

**EDITED BY  
JULIE DICKINSON • ANNE MEYER**

# **LEGAL NURSE CONSULTING PRINCIPLES AND PRACTICES**

**Fourth Edition**

# LEGAL NURSE CONSULTING PRINCIPLES AND PRACTICES

*Legal Nurse Consulting Principles and Practices*, Fourth Edition, provides foundational knowledge on the specialty nursing practice of legal nurse consulting. Legal nurse consulting is defined, and essential information about the practice is discussed (history, certification, scope and standards of practice, and ethical and liability considerations). The essentials of the law and medical records are explored. Analysis of the various types of legal cases on which legal nurse consultants work is provided, as are other practice areas for legal nurse consultants. The various roles and skills of legal nurse consultants are explored, and the textbook concludes with discussion of the ways in which legal cases are adjudicated.

This volume allows nurses to bridge the gap from their clinical experience to the unfamiliar territory of the legal world, with practical advice on topics including tactics for being cross-examined in the courtroom and investigative and analytical techniques for medical records. Individual chapters by subject-matter experts focus on the full range of legal, medical, and business issues that new or experienced legal nurse consultants and nurse experts will encounter in their work. A nuanced look at the realities and complexities of toxic torts, medical malpractice cases, civil rights in correctional health care, ERISA and HMO litigation, and other practice areas is offered.

Suitable for experienced nurses studying for certification as legal nurse consultants, and for expert witnesses, practitioners seeking to expand their current legal nurse roles, and other health care and legal practitioners.

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*Fourth Edition*

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AALNC

AMERICAN ASSOCIATION OF  
LEGAL NURSE CONSULTANTS

 **Routledge**  
Taylor & Francis Group  
NEW YORK AND LONDON

# AALNC

AMERICAN ASSOCIATION OF  
LEGAL NURSE CONSULTANTS

Founded in 1989, the American Association of Legal Nurse Consultants (AALNC) is a not-for-profit membership organization dedicated to the professional enhancement and growth of registered nurses practicing in the specialty of legal nurse consulting and to the advancement of the nursing specialty. The AALNC is the gold standard for professionals with an interest in the legal nurse consulting arena, including novice and veteran legal nurse consultants. The AALNC provides networking opportunities, educational advancement, and professional development and supports certification through the American Legal Nurse Consultant Certification Board (ALNCCB®).

Additional information regarding the AALNC, the ALNCCB®, and their offerings can be found at:

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Fourth edition published 2020  
by Routledge  
52 Vanderbilt Avenue, New York, NY 10017

and by Routledge  
2 Park Square, Milton Park, Abingdon, Oxon, OX14 4RN

*Routledge is an imprint of the Taylor & Francis Group, an informa business*

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First edition published by CRC Press 1998  
Second edition published by CRC Press 2003  
Third edition published by CRC Press 2010

*Library of Congress Cataloging-in-Publication Data*

Names: Dickinson, Julie, editor. | Meyer, Anne, editor.

Title: Legal nurse consulting : principles and practices / [edited by] Julie Dickinson & Anne Meyer.

Other titles: Legal nurse consulting principles.

Description: 4th edition. | Abingdon, Oxon [UK] ; New York, NY : Routledge, 2019.

Identifiers: LCCN 2019012219 (print) | LCCN 2019012879 (ebook) | ISBN 9780429283642 (Ebook) | ISBN 9780367246402 (hardback)

Subjects: LCSH: Nursing—Law and legislation—United States. | Nursing consultants—Legal status, laws, etc.—United States. | American Association of Legal Nurse Consultants.

Classification: LCC KF2915.N8 (ebook) | LCC KF2915.N8 L349 2019 (print) | DDC 344.7304/14—dc23

LC record available at <https://lcn.loc.gov/2019012219>

ISBN: 978-0-367-24640-2 (hbk)

ISBN: 978-0-429-28364-2 (ebk)

Typeset in Adobe Garamond  
by Wearset Ltd, Boldon, Tyne and Wear

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# Acknowledgments

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The publication of this fourth edition textbook was achieved through the generosity of hundreds of volunteers. We are extremely grateful to these individuals for sharing their expertise and donating their time, as their collective contributions made this textbook possible.

The authors undertook the laborious process of updating or overhauling existing chapters and writing new chapters. They gave of their time and knowledge, without which this textbook could not exist. We also thank them for their patience throughout this lengthy project.

The Lead Associate Editors—Debbie Wipf, Beth Zorn, and Karen Huff—have been invaluable, and we are exceptionally grateful for them. They went above and beyond to ensure the quality of the chapters met the high standards set for this textbook. Their guidance, feedback, expertise, and perseverance have been extraordinary, and we cannot thank them enough.

The Associate Editors were instrumental in liaising with the authors, managing the chapters, editing the drafts, and keeping the project moving forward. They shared valuable ideas and suggestions for the project, and we are grateful for their vital contributions.

The peer reviewers were key to ensuring the chapter content was relevant, complete, and up-to-date. Their feedback ensured the textbook provided the necessary information to the readers.

We would like to extend our heartfelt thanks to the AALNC Board of Directors for entrusting us with this critical project. They backed our vision for the textbook, provided us with the resources to make it a reality, and encouraged and supported us along the way. Thank you for giving us this opportunity.

There are numerous other individuals who were essential to this project. Samantha Cook from the AALNC headquarters was indispensable. Her organizational skills, logistical support, and patience are unparalleled, and we could not have done this without her. Laura Harshberger, our project manager, provided considerable guidance, feedback, and publication expertise to us and this project. She was instrumental in helping us move the project to publication. We also wish to thank Mariann Cosby and Cheryl White for their significant contributions to this textbook. Their efforts provided the groundwork for this project.

We are also indebted to our families who provided never-ending encouragement, support, and patience throughout this project. Their sacrifices allowed us the freedom and time to see this project through, and we are so blessed and thankful for their love and support.

Lastly, we are grateful to have had the opportunity to serve together as Senior Editors of this textbook. We shared the same vision for this project, and our approach and leadership styles complemented each other perfectly. It was an honor to work together. We are proud to present this textbook to you, as it lays the foundation for the practice of legal nurse consulting.

**Julie Dickinson, MBA, BSN, RN, LNCC®**

**Anne Meyer, BSN, RN, LNCC®**

Senior Editors

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# Preface

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*Legal Nurse Consulting Principles and Practices*, Fourth Edition, provides foundational information on the practice of legal nurse consulting. Legal nurse consultants (LNCs) apply their nursing education, training, and clinical experience to the evaluation of medically related issues in legal cases or claims. The more LNCs learn and understand the legal context in which this evaluation is performed, the more valuable their work products become to their clients and employers.

This textbook offers a general overview of the basic legal concepts and processes common to medical-legal cases, thereby providing a framework for legal nurse consulting practice. While some state-specific examples are used to illustrate these concepts and processes, it is outside the scope of this textbook to delve into the nuances of each state's laws and statutes. Therefore, it is imperative that LNCs gain an understanding of the relevant laws and statutes in the jurisdictions in which they work.

In addition to introducing nurses to these legal fundamentals and the practice of legal nurse consulting, this textbook is also a resource for experienced LNCs who are seeking to fine-tune their skills, expand into other legal nurse consulting practice areas, offer new services to their clients, enhance their value to existing clients or employers, or transition to a different practice setting.

The continuous evolution of legal nurse consultant practice and the legal arena necessitated an updated textbook to address these changes. This Fourth Edition also features a significant content adjustment and reorganization to allow readers to build their knowledge base as the textbook progresses from the essentials of legal nurse consulting and the law through the adjudication of medical-legal cases. Readers are introduced to the primary practice areas identified in the 2017 Legal Nurse Consultant Practice Analysis conducted by the American Legal Nurse Consultant Certification Board (ALNCCB®). The analysis of cases in these practice areas is a significant focus of the textbook, and effort was made to ensure the broad applicability of this content regardless of the specifics of the underlying case (e.g., the clinical specialty of the medical malpractice case or the type of accident in the personal injury case).

To achieve an even higher-quality benchmark for this widely used textbook, content experts were utilized during every step of the process. Each chapter was written by an author or authors with extensive expertise and experience in the topic and was carefully vetted by another content expert(s) through a double-blind peer review process.

It is because of this consideration and attention to the thoroughness and quality of the content that this textbook is used by the American Association of Legal Nurse Consultants (AALNC) and other providers of LNC education as the core for curriculum development. It is also used by the ALNCCB® and its volunteers as a resource in developing questions for the Legal Nurse Consultant Certified (LNCC®) examination. As such, *Legal Nurse Consulting Principles and Practices* is recognized as the pre-eminent resource on the practice of legal nurse consulting.

**Julie Dickinson, MBA, BSN, RN, LNCC®**

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**Anne Meyer, BSN, RN, LNCC®** received her Bachelor of Science degree in Nursing from Marycrest College, Davenport (IA). She obtained board certification as a Legal Nurse Consultant Certified (LNCC®) in 2010. Anne brings over 30 years of professional nursing experience to her work as a consultant and expert witness. She has worked as a hospital staff and charge nurse in medical-surgical, cardiac, and critical care areas, Director of Nursing in both long-term care and a national home health infusion company, and implemented and facilitated a vestibular diagnostic and rehabilitation program for an outpatient rehabilitation company. She is currently President of Med-Law Connection, Inc., a legal nurse consulting firm established in 2005. As an experienced legal nurse consultant, Anne provides consulting and expert witness services to both plaintiff and defense attorneys, insurance companies and corporations covering the areas of medical malpractice and negligence, workers' compensation, personal injury, and long-term care. She is a member of the American Association of Legal Nurse Consultants (AALNC), served as chair of the American Legal Nurse Consultant Certification Board (ALNCCB®) for two years, and as an ALNCCB® board member for an additional four years. Anne has also been an item writer for the LNCC® examination and authored and edited learning modules for the AALNC online Legal Nurse Consulting course. She is a nurse educator and strong advocate for the nursing profession.

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## *Section I*

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# **Essentials of Legal Nurse Consulting**

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## Chapter 1

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# History, Entry into Practice, and Certification

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## Objectives

- Describe the role of the American Association of Legal Nurse Consultants in developing, supporting, and promoting the nursing specialty practice of legal nurse consulting
- List the pros and cons of in-house and independent legal nurse consulting practice
- Define the qualities and traits of successful legal nurse consultants
- Explain the difference between certification and a certificate
- Identify the purpose of specialty nursing certification
- Describe how the LNCC® meets accreditation standards

## Introduction

Legal nurse consulting is an exciting and unique specialty nursing practice that emerged in the early 1970s. This chapter details the history of legal nursing, including the founding of the American Association of Legal Nurse Consultants (AALNC) in 1989 and its major accomplishments over the next several decades. For nurses who are considering entry into legal nurse consultant practice, the pros and cons of working independently and in-house are explored, as are the necessary qualities, traits, skills, and education. The distinction between certification and a certificate of completion is explained and segues into a detailed discussion of the American Legal Nurse Consultant Certification Board (ALNCCB®) and the Legal Nurse Consultant Certified (LNCC®) credential. The LNCC® is the only certification in legal nurse consulting recognized by the AALNC and accredited by the Accreditation Board of Specialty Nursing Certification (ABSNC).

## History

### *Early Legal Nurse Consultant Practice*

It is difficult to determine exactly when nurses gained recognition as legal nurse consultants (LNCs) since attorneys have sought nurses to answer questions for many years regarding medical-legal matters. But at least since the early 1970s, nurses have been recognized as consultants to attorneys and have been compensated for their expertise and contributions. Nurses' earliest and most common experiences in the legal arena were as expert witnesses in nursing malpractice cases. During the 1980s, nursing malpractice litigation expanded along with medical malpractice. Courts began to recognize that nurses, rather than physicians, should define and evaluate the standards of nursing practice. Nurses became more interested and educated about the legal issues impacting health care, and it was clear to both nurses and attorneys that nurses were uniquely qualified to aid attorneys in their nursing malpractice cases. Attorneys sought nurses to review these cases and offer opinion testimony about nursing care, and thus the role of the nurse expert witness came to be essential for nursing malpractice cases.

During the same period, attorneys were searching for resources to help them understand medical records, medical literature, hospital policies and procedures, and medical testimony. Nurse consultants came to be valued as cost-effective alternatives to physician consultants, who were often unavailable due to their practice demands. Law firms began to employ nurses "behind-the-scenes" (i.e., not for expert witness testimony) and valued their expertise and input on a broader scope—not just in medical and nursing negligence cases but in personal injury and criminal cases as well. Since then, the scope of practice for LNCs has broadened considerably and includes the practice areas discussed below in Table 1.4 and in subsequent chapters of this textbook.

### *Formation of the Association*

During the 1980s, nurses in California, Arizona, and Georgia, who were practicing as consultants to attorneys, formed local professional groups. Their goals were to educate the legal profession about the effectiveness of the nurse consultant as a liaison between the legal and medical communities and to provide a network for members to share expertise. Leaders from these three groups became the driving force for founding the national association. On July 29, 1989, a steering

committee composed of these leaders met in San Diego and founded the American Association of Legal Nurse Consultants. From its inception, the AALNC was established as a nursing organization, rather than a legal organization. The founding members were passionate about distinguishing legal nurse consulting as a specialty practice of nursing, not of the law—a fundamental belief that continues to be important today.

The national steering committee was replaced as the decision-making body of the AALNC when the first board of directors was elected in March 1990. The AALNC's mission of promoting the professional advancement of registered nurses (RNs) consulting within the legal arena was inaugurated.

### ***Definition of Legal Nurse Consulting***

The AALNC defines legal nurse consulting as follows:

The legal nurse consultant is a licensed registered nurse who performs a critical analysis of clinically related issues in a variety of settings in the legal arena.

Legal nurse consulting:

- Is the application of knowledge acquired during the course of professional nursing education, training, and clinical experience to the evaluation of standard of care, causation, damages and other clinically related issues in cases or claims
- Is the application of additional knowledge acquired through education and experience regarding applicable legal standards and/or strategy to the evaluation of cases or claims
- Involves critical analysis of healthcare records and medical literature, as well as relevant legal documents and other information pertinent to the evaluation and resolution of cases or claims
- Results in the development of case-specific work products and opinions for use by legal professionals or agencies handling cases or claims (AALNC, 2017, p. 4).

### ***Major Contributions***

Since its formation in 1989, the AALNC has made countless contributions to the specialty practice of legal nurse consulting. These contributions were made possible by the efforts of innumerable volunteers and were achieved through various means, including chapters, education, certification, publications, code of ethics, scope and standards of practice, position statements, and professional relationships.

### ***Chapters***

While the AALNC offered national membership benefits to nurses licensed in any state or territory of the United States, it was through the establishment of chartered chapters that the AALNC fostered membership growth, networking, and education at the local level. As more LNCs found it beneficial to attend in-person chapter meetings, the number of chapters grew and within one year (by 1990), there were nine chapters (Bogart, 1998). In more recent years, the option of “virtual” meetings became a reality, and many chapters began offering online meetings and educational programs to attract members. Several chapters have expanded their membership using these meeting tools.

## *Education*

The AALNC offers numerous educational opportunities in live, online, print, and audio formats. These are designed to assist nurses at all levels of expertise in legal nurse consulting practice. Information regarding all of the AALNC's educational opportunities is available at the AALNC website ([www.aalnc.org](http://www.aalnc.org)). The AALNC is accredited as a provider of continuing nursing education by the American Nurses Credentialing Center's (ANCC's) Commission on Accreditation. The AALNC Director of Programs and Education oversees the association's educational offerings and ensures that education provided by the association complies with ANCC standards.

### ANNUAL EDUCATIONAL AND NETWORKING FORUM

The first annual AALNC educational conference was held in Phoenix, Arizona in 1990. Now known as the Educational and Networking Forum, this annual conference has been the major networking and educational opportunity for LNCs. The Forum offers cutting-edge clinical, legal, and practice topics and high-profile speakers as well as sessions for the less experienced LNC. It also includes the AALNC annual business meeting and provides for the transition of board members.

### LEGAL NURSE CONSULTING PROFESSIONAL COURSE

The AALNC introduced its first online legal nurse consulting course in 2007. Developed by experienced LNC content experts, the Legal Nurse Consulting Professional Course provides learners with a convenient, self-paced, and cost-effective method of securing information needed to begin legal nurse consulting practice. Originally offered in eight modules, the online course underwent a significant revision when it was expanded to 17 modules, which were released over several years from 2015 to 2017 (Dickinson, 2015).

### WEBINARS

In the summer of 2010, the AALNC launched its first webinar series for members and non-members (Huff, 2010a). Now offered on a variety of clinical, legal, and practice topics year-round, AALNC webinars are a convenient way to obtain continuing nursing education credits without incurring the cost of travel. The AALNC Online Educational and Professional Development Committee (formerly the Webinar Committee) oversees the selection of topics and speakers. Most webinars are recorded and available "on demand" for attendees who are unable to attend the "live" webinar. Currently, AALNC membership includes a certain number of free webinars per year as a benefit of membership. In addition, the AALNC Board of Directors periodically hosts a free webinar entitled "So You Want to Be an LNC" to educate nurses interested in becoming an LNC (Huff, 2011a). This webinar is also a useful resource for newer LNCs. The AALNC has also offered joint webinars with attorney and nursing organizations, which will be discussed later in this chapter.

### LEGAL NURSE CONSULTANT CERTIFIED (LNCC®) REVIEW COURSE

In 2012, the AALNC launched the LNCC® Review Course to help LNCs prepare for the LNCC® exam. The course is based on the LNC Practice Analysis, and now includes 12 content webinars

plus one webinar devoted to test-taking tips. These webinars may also be of interest to any LNC wishing to learn more about a particular area of legal nurse consulting practice. More information about the LNCC® Review Course can be found on the AALNC website at [www.aalnc.org/page/lnc-review-course](http://www.aalnc.org/page/lnc-review-course).

## *Certification*

Recognizing the importance of nursing certification that incorporates experiential and educational requirements, the AALNC established the American Legal Nurse Consultant Certification Board (ALNCCB®) in 1997. The ALNCCB® developed the LNCC® certification program and credential, with the first exam given in 1998. The LNCC® is the only certification in legal nurse consulting that is endorsed by the AALNC and accredited by the ABSNC, formerly known as the Accreditation Council for the American Board of Nursing Specialties (ABNS). A more detailed discussion regarding the LNCC® program and credential is provided later in this chapter.

## *Publications*

### NEWSLETTERS

From its inception, the AALNC has provided a newsletter to its members. Initially called Network News, this communication tool has changed over the years and is now an electronic Member Update. This update is sent monthly via email to provide members with professional and organizational information. The *President's Blog* has also been used by the association's leadership to communicate with the membership. Additionally, a monthly education update is sent to the members summarizing upcoming webinars and other educational opportunities.

### JOURNAL OF LEGAL NURSE CONSULTING

In January 1995, the AALNC issued the first edition of the *Journal of Legal Nurse Consulting (JLNC)*, which is the official publication of the AALNC. It is a refereed journal providing articles of interest to nurses in the legal nurse consulting specialty. The JLNC is now digital and is available to members and non-members on the AALNC website.

### LEGAL NURSE CONSULTING PRINCIPLES AND PRACTICES

The first edition of *Legal Nurse Consulting Principles and Practice* (Bogart, 1998) was published in 1998 as the AALNC's effort to provide a core curriculum for LNCs. It became the primary resource textbook for legal nurse consulting courses and for nurses who wished to learn more about this practice specialty through self-study. The core curriculum is also a key reference for the LNCC® exam. It is used by the ALNCCB® during exam development and also by LNCs studying to take the exam.

The second edition was published in 2003 (Iyer, 2003). With the publication of the third edition in 2010, the textbook expanded to two volumes: *Legal Nurse Consulting Principles* (Volume 1) and *Legal Nurse Consulting Practices* (Volume 2) (Peterson & Kopishke, 2010). This Fourth Edition is a continuation of the AALNC's ongoing effort to provide nurses with an authoritative reference regarding the practice of legal nurse consulting.



## OTHER PROFESSIONAL RESOURCES

The AALNC also publishes a variety of other professional resources, such as reference cards on various relevant topics, the “Growing Your Practice” online resource, and “The Nurse Expert Witness: Guidelines for Practice” virtual booklet. Such resources are available for sale to assist LNCs in establishing and developing their businesses or practices. These materials are designed to give realistic and practical information to enhance the practitioner’s knowledge and skills.

The AALNC’s online resources include the LNC Locator®, which is designed to assist other professionals, including attorneys, with finding an LNC or nurse expert witness in a certain geographic area and/or with a certain clinical or legal nurse consulting background.

## *Code of Ethics and Scope and Standards of Practice*

## CODE OF ETHICS

The *Code of Ethics and Conduct with Interpretive Discussion* was originally adopted in April 1992 and subsequently revised in 2005, 2009, and 2015. The code provides guidelines for ethical performance and conduct in the practice of legal nurse consulting (AALNC, 2015). See Chapter 2 for more information on the AALNC’s *Code of Ethics and Conduct*.

## SCOPE AND STANDARDS OF PRACTICE FOR THE LNC

In its initial effort to develop a scope of practice and standards of practice for legal nurse consulting, the AALNC conducted a role delineation study in 1992. The survey document contained questions regarding professional activities to identify the essential knowledge and skills for legal nurse consulting practice. Following the analysis of the survey data provided by LNC members, the AALNC published the first edition of the *Scope of Practice for the Legal Nurse Consultant* in January 1994 (AALNC, 1994).

In 1995, the AALNC Board of Directors determined that, while LNCs need legal knowledge and skills, the nursing profession is the basis for the practice of legal nurse consulting. In October 1995, the AALNC published *Scope and Standards of Practice for the Legal Nurse Consultant* based on the nursing process model (AALNC, 2002).

In 2005, the AALNC began to collaborate with the American Nurses Association (ANA) to update these standards to reflect the evolving practice of legal nurse consulting and to further establish legal nurse consulting as a specialty practice of nursing. Work was completed in 2006 when the AALNC co-published *Legal Nurse Consulting: Scope and Standards of Practice* in collaboration with the ANA (AALNC & ANA, 2006). In 2010, a taskforce was formed to revise the 2006 Scope and Standards in accordance with the ANA’s updated scope and standards of practice template for specialty nursing organizations. Work continued on this project for several years, and in 2016, the AALNC Board of Directors voted to self-publish the Scope and Standards. The final document entitled *Legal Nurse Consulting Scope and Standards of Practice* was published by the AALNC in 2017 and is available for purchase on the website (AALNC, 2017). See Chapter 2 for more information on the AALNC’s *Legal Nurse Consulting Scope and Standards of Practice*.

