LEGAL ISSUES IN NURSING

Course # 840
4 Contact Hours

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Table of Contents

Disclosures 3
- Description 3
- Criteria for Successful Completion 3
- Accreditation 3
- Conflicts of Interest 3
- Expiration Date 3

About the Authors 3

Purpose and Goals 3

Learning Outcomes 3

Introduction 3

Introduction to Law 3
- Sources of Law 3
- Types of Tort Law 4
- Professional Liability 6

Nursing Practice Act and Standard of Care 7
- Standards of Care 7
- Administering Medications with Care 7
- Informed Consent 7
- Medical Documentation 8
- Staffing Issues 8
- Patient Teaching 8
- Importance of Communication 8

Nurse Rights, Legal Defenses 9
- HIPAA and Confidentiality 9

Patient Rights 9

Advance Care Planning 10
- Advance Care Planning Practices 10
- Completion of an Advance Directive 10
- Record-Keeping 10

Medical Record Review Job Summaries 10

Discovery 11
- Types of Discovery 11
- Importance of a Lawyer during the Discovery Process 12
- Alternative Dispute Resolution (ADR) 12

Basic Summary of the Litigation Process 12
- Early Stage Motions 12
- Discovery and Pre-trial 12
- Trial and Judgment 12
- Appeals 13
- Enforcement 13

In Conclusion 13

References & Suggested Readings 13

Legal Terminology: 13

Disclosures

Description

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The goal of this course is to help nurses and healthcare professionals understand the complex interactions between the American medical and legal systems.

Learning outcomes include:

- Identify the legal concepts of beneficence and nonmaleficence and their application in medical settings
- State the elements of malpractice that a plaintiff must prove to recover damages
- Describe the different types of laws in the United States

Criteria for Successful Completion

After reading the material, complete the online evaluation. If you have a Florida nursing license or an electrology license you must also complete the multiple choice test online with a score of 70% or better. Upon completion of the requirements you may immediately print your CE certificate of completion.

Accreditation

- American Nurses Credentialing Center's Commission on Accreditation (ANCC)
- California Board of Registered Nursing Provider No. CEP 1704.
- This course has been approved by the Florida Board of Nursing No. 50-1408.
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Conflicts of Interest

No conflict of interest exists for any individual in a position to control the content of the educational activity.

Expiration Date

This course expires February 28, 2023.

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Purpose and Goals

The goal of this course is to educate nurses and other healthcare professionals about legal aspects of caring for patients. The course focuses on current medical standards, laws that apply to the medical industry, and litigation processes.

Learning Outcomes

Upon successful completion of this course, the participant should be able to:

1. List the sources of law in the United States.
2. List the basic categories of torts.
3. Explain the concepts of beneficence and nonmaleficence.
4. Compare the terms malpractice and negligence.
5. Summarize the elements of malpractice the plaintiff must prove to recover damages.
6. Compare patient consent rules for non-life-threatening circumstances versus emergency medical situations.
7. Understand guidelines for Advance Care Planning.
8. Define standard of care and give specific examples.
9. Interpret HIPAA regulations.
10. Describe the processes legal professionals use to detect medical document tampering.
11. Outline the potential consequences of tampering with a medical document.
12. Summarize types of discovery and the importance of discovery in medical malpractice litigation.
13. Describe the role of the legal nursing consultant.
14. Describe the types of alternative dispute resolution.
15. Summarize the litigation process.

Introduction

Dedicated healthcare providers strive to perform their professional responsibilities safely and competently. Despite best efforts to provide quality care, healthcare professions may find themselves involved in litigation. Clients, patients, their families, and coworkers may initiate legal action based on tasks performed or decisions made even in cases of correct application of standards of quality care. It is important to be educated and informed about laws, statutes, and standards that directly apply to your daily job requirements, and the options available to you if your efforts and decisions are questioned in a court of law.

This course is intended to contribute to your understanding and implementation of legal issues as they pertain to your profession.

Introduction to Law

This course focuses on the United States legal system and the ways it interacts with professional nursing. In your previous studies, you may have encountered the different sources of law in the United States. You may also have heard about liability and negligence. These and other concepts are described in this section.