## *Position Statements*

The AALNC Board of Directors is responsible for developing and publishing position statements on topics related to legal nurse consulting. Over the years, several position statements have been

published; some have been updated, and others have been retired. Current AALNC position statements include *Education and Certification in Legal Nurse Consulting* and *Providing Expert Nursing Testimony Regarding Nursing Negligence*. An additional position statement titled *Certification in Legal Nurse Consulting* is published by the ALNCCB® and endorsed by the AALNC.

In 2000, the AALNC published the position statement entitled *Education and Certification in Legal Nurse Consulting*. The purpose was to clarify the Association's position that legal nurse consulting education should build on nursing education and clinical experience; to recommend *Legal Nurse Consulting Principles and Practices* as the core curriculum for legal nurse consulting education; and to recognize and endorse the ALNCCB's LNCC® credential as the only certification in legal nurse consulting accredited by the ABSNC. See Appendix A for this position statement, which was updated in 2013 and 2016 (AALNC, 2016).

Recognizing that the profession of nursing is autonomous from the profession of medicine and other allied health disciplines and that nursing has the responsibility and knowledge to define its standards of practice, the AALNC published the position statement *Providing Expert Nursing Testimony* in 2006. It defines the AALNC's position that the only expert qualified to testify regarding nursing standards and on clinical and administrative nursing issues is a licensed RN. This position statement was updated in 2014 and is now titled *Providing Expert Nursing Testimony Regarding Nursing Negligence* (AALNC, 2014). See Appendix B.

In 2006, the ALNCCB® published a position statement on *Certification in Legal Nurse Consulting*. This position statement is endorsed by the AALNC and available on the website (ALNCCB®, 2006). See Appendix C.

The AALNC Board of Directors periodically reviews existing position statements to ensure their relevancy and to revise or retire as needed. See Table 1.1 for a list of current and retired position statements. Revision dates for the AALNC's Code of Ethics and Scope and Standards are also included.

## *Professional Relationships*

### NURSING ORGANIZATIONS ALLIANCE

In January 1994, the AALNC was seated as an affiliate member of the National Federation of Specialty Nursing Organizations (NFSNO). In November 1996, the AALNC became a regular participant in the Nursing Organization Liaison Forum (NOLF). By 2001, the NOLF and NFSNO, noting that both organizations were designed to achieve identical goals, merged to form one organization, the Nursing Organizations Alliance (NOA or The Alliance). The purpose of the NOA is to inspire and develop leaders in the community of nursing organizations (NOA, 2018a). The AALNC is a member of The Alliance. Delegates from member associations meet regularly to address issues of mutual concern across nursing specialties (NOA, 2018b).

### LEGAL ORGANIZATIONS/BAR ASSOCIATIONS

The AALNC has long included as part of its mission the responsibility to increase awareness of the legal nurse consulting specialty practice among both the legal and nursing communities. In addition to ongoing efforts toward building relationships with other nursing organizations, the AALNC increased its focus on the legal community to enhance attorney awareness of the value of the LNC. The AALNC has made strides in collaborating with several attorney organizations, including Defense Research Institute (DRI) and the American Bar Association (ABA), and has

**Table 1.1 AALNC's Code of Ethics, Scope & Standards, and Position Statements**

<i>Publication Name</i>	<i>Category</i>	<i>Original Date</i>	<i>Status</i>
Code of Ethics and Conduct with Interpretive Discussion	Code of Ethics	1992	Revised in 2005, 2009, 2015
Legal Nurse Consulting Scope & Standards of Practice	Scope & Standards	1992	Revised in 1995, 2005, 2017
Role of the LNC as Distinct from the Role of the Paralegal and Legal Assistant	Position Statement	1999	Retired in 2012
Education and Certification in Legal Nurse Consulting	Position Statement	2000	Revised in 2013, 2016
The Specialty Practice of Legal Nurse Consulting 2005	Position Statement	2005	Retired in 2015
Licensure for Expert Witnesses	Position Statement	2006	Retired in 2013
Providing Expert Nursing Testimony Regarding Nursing Negligence	Position Statement	2006	Revised in 2014
Certification in Legal Nurse Consulting	Position Statement published by ALNCCB®	2006	Revised in 2008, 2011
Criminal Prosecution of Health Care Providers for Unintentional Human Error	Joint Position Statement with TAANA	2011	Retired in 2016

*Note:* Data on Code of Ethics from AALNC (2015), on Scope and Standards from AALNC (2017), on Role of the LNC position statement from AALNC (J. Dickinson, personal communication, August 9, 2016), on Education and Certification in Legal Nurse Consulting position statement from AALNC (S. Cook, personal communication, January 22, 2018), on Specialty Practice position statement from AALNC (J. Dickinson, personal communication, August 9, 2016), on Licensure for Expert Witnesses position statement from AALNC (J. Dickinson, personal communication, August 9, 2016), on Providing Expert Nursing Testimony position statement from AALNC (2014) (J. Dickinson, personal communication, August 9, 2016), on Certification in Legal Nurse Consulting position statement from ALNCCB® (2006) (K. Tamkus, personal communication, January 16, 2018), and on Criminal Prosecution position statement from AALNC (K. Dee, personal communication, August 7, 2017).

presented joint webinars with both (Huff, 2010b; Huff, 2011b). Several AALNC leaders have also served on attorney committees within these organizations to help raise awareness of the AALNC and legal nurse consulting.

Educating the legal community on legal nurse consulting continues to be one of the AALNC's strategic goals. In 2014, the Health Law Section of the ABA signed a Memo of Understanding (MOU) with the AALNC. The MOU outlines a common objective to educate legal and nursing professionals and a desire to collaborate on programs and initiatives that will benefit members of both organizations (ABA, 2014).

## Entry into Practice

Becoming an LNC is an avenue for registered nurses who are interested in expanding their practice area by using their knowledge and experience in a non-traditional setting. In deciding whether to enter the specialty practice of legal nurse consulting, consideration should be given to the pros and cons of in-house and independent legal nurse consulting practices and to the qualities, traits, and skills of successful LNCs. Educational options and the distinction between certification and a certificate should also be understood.

### *Pros and Cons of Legal Nurse Consulting Practice*

There are significant differences between in-house legal nurse consulting practice (in which the LNC is an employee of a law firm, a legal nurse consulting firm, etc.) and independent legal nurse consulting practice (in which the LNC is self-employed and contracted to work on a specific project for a particular case).

The pros of working as an in-house legal nurse consultant include:

- Guaranteed salary
- Regular pay check
- Benefits package that typically includes:
  - Vacation time
  - Paid time off
  - 401k or 403b retirement plans
  - Health insurance and
  - Disability insurance
- Team atmosphere
- Working on a case from inception through adjudication
- On-the-job experience under the tutelage of an attorney or another LNC
- Regular work hours
- Holidays and weekends off and
- No overhead costs

The cons of working as an in-house legal nurse consultant include having set work hours with limited, if any, flexibility in the work schedule and receiving a flat salary regardless of the number of hours worked. If a nurse is hired as a firm's first LNC, there is no in-house LNC mentor available for training, but the nurse will have the unique opportunity to develop and mold the position. Depending on the size of the firm and the types of cases handled by the firm, in-house legal nurse consulting practice may also limit the LNC's exposure to different attorneys and types of legal cases.

The pros of working as an independent legal nurse consultant include:

- Being part of a team or fully independent
- Having autonomy
- Setting one's own hourly rate
- Billing by the hour (not a flat salary)
- Having flexible hours
- Taking time off when desired

- Having a flexible case load
- Experiencing tax benefits
- Having more creativity and latitude in decision-making
- Working from home (if desired)
- Experiencing variety in types of cases and
- Experiencing variety in attorney-clients (Carleo, 2017)

The cons of working as an independent legal nurse consultant include:

- Variable income
- No benefits package, typically (thus responsible for own insurance and retirement savings)
- No paid time off
- Responsibility for billing and collecting accounts receivable
- Responsibility for own taxes and accounting
- Overhead costs
- Nonbillable business management activities
- Work hours intruding on family time (possibly)
- The need for more self-discipline
- Limited interaction with colleagues (if fully independent) and
- The need for home office/dedicated space for confidential material (Carleo, 2017)

New independent LNCs frequently seek out mentoring or shadowing opportunities to work alongside an experienced LNC in independent practice, at a law firm, or in other settings. This can be very helpful but requires a time-intensive commitment from both the mentor and mentee to assure success from this mentoring process.

Independent LNCs may desire to perform only behind-the-scenes work, or they may wish to testify as an expert witness or an expert fact witness. Expert witnesses offer opinion testimony on the standard of care, causation, future healthcare needs, etc. If a nurse wishes to testify as an expert witness for nursing malpractice cases, the nurse must remain clinically active in the clinical practice area about which the nurse will testify. For example, an experienced labor and delivery nurse will need to remain clinically active in a labor and delivery unit to opine on the standard of care owed by a labor and delivery nurse. Expert fact witnesses testify about the facts in a case without offering opinion testimony about the healthcare issues (Costantini, Huff, & Mihalich, 2013). They educate the jury and judge about the case facts. See Chapters 31 and 32 for more information about expert witnesses and expert fact witnesses.

Successful entry into the specialty practice of legal nurse consulting, whether as an independent or in-house LNC, will require change. Prospective LNCs should weigh family obligations, personal relationships, and financial considerations. Possessing the qualities, traits, and skills necessary to succeed in legal nurse consulting practice will help make this transition smoother.

### ***Qualities, Traits, and Skills***

According to the AALNC, “the foundation of legal nurse consulting is nursing education and experience” (AALNC, 2017). Thus, legal nurse consultants are validly licensed registered nurses. It is this foundation of education and experience in the field of nursing that provides registered nurses the knowledge and capability to consult on medical-legal matters. Therefore,

it is recommended that an entry-level LNC has, at a minimum, five years of clinical experience as a registered nurse.

Specific qualities, traits, and skills need to be in place to ensure success as an LNC, whether independent or in-house. Organizational and prioritization skills, in addition to professionalism, are integrated within the fundamentals of nursing education and training. These essential skills are necessary for the LNC as well, because LNCs juggle multiple cases in various stages of litigation and are assigned different tasks on different cases with different deadlines (AALNC, 2018). Attributes such as dependability, flexibility, good judgment, uncompromising ethical standards, problem-solving skills, and a positive attitude are also critical. To succeed, LNCs must demonstrate effective time-management skills and be prepared to do every job efficiently, cost effectively, and accurately (Costantini et al., 2013). Exceptional computer and research skills are also essential.

Independent LNCs need strong marketing, networking, sales, accounting, and other business and entrepreneurial skills to develop their consulting businesses. In-house LNCs need solid delegation and conflict-resolution skills, people skills, initiative, and foresight. Both independent and in-house LNCs must be politically savvy to navigate the organization or firm with whom they work. They must present a professional image and utilize leadership skills when collaborating with the legal team on a case. Legal nurse consultants must have a strong work ethic and the “ability to work independently with minimal supervision and direction” (AALNC, 2018). They must be willing to learn about the relevant laws and rules applicable to their cases (AALNC, 2018). See Chapters 29 and 30 for more information about in-house and independent LNCs.

Other qualities, traits, and skills of successful LNCs include drive, analytical skills, attention to detail, communication skills, and writing skills.

#### DRIVE

Drive, as a quality to building a successful independent or in-house legal nurse consulting practice, requires a significant amount of ambition, energy, and effort. This ambition is grounded in goal-oriented planning, a characteristic that every nurse uses in reaching objectives. Industry and hard work are the traits that support this quality, as are diligence and the thoroughness to see a task to completion with a watchful eye on meeting deadlines.

#### ANALYTICAL SKILLS

To succeed in this specialty practice, an LNC needs to have strong analytical skills. The analysis of medical records and other information is performed in the context of the allegations and applicable legal standards, and it focuses on critical details related to injuries, care and treatment of disease or injury conditions, timing of events, and completeness of information. The analytical LNC spots the missing records, the sequence of events that seems to be out of order, the defendant’s deviations from the standard of care, the plaintiff’s contributory negligence, details that do not seem right, etc. The role of the LNC often involves collecting and synthesizing data to reconstruct a series of events or determine what should have been done for an injured person. Attorneys rely on LNCs’ clinical knowledge and experience and their ability to place data into a framework that helps the attorneys understand the medical information and focus on the critical case issues. The LNC must remember most attorneys do not have a clinical background and even those who are experienced in handling medical-legal tort claims still rely on the LNC’s analytical skills to uncover the nuances in the case.

## ATTENTION TO DETAIL

A keen sense of what is and is not relevant to a case is another trait that is important to a conscientious, successful LNC. Being detail-oriented when analyzing records and evaluating a case is more than just dotting all the i's and crossing all the t's to ensure that nothing essential is missed. Detail-oriented LNCs work through the minutiae of lengthy documents with an eye for the smallest items of importance. The ability to review each piece of evidence for its potential significance to a case is a valuable service that LNCs provide to their attorney-clients. Sifting through and clarifying the most significant details or themes of a case are invaluable to the attorney. Just as important is the LNC's identification of what is extraneous information and essentially a distraction in the case. One does not want to have an attorney waste time and money on facts or issues that are not germane to the underlying case and do not add anything to the claim. For example, the LNC might identify a breach in the standard of care. However, if that breach did not cause harm (i.e., if it does not have associated damages), it is irrelevant to the case.

## COMMUNICATION SKILLS

It is important to be an active listener to show understanding and attentiveness when an attorney-client or the attorney's client relates details of a case. Concentrating on what is being said and, at the same time, perceiving body language that may or may not be contradictory are basic active listening skills honed by most nurses through years of clinical practice. The ability to accurately and succinctly document what is said and observed requires practice and is crucial in discriminating between critical and non-critical information. The LNC must parse out relevant details that are at issue. See Chapter 33 for more information on communicating with attorneys' clients.

Good teaching skills are essential for LNCs and expert witnesses. Whether teaching the attorney-clients and their staff, the attorney's client, or a judge and jury, the legal nurse consultant's or expert witness's teaching ability is paramount. The LNC and expert witness must reduce complex medical conditions, treatment, and outcomes to layman's terms, so all can understand and appreciate the importance of the information and how it fits into the case.

## WRITING SKILLS

Decisive writing skills that provide the necessary breadth and depth of relevant information in a succinct manner are needed to be effective as an LNC. It is essential that the LNC's writing style presents information clearly and concisely. Written work products and other written communication (including emails) should be free of grammatical and spelling errors. When asked to prepare a written work product, it is imperative the LNC understand the purpose and intended audience of the document and then tailor the document to meet those needs. See Chapter 35 for more information on preparing written work products.

Aspiring LNCs should perform an honest, objective self-assessment to identify the qualities, traits, and skills they possess as well as those that would need to be strengthened. Honing these qualities, traits, and skills will improve the likelihood of the LNC's success. This effort is rewarded in the long run by adding proficiency and competency to the list of assets the legal nurse provides to the attorney or other client.



## ***Education***

Entering the specialty practice of legal nurse consulting does not require additional education in a formal program. However, many nurses seeking to transition to legal nurse consulting prefer formal training in their new venture. Of note, if the RN is seeking expert witness work, many attorneys do not want experts who have formal legal training, as nursing experts are retained solely for their clinical nursing expertise. The concern is that opposing counsel could paint the expert as being biased by asserting that the expert's opinions are not objective but, rather, are influenced by the expert's knowledge of legal standards. That, however, does not mean that such RNs cannot or should not seek to obtain additional information that will serve them in this specialty practice. Some nurse experts opt to maintain two separate curricula vitae—one for expert work (that lists only their clinical nursing information) and one for behind-the-scenes work (that includes their legal nurse consulting education).

There are many legal nurse consulting courses offered in a variety of settings. One is the AALNC's interactive Legal Nurse Consulting Professional Course. The 17 modules cover a variety of topics such as "Legal Fundamentals," "Medical Records Identification, Access, and Analysis," "Communication and Report Writing," and more. These modules may be accessed individually to fit one's needs, or in their entirety. These resources, and others of benefit to the novice as well as the experienced LNC, are available through the AALNC website.

Other education is available by proprietary schools, for-profit and non-profit businesses, universities, four-year colleges, and community colleges. This education is offered through traditional on-campus programs, tele-courses, and distance courses that may be print-based or online. Some courses culminate with a certificate of completion. Some universities offer post-graduate classes in legal nurse consulting, and a few offer a Master of Science in Nursing with a concentration in legal nurse consulting (AALNC, 2017).

In evaluating the merit of any course or program, the reputation and accreditation of the sponsoring institution should be considered, as well as the cost, format, and length of the program; its schedule; and the convenience of the location or online accessibility. Another consideration includes whether the program offers student placement in an externship with a law firm or a legal nurse consultant firm. If a local AALNC chapter is available, it is a valuable resource of information regarding availability of university-based programs and other options in the area.

Although legal education is available to nurses through legal assistant or paralegal education programs, it must be stressed that the education of paralegals and legal assistants is vastly different from the needs of the nurse practicing in the legal arena. The terms "paralegal" and "legal assistant" are sometimes used interchangeably in different parts of the country. According to the ABA, a legal assistant or paralegal is "a person qualified by education, training or work experience ... employed by an attorney ... who performs specifically delegated substantive legal work for which a lawyer is responsible" (ABA, 2008). The legal nurse consultant is distinct from the paralegal or legal assistant, because the foundation of legal nurse consulting is nursing education and experience (AALNC, 2017).

The primary focus of legal nurse consulting education is teaching nurses how to apply their nursing education and clinical experience to the analysis of legal cases.

The AALNC maintains the position that legal nurse consulting education programs must be developed and presented as specialty nursing curricula by nurse educators in partnership with legal educators. The qualifications of the program directors and instructors should be considered when evaluating a program. In general, programs developed and taught by experienced nurse educators who are practicing LNCs are preferred, as these

instructors have current real-life experience and success in the medical-legal field (AALNC, 2016).

### ***Certification versus Certificate***

Legal nurse consultants beginning in this specialty practice are often confused by the number of different courses that advertise “certification” or certificates at the completion of the program and bestow their own “credentials.” While education from any reputable source is helpful, it can be difficult for the new LNC to decipher which credentials have meaning to those in the medical-legal community. The differences between certification and certificate programs are outlined in Table 1.2. The only true board certification in legal nurse consulting is the LNCC® credential, which meets the rigorous standards of the ABSNC. The LNCC® is the only certification in legal nurse consulting that is endorsed by the AALNC. The LNCC® exam is based not only on knowledge of the specialty practice but also on experience as a practicing legal nurse consultant and requires 2,000 hours of legal nurse consulting experience prior to being eligible to sit for the exam.

## **Certification**

The founding members of the AALNC have been credited for their long-range vision for the association and the specialty practice of legal nurse consulting. Some of the initial decisions made

**Table 1.2 Certification versus Certificate Programs**

<i>Certification</i>	<i>Certificate</i>
Results from an assessment process that recognizes an individual’s knowledge, skills, and competency in a particular specialty	Results from an educational process
Typically requires professional experience	For newcomers and experienced professionals
Awarded by a third-party, standard-setting organization, typically not-for-profit	Awarded by the educational program or institution, often for profit
Indicates mastery/competency as measured against a defensible set of standards, usually by application or exam	Indicates completion of a course or series of courses with a specific focus (different from a degree-granting program)
Standards set through a defensible, industry-wide process (job analysis/role delineation) that results in an outline of required knowledge and skills	Course content determined by the specific provider or institution, not standardized
Typically results in credentials to be listed after one’s name (LNCC®, ONC, CCRN)	Usually listed on a resume detailing education
Has ongoing requirements in order to maintain; holder must continue to demonstrate meeting the requirements	Demonstrates knowledge of course content at the end of a set period in time

Source: AALNC (2018).

by these founders had a lasting impact on the association and the specialty practice and ultimately led to the certification offered by the ALNCCB®. This section will discuss the purpose of nursing certification, the importance of accreditation, and key elements involved in developing the LNCC® exam.

## ***Certification in a Nursing Specialty***

### ***Definition and Purpose***

Professional certification in nursing is widely used to recognize a higher level of nursing skill and expertise within a specialty than is expected from nurses with the minimal qualifications required for entry into the practice setting. Nurses who achieve certification from an accredited certification program in their specialty are considered “board certified.”

Standards for nursing professional certification programs vary, but three minimum components are generally required (ALNCCB®, 2018a):

1. Licensure as an RN
2. Eligibility criteria, which include experience in the specialty, such as clinical experience or a specified number of work hours using skills and knowledge unique to the specialty and
3. Identification and testing of a specialized body of knowledge that is distinctly different from the general practice of nursing

In legal nurse consulting, the only certification that meets these minimum requirements is the Legal Nurse Consultant Certified, designated as LNCC®. The LNCC® is the only certification in the specialty endorsed by the AALNC and accredited by the ABSNC, formerly known as the Accreditation Council of the American Board of Nursing Specialties. The LNCC® is comparable to other recognized nursing specialty credentials, such as Certified Critical Care Nurse (CCRN®) and Certified Emergency Nurse (CEN). Since LNCC® meets the definition of a credential as described above, LNCC® becomes part of the individual’s professional title, as in Lucy Smith, BSN, RN, LNCC®.

## ***Certification in Legal Nurse Consulting***

### ***Overview***

The mission of the LNCC® program is to promote expertise and professionalism in the practice of legal nurse consulting by recognizing practitioners who have met defined qualifications and demonstrated knowledge on a certifying examination in the specialty. The certification program is not designed to determine who is qualified or who shall engage in legal nurse consulting, but rather to promote a level of expertise and professionalism by documenting individual performance as measured against a predetermined level of knowledge about legal nurse consulting.

Per the ALNCCB®, the objectives of the LNCC® program are to:

1. Identify legal nurse consultants who have met eligibility criteria and demonstrated a defined level of knowledge of the principles and practice of legal nurse consulting for employers, clients, the public, and members of other nursing specialties
2. Encourage legal nurse consultants to further their professional development by achieving and maintaining certification in the specialty and

3. Promote the recognition of legal nurse consulting as a specialty practice of nursing (ALNCCB®, 2018c)

### *History of the LNCC®*

Once the founding members of AALNC, through their visionary leadership and long-range planning for the association, overcame challenges and laid the groundwork, the AALNC Board of Directors was ready to move forward with establishing a certification examination in the legal nurse consulting specialty. In 1997, a Certification Task Force was appointed to determine the scope of the program and to seek bids from testing companies.

The first Legal Nurse Consultant Certified examination was offered on October 24, 1998. The exam was originally offered every April and October in various cities around the country as well as at the AALNC annual education conferences. In October 2010, a computer-based testing model was developed, and the LNCC® examination is now offered electronically at over 300 computer-based testing sites twice each year—during a two-week period in the spring and fall of each year.

### *Setting the LNCC® Apart Through Accreditation*

Early in the AALNC's research process, one of the goals for the development of the certification program was to meet the standards necessary for accreditation (Ehrlich, 1995; Janes, Bogart, Magnusson, Joos, & Beerman, 1998). The early certification committees identified the ABNS, now the ABSNC, as the accreditation body best qualified to give the certification program the credibility they sought.

### *The American Board of Nursing Specialties*

The American Board of Nursing Specialties was incorporated in 1991 after a number of years of discussion and consensus-building within the nursing profession. Consensus-building discussions resulted in the development of 12 standards for nursing certification programs.

In 1996, the ABNS formed a task force to review and strengthen the original standards. In addition, a rationale section was added to each standard. The task force developed 17 revised standards which were adopted by consensus among members at the ABNS Assembly. In 1999, the ABNS Assembly revised the standards to delete the previous requirement for a BSN degree as an eligibility criterion for examination candidates.

Soon afterward, the ABNS restructured to create a membership organization with an autonomous accrediting body called the Accreditation Council. In 2007, the ABNS began a process for creating a separate, autonomous body to perform the accreditation function. In 2009, the ABNS Accreditation Council was renamed the Accreditation Board for Specialty Nursing Certification, and a separate corporation was established (ABSNC, 2019). The Accreditation Board for Specialty Nursing Certification currently has 18 standards that must be met in order to pass the stringent peer review process. These accreditation standards are listed in Table 1.3.

### *Initial Accreditation of the LNCC® Exam*

The LNCC® program was awarded initial accreditation at the September 1999 ABNS meeting. The initial accreditation was attributed to the volunteer members of AALNC and ALNCCB®, as well as the testing professionals who were involved in creating a quality certification program.

**Table 1.3 Accreditation Board for Speciality Nursing Certification (ABSNC) Standards: Promoting Excellence in Nursing Certification\***

Standard 1	<p><i>Definition and Scope of Nursing Specialty</i></p> <p>The certification examination program is based on a distinct and well-defined field of nursing practice that subscribes to the overall purpose and functions of nursing. The nursing specialty is distinct from other nursing specialties and is national in scope. There is an identified need for the specialty and nurses who devote most of their practice to the specialty.</p>
Standard 2	<p><i>Research Based Body of Knowledge</i></p> <p>A body of research based knowledge related to the nursing specialty exists. Mechanisms have been established for the support, review, and dissemination of research and knowledge in the specialty. Activities within the specialty contribute to the advancement of nursing science within the specialty.</p>
Standard 3	<p><i>Organizational Autonomy</i></p> <p>The certifying organization is an entity with organizational autonomy governed in part or in whole by certified nursing members.</p>
Standard 4	<p><i>Non-discrimination</i></p> <p>The certifying organization does not discriminate among candidates as to age, sex, race, religion, national origin, ethnicity, disability, marital status, sexual orientation, and gender identity.</p>
Standard 5	<p><i>Public Representation</i></p> <p>The certifying organization includes at least one Public Member with full voting rights on its Board of Directors.</p>
Standard 6	<p><i>Eligibility Criteria for Test Candidates</i></p> <p>The eligibility criteria for non-RN nursing team member certification include:</p> <ul style="list-style-type: none"> <li>■ Licensure or registration as required</li> <li>■ Education and/or experiential qualifications defined by the certifying organization</li> </ul> <p>The eligibility criteria for specialty RN nursing certification include:</p> <ul style="list-style-type: none"> <li>■ Current RN licensure</li> <li>■ Educational and experiential qualifications as determined by the certifying organization</li> </ul> <p>The eligibility criteria for advanced practice nursing certification include:</p> <ul style="list-style-type: none"> <li>■ RN licensure</li> <li>■ A minimum of a graduate degree in nursing or the appropriate equivalent, including content in the specific area of advanced specialty practice</li> </ul> <p>The eligibility criteria for advanced practice registered nurse (APRN) certification include:</p> <ul style="list-style-type: none"> <li>■ RN licensure</li> <li>■ Completion of a graduate degree program in nursing or the appropriate equivalent (or post-master's or post-doctoral certificate program) from an accredited program in one of the four APRN roles across at least one of six APRN population foci as described in the 2008 Consensus Document</li> <li>■ Three separate courses in advanced pathophysiology across the life span, advanced health/physical assessment, and advanced pharmacology as part of graduate educational preparation</li> <li>■ A minimum of 500 clinical hours as part of graduate educational preparation</li> </ul>

- Standard 7 *Validity*  
The certifying organization has conducted validation studies to assure inferences made on the basis of test scores are appropriate and justified.
- Standard 8 *Test Development*  
Certification examinations are constructed and evaluated using methods that are psychometrically sound and fair to all candidates.
- Standard 9 *Reliability*  
The certifying organization assures test scores, including subscores, are sufficiently reliable for their intended uses.
- Standard 10 *Test Administration*  
The certification examination is administered in a manner that minimizes construct-irrelevant variance and maintains examination security.
- Standard 11 *Test Security*  
Procedures are in place to maximize the security of all certification examination materials.
- Standard 12 *Standard Setting, Scaling, and Equating*  
The passing score for the certification examination is set in a manner that is fair to all candidates, using criterion-referenced methods and sound equating and scaling procedures.
- Standard 13 *Recertification and Continuing Competence*  
The certifying organization has a recertification program in place that requires certificants to maintain current knowledge and to provide documentation showing how competence in the specialty is maintained and/or measured over time.
- Standard 14 *Communications*  
The certifying organization provides information that clearly describes the certification and recertification process to candidates, certificants, and other stakeholders.
- Standard 15 *Confidentiality and Security*  
The certifying organization protects confidential information about candidates and certificants.
- Standard 16 *Appeals*  
The certifying organization has an appeal process available to candidates/certificants who have been denied recertification or access to an examination, or who have had certification revoked.
- Standard 17 *Misrepresentation and Non-compliance*  
The certifying organization has a mechanism in place to respond to instances of misrepresentation and non-compliance with eligibility criteria or the certifying organization's policies; this mechanism includes reporting cases of misrepresentation and non-compliance to appropriate authorities.
- Standard 18 *Quality Improvement*  
The certifying organization shall have an internal audit and management review system in place, including provisions for continuous corrective and preventive actions for quality improvement.

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*Note:* \* The ABSNC is the only accrediting body specifically for nursing-related certification programs. Nursing certification organizations may attain accreditation by demonstrating compliance with the 18 standards established by the ABSNC. The ABSNC is an approved accrediting agency for the National Council of State Boards of Nursing's Advanced Practice Registered Nurses (APRN) Certification Review Program.

### *Reaccreditation*

Since the initial accreditation, the ALNCCB® has continued to ensure that the LNCC® program meets or exceeds the ABSNC accreditation standards as outlined in Table 1.3. This requires application for recertification every five years. The recertification process is difficult and requires the ALNCCB® to follow a calendar of yearly requirements to assure there is no lapse in the certification. The LNCC® is the only certification program in legal nurse consulting that has achieved ABSNC accreditation, a distinction that sets the LNCC® program apart from others.

### *The American Legal Nurse Consultant Certification Board*

The ALNCCB® was established in September 1997 to provide an accredited examination and certification program (ALNCCB®, 2018c). The ALNCCB® also maintains membership status in the ABNS. As such, the ALNCCB® is invited to attend ABNS Assembly meetings where issues of interest to all nursing specialty certification organizations are discussed.

### *Autonomy*

The Accreditation Board of Specialty Nursing Certification standard three requires that the certifying organization is an entity with organizational autonomy governed in part or in whole by certified nursing members. Based on this standard, the ALNCCB® has independent responsibility for the certification program. The ALNCCB® develops the certification budget, determines the eligibility criteria for the examination, audits applications for compliance with the criteria, sets fees, and sets criteria for certification renewal. The ALNCCB® is charged with the responsibility of maintaining an examination that is valid, reliable, and legally defensible. The AALNC and ALNCCB® share some resources while still maintaining separation of power. A Memorandum of Understanding approved by both boards defines this relationship (AALNC & ALNCCB®, n.d.).

### *Position Statement on Certification in Legal Nurse Consulting*

As previously discussed, numerous certificate courses for legal nurse consulting are offered by for-profit companies in the marketplace. The ALNCCB® has published a position statement entitled “Certification in Legal Nurse Consulting” to clarify the distinction between “certificate” and “certification” and to identify the LNCC® credential as the gold standard in legal nurse consulting. A copy of this position statement can be found in Appendix C.

### *The LNCC® Practice Test*

The LNCC® practice test, first published in 2001, was created by ALNCCB® in conjunction with a testing company. The test has 100 questions that meet the current exam blueprint (discussed below) and is designed to help the test-taker assess one’s readiness to sit for the certification examination. In addition to the practice test, a number of products have been developed by the ALNCCB® to assist in preparation for the examination. These products are available for purchase on the AALNC website.

### *The LNCC® Exam*

#### *Necessary Expertise: Working with the Testing Company*

The Accreditation Board of Specialty Nursing Certification standards 7 through 12 have detailed requirements for maintaining statistical validity, reliability, and security related to the certification



examination (ABSNC, 2017b). To achieve this, the ALNCCB® depends on help from outside experts in the testing field.

The Standards for Educational and Psychological Testing, published jointly by the American Educational Research Association (AERA), the American Psychological Association (APA), and the National Council on Measurement in Education (NCME), offer guidance for developing valid and reliable examinations, including certification examinations. Standard 14.14 states: “The content domain to be covered by a credentialing test should be defined clearly and justified in terms of the importance of the content for credential-worthy performance in an occupation or profession” (AERA, APA, & NCME, 2014, p. 181).

The same standard also specifies that the knowledge and skills addressed in the certification examination should be those necessary to protect the public. In general, the standard states that the knowledge and skills contained in a core curriculum designed to train people for the profession are relevant. Thus, the AALNC’s *Legal Nurse Consulting Principles and Practices* textbook is used as a primary resource for test development. In addition, the ALNCCB® adheres to guidelines of the Equal Employment Opportunity Commission and the standards set by ABSNC to ensure fairness to all test-takers and validity of test content.

### *Determining What to Test: Practice Analysis*

A practice analysis provides the primary basis for defining the content domain of a certification examination. The first role delineation survey performed by the AALNC took place in 1992. Numerous surveys, with the assistance of expertise from vetted testing companies, were developed and mailed to determine the “blueprint” for the certification examination. Most recently, an LNC practice analysis was completed in 2016 and 2017, and from it, the 2018 LNCC® test matrix, as shown in Table 1.4, was developed.

The content areas covered by the exam continue to expand with each successive practice analysis, but the top five content areas have remained constant since the inception of the certification

**Table 1.4 2018 LNCC® Test Blueprint**

<i>Content Area</i>	<i>% of Exam</i>
Medical malpractice	19–23
Personal injury	12–14
Long term care litigation	8–10
Product liability	7–9
Toxic tort	5–7
Workers’ compensation	6–9
Risk management	6–8
Life care planning	5–7
Regulatory compliance	5–8
Medicare set-aside	4–6

Source: American Legal Nurse Consultant Certification Board (2018b).



exam. This is exemplified in Table 1.5, which notes the evolution of the LNCC® certification test blueprint.

A practice analysis is completed approximately every five years to ensure that the certification examination remains a valid assessment of the knowledge and skills required for effective practice by legal nurse consultants. The practice analysis is important for due diligence in test development and is required by the standards of the ABSNC and other accrediting bodies.

### *Developing Test Items*

The original and current examination questions, or “items,” are designed to test the nurse’s ability to apply legal nurse consulting knowledge in situations that simulate actual practice. The majority of items are in case study format, meaning the test-taker is presented with a passage describing a legal case followed by several questions relating to the case.

Originally, a group of 12 item writers were selected from the AALNC membership. These item writers were experienced practitioners in a wide range of practice settings from all regions of the country. All item writers were required to meet the eligibility requirements for the examination. The ALNCCB® Item Writing Panel was charged with the responsibility of developing new items as needed based on the exam blueprint. Over time, this item writing panel has evolved into a group of AALNC members who have completed applications to volunteer as item writers in their areas of expertise and have been selected by members of the ALNCCB® from the applicant pool.

In September of 2014, the ALNCCB® created a new volunteer role for an experienced LNCC® to act as a liaison between the testing vendor, the ALNCCB®, and the item writers. This role is intended to assist in meeting the needs of the item writers and to ensure that an adequate number of items for each practice area is available in the item bank. The goal is to keep enough items in the item bank to change the certification test at least every two years and to keep both the certification and practice tests current.

Each new item is reviewed by ALNCCB® members, experts from the testing company, and other item writers approved by the ALNCCB® to ensure that psychometric testing standards are met. Each individual item is coded by content area and scope of practice (ALNCCB®, 2018b). The highest portion of items on the certification exam are in the content areas of medical malpractice and personal injury, as noted in Table 1.5.

### *Validating Test Items*

Initially, two pilot tests were developed. The pilot tests were offered to all LNCs attending the 1998 AALNC National Education Conference in Dallas, Texas. The pilot tests did not exclude LNCs who would not have met eligibility criteria, but a questionnaire included with the pilot tests revealed that most of the 217 LNCs who took the pilot tests would have met eligibility requirements. The superior performance by those who met eligibility requirements validated that the eligibility criteria did tend to identify those candidates who had reached the level of proficiency measured by the examination.

In accordance with ABSNC standards, the ALNCCB® regularly evaluates the validity of test items with the assistance of the testing company and in partnership with an independent psychometrician. Post-administration analysis has consistently found the examination to be psychometrically sound. Denoting that the questions are directly related to the roles of experienced LNCs as identified by the practice analysis, the majority of LNCs who meet eligibility criteria perform successfully on the examination.

**Table 1.5 Evolution of the LNCC® Certification Test Blueprint 1998–2017**

<i>Content Areas</i>	<i>% in 1998</i>	<i>% in 2008</i>	<i>% in 2012</i>	<i>% in 2017</i>
<b>Medical malpractice</b>	28 to 32	27 to 31	19 to 23	22 to 25
<b>Personal injury</b>	20 to 24	19 to 23	12 to 14	13 to 15
<b>Long term care litigation/Elder law</b>	1 to 3	3 to 6	8 to 10	12 to 14
<b>Product liability/toxic tort</b>	12 to 16	10 to 14	7 to 9 (Product liability only)	8 to 10 (Product liability only)
<b>Toxic tort</b>	–	–	5 to 7	5 to 7
<b>Workers' compensation</b>	12 to 16	12 to 16	6 to 9	10 to 12
<b>Risk management</b>	4 to 8	5 to 9	6 to 8	5 to 7
<b>Life care planning</b>	5 to 9	4 to 7	5 to 7	4 to 6
<b>Regulatory compliance</b>	–	–	5 to 8	5 to 8
<b>Forensic/criminal</b>	1 to 4	1 to 4	4 to 6	2 to 4
<b>Administrative health law</b>	1 to 4	4 to 8 (incl. regulatory compliance)	–	–
<b>Civil rights</b>	–	–	3 to 5	3 to 5
<b>Employment discrimination (including ADA)</b>	–	–	3 to 5	4 to 6
<b>Medicare set-aside</b>	–	–	4 to 6	2 to 4

*Source:* Data on 1998 and 2008 content areas from Peterson and Kopishke, 2010; data on 2012 content areas from Webb, 2012; and Data on 2017 content areas from Webb, 2017.

### *Eligibility Requirements and Recertification*

Eligibility requirements to take the LNCC® examination include:

1. Current unrestricted licensure as an RN in the United States or its territories
2. A minimum of five years' experience practicing as an RN and
3. Evidence of 2,000 hours of legal nurse consulting experience within the past five years

Hours worked in a formal internship or practicum program can be counted toward the legal nurse consulting practice experience eligibility criterion as long as these internship or practicum hours are worked on active client cases and consist of activities that would generally be considered billable. These activities should fall under the content areas and scope of practice identified on the most current practice analysis. Internship and practicum hours can only be used toward a maximum of 10% of the practice hours submitted.

Certification is valid for five years (ALNCCB®, 2018a). Board-certified LNCs (LNCC®s) can renew their certification by meeting the eligibility criteria for recertification, which are:

1. Having a current, unrestricted RN license
2. Having evidence of 2,000 hours of legal nurse consulting practice during the five-year certification period and
3. Completing one of the following:
  - a. Submitting 60 contact hours that meet published criteria and were earned over the five-year certification period, or
  - b. Retaking and passing the LNCC® certification examination

The recertification application can be completed on the ALNCCB® website, and as of January 2018, all recertifications are due in October of the fifth year after the LNCC®'s initial certification or recertification (ALNCCB®, 2018d).

### ***Protecting the Value of LNCC®***

Nurses who achieve specialty certification want their credential to be meaningful to others. Indeed, the aim of specialty nursing certification and accreditation is to provide assurance to the public that the certification holder is proficient in the specialty practice at a level that exceeds the minimum requirements for entry into practice.

The ALNCCB® has taken a number of steps to assure that the value of the LNCC® designation signifies proficiency in the specialty practice. Both ALNCCB® and LNCC® are registered trademarks. No other organization or person may use LNCC® to designate certification as a legal nurse consultant. While it is not necessary to use the registered trademark symbol with the credential, its use may help distinguish the LNCC® from the ever-evolving list of entry-level certificates.

Accreditation by the ABSNC indicates that the LNCC® is comparable to other nursing specialty certifications with high standards and legally defensible programs. The ABSNC accreditation process includes a stringent third-party peer-review process of all applications submitted for accreditation.

The ALNCCB® performs ongoing review of the examination and the individual items and writes new items on a regular basis. Applications for examination and recertification are subject to audit by appointed members of the audit panel, which is under the supervision of the ALNCCB®.

Appeals related to examination and recertification applications are also under the supervision of the ALNCCB®.

Confidentiality regarding test content is a strict requirement for every member of the ALNCCB®, its staff, and contracted advisers. All examination candidates are required to read and sign a confidentiality statement.

Ultimately, the public should judge the value of the LNCC® credential. As in other nursing specialties, the process of proving the value of certification takes a great deal of time. A specialty practice as small as legal nurse consulting is at a greater disadvantage in this regard. The LNCC®'s employers and clients usually do not work with enough LNCs to make comparisons between those who have achieved the LNCC® credential and those who have not. Consumers, including the LNCC®'s employer's clients, may not even know of the LNCC®'s involvement in the case and have no way to judge the LNCC®'s impact on the case. The complexity of legal processes and the multitude of variables that affect case outcome make it difficult to measure any one individual's effect on a case.

To protect the value of the LNCC® credential, the ALNCCB® has developed a "Use of the LNCC® Credential Policy." This policy speaks directly to: (1) Use of the credential; (2) Eligibility criteria; (3) Irregular behavior; (4) Disciplinary action; (5) Trademark infringement and/or fraud; (6) Preliminary determination; (7) Disciplinary hearing; (8) Disciplinary action (after the hearing); (9) Notice; (10) Appeal; (11) Records; (12) Confidentiality; (13) Impartiality; (14) Reapplication; and (15) Revocation (ALNCCB®, 2011).

Education is needed to help consumers differentiate the LNCC® credential from other less meaningful "credentials." The AALNC recommends listing certificates and entry-level "certifications" in the education section of one's resume or curriculum vitae rather than adding initials to one's title that do not represent attainment of specialty nursing certification.

## **Research**

### *Nursing Certification*

In describing the purposes of nursing certification in patient care settings, Ann Cary, director of the International Program of Research on the Certified Nurse Workforce, states: "Ostensibly, [nursing certification] protects the public from unsafe and incompetent providers, gives consumers more choices in selecting healthcare providers, distinguishes among levels of care, and gives better trained providers a competitive advantage" (Cary, 2001, p. 44). While legal nurse consulting practice does not involve patient care, this statement can easily be adapted to describe the purpose and value of board certification in legal nurse consulting (LNCC®).

### *ABNS Value of Certification Study*

In March of 2016, the ABNS hosted a national convening of more than 100 experts from the healthcare, academia, and professional certification industries on *The Value of Certification: Building the Business Case for Certification*. The Value of Certification convening developed actionable and measurable activities to support certification research that builds a business case for the value of certification across multiple stakeholders. The convening focused on the value of a multidisciplinary certified workforce, continuing competence, and the work of certified team members in team practice. The Value of Certification convening provided participating organizations with concrete ideas to implement and strategies to enable them to work together. The

ABSNC developed a statement that outlines the importance of accreditation with the ABSNC (ABSNC, 2017a).

At this 2016 national convening, the following research priorities were identified to define the value of certification:

- Certification improves the recruitment and retention of qualified nurses, enhances their employability and potential job prospects
- Certification is recognized validation of knowledge in the specialty
- Certification improves organizational culture of healthcare delivery, job satisfaction, empowerment, and confidence and
- Certification advances safety, improves processes of care, and improves quality of care

### ***Future Trends***

The ALNCCB® has the unique opportunity of being involved in developing a national research agenda by remaining a member of the ABNS. As noted, research related to the value of certification continues to be important.

### **Summary**

The AALNC is widely known as the representative voice for LNCs. Through the efforts of its leaders, members, volunteers, and staff, the AALNC has focused on the development and continued growth of the specialty practice of legal nurse consulting since its inception. The practice of legal nurse consulting marries the fields of nursing and law. The intersection of these two professions has created opportunities for registered nurses to provide consultation to attorneys, insurance companies, and others who work on legal matters in which there are medical components. Nurses considering entry into legal nursing practice should carefully weigh the pros and cons of independent and in-house practice and conduct a self-assessment relative to the qualities, traits, and skills of successful LNCs. Once eligibility criteria are met, all LNCs are encouraged to seek LNCC® certification to validate their knowledge. As the only legal nursing certification in the nursing profession endorsed by the AALNC and accredited by the ABSNC, the LNCC® is the gold standard sought by experienced practitioners in the field.

### **References**

- Accreditation Board for Specialty Nursing Certification. (2017a). A commitment to quality and care: The importance of accreditation for certifying organizations and their members. Retrieved from [https://absnc.org/sites/default/files/docs/2017/absnc\\_valueaccreditation.pdf](https://absnc.org/sites/default/files/docs/2017/absnc_valueaccreditation.pdf).
- Accreditation Board for Specialty Nursing Certification. (2017b). Promoting excellence in nursing certification: Accreditation standards. Retrieved from [www.absnc.org/sites/default/files/docs/2017/absnc-standards-fact-sheet-080117.pdf](http://www.absnc.org/sites/default/files/docs/2017/absnc-standards-fact-sheet-080117.pdf).
- Accreditation Board for Specialty Nursing Certification. (2019). About. Retrieved from [www.absnc.org/about](http://www.absnc.org/about).
- American Association of Legal Nurse Consultants. (1994). *Scope of practice for the legal nurse consultant*. Glenview, IL: AALNC.