Sources of Law

The primary sources of law in the United States are the U.S. Constitution, statutory law, administrative law, and case law.

1. The U.S. Constitution is the supreme law of the United States. The Constitution sets forth the framework for the U.S. government, including the separation of powers, which separates the federal government into three co-equal branches: 1) the legislative, 2) the executive, and 3) the judicial.

2. Statutory law is written law passed by a legislative body. Such laws may originate in the United States Congress, state legislatures, or even local municipalities. Most statutes are codified or organized by subject. For example, statutes governing federal regulations are codified in the Code of Federal Regulations.

Legal cases may involve the interpretation of a statute as it relates to a particular case. In such circumstances, a law that was enacted by a legislature will be *interpreted* by a judge.

Statutory laws are subordinate to constitutional laws.

3. Administrative law is a body of law created by the government agencies and departments that are responsible for carrying out the laws passed by legislative bodies. Because statutes often lack details about how to implement and enforce laws, administrative bodies create additional rules in order to achieve the legislatures' goals. For example, Congress

passes social security and disability laws, and the Social Security Administration – the government body tasked implementing these laws – regulates the operations and procedures involved in determining benefit eligibility and remitting benefits. Other examples of administrative agencies include the Federal Trade Commission (FTC), the National Labor Relations Board (NLRB), and the Food and Drug Administration (FDA).

Administrative law plays a key role in the regulation of international trade, manufacturing, environmental issues, taxation, broadcasting, immigration, and transport.

4. Case law is derived from court decisions made by judges. The total collection of past legal decisions from courts and tribunals comprises case law, which is also known as **common law**. The doctrine of stare decisis - Latin for "let the decision stand"- guides decision-making by judges. This doctrine obligates courts to follow historical cases, or "precedent," when making a ruling in a similar case.

Only in cases in which a dispute is fundamentally different from all previous cases may judges "create precedent." In these cases, the judges' decisions bind future courts in the same jurisdiction. However, a precedent established in one state does not set a precedent for another state. Additionally, prior decisions can also be overruled if there is a change in social attitudes, public needs, or contemporary political thought.

Beneficence and Nonmaleficence

Most malpractice claims involve the concepts of beneficence and nonmaleficence. Many nurses are familiar with the term beneficence, an ethical principle related to the quality or state of doing or producing good. Beneficence may be an act of kindness, mercy, or charity. In the medical field, beneficence involves taking actions that are in the best interest of the patients assigned to a medical professional's care – even if that action is simply doing nothing.

Nonmaleficence is an ethical duty to avoid harming others and can be summarized with the oft-heard phrase, "First, do no harm." Nonmaleficence is another guiding principle for medical professionals, particularly for those dealing with end-of-life caregiving decisions. These professionals may be inclined to provide care designed to extend the lives of dying patients, even at the cost of causing them physical or emotional harm. The principle of nonmaleficence encourages medical professionals to think carefully about these caregiving decisions and ensure that their benefits outweigh their harms.

In other cases, healthcare providers and patients may face treatments with unknown outcomes. Some treatments may carry the risk of debilitating consequences or even death. Medical professionals must ensure that their patients understand both the possible benefits and the risks associated with their medical treatment.

As many nurses know, disagreements may arise between healthcare professionals and their patients and patients' families. Different societies and cultures settle these types of conflicts differently. Practitioners of Western medicine usually prioritize the desires of mentally competent patients to make their own decisions concerning their healthcare – even when they believe those decisions to be detrimental. Sometimes, though, a practitioner may prioritize his or her own beneficence, or desire to do good, over the patient's treatment preference. For example, when patients refuse recommended treatments due to religious or cultural principles or when they seek unnecessary treatment due to hypochondria, a healthcare provider may, depending on the circumstances, overrule the patient's desire.

Types of Tort Law

A **tort** is an act or omission that causes an injury or harm to another and for which courts impose liability. There are three basic categories of torts: intentional torts, negligent torts, and strict liability torts.

Intentional Torts

An intentional tort is an act that causes harm to another and was committed intentionally by a tortfeasor (a person who commits a tort). In an intentional tort case, the plaintiff must prove that the defendant committed the harmful act intentionally and that a reasonable person would have known to a high degree of certainty that harm would result from the act.