- American Association of Legal Nurse Consultants. (2002). *Scope and standards of practice for the legal nurse consultant*. Glenview, IL: AALNC.
- American Association of Legal Nurse Consultants. (2014). Providing expert nursing testimony regarding nursing negligence. Retrieved from [www.aalnc.org/d/do/258](http://www.aalnc.org/d/do/258).
- American Association of Legal Nurse Consultants. (2015). Code of ethics and conduct with interpretive discussion. Retrieved from [www.aalnc.org/d/do/85](http://www.aalnc.org/d/do/85).
- American Association of Legal Nurse Consultants. (2016). Education and certification in legal nurse consulting. Retrieved from [www.aalnc.org/page/position-statement-on-education-certification](http://www.aalnc.org/page/position-statement-on-education-certification).
- American Association of Legal Nurse Consultants. (2017). *Legal nurse consulting scope and standards of practice*. Retrieved from [www.aalnc.org/page/aalnc-online-bookstore](http://www.aalnc.org/page/aalnc-online-bookstore).
- American Association of Legal Nurse Consultants. (2018). *Legal nurse consulting: A nursing specialty* (4th ed.). Retrieved from [www.aalnc.org/d/do/424](http://www.aalnc.org/d/do/424).
- American Association of Legal Nurse Consultants, & American Legal Nurse Consultant Certification Board. (n.d.) Memo of understanding. In ALNCCB®'s Operating Guidelines.
- American Association of Legal Nurse Consultants, & American Nurses Association. (2006). *Legal nurse consulting: Scope and standards of practice*. [Brochure]. Silver Spring, MD: NurseBooks.Org.
- American Bar Association. (2008). Current ABA definition of legal assistant/paralegal. Retrieved from [www.americanbar.org/groups/paralegals/resources/current\\_aba\\_definition\\_of\\_legal\\_assistant\\_paralegal.html](http://www.americanbar.org/groups/paralegals/resources/current_aba_definition_of_legal_assistant_paralegal.html).
- American Bar Association. (2014). ABA signs memorandum of understanding with American Association of Legal Nurse Consultants. Retrieved from [www.americanbar.org/news/abanews/aba-news-archives/2014/08/aba\\_signs\\_memorandum.html](http://www.americanbar.org/news/abanews/aba-news-archives/2014/08/aba_signs_memorandum.html)
- American Education Research Association, American Psychological Association, & National Council on Measurement in Education. (2014). *Standards for educational and psychological testing*. Washington, DC: American Educational Research Association.
- American Legal Nurse Consultant Certification Board. (2006). Certification in legal nurse consulting. Retrieved from <https://lncc.aalnc.org/page/position-statement>.
- American Legal Nurse Consultant Certification Board. (2011). *ALNCCB® policy and procedure manual: Use of the LNCC® credential policy*. Chicago, IL: ALNCCB®.
- American Legal Nurse Consultant Certification Board. (2018a). Eligibility criteria. Retrieved from <http://lncc.aalnc.org/page/lncc-certification-faq>.
- American Legal Nurse Consultant Certification Board. (2018b). Examination, scope and content. Retrieved from <http://lncc.aalnc.org/page/examination-scope-and-content>.
- American Legal Nurse Consultant Certification Board. (2018c). Mission and objectives. Retrieved from <http://lncc.aalnc.org/page/mission-objectives>.
- American Legal Nurse Consultant Certification Board. (2018d). Recertification. Retrieved from <http://lncc.aalnc.org/page/recertification>.
- Bogart, J. B. (Ed.). (1998). *Legal nurse consulting: Principles and practice*. Boca Raton, FL: CRC Press.
- Carleo, S. (2017). Business principles and practices. In *AALNC Legal nurse consultant professional course* (module 13). Retrieved from [www.aalnc.org/page/course-content](http://www.aalnc.org/page/course-content).
- Cary, A. H. (2001). Certified registered nurses: Results of the study of the certified workforce. *American Journal of Nursing*, 101(1), 44–52.
- Costantini, P., Huff, K., & Mihalich, J. (2013). Introduction to legal nurse consulting. In *AALNC Legal nurse consultant professional course* (module 1). Retrieved from [www.aalnc.org/page/course-content](http://www.aalnc.org/page/course-content).
- Dickinson. (2015, January 20). New online LNC course. [Web log post]. Retrieved from [www.aalnc.org/p/bl/et/blogaid=5](http://www.aalnc.org/p/bl/et/blogaid=5).
- Ehrlich, C. J. (1995). Certification development. *Journal of Legal Nurse Consulting*, 6, 6.
- Huff, K. (2010a, June 21). AALNC webinar series. [Web log post]. Retrieved from [www.aalnc.org/p/bl/et/blogaid=52](http://www.aalnc.org/p/bl/et/blogaid=52).
- Huff, K. (2010b, October 8). AALNC announces joint webinar with DRI. [Web log post]. Retrieved from [www.aalnc.org/p/bl/et/blogid=2&yym=201010](http://www.aalnc.org/p/bl/et/blogid=2&yym=201010).

- Huff, K. (2011a, January 26). Free webinar—so you want to be an LNC. [Web log post]. Retrieved from [www.aalnc.org/p/bl/et/blogid=2&cym=201101](http://www.aalnc.org/p/bl/et/blogid=2&cym=201101).
- Huff, K. (2011b, March 29). AALNC announces webinar series with the American Bar Association. [Web log post]. Retrieved from [www.aalnc.org/p/bl/et/blogid=2&cym=201103](http://www.aalnc.org/p/bl/et/blogid=2&cym=201103).
- Iyer, P. (Ed.). (2003). *Legal nurse consulting: Principles and practice* (2nd ed.). Boca Raton, FL: CRC Press.
- Janes, R., Bogart, J., Magnusson, J., Joos, B., & Beerman, J. (1998). The history and evolution of legal nurse consulting. In J. B. Bogart (Ed.), *Legal nurse consulting practices* (pp. 3–24). Boca Raton, FL: CRC Press.
- Nursing Organizations Alliance. (2018a). About us. Retrieved from [www.nursing-alliance.org/dnn/About-Us](http://www.nursing-alliance.org/dnn/About-Us).
- Nursing Organizations Alliance. (2018b). Member benefits. Retrieved from [www.nursing-alliance.org/dnn/Join-Us](http://www.nursing-alliance.org/dnn/Join-Us).
- Peterson, A., & Kopishke, L. (Eds.). (2010). *Legal nurse consulting practices* (3rd ed.). Boca Raton, FL: CRC Press.
- Webb, L. C. (2012). Practice analysis report for legal nurse consultants prepared for the American Legal Nurse Consultant Certification Board (ALNCCB®) by testing consultant.
- Webb, L. C. (2017). Practice analysis report for legal nurse consultants prepared for the American Legal Nurse Consultant Certification Board (ALNCCB®) by testing consultant.

## Test Questions

1. The primary value of an LNC to an attorney comes from the LNC's
  - A. Legal knowledge gained from educational courses
  - B. Medical knowledge and computer skills
  - C. Nursing knowledge and experience
  - D. Research and organizational skills
2. According to AALNC, the definition of legal nurse consulting includes all of the following EXCEPT:
  - A. The application of knowledge acquired during the course of professional nursing education, training, and clinical experience to the evaluation of standard of care, causation, damages and other clinically related issues in cases or claims
  - B. The application of legal standards and analysis to a particular case or claim based on experience working with attorneys
  - C. Critical analysis of healthcare records and medical literature, as well as relevant legal documents and other information pertinent to the evaluation and resolution of cases or claims
  - D. The development of case-specific work products and opinions for use by legal professionals or agencies handling cases or claims
3. The pros of working as an independent legal nurse consultant include:
  - A. Autonomy
  - B. Flexible hours
  - C. Greater variety of cases and attorney-clients
  - D. All of the above
4. The qualities, traits, and skills of successful legal nurse consultants include:
  - A. Analytical skills
  - B. Attention to detail
  - C. Communication skills
  - D. Writing skills
  - E. All of the above
5. Eligibility requirements to sit for a certification examination in a nursing specialty include all of the following EXCEPT:
  - A. Experience as an RN
  - B. Evidence of formal education in the specialty practice
  - C. Current licensure as an RN
  - D. Current practice in the specialty
6. Which tool should be used to determine the test specifications (blueprint) of a nursing specialty certification exam?
  - A. Core curriculum
  - B. Accreditation standards
  - C. Practice analysis
  - D. Post-examination statistical analysis

**Answers:** 1. C, 2. B, 3. D, 4. E, 5. B, 6. C



## **Appendix A: AALNC Position Statement on Education and Certification in Legal Nurse Consulting**

### ***Education and Certification in Legal Nurse Consulting***

The legal nurse consultant's primary educational foundation is the theory and practice of professional nursing. Entry into the specialty requires at a minimum, completion of a formal nursing education program and active licensure as a registered nurse. Optimally, legal nurse consultants should have been licensed as a registered nurse for at least five years and have significant clinical experience in order to bring the most value to the legal nurse consulting role.

Legal nurse consulting is the analysis and evaluation of facts and testimony related to the delivery of nursing and other healthcare services. Legal nurses render informed opinions on the nature and cause of injuries and (in relation to) patient outcomes. The legal nurse consultant is a licensed registered nurse who performs a critical analysis of clinically related issues in a variety of settings in the legal arena. The nurse expert with a strong educational and experiential foundation is qualified to assess adherence to standards and guidelines of practice as applied to nursing practice.

The practice of legal nurse consulting predates any specialty organization, training program, or certification. While many legal nurse consultants have acquired knowledge of the legal system through such experience as consulting with attorneys and attending seminars, legal or paralegal education is not a prerequisite to the practice of legal nurse consulting. In the early days of the specialty, nurses became legal nurse consultants (LNCs) without the benefit of formal education, relying on their nursing expertise and informal guidance or "on the job training" from attorneys. Then as now, nurses entered the specialty with a variety of educational backgrounds and practical experiences in nursing. The nurses who founded the American Association of Legal Nurse Consultants in 1989 were already practicing as LNCs when they came together to share their experience and to promote the specialty by forming a professional association.

### ***Education***

While formal education in legal nurse consulting is not required to enter the field, there are universities, colleges, professional organizations, and businesses that offer legal nurse consulting courses that culminate with a certificate of completion. In addition, some universities have post-graduate classes in legal nurse consulting, and a few offer a Master of Science in Nursing with a concentration in legal nurse consulting. The American Association of Legal Nurse Consultants has developed and recommends incorporation of *Legal Nurse Consulting Practices*, a two-volume core curriculum, into educational programs for this nursing specialty (Peterson & Kopishke, 2010).

The legal nurse consultant should continually expand one's knowledge of pertinent clinical and legal topics (e.g., legal standards and strategy) and hone their technical skills (e.g., research and writing) which are used in the specialty practice. Continuing education is necessary to remain current in medical and legal issues, assures value for clients and employers, and to maintain licensure and specialty certification. In addition to the educational opportunities already described, the *Journal of Legal Nurse Consulting* and other publications (i.e., legal journals) serve as educational resources for legal nurse consultants from entry level to the most experienced in the field.

The AALNC maintains the position that legal nurse consulting education programs should be developed and presented as specialty nursing curricula by nurse educators in partnership with

legal educators. The qualifications of the program directors and instructors should be considered when evaluating a program. In general, programs developed and taught by experienced nurse educators who are practicing LNCs are preferred. The growth of this specialty into new practice areas and the changes in both the legal and healthcare fields pose constant educational challenges for the legal nurse consultant.

## Certification

Most LNC education programs offer a certificate that testifies to the completion of a course of study and, in some cases, to passing an examination on the course material. Some graduates of LNC certificate programs chose to include letters such as “LNC” after their names, along with their educational degrees and professional credentials. The AALNC does not endorse this practice. It is customary to list such certificates in the education section of a resume or curriculum vitae. These certificate programs should not be confused with the certification programs offered by nursing certification boards, which are commonly affiliated with professional nursing associations. Certification is a process that recognizes an individual’s qualifications and demonstrated knowledge in a specialty. In 1997, the AALNC established the American Legal Nurse Consultant Certification Board (ALNCCB®) to administer the Legal Nurse Consultant Certified (LNCC®) program. The LNCC® certification program is accredited by the American Board of Nursing Specialties (ABNS).

The purpose of the LNCC® program is to promote a level of expertise and professionalism in legal nurse consulting. Legal nurse consultants must meet the eligibility requirements, which include consulting experience, and achieve a passing score on a multiple-choice examination to earn the LNCC® designation. As with many clinical nursing certification programs, the LNCC® credential is designed for those who have demonstrated experience and knowledge in the specialty.<sup>1</sup> Certification is an appropriate goal for those who are committed to a professional legal nurse consulting practice.

The AALNC supports the practice initiated by the American Nurses Association of listing one’s credentials in the following order: highest educational degree, highest nursing degree if different, licensure, and professional certifications. “LNCC®” is the only legal nurse consulting credential recognized by AALNC and ABNS.

To the extent that legal education is provided to nurses by legal assistant or paralegal education programs, it should be considered separate from the education of paralegals and legal assistants because of the differences in their practice in the legal arena. The primary focus of legal nurse consulting education should be to build on nursing education and clinical experience and to prepare nurses to function in the legal arena. In evaluating a particular program, its mission and purpose should be compared to this standard.

Revised 2016

Revised 2013

Originally published 2000

## Note

1 The LNCC® credential can be compared to recognized nursing credentials such as RNC; CCRN; CEN; CPN; and CRRN.

## Appendix B: AALNC Position Statement: Providing Expert Nursing Testimony Regarding Nursing Negligence

### *Introduction*

Nurses are uniquely prepared to perform a critical review and analysis of clinical nursing care and administrative nursing practice to provide the foundation for testifying on nursing negligence issues.

### *Background and Discussion*

Nursing has evolved into a profession with a distinct body of knowledge, methodology, university-based education, specialized practice, standards of practice, board certifications, a societal contract, and an ethical code. The practice of nursing requires decision-making and skill based upon principles of the biological, physical, behavioral, and social sciences as well as evidence-based research related to functions such as identifying risk factors, providing specific interventions, and evaluating outcomes of care. Each state has a Board of Nursing that is the authorized state entity with the legal authority to regulate nursing practice. State legislature has set forth licensing and regulations for the nursing profession in their respective Nurse Practice Acts and Advanced Practice Nursing Acts. It is evident that, under these nursing acts, only a nurse would meet the qualifications for sitting for nursing licensure examination and, as such, be eligible for licensure and practice as a registered nurse.

It appears straightforward that, generally, the most qualified expert to render expert opinion testimony regarding standards of care would be a member of the same profession who practices in a substantially similar clinical specialty as the potential defendant in the case. The courts are now generally acknowledging that nurses possess specialized knowledge that physicians do not have unless they have been trained and practice as a nurse.

The Supreme Court of Illinois held that a board certified internal medicine physician was not competent to testify as to the standard of care of a nurse. Citing the Amicus Brief submitted by The American Association of Nurse Attorneys, *the court noted*:

A physician who is not a nurse is no more qualified to offer expert opinion testimony as to the standard of care for nurses than a nurse would be to offer an opinion as to the physician standard of care. Certainly, nurses are not permitted to offer expert testimony against a physician based on their observances of physicians or their familiarity with the procedures involved. An operating room nurse, who stands shoulder to shoulder with surgeons every day, would not be permitted to testify as to the standard of care of a surgeon. An endoscopy nurse would not be permitted to testify as to the standard of care of a gastroenterologist performing a colonoscopy. A labor and delivery nurse would not be permitted to offer expert testimony as to the standard of care for an obstetrician or even a midwife. Such testimony would be, essentially, expert testimony as to the standard of medical care.

*(Sullivan v. Edward Hospital, 806 N.E. 2d 645 (Ill. 2004))*

The AALNC supports nursing expert opinions with regard to all aspects of nursing negligence.

## Conclusion

Nursing has the knowledge, experience, and responsibility to define its standards of practice and indeed has published these standards of care. Therefore, licensed registered nurses are the only competent professionals to address these standards of nursing practice in the litigation arena.

It is the position of the American Association of Legal Nurse Consultants that, when registered nursing standards need to be established through expert testimony, the expert shall be a licensed, registered nurse.

## Additional References

- Albee, T. (2007). The legal nurse consultant as a board of nursing expert witness. *Journal of Legal Nurse Consulting*, 18(1), 11–14.
- American Association of Legal Nurse Consultants. (2006). Position statement: Providing expert nurse witness testimony. Retrieved from [www.aalnc.org/images/EXPWit.pdf](http://www.aalnc.org/images/EXPWit.pdf).
- American Association of Legal Nurse Consultants. (AALNC). (Peterson & Kopishke, Eds.) (2010). *Legal nurse consulting practices*. (3rd ed.). Boca Raton, FL: CRC Press.
- Amom, E. (2007). Expert witness testimony. *Clinics in Perinatology*, 34, 473–478.
- Cohen, M., Rosen, L., & Barbacci, M. (2008). Past, present and future: The evolution of the nurse expert witness. *Journal of Legal Nurse Consulting*, 19(4), 3–8.
- Lynch, V., & Duval, J. (2011). *Forensic nursing science* (2nd ed.). St. Louis, MO: Elsevier Mosby.
- Peterson, A., & Kopishke, L. (Eds.). (2010). *Legal nurse consulting practices* (3rd ed.). Boca Raton, FL: CRC Press.
- Sullivan v. Edward Hospital*, No. 95409, 2004 WL 228956 (Ill. Feb 5, 2004) Amicus brief submitted to Illinois Supreme Court—Karen Butler, Esq American Association of Nurse Attorneys.

Approved by the American Association of Legal Nurse Consultants Board of Directors, January 2006

Revised and approved 2014

## Appendix C: ALNCCB® Position Statement: Certification in Legal Nurse Consulting

### Position Statement

#### Certification in Legal Nurse Consulting

##### SUMMARY

The purpose of this position statement is to define and clarify the role of certification for legal nurse consultants and to establish the Legal Nurse Consultant Certified (LNCC®) program<sup>1</sup> as the premier certification in this specialty.

##### INTRODUCTION

As a nursing specialty recognized by the American Nurses Association (ANA), it is vital that legal nurse consultants (LNCs) have a pathway to certification which incorporates experiential and educational requirements. The LNCC® program is the only certification examination in the field

endorsed by the American Association of Legal Nurse Consultants (AALNC) and accredited by the Accreditation Board for Specialty Nursing Certification (ABSNC).

#### BACKGROUND & DISCUSSION

Established in 1997 by AALNC, the American Legal Nurse Consultant Certification Board (ALNCCB®) is responsible for developing and maintaining a certification program in legal nurse consulting.

As part of the decision to offer a high-quality certification program, ALNCCB® sought accreditation by an outside body and selected ABSNC as the most appropriate accreditor. ABSNC is an advocate for consumer protection, and is the only accrediting body specifically for nursing certification. ABSNC provides a peer-review mechanism that allows nursing certification organizations to obtain accreditation by demonstrating compliance with established ABSNC standards.

ALNCCB® maintains the only certification in legal nurse consulting accredited by ABSNC and endorsed by AALNC. The LNCC® program was initially accredited in 1999 and reaccredited in 2004 and 2009. Accreditation distinguishes the LNCC® Program within the field of legal nurse consulting and equates the LNCC® credential with credentials from other highly respected programs.

ALNCCB® endorses the definition of certification adopted by ABNS, now ABSNC:

*Certification* is the formal recognition of the specialized knowledge, skills, and experience demonstrated by the achievement of standards identified by a nursing specialty to promote optimal health outcomes.

(ABNS, 2005)

A certification program helps advance the profession, and is one of the required elements for recognition as a nursing specialty. AALNC achieved this milestone in 2006 when the ANA officially recognized legal nurse consulting as a specialty practice of nursing. AALNC, in collaboration with the ANA, published *Legal Nurse Consulting Scope and Standards of Practice*. In this document, the authors note:

Participation in the specialty's certification process demonstrates a level of professionalism and commitment, and allows community recognition of those legal nurse consultants who have achieved a higher level of skill and expertise within the specialty.

(ANA, 2006)

While RN licensure ensures entry-level competency, certification is the gold standard for demonstrating knowledge and experience in specialty practice. Similar to physician board certification, nursing specialty certification is not achieved at entry into practice. The ABNS/ABSNC Position Statement on the Value of Certification address the issue of certification as a standard beyond licensure, noting that:

While state licensure provides the legal authority for an individual to practice professional nursing, private voluntary certification is obtained through individual specialty nursing certifying organizations and reflects achievement of a standard beyond licensure for specialty nursing practice.

(ABNS, 2005)

The value of certification also extends to the public. According to ABNS:

The increasingly complex patient/client needs within the current healthcare delivery system are best met when registered nurses, certified in specialty practice, provide nursing care.

(ABNS, 2005)

This statement applies to traditional nursing roles as well as legal nurse consulting practice. Similar to certified nurses in other specialties, LNCC<sup>®</sup>s, by virtue of their knowledge and experience in the specialty, can more readily meet the needs of their client than the novice practitioner.

Certification is a commitment that begins at entry into the specialty and continues throughout a nurse's career. Although voluntary, certification allows nursing specialties—including Legal Nurse Consulting—to publicly acknowledge a member's level of experience, judgment, and knowledge. Legal nurse consultants should commit to building their competency in the field, with a goal of sitting for the LNCC<sup>®</sup> examination.

## CONCLUSION

The LNCC<sup>®</sup> program is designed to promote a level of expertise and professionalism by documenting individual performance as measured against a predetermined level of knowledge in legal nurse consulting; however it is not intended to determine who is qualified or who shall engage in legal nurse consulting. The LNCC<sup>®</sup> credential allows the public to more readily identify legal nurse consultants who have demonstrated a high level of experience, expertise, and commitment to this specialty nursing practice.

Legal nurse consultants who wish to distinguish themselves in the profession should seek voluntary certification as an LNCC<sup>®</sup>. As the only practice-based certification program that meets national testing standards, the LNCC<sup>®</sup> is comparable to board certification in other nursing specialties. In addition to the personal satisfaction that comes with certification, LNCs who invest their time in achieving and maintaining LNCC<sup>®</sup> certification can be comfortable in the knowledge that they have achieved a credential that has met or exceeded ABNS/ABSNC requirements, and is the gold standard for certification in the specialty.

### **It is the position of the American Legal Nurse Consultant Certification Board that**

1. Certification is an objective measure of professional knowledge. It demonstrates to the public that an individual has met national testing standards, and has achieved a level of expertise in the specialty.
2. Certification in Legal Nurse Consulting is based on experience and knowledge, and is not achieved at entry into the specialty.
3. The Legal Nurse Consultant Certified (LNCC<sup>®</sup>) is the premier certification credential for legal nurse consultants, which is the only legal nurse consultant certification program accredited by the Accreditation Board for Specialty Nursing Certification (ABSNC).

## Note

- 1 The LNCC<sup>®</sup> program is the collective term for all components of the certification process, including policies related to test development, certification, and recertification.

## References

- American Board of Nursing Specialties. (March 5, 2005). A position statement on the value of specialty nursing certification. Retrieved July 11, 2006 from [www.nursingcertification.org/position\\_statements.htm](http://www.nursingcertification.org/position_statements.htm).
- American Board of Nursing Specialties. (October, 10, 2010). Frequently asked questions about ABSNC accreditation. Retrieved December 8, 2011 from <http://nursingcertification.org/pdf/10-19-10%20Final%20FAQs.pdf>.
- American Nurses Association, & American Association of Legal Nurse Consultants. (2006). *Scope and standards of practice for legal nurse consultants*. Silver Spring, MD: Nursesbooks.org.

Approved by the American Legal Nurse Consultant Certification Board  
November 2006  
Amended December 2008  
Amended December 2011

## Chapter 2

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# Professionalism, Ethics, Scope and Standards of Practice

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## Objectives

- Compare the key elements that define a profession to the characteristics of the practice of nursing
- Describe the purpose of the AALNC Code of Ethics in legal nurse consulting
- Detail three areas of potential liability for legal nurse consultants and nurse experts
- Discuss the relationship of the specialty practice of legal nurse consulting to the nursing profession
- Discuss the rationale for standards of practice and professional performance in nursing
- Identify the six Standards of Practice used by legal nurse consultants as a process for completion of work and assignments
- Discuss how the application of the Standards of Professional Performance may enhance the legal nurse consultant's practice

## Introduction

Since the inception of the specialty practice of legal nurse consulting and the term “legal nurse consultant” (LNC), there have been efforts to distinguish the identity of these nurses from others practicing in the nursing or legal professions. Both professions, other allied fields, and the public needed to understand the LNC's role as a participant in the legal arena. Just as important, LNCs needed guidelines to practice ethically and successfully within this specialty practice of nursing.

This chapter provides an overview of the use of a code of ethics and a scope and standards of practice in legal nurse consulting. These published guidelines can be used by LNCs to steer practice activities and roles and by consumers of service to develop job descriptions, contractual arrangements, protocols, and performance evaluations.

## Professionalism in Nursing

Endeavors have been made to define a profession by identifying various common characteristics. The five elements generally accepted as attributes of a profession are:

- A systematic, unique body of theory obtained through a formal education followed by examination for entry into practice
- An authority to define the profession and autonomy in its practice
- A high status granted by society because of altruistic motivation and commitment to serve society
- A code of ethics governing the conduct of members and
- A professional culture that embodies specific values, norms and symbols (Fowler, 2013).

The attempt to apply these attributes to nursing as a profession has promoted recognition of inconsistencies and movement toward solutions, most notably in the areas of educational preparation and control over professional practice.

While the nursing profession may accept various degrees for entry into practice, the commonality is a formal delivery of education in the health sciences, with a focus on the nursing process, coupled with a minimum level of experience necessary to prepare one for licensure and practice.

The concept of autonomy in practice has been an area of challenge for nursing. However, changes in the healthcare system have actually propelled nurses into more autonomous roles (e.g., nurse practitioners, clinical specialists, and case managers) as cost-effective providers of healthcare services.

It is generally accepted that nurses provide a valued service based on altruistic motivation. The public assumes the title of “nurse” carries with it a certain level of expertise, caring, and commitment. They believe nurses provide essential services desired and needed by society. These assumptions, in part, set the legal precedent of professional duty. The increasing responsibility and authority of advanced practice nurses in public health maintenance and illness management further validates nursing as a profession.

Professionals have codes of ethics to help regulate their relationships with consumers and each other. Formal codes of ethics are usually based on a set of values and norms that represent the philosophy and practice of the profession. Professionals have strong values pertaining to their occupational identity. This identity impacts all aspects of the professional’s attitude and behavior toward work and lifestyle. The values established by the profession become the rules of expected behavior among the members of the profession, with expectations of loyalty and adherence.

Today, nurses have many options for practice settings besides direct patient care. In those settings, nurses apply health science education and expertise in a wide variety of situations. Consumers are protected by nurses adhering to the scope of nursing practice, using the nursing process, and applying professional ethics and standards.

Nursing practice in the legal arena facilitates the efforts to identify and right a wrong, prevent future untoward events, and mitigate damages resulting from such events. For example, whether working with the plaintiff or defense in a professional negligence case, the LNC’s goal is to defend the appropriate standard of care as defined by medical research and the law. The LNC healthcare risk manager uses root cause analysis to identify and correct system failures. The LNC insurance case manager analyzes and recommends treatment modalities to maximize recovery.

## Ethics in the Nursing Profession

The American Nurses Association’s (ANA’s) Code of Ethics for Nurses with Interpretive Statements (ANA, 2015a) contains nine provisions which identify the responsibilities of nurses, while the interpretive statements provide guidance in their application. While the first three provisions speak to a nurse’s obligations to a patient, the remainder are designed to be guidelines for all nurses regardless of their practice areas. Legal nurse consultants should apply these ethics to their practice and behavior in society.

### ***Identifying and Handling Ethical Dilemmas in Legal Nurse Consulting***

Ethical dilemmas may arise in legal nurse consulting practice, and LNCs and nurse experts must be able to promptly identify and handle them. The American Association of Legal Nurse Consultants (AALNC) has developed and promoted ethical standards for LNCs since 1992, publishing the current Code of Ethics and Conduct in 2015. This Code of Ethics and the *Legal Nurse Consulting: Scope and Standards of Practice* (AALNC, 2017) offer guidelines to identify, resolve, and prevent ethical issues for practicing LNCs and testifying experts. See Appendix A for the AALNC Code of Ethics and Conduct.

An example of an ethical dilemma would be if a town resident, who is a personal injury attorney, approaches an LNC, who volunteers for the town's Zoning Board of Appeals. The attorney privately requests facilitation of a zoning variance application the attorney has submitted to the board. In exchange, the attorney offers to contract the LNC to work on several cases. The LNC understands from the seventh ethical standard that this quid pro quo is unethical and declines the attorney's request.

Another example would be if an attorney calls a nurse to explain that a nursing expert has withdrawn from a case. The attorney gives the nurse an overview of the case, explains there are voluminous medical records and deposition transcripts, and asks the nurse to sign the prior expert's report to meet a looming disclosure deadline. The nurse expert understands that an expert must develop independent opinions through an objective review of the records. The nurse expert declines to sign another's work and offers to review the records independently.

### ***Avoiding Liability in Legal Nurse Consulting***

Nurse experts and LNCs generally have a low risk of professional liability. Risk factors include serving as a nurse expert, working independently, and full-time practice. Factors that mitigate liability risk are working behind the scenes (i.e., not serving as a testifying expert), in-house employment, and part-time work (Dickinson & Zorn, 2013).

### ***Areas of Potential Liability***

Any improper conduct that adversely impacts a client, a claim, or a party to a legal action could give rise to a professional liability claim. Legal nurse consultants and nurse experts should be mindful of the following most common areas of potential liability and implement measures to reduce potential liability exposure (Dickinson & Zorn, 2013).

#### **CONFLICT OF INTEREST**

Conflicts of interest involving LNC practice may be legal or personal (Dickinson & Zorn, 2013). Legal conflicts of interest affect attorneys and their cases. If a plaintiff attorney hired a nurse expert who works on the same unit where the care at issue occurred, defense counsel may file a motion to preclude the plaintiff attorney's continued representation of the client on the grounds that the nurse expert possesses information to which the plaintiff attorney would not ordinarily be entitled. Personal conflicts of interest affect an LNC's or nurse expert's ability to evaluate a case objectively (e.g., if a party to the claim is a family member or friend).

As set forth in AALNC's Code of Ethics (AALNC, 2015), "Relationships that may give an appearance of or create a conflict of interest will be considered and disclosed when practicing." Thus, prior to agreeing to work on a case, the LNC and nurse expert should always consider whether any potential or actual conflicts of interest may exist and, if so, discuss the details with the hiring attorney.

#### **EVALUATING POTENTIAL CLAIMS WITHOUT ATTORNEY INVOLVEMENT**

Persons contemplating a medical malpractice claim sometimes approach an LNC for an opinion regarding the merits of such a claim. However, in accordance with AALNC's Code of Ethics (AALNC, 2015), the LNC should always decline to evaluate a potential claim without an attorney

being involved, as it could be construed as the unauthorized practice of law. The primary concern is that, if the statute of limitations or a notice requirement expires while the LNC is still evaluating the potential claim, the claim may be forever barred, thus exposing the LNC to a liability claim.

#### INSUFFICIENT QUALIFICATIONS OR EXPERT AFFIDAVIT

The rules related to expert witness qualifications and testimony are set forth in the Federal Rules of Evidence for federal court cases and in a state's evidentiary rules for state court cases. If an expert's qualifications, testimony, or expert affidavit or report does not meet the applicable evidentiary requirements, the judge may preclude the expert from testifying or preclude the specific testimony, affidavit, or report from being admitted into evidence, negatively impacting that side's case. Nurse experts should be mindful of the applicable requirements pertaining to expert witness qualifications and opinions and should work with the hiring attorney to ensure compliance with these rules.

In a notable case involving improper expert credentials, a malicious prosecution claim was brought against a nurse expert who signed an expert affidavit against an urologist. The malicious prosecution claim alleged bad faith, fraud, misrepresentation, and civil conspiracy (Dickinson, Zorn, & Burroughs, 2014). The attorney who hired the nurse expert was also sued. The nurse and the attorney should have known that evidentiary rules do not permit a nurse to opine as to the proper standard of care for an urologist. The case ultimately settled.

#### OPINING OUTSIDE ONE'S SCOPE OF EXPERTISE

The validity of expert opinions directly impacts case outcomes. Opining outside the scope of one's experience, knowledge, or expertise could adversely affect a case outcome, giving rise to potential liability. As set forth in AALNC's Code of Ethics (AALNC, 2015), "the legal nurse consultant does not purport to be competent in matters in which he or she has limited knowledge or experience." Thus, the nurse expert must only opine on those issues about which the nurse has significant knowledge and experience. For example, it is improper for a perioperative nurse to offer opinions on the standards of care for an emergency department nurse.

#### IMPROPER WITHDRAWAL AS AN EXPERT WITNESS

Withdrawing as an expert in a case without sufficient notice to the attorney could negatively impact the attorney's case if the attorney is unable to retain another qualified expert prior to the procedural deadlines. At the outset of the case assignment, it is critical that the nurse communicate with the attorney regarding willingness to serve as an expert witness should the nurse's review support the attorney's case. If, after review of all the medical records and other evidence, the nurse expert cannot support the case, the attorney should be notified as soon as possible. If the nurse expert's review was favorable but extenuating circumstances arose that prevent the nurse expert from continuing to work on the case, the attorney should be notified immediately, and every effort should be made to assist the attorney to find a qualified, available replacement so the attorney can still meet the procedural deadlines.

#### ADVICE AND WORK PRODUCT OF BEHIND-THE-SCENES LNCS

Ultimately, the attorney is responsible for evaluating the work product, research, and opinions of behind-the-scenes consultants. Even so, improper conduct by such consultants (such as

incomplete medical literature research leading to a faulty recommendation on the merits of a case) has given rise to litigation, and thus these LNCs “still have exposure and are accountable for generating opinions and work products that are of the utmost quality” (Dickinson & Zorn, 2013).

#### FEE DISPUTES

Billing disputes related to professional services are the most common claims against LNCs and are sometimes related to the attorney’s perception of the work quality. To avoid such disputes, it is essential to utilize a fee schedule and business contract and discuss its terms and conditions with the attorney at the outset (Dickinson & Zorn, 2013). In addition, the provision of excellent work that enhances the attorney’s delivery of high-quality legal services lessens the likelihood of a billing dispute.

#### CONFIDENTIALITY VIOLATIONS

Breach of confidentiality or violation of privacy laws pertaining to protected health information may give rise to liability claims against the LNC and the hiring attorney (Dickinson & Zorn, 2013). As set forth in AALNC’s Code of Ethics (AALNC, 2015), “the legal nurse consultant uses confidential materials with discretion and abides by applicable statutes, regulations, and professional codes of conduct that pertain to confidentiality.”

## Scope of Practice and Standards in the Nursing Profession

### *Defining Legal Nurse Consulting as a Specialty Practice of Nursing*

The AALNC Board of Directors resolved in 1995 that the professional foundation of legal nurse consulting was the practice of nursing, not the practice of law. The LNC’s value to the legal arena was one’s nursing education and experience, rather than the knowledge of the law. By applying that foundation in a consulting capacity in the legal arena, AALNC defined legal nurse consulting as a new specialty practice of nursing. While knowledge of applicable laws and regulations can enhance the LNC’s contributions, the primary value of the LNC is one’s knowledge of healthcare systems and sciences.

### *Scope of Legal Nurse Consulting*

One of the characteristics of a profession is the ability to define its own scope and standards of practice. The purpose of the scope is to describe the “who, what, where, when, why, and how” of the persons practicing in that profession. Standards are authoritative statements of the duties or responsibilities the professional should be able to perform competently. The ANA has long assumed the responsibility for developing and maintaining the Scope and Standards of Practice for the nursing profession. This document, in turn, serves as a template for the scope and standards of nursing specialty practice.

The Legal Nurse Consulting Scope of Practice (AALNC, 2017) identifies the LNC as a licensed registered nurse who:

- Applies knowledge acquired during the course of professional nursing education, training, and clinical experience to the evaluation of standard of care, causation, damages, and other clinically health related issues in cases or claims
- Applies additional knowledge acquired through education and experience regarding applicable legal standards and/or strategy to the evaluation of cases or claims
- Critically analyzes healthcare records, medical literature, relevant legal documents, and other information pertinent to the evaluation and resolution of cases or claims and
- Develops case-specific work products and opinions for use by legal professionals or agencies handling cases or claims

The LNC generally performs these activities in cases involving civil or criminal litigation or administrative actions. The most common areas of practice for the LNC continues to be medical malpractice and general liability involving personal injury or death. Other practice areas include long-term care/violation of resident rights, product liability, toxic tort, mass tort, healthcare risk management, life care planning, regulatory compliance, workers' compensation, forensics, and violation of civil or disability rights. More recently, LNC activities have expanded into areas of Medicare Set-Aside, Social Security disability, and medical billing fraud. The common factor is the need for a practitioner with knowledge and skills in evaluating evidence pertaining to quality or standard of care, cost of care, cause of physical/mental injury, treatment of injury, violation of rights specific to health and safety, and impact of disability.

Legal nurse consultant practice settings are defined as those venues in which LNCs provide the above services. Law firms remain the prominent consumer of LNC services. Legal nurse consultants are also hired by other agencies, companies, and institutions that handle liability or disability insurance claims, healthcare risk management, professional licensing issues, or medical products safety. Whether the employer hires the LNC as an in-house employee or an independent contractor often depends on the LNC's role. Law firms tend to hire nurses either as a behind-the-scenes LNC or as a testifying expert. The nurse expert is usually hired as an independent contractor on an as-needed basis. Whether law firms or companies prefer to hire behind-the-scenes LNCs as employees or independent contractors often depends on the employer's work load, job descriptions and responsibilities, desire for exclusivity, and extent of financial compensation and benefits.

## ***Standards for Legal Nurse Consulting***

The ANA Standards of Practice (ANA, 2015b) are based on the nursing process which consists of actions that are logical, interdependent, and sequential but cyclic: assessment, diagnosis, outcome identification and planning, implementation, and evaluation. All of these actions require critical thinking, the use of clinical experience, and the application of theory learned in a formal nursing education (ANA, 2015b).

Using the nursing process provides the LNC with a framework or consistent problem-solving approach for meeting the needs of a particular case, client, project, or role. In legal nurse consulting, the process includes needs assessment, issue identification, case outcome identification, case planning, implementation, and evaluation. (See Table 2.1.)

Consumers of legal nurse consulting services have the right to expect quality services and work products. The first six Standards in the Legal Nurse Consulting Standards of Practice (Appendix B) outline competencies the LNC performs to provide such services and work products. The LNC may apply these tools flexibly as applicable to the practice setting, practice role, and stage of

**Table 2.1 Comparison of ANA's Standards of Professional Nursing Practice and the AALNC Standards of LNC Practice**

<i>Professional Nursing Practice Standards</i>	<i>LNC Practice Standards</i>
<b>Standard 1: Assessment</b> The registered nurse collects pertinent data and information relative to the healthcare consumer's health or the situation.	<b>Assessment</b> The LNC identifies and collects comprehensive data pertinent to the assessment of a medical-legal case or claim.
<b>Standard 2: Diagnosis</b> The registered nurse analyzes the assessment data to determine actual or potential diagnoses, problems, and issues.	<b>Issue Identification</b> The LNC analyzes the collected data to determine the issues in a medical-legal case or claim.
<b>Standard 3: Outcomes Identification</b> The registered nurse identifies expected outcomes for a plan individualized to the healthcare consumer or the situation.	<b>Case Outcome Identification</b> The LNC participates in the identification of the optimal outcome for the medical-legal case or claim.
<b>Standard 4: Planning</b> The registered nurse develops a plan that prescribes strategies to attain expected, measurable outcomes.	<b>Case Planning</b> The LNC develops a work plan that contributes to optimal case outcome.
<b>Standard 5: Implementation</b> The registered nurse implements the identified plan. 5A. Coordination of care The registered nurse coordinates care delivery. 5B. Health teaching and health promotion. The registered nurse employs strategies to promote health and a safe environment.	<b>Implementation</b> The LNC implements the plan, participating in the legal process pertinent to resolution of the medical-legal case or claim.
<b>Standard 6: Evaluation</b> The registered nurse evaluates progress toward the attainment of goals and outcomes.	<b>Evaluation</b> The LNC evaluates progress toward attainment of optimal case outcome.

*Note:* Data for Professional Nursing Practice Standards from ANA (2015b) and for LNC Practice Standards from AALNC (2017).

litigation. The resulting standardized, systematic action plan results in economical use of time and energy, consistent work quality, and job satisfaction.

Standards 7–16 provide the LNC with guidelines for professional behavior in the specialty, providing the LNC with a roadmap to personal and professional growth. Taken together, the Standards define, direct, and offer a framework for legal nurse consulting practice to benefit consumers and the profession (AALNC, 2017).

## Summary

Registered nurses possess the knowledge of science, healthcare theory, and clinical practice that makes them valued assets in a multitude of roles and settings as consultants to those handling



medical-legal matters. The American Association of Legal Nurse Consultants' *Legal Nurse Consulting: Scope and Standards of Practice* (2017) and Code of Ethics and Conduct with Interpretive Statements (2015) create a foundation for quality LNC practice, including guidelines for ethical practice to reduce the risk of liability. Legal nurse consultants are encouraged to base their practices on these guidelines and standards according to their individual education, experience, and client needs.

## References

- American Association of Legal Nurse Consultants. (2015). Code of ethics and conduct with interpretive discussion. Retrieved from [www.aalnc.org/d/do/85](http://www.aalnc.org/d/do/85).
- American Association of Legal Nurse Consultants. (2017). *Legal nurse consulting: Scope and standards of practice*. Retrieved from [www.aalnc.org](http://www.aalnc.org).
- American Nurses Association. (2015a). *Code of ethics for nurses with interpretive statements*. Washington, DC: American Nurses Publishing.
- American Nurses Association. (2015b). *Nursing: Scope and standards of practice*. Washington, DC: Nursesbooks.org.
- Dickinson, J., & Zorn, E. (2013). Liability lessons for legal nurse consultants part one: An analysis of claims involving legal nurse consultants. *Journal of Legal Nursing Consulting*, 24(2), 4–9.
- Dickinson, J., Zorn, E. & Burroughs, R. (2014). Liability lessons for legal nurse consultants part two: A case study with risk management strategies. *Journal of Legal Nurse Consulting*, 25(1), 4–6.
- Fowler, M. (2013). *Guide to nursing's social policy statement: Understanding the profession*. Washington, DC: American Nurses Publishing.



## Test Questions

1. The key element that *challenges* the premise that nursing is a profession is:
  - A. Disagreement regarding ethical standards in nursing practice
  - B. Nursing's failure to define its unique professional autonomy
  - C. Lack of minimum requirement for university-based education
  - D. Public perception that nursing is under the direction of physicians
2. When comparing the general nursing standards to the legal nurse consulting standards of practice, the standard most similar to Diagnosis is:
  - A. Assessment findings
  - B. Outcomes identification
  - C. Issues identification
  - D. Analysis results
3. Applying the AALNC Code of Ethics and Conduct can assist legal nurse consultants and nurse experts to:
  - A. Identify ethical dilemmas
  - B. Make practice decisions
  - C. Evaluate their professional performance and behavior
  - D. All of the above
4. Areas of potential liability in LNC practice include:
  - A. Evaluating potential claims without attorney involvement
  - B. Fee dispute
  - C. Opining outside one's scope of expertise
  - D. All of the above
5. Which one of the following is a Standard of Professional Performance
  - A. Evaluation
  - B. Leadership
  - C. Records review
  - D. Teaching
6. After reviewing the deposition testimony of one defendant, the LNC identified several new facts about deviations in care by another defendant. This is known as:
  - A. Issues identification
  - B. Outcomes identification
  - C. Planning
  - D. Evaluation
7. The independent LNC applies the Evaluation standard by:
  - A. Showing a work product to other LNCs at an AALNC chapter meeting for feedback
  - B. Sending holiday gifts to those clients who provided the most work opportunities
  - C. Comparing one's annual income from LNC work to that of previous years
  - D. Discussing work product effectiveness with the client after case resolution

**Answers:** 1. D, 2. C, 3. D, 4. D, 5. B 6. A, 7. D

## Appendix A: Code of Ethics and Conduct with Interpretive Discussion

### *Preamble*

The Code of Ethics and Conduct of the American Association of Legal Nurse Consultants (AALNC) establishes the ethical standard for the specialty practice and provides a guide for legal nurse consultants to use in ethical analysis and decision-making in their practice. It provides guidelines for the professional performance and behavior of legal nurse consultants. The esteem of this specialty practice of nursing results from the competence and integrity of its practitioners. Thus, AALNC sets forth this code to impart its ethical expectations for legal nurse consultants and to set the standards of accountability.