Intentional torts include but are not limited to: assault, battery, false imprisonment, invasion of privacy, disclosure of information, defamation of character, misrepresentation, and infliction of mental distress.

A person who angrily punches another in the nose has committed an intentional tort. A person riding a bicycle who accidentally collides with a pedestrian has not committed an intentional tort – even if the collision injured the pedestrian – because the bicyclist did not intend to collide with the victim.

Most injuries caused by intentional torts are physical but not all. Libel, slander, and intentional infliction of emotional distress are all intentional torts.

A number of intentional torts may occur in a healthcare setting.

Assault: An intentional act by one person that creates an apprehension in another of an imminent harmful or offensive contact. The victim must be conscious and aware at the time of the assault.

Battery: An intentional, unpermitted act causing harmful or offensive contact with the "person" of another. A person may be a victim of battery even if the person was unaware of the battery at the time it occurred, such as when an unconscious client receives surgery without consent (either implied or expressed consent). Health professionals should realize that procedures ranging from bed baths to medication administration to surgical interventions involve touching.

Any adult client who is alert and oriented has the right to refuse any aspect of his or her recommended treatment. A client also has the right to choose which physician will perform a certain procedure. Legally, the issue of whether the client benefited from a healthcare professional's touching is less important than whether the professional had permission to touch the patient in a certain way in the first place.

False Imprisonment: The illegal confinement of one individual against his or her will by another individual in such a manner as to violate the confined individual's right to be free from restraint of movement.

False imprisonment does not necessarily require physical force. A person who is physically confined to a certain area, is aware of this confinement and has no perceptible means of escape may claim false imprisonment. Freedom of movement in all directions must be limited, but the victim does not have to resist in order to have a viable claim. Neither does the length of time of the confinement matter, except in relation to the injuries sustained by the victim.

Although most actions for false imprisonment involve psychiatric clients, patients who are detained until hospital bills are settled may also claim false imprisonment. However, no charges can be brought against a hospital or its employees for compelling a client with a contagious disease to remain in the hospital. Also, in many states, a mentally ill client may also be confined to a hospital if there is a danger that the client may harm himself or others.

When a patient insists on leaving a healthcare facility against the wishes of the medical staff, the patient should be informed of the risks posed by leaving against medical advice (AMA). Ideally, the patient will sign a release of responsibility form indicating that the patient is leaving against the advice of the staff. The patient's insistence on leaving should also be noted in the patient's medical records. Except where the client has a contagious disease or is mentally ill and could harm others, using force to restrain the patient may be grounds

for a legal action for both battery and false imprisonment.

Invasion of Privacy: The intrusion into the personal life of another, without just cause, which can give the person whose privacy has been invaded a right to bring a lawsuit for damages against the person or entity that intruded. Examples of invasion of privacy include workplace monitoring, data collection, and other means of disseminating private information.

Legally, the right to privacy is akin to a right to simply be left alone (and free from unwarranted publicity and exposure to public view). Negligent disregard for a patient's right to privacy, particularly when a patient is unconscious or immobile, is legally actionable. Hospitals, physicians and nurses may become liable for invasion of privacy if they divulge information from a medical record to parties who do not have a legal right to see that information.

Under certain circumstances, however, medical professionals may have the right to release information to the public against a patient's wishes. Medical professionals who are mandated reporters, for example, must report child abuse and elder abuse. Medical providers may also be mandated to report gunshot wounds or communicable diseases.

Disclosure of Information: Any release of information from one party to another. The **Health Insurance Portability and Accountability Act (HIPAA)** describes disclosure of information in the medical context.

Information in a patient's medical record is often detailed and personal. The client's bill of rights states that the client has the right to expect confidentiality in a relationship with a healthcare provider. Therefore, when a provider discusses a client's problems with any unauthorized third party, that provider has likely committed a disclosure of information violation.

Consequently, nurses must be careful about what they say about a client, to whom they say it, and where they say it – as conversations in certain locations are more likely to be overheard.