1. **The legal nurse consultant maintains professional nursing competence.** The legal nurse consultant is a Registered Nurse and maintains an active nursing license. The legal nurse consultant is knowledgeable about the current scope and standards of legal nursing practice and advocates for these standards.
2. **The legal nurse consultant uses informed judgment, objectivity and individual professional competence as criteria when accepting assignments.** The legal nurse consultant does not purport to be competent in matters in which he or she has limited knowledge or experience. Only services that meet high personal and professional standards are offered or rendered. The legal nurse consultant is accountable for his or her decisions and actions.
3. **The legal nurse consultant does not engage in activities that could be construed as the unauthorized practice of law.** The legal nurse consultant refrains from offering opinions that could be deemed legal opinions requiring a law license (e.g., opining directly to a potential plaintiff without an attorney being involved regarding whether a claim may have merit).
4. **The legal nurse consultant's work products and opinions are free from bias.** The legal nurse consultant does not discriminate against any person based on race, creed, color, age, gender, sexual orientation, national origin, social status or disability. The legal nurse consultant does not allow personal attitudes or individual differences to interfere with professional performance and practice. Financial and/or other relationships that may give an appearance of or create a conflict of interest will be considered and disclosed when practicing.
5. **The legal nurse consultant performs his or her work with the highest degree of integrity.** Integrity is exemplified by uprightness, honesty, and sincerity. The legal nurse consultant applies these attributes to the specialty practice. Integrity is a personal and sacred trust and the standard against which the legal nurse consultant must ultimately measure all actions and decisions. Honest errors and differences of opinion may occur, but deceit, poor judgment, and/or lack of principles are unacceptable.
6. **The legal nurse consultant respects and protects the privacy and confidentiality of the individuals involved in a medical-legal case or claim.** The legal nurse consultant uses confidential materials with discretion and abides by applicable statutes, regulations, and professional codes of conduct that pertain to confidentiality. The legal nurse consultant does not use any case information for personal gain.
7. **The legal nurse consultant maintains standards of personal conduct that reflect honorably upon the profession of nursing and the specialty practice of legal nurse consulting.**

The legal nurse consultant abides by all local, state and federal laws and other regulatory requirements. The legal nurse consultant who knowingly becomes involved in unethical or illegal activities prioritizes personal interest or personal gain over professional responsibility. Such activities jeopardize the public confidence and trust in the nursing profession and are unacceptable to the profession and to this specialty nursing practice.

8. **The legal nurse consultant integrates ethical considerations into his or her practice.** The legal nurse consultant works to achieve client goals while upholding the responsibility to provide accurate information, independent and sound opinions, and professional recommendations. The legal nurse consultant contributes to resolving ethical issues in practice; reports illegal, incompetent or impaired practice; and promotes respect for the judicial system.

## **Conclusion**

By promulgating this Code of Ethics and Conduct, the American Association of Legal Nurse Consultants sets forth the level of professional behavior and conduct expected of legal nurse consultants. Each legal nurse consultant's personal commitment to this Code of Ethics and Conduct safeguards the continued honor and integrity of both the nursing profession and this specialty nursing practice.

For more information, contact:

### **American Association of Legal Nurse Consultants**

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Revised 2005, 2009, 2015

By the American Association of Legal Nurse Consultants

## **Appendix to the Code of Ethics and Conduct with Interpretive Discussion**

### **Resources**

Legal nurse consultants, as nurses, should acknowledge and be mindful of the American Nurses Association's *Code of Ethics for Nurses*.

As consultants in the legal arena, legal nurse consultants should acknowledge and be mindful of the applicable portions<sup>1</sup> of the American Bar Association's *Model Rules of Professional Conduct*.

1 The applicable portions are Rule 1.6c (maintaining the confidentiality of information), Rule 5.3 (the attorneys' responsibilities regarding non-lawyer assistants), and Rule 5.7b (unauthorized practice of law).

### **Note**

1. The applicable portions are Rule 1.6c (maintaining the confidentiality of information), Rule 5.3 (the attorneys' responsibilities regarding non-lawyer assistants), and Rule 5.7b (unauthorized practice of law).

## **Appendix B: Legal Nurse Consulting: Standards of Practice and Professional Performance**

### ***Standard 1: Assessment***

The LNC identifies and collects comprehensive data pertinent to the assessment of a medical-legal case or claim.

#### ***Competencies***

The LNC:

- A. Identifies comprehensive, relevant data in a systematic and ongoing process to include potential conflicts of interest, statute of limitations, medical and non-medical records, knowledge gaps requiring research, and purpose and source of medical literature.
- B. Collects the identified data from parties and witnesses, medical records and literature, legal documents, expert witness opinions, and other sources, via interviews or processes consistent with federal or state laws, rules, or regulations.
- C. Collects data regarding testifying experts and defendant healthcare providers, including background research, licensure, accreditation, qualifications, prior testimony, publications, and reliance materials.
- D. Prioritizes data collection based on the procedural deadlines of the case or claim and the needs of the legal professional.
- E. Organizes data collected (e.g., medical records) in an appropriate manner.
- F. Applies ethical, legal, and HIPAA guidelines and policies to the collection, maintenance, use, and dissemination of information in a case or claim.
- G. Documents relevant data in a retrievable and appropriate format.

### ***Standard 2: Issue Identification***

The LNC analyzes the collected data to determine the issues in a medical-legal case or claim.

#### ***Competencies***

The LNC:

- A. Derives case issues from the collected data, including identification of potential defendants, certificates of merit, complaints, petitions, records, and analysis of research findings.
- B. Validates identified issues with the legal professionals, healthcare providers, experts, and parties.
- C. Utilizes data to identify case strengths/weaknesses regarding liability, causation and damages, and their impact on potential case value.
- D. Recognizes the potential impact of personal attitudes, values, and beliefs on case analysis.
- E. Assesses parties, fact witnesses, and experts as witnesses and their likely impact on the case.
- F. Documents research findings.

### ***Standard 3: Case Outcome Identification***

The LNC participates in the identification of the optimal outcome for the medical-legal case or claim.

### *Competencies*

The LNC:

- A. Contributes to analysis of case issues to identify optimal case outcome.
- B. Participates in ongoing case strategy discussions with legal professionals.
- C. Participates in ongoing discussions regarding risks of proceeding to trial versus case settlement.
- D. Documents expected outcomes in terms of probability versus possibility of reaching goals, when applicable.

### ***Standard 4: Case Planning***

The LNC develops a work plan that contributes to optimal case outcome.

### *Competencies*

The LNC:

- A. Develops a plan based on the issues and needs of the case and client/attorney.
- B. Incorporates applicable procedural rules and deadlines into the plan to include statute of limitations.
- C. Considers the cost-benefit analysis of the components within the plan.
- D. Establishes work priorities within a given case and among all case projects.
- E. Incorporates a timeline for completion of projects.
- F. Utilizes the plan to provide direction to other members of the legal team.
- G. Provides for continuity and follow-up within the plan.
- H. Modifies the plan according to the legal professional's feedback and changes in case or claim status.
- I. Documents progress toward completion of plan.

### ***Standard 5: Implementation***

The LNC implements the plan, participating in the legal process pertinent to resolution of medical-legal case or claim.

### *Competencies*

The LNC:

- A. Engages in appropriate and effective oral and written communication with the legal team, experts, and parties.
- B. Accommodates for barriers to effective communication.
- C. Partners with legal professionals, parties, and others as appropriate to implement the plan in a realistic and timely manner.
- D. Utilizes technology to implement, maximize access to, and optimize the effectiveness of the plan.
- E. Applies clinical and legal knowledge to extract relevant information from the medical literature, medical records, deposition testimony, and other sources when preparing case work products and discussing strategy.

- F. Provides content relevant to case issues for the preparation of legal documents and correspondence.
- G. Collaborates with legal professionals in mediation, arbitration, or trial preparation, to include preparation of witnesses and experts, and identifying appropriate exhibits and demonstrative evidence.
- H. Serves as an effective nurse expert or fact witness.
- I. Identifies the legal professional, client, witnesses' knowledge gap of the clinically-related issues in the case.
- J. Educates the legal professional, parties, witnesses, and others regarding clinically-related issues on standards of care, causation, and injuries pertinent to the case.

### ***Standard 6: Evaluation***

The LNC evaluates progress toward attainment of optimal case outcome.

#### ***Competencies***

The LNC:

- A. Seeks feedback from the legal professional regarding ideas to improve the effectiveness of the work product and advice toward achieving optimal case outcome.
- B. Incorporates new knowledge and strategies in LNC practice to optimize effectiveness and quality of work products.
- C. Collaborates, as appropriate, with the parties, family members, legal professional, and others in the case evaluation process.
- D. Evaluates the effectiveness of the case plan and the progress toward the optimal case outcome with the legal professional.

### ***Standard 7: Ethics***

The LNC practices ethically.

#### ***Competencies***

The LNC:

- A. Utilizes Guide to the Code of Ethics for Nurses with Interpretive Statements (ANA, 2015a), and the Code of Ethics and Conduct with Interpretive Discussion (AALNC, 2015) to guide professional activities.
- B. Maintains client confidentiality.
- C. Maintains a client-LNC relationship within appropriate professional role boundaries.
- D. Questions decisions that may not be in the best interest of the legal professional's client.
- E. Takes appropriate action regarding illegal or inappropriate behavior that arises in a case or claim.
- F. Provides services in a manner that preserves and protects parties' autonomy, dignity, rights, values, and beliefs.

### ***Standard 8: Education***

The LNC attains knowledge and competence reflecting current specialty practice.

#### ***Competencies***

The LNC:

- A. Demonstrates a commitment to lifelong learning through self-evaluation and inquiry to address learning and personal growth needs.
- B. Identifies learning needs based on medical-legal knowledge, the various roles the LNC may assume, and the trends and issues in the clinical and legal environments.
- C. Participates in formal and informal educational activities to develop, maintain, and expand professional skills and knowledge.
- D. Shares knowledge, educational experiences, and ideas with colleagues.
- E. Contributes to a practice environment conducive to the education of healthcare and legal professionals.
- F. Maintains professional records that provide evidence of competence and lifelong learning.

### ***Standard 9: Practice and Research***

The LNC integrates evidence and research into practice.

#### ***Competencies***

The LNC:

- A. Contributes to the expansion of a research-based body of knowledge in the practice.
- B. Shares pertinent research findings with colleagues and peers.
- C. Applies research findings to practice, as appropriate.

### ***Standard 10: Quality of Practice***

The LNC participates in providing quality services.

#### ***Competencies***

The LNC:

- A. Demonstrates an ongoing commitment to quality by consistently applying the nursing process.
- B. Uses creativity and innovation to enhance the practice.
- C. Participates in quality improvement of practice, to include:
  - Identifying aspects of practice important for delivery of quality services.
  - Formulating recommendations to improve practice services.
  - Implementing activities to enhance the quality of practice services.
  - Developing, implementing, and/or evaluating policies, procedures, and guidelines to improve the quality of practice services.
  - Analyzing factors related to quality and effectiveness of practice services.

**Standard 11: Communication**

The LNC communicates effectively in a variety of formats in all areas of practice.

**Competencies**

The LNC:

- A. Determines communication format preferences of legal professionals, clients, experts, and colleagues.
- B. Conveys information to the legal team and others in formats that promote accuracy, clarity, conciseness, completeness, and logic.
- C. Contributes own professional perspective in discussions with the legal team.
- D. Evaluates personal communication skills in encounters with legal professionals, clients, experts, and colleagues.
- E. Seeks continuous improvement of personal communication and conflict resolution skills.

**Standard 12: Leadership**

The LNC demonstrates leadership in the practice setting and the profession.

**Competencies**

The LNC:

- A. Oversees the delegated work performed by others as appropriate, while retaining accountability for the quality of the work.
- B. Contributes to the identification, implementation, and evaluation of goals and strategies for resolving cases and claims.
- C. Mentors colleagues for the advancement of the specialty practice, the nursing profession and quality of LNC services.
- D. Treats colleagues with respect and dignity.
- E. Achieves trustworthiness among colleagues and clients.
- F. Develops effective communication and conflict resolution skills.
- G. Participates in professional associations.
- H. Seeks ways to advance legal nurse consulting autonomy and accountability within the applicable ethical guidelines.

**Standard 13: Collaboration**

The LNC collaborates with legal professionals and others in the conduct of the practice.

**Competencies**

The LNC:

- A. Partners with others to produce favorable outcomes through the sharing of knowledge regarding the case or claim, as appropriate.
- B. Communicates with the legal professionals and clients, as appropriate, regarding the legal nurse consultant's role in the provision of services provided on the case or claim.



- C. Adheres to standards and applicable codes of conduct that govern behavior among colleagues to create a work environment that promotes cooperation, respect, and trust.
- D. Engages in teamwork and consensus-building processes.

### ***Standard 14: Professional Practice Evaluation***

The LNC evaluates one's own practice in relation to professional practice standards and applicable rules and regulations.

#### ***Competencies***

The LNC:

- A. Obtains feedback regarding one's own practice and services from legal professionals and others, as appropriate.
- B. Engages in self-evaluation of practice on a regular basis, identifying areas of strength as well as areas in which professional growth would be beneficial.
- C. Takes action to achieve goals for professional growth identified during the evaluation process.
- D. Interacts with colleagues to identify ways to enhance one's own practice or role performance.

### ***Standard 15: Resource Utilization***

The LNC utilizes appropriate resources to provide effective and financially-responsible services.

#### ***Competencies***

The LNC:

- A. Identifies available resources to provide quality services.
- B. Considers the legal professional's needs, complexity of task, and costs when recommending resources.
- C. Delegates work to legal team members, as appropriate.
- D. Advocates for use of the latest technology that enhances specialty practice.

### ***Standard 16: Environmental Health***

The LNC practices in an environmentally-responsible manner.

#### ***Competencies***

The LNC:

- A. Attains knowledge of environmental health concepts.
- B. Promotes a practice environment that reduces environmental waste.
- C. Advocates for the judicious use of materials.

The full *Legal Nurse Consulting: Scope and Standards of Practice* is available for purchase at [www.aalnc.org/page/aalnc-online-bookstore](http://www.aalnc.org/page/aalnc-online-bookstore).

## *Section II*

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# Essentials of the Law

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## Chapter 3

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# Legal Fundamentals

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## Objectives

- Discuss the sources and types of law
- Discuss the considerations when deciding whether to litigate a case in state or federal court
- Describe what makes potential evidence relevant to a case
- List the rules of civil procedure that pertain to initiating a lawsuit and engaging in pre-trial discovery
- Discuss two common legal doctrines

## Introduction

Over the centuries, the law has evolved into a quagmire of rules, statutes, regulations, case law, codes, and opinions that, in many instances, vary from state to state, state court to federal court, and jurisdiction to jurisdiction. Laws serve to control and guide people and entities in relationships, unions, and interactions. Laws are also used to resolve conflicts involving people, corporations, countries, and states. Laws have evolved through the ages and have resulted in major changes in the way people live and work in a modern society. This chapter introduces the legal nurse consultant (LNC) to the law, court systems, evidentiary rules, procedural rules, and legal doctrines frequently encountered in medical-legal cases.

## Sources of Laws

The word *law* originates from the Anglo-Saxon term *lagu*, meaning *that which is fixed*. There are several sources of laws that affect individuals, society, and the medical-legal arena. Sources of laws include constitutional law, statutory law, administrative law, and common law.

### ***Constitutional Law***

Constitutional law is a compilation of laws, principles, and amendments derived from the United States (U.S.) and state constitutions that govern and guide federal and state governments, corporations, society, and individuals. The constitutional laws and amendments guarantee individuals certain rights, such as the right to privacy, freedom of speech, and equal protection. The U.S. Constitution grants certain powers to the federal government and agencies and reserves powers for the states. The Constitution is the supreme law of the land and takes precedence over state and local laws. Constitutional law is the highest form of law in the United States. If not addressed in federal law, then the issue is “given” to the state government. In some instances, laws are codified (arranged by subject/area of law) at both the state and federal levels for different circumstances.

Federal and state governments have the constitutional authority to develop and create laws. In addition to creating laws, governments also have the ability to enforce the laws that have been established. Federal and state laws can be accessed at <http://law.justia.com/>.

### ***Statutory Law***

Statutory laws are laws enacted by federal, state, and local legislative bodies. Many healthcare providers, special interest groups, legal groups, attorneys, and lobbyists are involved in lobbying for certain bills or amendments to pass that will promote or protect their specific interests or special interest groups. An example of statutory law that every state has addressed is the law outlining the statute of limitations for filing a medical malpractice, wrongful death, or personal injury claim. Other examples of statutory laws related to health care include the reporting of elder and child abuse and communicable diseases.

### ***Administrative Law***

Administrative laws originate from administrative agencies that are under the arm of the executive branch of the government. For example, state boards of nursing are state administrative agencies. These agencies promulgate rules and regulations to guide nursing practice in the state and to

enforce nurse practice acts. Such nursing board regulations are legally binding. The state boards for healthcare professionals conduct investigations and hearings to ensure enforcement of the practice acts. These administrative laws also detail the sanctions that can be imposed upon healthcare professionals if they are found to have violated their practice act.

The state's laws and the National Council of State Boards of Nursing are resources for identifying the acts considered to be healthcare professional practice violations in that specific state. The following are examples of violations that can affect a healthcare provider's license. (For more information on healthcare provider licensure investigations, see Chapter 25.)

- Practicing while using a diploma, license, renewal of license, or record illegally or fraudulently obtained, illegally signed, or unlawfully issued
- Practicing when the license has been revoked or suspended
- Practicing when the license has lapsed due to failure to renew
- Aiding or abetting a felon
- Using controlled substances or dangerous drugs or devices that may impair the ability to practice
- Diverting patient medications (e.g., narcotics)
- Presenting an illegal prescription
- Abusing drugs or alcohol
- Failing to follow the diversionary or recovering healthcare provider program
- Failing to exercise appropriate judgment and skills
- Falsifying documents
- Failing to intervene and follow orders
- Delegating care improperly
- Failing to disclose prior arrests or criminal convictions
- Unprofessional conduct
- Guilty of moral turpitude
- Gross negligence involving patient care or when carrying out licensed functions
- Incompetence in carrying out certified or licensed functions
- Practicing outside the scope of the license (e.g., a nurse practicing medicine without a medical license or a dental hygienist practicing dentistry without a dental license)
- Aiding unlicensed practice and
- Willfully employing an unlicensed person to perform licensed functions

For any LNC working on a matter involving the practice of any healthcare provider, it is necessary to have access to the statutes that regulate that practice.

Another example of administrative law is an attorney general's opinion. The attorney general may provide an opinion regarding a specific interpretation of a law that cannot be found in a statute or regulation. The opinion is based on statutory and common law principles.

Other examples of administrative agencies include the Social Security Administration (SSA), the Environmental Protection Agency (EPA), and the Occupational Safety and Health Administration (OSHA).

## ***Common Law***

Common law was developed in England. The king in his divine right decided disputes on a case-by-case basis. Common law is used by all states and the federal courts except for Louisiana. Louisiana is the only state that has adopted the Napoleonic Code, developed from a compilation of French, Spanish, and Roman civil law.

Common law is based on court decisions that originate from the judiciary branch of the government. Court cases that are resolved through the judicial process act as a data bank for those seeking information in various types of cases, whether personal injury, medical malpractice, workers' compensation, admiralty, bankruptcy, or domestic issues. Attorneys search for cases similar to the ones they are evaluating, mediating, arbitrating, settling, or trying. Common law interprets disputed legal issues, statutes, and regulations, and is created by the various courts.

## Types of Law

The LNC may encounter cases involving criminal law, civil law, contract law, and tort law.

### ***Criminal Law***

Criminal law is created to provide guidance and protection to those injured by offenses against society. A criminal action by an individual is considered a criminal act against society as a whole, even if the act is directed solely at an individual. The criminal justice system was created to deter, punish, and rehabilitate persons who perform criminal acts. Criminal conduct can include forgery, burglary, murder, assault, battery, theft, rape, and false imprisonment. To prove guilt in a criminal action, the level of proof required is beyond a reasonable doubt. Remedies in criminal law usually involve fines and imprisonment of the guilty defendant.

Healthcare providers have been prosecuted in the criminal justice system, most often for Medicare and Medicaid fraud and abuse, drug diversion, nursing home patient abuse, failure to report elder or child abuse as required by statute, and sexual misconduct. (Both criminal and civil claims can be pursued against a healthcare provider for the same act or omission. The criminal action relates to the crime against society; the civil action relates to the injury incurred by an individual or entity.)

### ***Civil Law***

Civil law is law that applies to the rights of individuals or entities, whereas criminal law deals with offenses against the general public. Under civil law, the remedies for a person or entity involve money or compensation to make the plaintiff whole again. The amount of monetary compensation, or damages, is generally determined by a judge or jury following trial. Monetary remedies are common in personal injury, medical malpractice, and tort cases.

The other legal remedy (besides money) is an equitable remedy. Equitable remedies are ordered by the court and require the person to do something other than pay money for the violation. Examples include ordering an injunction which prevents a person from doing a specific action and ordering a specific performance which requires a person who has breached a contract to actually perform specific contract terms.

### ***Contract Law***

Contract law is an area of civil law that involves agreements between parties, individuals, and entities. The requirements for a contract to exist include:

1. Capacity to contract/competent parties (e.g., those who are not minors, mentally incompetent, or under the influence of drugs or alcohol)



2. Legality (i.e., the purpose of the contract must be lawful; a contract entered into for an illegal purpose is not legally binding)
3. Offer
4. Acceptance and
5. Consideration (i.e., the exchange of something of value between the parties to a contract)

A contract can be in oral or written form, depending on the subject matter and the reason for the contract. However, written contracts specifically outlining the details of the agreement, along with the payments and other terms agreed upon by the parties, are advisable in case a dispute arises later. Today, healthcare providers are faced with many situations that involve contracts, including employee/employer contracts and contracts with health maintenance organizations, vendors, other healthcare providers, and facilities. Contract litigation involves allegations of failure to perform, or a breach of, contractual duties.

## ***Tort Law***

### ***Basics of Tort Law***

Tort law is an area of civil law that encompasses negligence, personal injury, and medical malpractice claims. A tort is a wrongful act committed by some individual or entity that causes injury to another person or property. Remedies in tort law attempt to make the injured person “whole” again, usually with compensation in the form of a monetary award.

Negligence is a failure to act as an ordinary prudent or reasonable person would under similar circumstances. Professional negligence is the failure to act as a reasonably prudent similar professional would under similar circumstances. Professional negligence claims can involve attorneys, real estate agents, etc. Medical malpractice claims are professional negligence claims involving healthcare professionals. Professional negligence is different from ordinary negligence, because professionals are held to certain standards of care dictated by the profession. Ordinary negligence is conduct that involves undue risk of harm to someone caused by the failure to act as an ordinary prudent person would have acted. For example, a nursing assistant sees water on the floor in a patient’s room but fails to mop up the water. The patient falls and breaks a hip, requiring surgery. This is ordinary negligence, because professional judgment and standards of care are not involved.

Examples of professional negligence allegations resulting from healthcare providers causing injury to the plaintiff include but are not limited to:

- Failure to timely or properly perform a surgery
- Failure to timely or properly perform a procedure, resulting in a retained foreign body (e.g., lap pad, hemostat, cotton ball, or needle)
- Failure to properly position a patient in surgery resulting in a paralyzed limb
- Failure to timely and properly render care and treatment
- Failure to timely perform blood work or recommend that blood work be done
- Failure to timely perform blood cultures or recommend blood cultures be done
- Failure to prevent or timely treat an infection
- Failure to timely and properly refer to the proper consultant or recommend a referral
- Negligently hiring healthcare providers who failed to provide timely and proper treatment
- Negligently hiring an employee, agent, or independent contractor who lacked the requisite skills for the job description and clearly breached standards of care

- Failure to properly perform an imaging study resulting in a delay in diagnosis
- Failure to properly read and interpret imaging studies
- Failure to properly compare previous imaging studies and report findings
- Failure to inform a patient of the limitations of an imaging study or test (e.g., that dense breasts might mask the earliest signs of tumors on supposedly “clean” mammograms)
- Failure to timely and properly diagnose cancer resulting in a more extensive and invasive cancer and necessitating more extensive surgery, severe disfigurement, chemotherapy, radiation, side effects, treatment, emotional distress, and mental anguish
- Failure to timely diagnose and treat cancer resulting in loss of chance of survival and an untimely death
- Failure to detect signs and symptoms of bleeding resulting in hemorrhaging and death
- Failure to provide a patient with a safe environment resulting in the patient’s molestation
- Failure to prescribe the recommended medication resulting in further patient injury
- Failure to properly administer medication resulting in death
- Failure to timely and properly administer intravenous medication resulting in severe damage to the arm, loss of use of the arm, or loss of the arm
- Failure to properly monitor a restrained patient resulting in asphyxia, brain damage, and death and
- Failure to properly evaluate a limb in a cast, resulting in an infection and osteomyelitis

Typical causes of action (i.e., the specific legal claims for which a plaintiff is seeking compensation) arising from alleged negligent healthcare delivery include breach of contract (guaranteeing a specific medical result), negligence, insufficient informed consent or negligence in obtaining informed consent, confidentiality violation, and intentional misconduct.

Four elements of negligence must be established for there to be a viable medical malpractice claim:

1. A duty must be owed to the patient. This duty usually occurs when the healthcare provider accepts responsibility for the care and treatment of that patient.
2. There is a breach of duty or standard of care by the professional through an act of omission or commission. The standard of care for the specific healthcare profession/specialty and treatment rendered must be determined to see if there was a breach that caused injury to the patient/plaintiff.
3. Proximate cause or causal connection must be evident between the breach of duty and the harm or damages that have occurred to the patient/plaintiff.
4. Damages or injuries must be suffered by the patient/plaintiff. Damages or injuries can include (but are not limited to) pain and suffering; mental anguish; emotional distress; disfigurement; past, present, and future medical expenses; past, present, and future loss of wages; premature death; decreased life expectancy; loss of enjoyment of life; and loss of love, affection, and nurturance (loss of consortium). Some states also recognize damages for the loss of chance for survival due to misdiagnosis, late diagnosis, or failure to diagnose a condition such as cancer or hemorrhaging.

See Chapter 4 for more information on the four elements of proof in negligence claims.

The burden of proof in a medical malpractice claim (civil tort law) is met by a preponderance of the evidence, or more likely than not, which attributes 50.1% or more of fault to the defendant(s). The burden of proof is further discussed later in this chapter.

Some states award punitive damages in medical malpractice cases. Punitive awards are designed to punish the defendant and deter this type of behavior. Some states have made punitive damages available only in claims involving intentional malpractice or gross negligence. The LNC should check the specific state's laws and statutes to determine if punitive damages can be awarded.

### *Quasi-Intentional Torts*

A *quasi-intentional* tort is a wrongdoing that involves speech (oral or written). The claim focuses on protection of an individual's interest in privacy, reputation, and freedom from unfounded legal action. In contrast to medical malpractice cases, quasi-intentional (and intentional) torts are not based on the negligence theory of law. These torts are intentional, in that the person or entity committing the tort (the tortfeasor) is reasonably certain that harm will result from the actions. If the defendant can establish a lack of intent, the defendant will likely be successful in defending against the claimed intentional tort.

For example, defamation (libel—written defamation and slander—oral defamation) is a quasi-intentional tort. Defamation is the false communication of information to a third party that in some way causes harm to the subject person (e.g., economic loss, loss of a promotion, loss of esteem/reputation in the community, etc.). The tort is that the tortfeasor *knew* the statement was false when making it. Truth is the defense of the tortfeasor's false statement.

Breach of confidentiality is another quasi-intentional tort. Healthcare providers must be especially cautious not to discuss a patient's healthcare information in common areas where such breaches can occur. The defense in a breach of confidentiality case may claim the defendant was not informed of the proper handling and usage of confidential information as it related to clients or patients.

### *Intentional Torts*

Intentional torts include assault, battery, invasion of privacy, false imprisonment, trespass to land, and intentional infliction of emotional distress. Assault is an intentional act that causes fear or apprehension that a person will be touched in an injurious or offensive manner. Battery is the actual unpermitted touching. Medical battery is the unpermitted touching of a patient associated with the lack of informed consent to perform the procedure or treatment. Some states no longer recognize medical battery per se but have incorporated the cause into the informed consent law. For example, a patient gave an informed consent for a right foot amputation due to gangrene, but the surgeon actually amputates the left foot. In such a case, the patient may file a tort claim based on medical negligence as well as an intentional tort claim of medical battery for amputation of the wrong foot (Aiken, 2008).

Other intentional torts include the following:

- Invasion of privacy, which occurs when a person's privacy right has been violated through public disclosure. Disclosure is such that a reasonable person would object to such an intrusion or disclosure. For example, the use of photographs (taken before and after plastic surgery) for an advertisement, without the patient's consent, is an example of an unauthorized disclosure. An important legislative act that focuses on protection of the patient's privacy is the Health Insurance Portability and Accountability Act of 1996 (HIPAA). This act establishes privacy and security standards to protect a patient's healthcare information.

In December 2000, the Department of Health and Human Services issued final regulations governing privacy of this information under HIPAA.

- False imprisonment is the unlawful intentional confinement of a person through physical, chemical, or emotional restraints so that the person is conscious of being confined and is harmed by it. Areas of healthcare that are more likely to encounter such claims include emergency departments and psychiatric facilities. Following hospital restraint policies and documentation are the keys to protecting the healthcare provider from liability.
- Trespass to land can be both an intentional tort and a negligent act that occurs when a person refuses to leave a place, places something on the property, or causes another person to enter the property of another without permission. An example is a patient who absolutely refuses to leave the hospital after being discharged.
- Intentional infliction of emotional distress is the intentional invasion of a person's peace of mind by the defendant's outrageous behavior. Some states do not recognize a claim for intentional infliction of emotional distress, and others strictly limit its application. The conduct must be extreme and outrageous, intentional and reckless, and cause severe emotional distress and possibly bodily harm. For example, ulcers or headaches can be caused by severe emotional distress.

## State and Federal Court Systems

### *State and Municipal Courts*

Courts' functions are divided along geographical lines, level of responsibility, the types of injury for which relief is sought, and the identity of the plaintiff or the defendant who is involved in a potential suit. As individual states are empowered to create their own justice systems, there is significant variation among the names given to the state-level courts; however, the majority of states have developed some division between the various court functions.

### *Municipal, Justice, and City Courts*

Cities and other municipalities generally are authorized to pass local laws or ordinances, and city courts are tasked with adjudicating those laws. City courts also adjudicate lower-level state law criminal violations and low-dollar value or "small claims" civil suits. (The federal court system has a similar specialty court called the Central Violation Bureau, which processes minor civil, criminal, and petty offense violations that occur on federal property.) While an LNC may not directly encounter cases that involve these lower courts, it is important to note healthcare professionals can be held to answer to their boards for alleged unprofessional conduct arising out of a municipal or low-level criminal violation.

### *State Trial Courts*

State courts are where the majority of civil lawsuits and felony criminal offenses are litigated. State courts are established by the state constitution and laws of the state in which they sit. State courts are referred to as courts of *general jurisdiction*, because state courts have wide-ranging jurisdiction to hear any case with a connection to the state unless otherwise limited by the United States Constitution, Congress, or the federal courts. State courts typically adjudicate cases that involve

parties within the state and issues involving state law, although many cases that involve a federal issue can be heard in state court. State trial courts also often act as a court of appeals for administrative law decisions, such as findings by boards of nursing or administrative hearing offices.

Above the state courts are typically one or two levels of appellate courts. These courts do not hold trials or engage in fact-finding about a case. Rather, they review the decisions and outcomes of the trial courts and determine if a decision or outcome complied with state law. As aforementioned, because each state is empowered to develop its own court system, there is variation in how the state courts are named and structured. For example, the Supreme Court of Arizona is the highest appellate court in Arizona, but the Supreme Court in New York is the trial court. Similarly, Colorado has a Court of Appeals and a Supreme Court that hear appeals, but Montana does not have an intermediate court of appeals—cases heard in the trial court are appealed directly to the Montana Supreme Court.

## ***Federal Courts***

Federal courts exist by operation of the United States Constitution and through laws passed by Congress establishing the District Court system and the Court of Appeals (known as the Circuit Court). Federal courts are referred to as courts of *limited jurisdiction*, because they are generally not permitted by law to hear cases that lack a connection to federal law or cases that Congress has not explicitly permitted the federal court to hear. The majority of litigation occurs in the District Court, which is the trial-court level of the federal court. On appeal, a case is transferred to one of the 13 Circuit Courts, based on the state or federal territory in which the District Court that heard the original case sits.

Federal courts have jurisdiction over cases involving questions of federal law. This type of jurisdiction is called “federal question jurisdiction.” In addition, in order to ensure that an out-of-state defendant is treated fairly and not disadvantaged by litigating in a foreign state court, federal courts also have jurisdiction over such cases, called “diversity jurisdiction.” Bringing a case in federal court involving a “federal question” or “diversity” of the parties is at the parties’ discretion, as state courts can also hear these disputes. A defendant may have the ability to move a case from a state court to federal court, if certain requirements are met. Once a District Court obtains jurisdiction, it is generally empowered to decide any state law claims that are involved in the suit.

Some suits, however, *must* be filed in federal court, including cases in which the United States is a party or in which Congress has given federal court exclusive jurisdiction. For example, the Federal Tort Claims Act (FTCA), a federal law that allows plaintiffs to sue the United States government for damages (monetary payment) resulting from a tort injury, requires that suit be brought in federal court. A veteran wishing to bring a medical malpractice suit against a Veterans Affairs hospital or employee, for example, would file suit under the FTCA, as would a patient of a federal healthcare clinic. There are also specialty courts, such as Bankruptcy Courts, the United States Court of Federal Claims, and the federal Tax Court, which are granted exclusive jurisdiction to hear certain types of claims.

## ***The Decision to Litigate in State or Federal Court***

In preparing a case for suit, or when defending against a suit, where the litigation occurs can make a substantial difference in the strategy and outcome. State and federal courts can be physically located in the same city or county but may operate under different laws and rules. The

decision to bring suit in state or federal court (or to move it from state to federal court) is a complex strategy decision. The LNC should be aware of the various factors that are evaluated when determining the appropriate court in which to bring or move a suit.

For example, there is a uniform rule of evidence that every federal court in the United States uses to determine whether an expert is qualified to testify and whether the tests or methods that an expert used are sufficiently reliable to present in trial. However, state courts are not bound by the federal court's evidentiary rule, and a particular state may have rules about experts that differ significantly from the federal court located in the same city. Similarly, federal rules of procedure impose a limit of 10 7-hour depositions in a case, unless permission is sought to exceed those limits. States vary on the number and length of depositions that are permitted.

The choice of whether to file in state or federal court is crucial and can greatly impact the scope and course of litigation and drastically change the outcome of a case. Some considerations include:

- Whether any law requires bringing a case exclusively in state or federal court
- Court congestion and the respective average length of suits in each court
- Physical location of the state court versus the federal court
- Historical monetary awards or relief given
- Historical awards by the Court of attorneys' fees and costs to the successful party
- Eligibility of the case to be decided by a judge or jury
- Composition of the jury pool (registered voters, licensed drivers, taxpayers)
- Rules of procedure or evidence that may help or hinder a case, including the scope of investigation or pre-trial "discovery" that is permitted
- Philosophy or decision history of the judge or jury regarding the type of claim
- Complexity of the filing process and
- Barriers to entry to a court, including state or federal requirements that must be satisfied before litigating in a particular court

## Substantive Law and Procedural Rules

Whether addressing a state healthcare professional board complaint involving unprofessional conduct, a malpractice lawsuit, or a claim for Veteran's benefits, for example, there are rules and laws that govern *what* constitutes a violation of the law, and there are also rules and laws that govern *how* to litigate that violation. Although specific analysis of these sets of rules and laws are outside the scope of this text, an LNC should be aware of the two overarching categories of law: substantive law (what) and procedural rules (how).

Substantive law refers to the laws that establish what is and is not permitted and the different rights and duties an individual or entity has to others. Statutes are the laws passed by the legislative body, such as a state or federal government. For example, a state law may explicitly define the rights of access a parent has to a child's medical records. Government agencies generally are given authority to draft regulations that pertain to the activities governed by the agency. Regulations are the rules that interpret and provide further guidance regarding how an agency will enforce the statutes that have been passed by the legislature. For example, a government agency may be empowered to set forth the specific documentation or qualifications a nurse must possess before applying to become an advanced practitioner. Substantive law is also developed through case law. For example, a jurisdiction may not have passed a statute defining what constitutes a

contract; however, through the development of the law by way of prior court rulings, there will be a definition on which a litigant can rely.

Procedural rules establish the “ground rules” for litigation. There are a variety of sources of procedural law. Jurisdiction-specific Rules of Civil Procedure include rules concerning who can be sued in a particular court, what a complaint or lawsuit must contain, what kinds of investigation or pre-trial discovery is allowed, and time limits and deadlines for many of the activities that occur in litigation. In the professional discipline setting, acts regarding administrative procedures similarly set forth rules of procedure for administrative actions before a board or administrative agency. While there is a uniform set of rules for federal litigation, certain federal specialty courts have their own sets of rules that vary from the rules that govern more routine federal cases. Courts can also have “local rules,” which modify or expand on the state-wide or federal rules of procedure.

An LNC must be conversant in the procedural rules that govern the litigation. While the rules are often focused on the process of litigating a case, failure to follow procedural rules can result in sanctions for the violating party, including dismissal of claims or the entire case. For LNCs who are involved in professional license defense or prosecution of board complaints, mastery of procedural rules is critical. A professional who fails to follow procedural rules may “waive” or give up a claim. Similarly, a board that fails to follow its own rules is subject to having its decision reversed or found to be invalid by a reviewing court. For more information on procedural rules, see the Federal Rules of Civil Procedure section later in this chapter and see Chapter 5. For more information on administrative actions involving healthcare professionals, see Chapter 25.

Litigating requires the use of both substantive laws and procedural rules. A case may be substantively strong, but if the procedures are not followed, the fact-finder (e.g., judge or jury) may never hear the strength of the claims because of a procedural shortcoming. Similarly, a litigant may strictly adhere to all procedural requirements but may, nevertheless, be unsuccessful in litigating a claim due to an inability to prove that a substantive law was violated. When evaluating a claim, the LNC and legal team should consider whether it is viable from both a substantive and procedural perspective.

## Federal Rules of Civil Procedure

The primary role of an LNC is to analyze, evaluate, and provide informed opinions about the medical aspects of a legal case, thereby establishing the medical basis or defense of a case. While that remains the focus of the LNC’s work, in order to bridge the gap between the medicine and the litigation process, the LNC must have a basic understanding of the legal process.

The legal framework is established by the rules of civil procedure and the written opinions of the judges who interpret them. The rules of civil procedure establish the roadmap that all civil cases traverse, from the initial complaint to resolution of the matter by settlement or trial. The Federal Rules of Civil Procedure (FRCP) prescribe how federal lawsuits are governed. The Federal Rules of Civil Procedure are to be “construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding” (Fed. R. Civ. P. 1). They have been adopted in whole or in part by most states (*Bell Atlantic v. Twombly*, 2007; Tarpley, 2015).

The FRCP (or the equivalent state rules for state cases) of most importance to an LNC are those related to (1) initiation of a lawsuit and (2) pre-trial discovery of the facts and opinions known by the opposing party. Rules 3–12 relate to the initiation of a lawsuit and Rule 16 and Rules 26–37 relate to pre-trial discovery.



## ***Initiation of a Lawsuit***

Every civil action begins with a plaintiff, the person who files a complaint pursuant to Rule 3. The purpose of the complaint is to inform the defendant(s), the person(s) and entities being sued, and the court of the basis of the plaintiff's claim. Under Rule 8, the complaint need only contain a short and plain statement of the claim, a statement of the grounds for the court's jurisdiction, and a demand for the relief sought.

A summons must be served with a copy of the complaint. A summons is an order by a court requiring the presence of a person, usually a defendant, to defend a legal case. On or after filing the complaint, the plaintiff must present a summons to the court clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant(s). The complaint must then be properly sent to or "served" upon the defendant(s). This procedure is known as "service of process."

Service of process is the method by which courts assert their authority over the defendant(s), and Rule 4 governs service of process in federal court. It sets forth what content must be in the summons, identifies who may serve process, and specifies how and when service may be made. Under the FRCP 4(m), the plaintiff is responsible for serving the summons and complaint upon the defendant(s) within 90 days, or the plaintiff risks dismissal of the complaint.

Once service of process is completed, the defendant(s) is deemed to have notice of the claim(s), and the Federal Rules of Civil Procedure require that the defendant respond (Fed. R. Civ. P. 12(a)(1)). Rule 12 requires that a defendant either file an answer delineating its defenses to the claim or file a motion to dismiss the claim. Rule 12(b) lists seven key defenses utilized in motions to dismiss. They exist to expedite and simplify the pre-trial phase and to eliminate fatally flawed complaints. Defenses 12(b)(2)–(7) must be claimed immediately after service of the complaint; otherwise, the opportunity to assert them will be lost forever (Fed. R. Civ. P. 12(h)). The key defenses are:

- Rule 12(b)(1): Lack of subject-matter jurisdiction (wrong type of case for that court)
- Rule 12(b)(2): Lack of personal jurisdiction (wrong person)
- Rule 12(b)(3): Improper venue (wrong place)
- Rule 12(b)(4): Insufficient process (wrong summons or complaint)
- Rule 12(b)(5): Insufficient service of process (defective service of the summons or complaint)
- Rule 12(b)(6): Failure to state a claim upon which relief can be granted (does not state enough facts to show a violation of law or entitlement to a legal remedy) and
- Rule 12(b)(7): Failure to join a necessary party under Rule 19, Required Joinder of Parties (did not sue all of the persons necessary to resolve the dispute)

If the defendant does not file a motion to dismiss, or if the court denies the motion, the defendant must then file an answer which admits or denies the claims or states the defendant lacks sufficient information to admit or deny the claims. See Chapter 5 for more information on initiating lawsuits, including the LNC's role.

## ***Pre-trial Discovery***

After the complaint has been served and the defendant(s) has submitted an answer, all parties may engage in discovery or formal investigation. Rule 16, which "addresses pretrial conferences,



pretrial orders, and the activities that courts may require as part of the pretrial case management process,” governs the pretrial schedule by requiring the court to issue a scheduling order which limits the time to join parties, amend pleadings, complete discovery, and file motions (Gensler, 2019). It still leaves enough room, though, for individual judges to determine how to manage a particular case.

While Rule 16 manages the pre-trial schedule, Rule 26 provides the “foundation of discovery practice in federal court” (Gensler, 2019). Other rules, such as Rule 30, which covers depositions, and Rule 34, which covers requests for production, provide for particular discovery tools; but Rule 26 defines the “universe of information” that parties may seek by utilizing those tools (Gensler, 2019).

The goal of discovery is to gain knowledge about the adversary’s case. It is used to avoid surprises at trial and to facilitate settlement. Rule 26(b)(1) establishes the scope of discovery and, according to the 2015 amendments to the rule, provides that “parties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case...” When determining proportionality, considerations include the amount in controversy, a party’s access to the information, a party’s resources, and a determination as to whether the burden or expense of producing the discoverable information outweighs its benefit. Although information that is relevant to a party’s claim or defense may not be admissible at trial, it can still be discoverable. Discoverable information includes the existence, description, nature, custody, condition, and location of any books, electronic data, documents, or other tangible things, and the identity and location of persons who have knowledge of any discoverable matter.

While proportionality serves as one limitation on the scope of discovery, there are other limitations, including Rule 26 protection of trial preparation materials (i.e., work product) and communications between attorneys and experts. In addition, Rule 26(c) allows parties to move for protective orders “against overzealous, abusive, or otherwise improper discovery” (Gensler, 2019). Despite the adversarial nature of litigation, Rule 26(f) requires that attorneys communicate early in the lawsuit to discuss their discovery needs and possible problems.

Under Rule 26, there are two types of witnesses: (1) the fact witness who has direct knowledge of the issues and (2) the expert witness who will use specialized education, training, experience and knowledge to assist the judge or jury to understand the evidence (Bell, 2013). However, these roles are often conjoined when a person, not retained or specifically employed to provide expert opinion testimony, has both personal knowledge of the facts of a case and expertise in the relevant field, thus establishing a hybrid witness (Fed. R. Civ. P. 26; Meckstroth, 2017). Common examples of a hybrid witness include a treating healthcare professional and the medical examiner who performed an autopsy in a death case (Bell, 2013; Rahman, 2016).

Rule 26(a)(2) governs the disclosure of expert witnesses, and subsection (a)(2)(B) requires that a detailed written report accompany disclosure when the witness is “retained or specifically employed” to provide expert testimony. A hybrid witness is not required to submit a detailed written report, but the hybrid witness must be disclosed with a summary of the expected testimony under Rule 26(a)(2)(C) (*Alfaro v. D. Las Vegas, Inc.*, 2016; Fed. R. Civ. P. Advisory Committee Notes, 2010; *Harvey v. District of Columbia*, 2015).

## ***Key Discovery Tools Under the Federal Rules of Civil Procedure***

### ***Interrogatories: Rule 33***

Interrogatories are lists of questions one party sends to another as part of the discovery process. Per Rule 33, the questions may relate to any matter not privileged that is relevant to the subject

matter of the litigation. Once served, the responding party has up to 30 days to respond or object (Fed. R. Civ. P. 33(b)(2)). Interrogatory answers must be in writing and answered under oath. If information is withheld by the responding party, a proper explanation must be provided.

### *Requests for Production: Rule 34*

Requests for production are requests for documents, electronically stored information, or other tangible items that would assist in establishing or refuting the facts asserted in the complaint. Like interrogatories, requests for production are made in writing and must be responded to within 30 days (Fed. R. Civ. P. 34(b)). Requests for production also “permit entry onto designated land or other property,” so site visits may be requested to inspect the place where the injury occurred (Fed. R. Civ. P. 34(a)(2)).

### *Depositions: Rule 30*

Under Rule 30, depositions are oral examinations, under oath, of any person a party believes has relevant information (Fed. R. Civ. P. 30). Therefore, unlike interrogatories, depositions are not limited to the plaintiff(s) and defendant(s). Witnesses and any other persons with information relevant to the matter may be deposed. Deposition testimony is similar to trial testimony in that the entire process is conducted under oath and recorded by a court reporter. The vast majority of civil cases never make it to trial, however, so depositions are the evidentiary basis for the resolution of most disputes (Cochran, 2012). Therefore, depositions are very important.

Obtaining information from institutional adversaries, as opposed to discrete individuals, can be extremely challenging as individual witnesses do not normally have access to all information known to the organization (Kosieradzki, 2016). Therefore, Rule 30(b)(6) exists to force institutions like hospitals, for example, to designate and prepare a representative who is able to speak to all of the information that an institution has on an identified topic.

### *Physical and Mental Examinations: Rule 35*

A physical or mental examination may be requested by either party when the physical or mental state of a client is at issue (Fed. R. Civ. P. 35(a)). In practice, physical and mental examinations are usually limited to personal injury and paternity lawsuits, but they also arise in medical malpractice and disability lawsuits. They may be used to substantiate the cause of injury, provide a prognosis, or make recommendations for future treatment. The examination should be conducted by an impartial healthcare provider, one who has never been involved in the direct care of the client. However, because the party who requests the exam selects the healthcare provider who performs it, some providers may be biased toward the requesting (paying) party. The LNC may attend the exam as an observer. See Chapter 6 for more information on these medical examinations.

### *Subpoena: Rule 45*

A subpoena is a discovery tool that requires a witness or non-party to appear or produce documents. It has the force and effect of a court order. There are two types of subpoenas. One is a subpoena *ad testificandum*, which requires that the person testify before a court or other legal authority. The other is a subpoena *duces tecum*, which requires that the person produce

documents, materials, or other tangible evidence. Subpoenas may be issued by either a clerk of the court where the action is pending or an attorney licensed in the state.

### *Failure to Cooperate in Discovery: Rule 37*

If a party fails to respond to discovery requests, then the party seeking the discovery may file a motion to compel with the court (Fed. R. Civ. P. 37(a)). If the court grants the motion to compel, then the party who objected or failed to respond must respond. If a party fails to comply once the court issues an order compelling discovery, the court may then sanction the party in various ways which include prohibiting the party's evidence at trial, dismissing the plaintiff's lawsuit, striking the defendant's defense to the lawsuit, and imposing financial sanctions (Fed. R. Civ. P. 37(b)).

See Chapter 5 for more information on the discovery process, including the LNC's role.

## **Federal Rules of Evidence**

The Federal Rules of Evidence (the "Rules") govern what type of evidence may be considered by a judge and jury (each a "trier of fact") in the event of a trial. The Rules range from broad pronouncements relating to the admissibility of prior criminal convictions and the proper uses of character evidence to specific rules relating to admissibility of documents and how jurors can sometimes serve as witnesses.

The primary question addressed by the Rules is whether a statement, document, item, or witness testimony ("Evidence") is admissible. From a practical perspective, evidence is considered admissible if it is relevant, unless it is expressly excluded by another of the Rules. Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence[,] and the fact is of consequence in determining the action" (Fed. R. Evid. 401). If the Evidence is relevant, it is admissible pursuant to the Rules, and it may be admitted to the case for the triers of fact to consider in making their decision. If not, the Evidence may not be admitted, and the triers of fact will not have that Evidence to consider when reaching their decision.

It is important to note that numerous other federal and common law legal frameworks may be implicated when considering Evidence issues under the Rules. For example, HIPAA may hinder or prevent access to potentially admissible Evidence without a court order. In addition, whether and to what extent a medical professional may testify on an issue may implicate professional-patient relationship laws and guidelines.

A comprehensive review of the Rules is beyond the scope of this textbook. However, LNCs should be aware of several Rules with particular relevance to healthcare providers.

### ***Hearsay***

Hearsay is one of the more common Evidence issues. Hearsay is not admissible under the Rules unless one or more specific exceptions or exemptions apply. The Rules define hearsay as "a statement that: the declarant does not make while testifying at the current trial or hearing; and a party offers in evidence to prove the truth of the matter asserted in the statement" [Fed. R. Evid. 801(c)]. The definition is helpful but conceptually difficult for many professionals to apply. It is quite common for some to consider any verbal statement made by anyone to be a hearsay issue under the Rules. However, statements can be written, verbal, or non-verbal, and the Rule is

only implicated if another party is trying to prove the truth of what was asserted in the statement. Restating the Rule with particular attention to the parties involved can be helpful. Hearsay is an out-of-court statement made by a person (the “Declarant”), which is being offered to the court by a separate party (the “Proponent”), to demonstrate the truth of the matter asserted in the statement by the Declarant (the “Hearsay Rule”).

### *Statements for Purposes of Medical Treatment or Diagnosis*

The Hearsay Rule contains an exception for statements made by a Declarant for purposes of medical diagnosis. The statement made by the Declarant must be for the purposes of medical diagnosis or treatment, and it must describe medical history, past or present symptoms or sensations, or the inception or general character of the cause of the Declarant’s medical condition. These types of statements are often made by the Declarant to a nurse, doctor, or someone else who may use the information for medical diagnosis or treatment. Statements made for medical diagnosis are often relevant in lawsuits, as the statements can include present and past conditions as well as the cause of the conditions if the cause is relevant to diagnosis and treatment. This Hearsay Rule exception contemplates that these types of statements should generally be admissible for trier of fact’s consideration.

For example, a patient visits a healthcare provider complaining of back pain and a headache. The patient tells the healthcare provider, “I felt this sudden back pain a couple hours ago, and I’ve developed a headache since then.” The healthcare provider asked what happened, and the patient described trying to pry a 500-pound bale of compressed cardboard from the baler at work. Using this information, the healthcare provider diagnoses the patient’s back pain and provides treatment (prescriptions) for muscle swelling and the headache. The patient is sent home and dies later that day from an aneurysm. The patient’s spouse brings a lawsuit against the patient’s employer seeking worker’s compensation survivor benefits. The spouse (the Proponent in this example) wants the healthcare provider to testify about what the patient (the Declarant) told the healthcare provider. The spouse wants to use the patient’s statements to the healthcare provider to prove the truth of the matter asserted, that the aneurysm that ultimately led to the patient’s death was caused by an injury sustained at work. In this example, the patient’s statements to the healthcare provider would likely be admissible under the Hearsay Rule exception for statements made for purposes of medical diagnosis or treatment. The healthcare provider would likely be allowed to testify about what the patient said, and the spouse would be able to use those statements to help establish to the trier of fact that the patient’s death was caused by an injury sustained at work, which would allow the spouse access to worker’s compensation survivor benefits.

### *Records*

The Hearsay Rule also contains an exception for records kept in the course of a regularly conducted business activity. This includes medical records, provided that the record includes conditions, opinions, or diagnoses and was made at or near the time of the treatment or consultation. Continuing the above example, if the healthcare provider summarized the patient’s assertion about the cause of the injury in the written notes of the medical record, the spouse may be able to use the healthcare provider’s notes to argue that the patient’s death was caused by an injury sustained at work.

## *Opinions*

Medical professionals may be asked to provide formal medical opinions from time to time. For example, a medical professional may be asked to describe a patient's appearance and mannerisms in a pain and suffering case or offer an opinion as to whether a patient has reached maximum medical improvement in a personal injury case. An LNC should be familiar with the types of opinion testimony that a medical professional may be able to provide. Opinion testimony, particularly expert opinion testimony, can be quite persuasive depending on the type of case. Article VII of the Rules addresses opinions and expert testimony.

### *Lay Opinions*

Any person can offer opinion testimony, provided that:

- The person has opinions or inferences that are based on that person's perception
- The opinion or inference would be helpful to a clear understanding of that person's testimony or of a fact at issue in the case and
- The opinion or inference is not based on scientific, technical, or specialized knowledge

From a healthcare perspective, this may include a medical professional describing how someone looked to be distressed or in pain when the issue (or amount) of pain and suffering is disputed in a lawsuit.

### *Expert Opinions*

Expert opinions are sometimes requested of medical professionals. As with lay opinions, these expert opinions must be helpful to the trier of fact. To be permitted to offer expert testimony and opinions, a medical professional must be qualified as an expert by knowledge, skill, experience, training, or education. Ultimately, the attorneys on either side of a lawsuit attempt to establish or discredit a professional's expertise. However, the final decision as to expertise is often made by the court.

Once a professional is established as an expert, the professional may offer opinions on complex issues, provided that:

- The opinion is based on facts or data
- The opinion is analyzed and evaluated utilizing reliable principles and methods and
- The professional has applied the principles and methods reliably to the facts of the case

These expert opinions can even address the ultimate issue in a case (e.g., legal fault). However, there are limitations relating to mental state opinions. An expert cannot offer an opinion or inference regarding whether a defendant in a criminal case had a particular mental state or condition. For more information on the Rules, see Chapter 5.

## Common Legal Doctrines and Concepts

### ***Statute of Limitations***

This is the time period within which a prospective plaintiff may bring a cause of action following the event giving rise to a potential claim. The governing period of time is set by statute. Each jurisdiction has statutory limitations periods for different types of lawsuits. For example, some jurisdictions provide for a five-year limitations period for actions based in contract violations and a two-year limitations period for personal injury lawsuits. Some of the relevant law surrounding statutes of limitations provide that a plaintiff's cause of action may not accrue until the plaintiff discovers the injury.

While it is the attorney's responsibility to determine exactly when a cause of action "arose" (and thus when the statutory limitations period began), it is very important for the LNC to be cognizant of the relevant statute of limitations period pertaining to the matter at hand. Plaintiff LNCs who are screening cases for merit need to identify, and alert the attorney to, a limitations period that is nearing its expiration. Defense LNCs may discover information showing the lawsuit was filed outside the statutory limitations period.

### ***Burden of Proof***

The burden of proof is the requirement that is placed on one of the parties to prove (or disprove) the merits of an argument or assertion. For example, in a medical malpractice case, the plaintiff asserting negligence bears the burden to prove that the defendant or defendants were negligent or fell below the standard of care and that the plaintiff was injured as a result of the negligence.

There are various burdens of proof, and one or more may apply to claims and defenses that arise during the litigation of a claim. Generally, in order to prevail in civil litigation, the plaintiff must prove the different elements of the case to a preponderance of the evidence. That is, it is more likely than not that the plaintiff's evidence supports the claims in comparison to evidence presented by the defendant to the contrary. In some instances, the law will impose a higher burden of clear and convincing evidence, which requires an elevated showing that the party with the burden has presented substantial evidence in support of its assertion. Examples of when this standard may be used include certain civil fraud cases, actions to terminate parental rights, and certain administrative law actions. The highest burden of proof, which requires proof beyond a reasonable doubt, is typically reserved for criminal proceedings. Under this standard, the government entity seeking to prove a defendant's guilt must show that there is no reasonable doubt of the defendant's guilt and must firmly convince the finders of fact of the defendant's guilt.

A detailed discussion of the burdens of proof and their application is beyond the scope of this text. However, the LNC should be aware of which burden of proof applies in a particular instance, understand which party bears the burden on a given issue, and develop sufficient evidence to meet the burden.

### ***Res Ipsa Loquitur***

Generally, a plaintiff must prove how negligence occurred and whose negligence caused the injury. However, there are some injuries that are extraordinary and do not normally occur unless someone was negligent. In those situations, the plaintiff's burden of proof is relaxed by the legal doctrine of *res ipsa loquitur*, which translates to "the thing speaks for itself."

Certain acts of negligence in medical litigation readily lend themselves to the application of this doctrine. For example, a patient who is injured when a surgical sponge is left inside the abdominal cavity may use *res ipsa loquitur*. Similarly, a patient who has had the wrong side of the body operated upon can invoke this doctrine. Even though the patient in either example may be unable to identify the specific circumstances that lead to the negligence, those acts of negligence would not have occurred without some member of the surgical team acting negligently.

To successfully assert this doctrine, plaintiff presents to the court that the injury *only* occurs when there is negligence. The plaintiff is relieved of having to identify (1) a specific defendant as the source of the negligent act and (2) the way in which the defendant or defendants acted negligently. Instead, the fact that the act occurred suffices, and the jury can infer that negligence occurred. Then, the burden of proof shifts to the defendant to disprove that the defendant acted negligently or to prove that the defendant was not the cause of the injury.

In order to utilize this doctrine, the plaintiff cannot bear any responsibility or control over the acts that lead to the injury, and the circumstances or instrumentality of the injury must have been exclusively within the control of the defendant or defendants.

### ***Wrongful Birth/Life***

These two legal theories of liability are similar but are brought by two different plaintiffs. In a wrongful birth action, the lawsuit is brought by the parent of a child born with some sort of birth defect, and allegations are made that there was negligent medical treatment on the part of health-care providers or a failure to provide advice that has deprived the parent of the opportunity to either avoid conceiving the child or timely terminate the pregnancy. Typically, these claims arise when there has been a failure to provide the parents with certain types of genetic testing or when a prenatal ultrasound was misread that evidenced severe birth defects. These claimants usually seek medical costs and expenses associated with caring for a child with a serious medical condition.

A wrongful life claim, on the other hand, is a lawsuit brought by a severely disabled child, but for similar reasons. Both types of lawsuits are emotionally challenging, very complex, and are not recognized in all jurisdictions. Indeed, 12 states do not allow wrongful birth claims at all.

In a sentinel Iowa case, *Plowman v. Fort Madison Community Hospital* (2017), the parents alleged that the defendant physicians failed to accurately interpret and communicate fetal abnormalities noted during a prenatal ultrasound. The parents claimed that, if they had been informed of the fetal abnormalities, they would have terminated the pregnancy. The child was born severely disabled. The parents sought to recover for the ordinary and extraordinary care associated with raising the child as well as for their emotional distress and lost income as a result of the child's life.

### ***Loss of Consortium***

This principle was introduced earlier in the chapter as one of the types of damages that is potentially recoverable in tort actions. The word “consortium” loosely means companionship or association. Legally, it is an expanded concept that deals with losses suffered by a spouse or partner, child, or other family member as a result of the death or disability of a person due to a negligent act. Each jurisdiction defines the specific scope of loss of consortium, but generally it includes things such as contributions of the injured/deceased to the household, care, companionship, advices, and affection. The damages are termed “non-economic” damages, meaning they do not



have actual concrete money value that can be shown with documents, receipts, and the like. Instead, the jury ascribes the value based on the evidence presented about the length and closeness of the relationship(s). It is, simply put, a way to quantify a loss that cannot be valued with money alone.

In jurisdictions that recognize loss of consortium claims, these claims are typically “derivative” claims, meaning they originate from a primary claim. For example, if a person who sustained a debilitating stroke due to medical negligence brings a suit to recover for damages (the primary claim), the person’s spouse/partner, and in some instances, child, may assert a separate cause of action for loss of consortium and would also be listed as a plaintiff. The success of a derivative claim is dependent on the viability of the primary claim; if the primary claim is dismissed or lost, so is the loss of consortium claim.

If a loss of consortium claim is permitted and asserted in the jurisdiction, the LNC will look at medical records for valuable clues to assist in either pursuing or defending against such a claim. Life expectancy of the injured becomes very relevant as well as co-morbid conditions. Further, illuminating the nature of the relationships between the injured/deceased and the beneficiaries is key in loss of consortium claims.

### ***Ostensible Agency (Apparent Agency)***

In general, the negligence of one person cannot be assigned or imputed to another person or entity. However, there are exceptions to this rule. Ostensible/apparent agency is one such tort doctrine that imposes liability upon one party for the breach of another due to the existence of a special legal relationship giving rise to such a duty.

To best understand this concept, one can first look at the inverse principle of “actual agency.” This is what occurs when a principal actually empowers another to bind it legally. For example, a hospital may give a particular employee the right to sign legal documents that bind it. Apparent or ostensible agency occurs most often when an employer may be legally bound by, or legally responsible for, the acts of an employee (or apparent employee). The agency relationship exists typically only to the extent that it is reasonable for a third person dealing with the agent to believe the agent was authorized by the principal and the principal did nothing to correct that incorrect belief. For example, in a suit involving negligent care by an emergency medicine physician, the plaintiff may also name the hospital as a defendant under the doctrine of ostensible agency. Most patients do not realize that emergency medicine physicians may not be hospital employees; thus, these patients believe the physicians are agents of the hospital and, during the course of litigation, will attempt to establish that the hospital is responsible for the physicians’ acts.

### ***Respondeat Superior/Vicarious Liability***

This is another exception to the rule outlined above, when negligence of one party can be assigned to another by virtue of a certain type of relationship. Generally, vicarious liability allows a plaintiff to hold a third party liable for the actions of a tortfeasor despite the fact that the third party is not guilty of any wrongdoing. The term “*respondeat superior*,” a Latin term, and therefore always written in italics, literally means “let the master answer.” This common law doctrine essentially defines the liability of an employer for the acts of its employee, provided the employee was working within the scope of employment at the time the tort was committed. Of note, a plaintiff is more likely to bring a lawsuit against a larger entity (the company/employer) along with the actual tortfeasor. This is because the larger entity will likely have “deeper pockets” than an



individual, and therefore, oftentimes, plaintiffs seek to establish a *respondeat superior* relationship (even if there is not a clear-cut employer/employee relationship available) in order to avail themselves of potential economic sources of recovery. Whether an employment relationship actually exists involves analysis of many factors including how the employee was paid, the employer's right to control the manner in which the employee performed the job, and the employer's right to dismiss the employee.

For example, in the Virginia case of *Majorana v. Crown Cent. Petroleum Corp.* (2000), the plaintiff alleged she was assaulted in a store by a store employee. The Virginia Supreme Court held that, when a plaintiff presents sufficient evidence to show the existence of an employer/employee relationship, the plaintiff has established a *prima facie* (at first sight) case triggering a presumption of liability on the part of the employer. The burden of proof then shifts to the employer, who may then rebut the presumption by showing that the employee departed from the scope of the employment relationship at the time the injurious act was committed.

### ***Eggshell Plaintiff***

This funny-sounding term has nothing to do with poultry, but the reference to the fragility of eggs is a good way to recall the meaning of this concept. Eggshells are delicate, weak, and easy to crack. The premise here is that the eggshell plaintiff may come to the table with a multitude of pre-existing issues, and this is something that has to be dealt with—the defense takes the plaintiff as found. For example, Ms. X was involved in a car accident which was caused by Mr. Y, who clearly ran a red light. The average person, one could conjecture, would only have suffered minor soft tissue injuries. It just so happens, though, that Ms. X was seven months pregnant and also had a prior cervical spine injury and fusion. This fender bender caused damage to Ms. X's fetus and significantly exacerbated her already delicate neck problems. The concept of “taking the plaintiff as found” means the defense cannot argue the plaintiff was different from the average person and, therefore, only average damages can be claimed. *Actual* damages and injuries must be evaluated, regardless of how “brittle” the plaintiff may have been before the injury occurred.

### ***Failure to Mitigate Damages***

This concept comes into play once an injury has been alleged and a claim for negligence has been brought. It is essentially a defense to overly inflated damages claims. The legal principle is as follows: although a person may have been injured at the hand of another, that person still has a responsibility to take reasonable measures to avoid further loss or injury and to minimize the extent of the injury. Under the rule of “mitigation of damages,” a personal injury plaintiff can be denied the right to recover the portion of damages that could have been avoided (as found by the court or a jury). In other words, a plaintiff has an obligation to act in a way that an ordinary, reasonably prudent person would have acted in a similar situation.

For example, Mr. A alleges Dr. B failed to timely diagnose a stroke, which resulted in right hand weakness and aphasia. Mr. A's physicians referred him to physical rehabilitation, but Mr. A missed over 70% of his appointments. The medical records also reflect that he was non-compliant with his anticoagulant medication, and he suffered a second stroke as a result, causing additional neurological effects. Defendant Dr. B argues that Mr. A failed to mitigate his damages by not participating in the recommended rehabilitation and by refusing to take his anticoagulation medication.

## ***Assumption of the Risk***

This is an affirmative defense in tort law, meaning the party seeking to invoke the doctrine must raise the defense before it will be considered by the Court. Affirmative defenses can bar a plaintiff's right to recover. Essentially, assumption of risk means that a person knowingly engaged in an activity that was understood to be risky/dangerous, and therefore, any injury that resulted from voluntarily undertaking that activity was completely at the person's own hand. Typically, in order for a court to find that a plaintiff assumed the risk of a dangerous activity, the burden is on the defendant to prove the plaintiff knew of the dangers involved with that activity and then willingly engaged in the activity, notwithstanding the dangers.

## ***Comparative and Contributory Negligence***

Both of these legal concepts are ways in which a plaintiff's recovery may be limited in litigation if the plaintiff is found to be at fault. Like failure to mitigate damages and assumption of the risk, these legal doctrines are employed to reduce a plaintiff's damages award or act as a defense to liability altogether. They are best explained by example.

The doctrine of "comparative negligence," which is more common, allows the finder of fact to determine the plaintiff's own percentage of fault in the incident giving rise to the injuries. The total recovery amount will then be reduced by that percentage. For example, if a plaintiff was found to have suffered \$1,000,000 in damages but was also found to be 10% responsible for an accident that gave rise to the injuries, the plaintiff's award would be \$900,000 (\$1,000,000 minus 10%, which is \$100,000). Under this doctrine, damages are apportioned between at-fault parties based on their proportionate shares of fault.

In "contributory negligence" jurisdictions (currently Alabama, Maryland, North Carolina, Virginia, and the District of Columbia), if a plaintiff is found to be even 1% at fault for causing an injury-producing event, the plaintiff will recover nothing, despite the defendant being up to 99% at fault. A finding of any fault by the plaintiff in these jurisdictions is a total bar to recovery by the plaintiff.

Some jurisdictions follow a doctrine of modified comparative negligence, which apportions fault to the parties, limits recovery if the plaintiff was a marginal contributor to the injuries, and bars recovery if the plaintiff was the majority contributor to the injuries. If the plaintiff is found to be less than 50% or 51% at fault (depending on the specific jurisdiction's rules), the plaintiff recovers damages (less the percentage the plaintiff was at fault). If the plaintiff is found to be more than 50% or 51% at fault, recovery is completely barred. For example, if a plaintiff was found to have sustained \$100,000 in damages and to have no fault, the plaintiff would recover the full \$100,000. If the plaintiff was found to have been 25% at fault, the plaintiff would recover \$75,000 (\$100,000 minus 25%, which is \$25,000). If the plaintiff was found to have been 51% at fault, the plaintiff would recover \$0.

When assisting with a case review, it is important for the LNC to know which doctrine is followed by the jurisdiction in which the case is venued.

## ***Stare Decisis***

*Stare decisis* is a doctrine that promotes consistency and predictability in the justice system. *Stare decisis* is Latin for "to stand by decided matters." The doctrine instructs a court to decide legal issues in subsequent cases consistently with how it decided legal issues in previous cases. The