Defamation of Character: Defamation is an act of communication that causes someone to be shamed, ridiculed, held in contempt, or lowered in the estimation of the community. Defamation may cause a victim to lose employment or earnings or otherwise suffer a damaged reputation.

Libel and slander are subcategories of defamation. Libel is defamation that occurs in print, while slander is oral.

Though the First Amendment, which guarantees freedom of speech, provides some protection against defamation claims, defamation is typically a state law issue. Defamation claims usually require the plaintiff to prove actual damages, though some exceptions to this rule exist. These exceptions include:

1. Accusing someone of a crime.
2. Accusing someone of having a disease.
3. Using words that negatively affect a person's profession or business.

Several defenses to a defamation claim exist. Among them are:

1. Truth: When a person has said something that damages another person's reputation, the person making the statement will *not* be held liable for defamation if that person can show that the statement was true.
2. Statement of Opinion: The alleged defamation was merely a statement of opinion.
3. Absolute Privilege: This type of privilege protects members of lawmaking bodies from charges of defamation for statements made "on the floor" of their legislative bodies, whether the statements were made in good faith or not.
4. Qualified Privilege: This type of privilege is also known as immunity and applies to acts committed in the performance of a legal or moral duty and to acts properly exercised and free from malice.

Defamation may occur in a healthcare setting if a nurse tells a hospital visitor to be cautious because a particular patient has a communicable disease, and the patient does not actually have such a disease.

Misrepresentation: To misrepresent is to give an incorrect or misleading representation of something. Misrepresentation may occur when a healthcare professional misleads a client to prevent the discovery of a mistake in treatment. In a legal action for misrepresentation, the plaintiff must prove not only that a misrepresentation occurred but also that the patient relied on the misrepresentation to make a decision about treatment.

A hospital may be held liable for an employee's failure to disclose negligent acts to an injured party. For example, most courts have held that when a surgeon knows or has reason to believe that a foreign object was left in the client's body during an operation, it is the physician's duty to disclose these facts to his client. To perform a follow-up procedure to remove the foreign object without disclosing that the procedure is necessary because of the provider's initial error is an example of misrepresentation.

Infliction of Mental/Emotional Distress: A tort that allows individuals to recover for severe emotional distress caused by another individual who intentionally or recklessly inflicted the emotional distress by behaving in a way that was "extreme and outrageous."

Liability for infliction of mental/emotional distress may be based upon either intentional or negligent misconduct. Distinguishing between intention and negligence in a hospital setting is often difficult. Another major hurdle that plaintiffs face in infliction of mental/emotional distress actions is proving that the defendant's conduct was extreme or outrageous. Generally, claimants must prove that the conduct was so outrageous in character and extreme in degree that it violated the bounds of decency.

Negligent Torts

Although the terms negligence and malpractice are often used interchangeably, some differences exist.

Negligence is 1) the failure to do something that a reasonable person of ordinary prudence would do in a certain situation or 2) the doing of something that such a person would not do. Negligence may provide the basis for a lawsuit when there is a legal duty, such as the duty of a physician or nurse to provide reasonable care to patients, and when the negligence results in damage to the patient. Negligent torts are not intentional, and injury must occur as a result of the breach of the duty in question. An example of a negligent tort is a slip-and-fall injury caused by a homeowner's failure to clear the sidewalk of ice.

There are two categories of negligence: ordinary and gross. **Ordinary negligence** is the failure to do (or not do) what a reasonable and prudent person would do (or not do) under the same circumstances. **Gross negligence** is any voluntary, intentional, and conscious act or omission committed by an individual, with reckless disregard for the consequences – especially how they may affect another person's life or property. In a medical context, gross negligence is the reckless provision of healthcare that is clearly below the standards of accepted medical practice, either without regard for potential consequences or with willful and wanton disregard for the rights and/or well-being of those for whom the healthcare is being provided.

Gross negligence is considered more severe than ordinary negligence.

Malpractice is any professional misconduct, unreasonable lack of skill or fidelity in professional duties, or illegal or immoral conduct. Malpractice is a form of negligence that can be defined as 1) an omission or failure to do something that a reasonable person, guided by those ordinary considerations which ordinarily regulate human affairs, would do or 2) the doing of something that a reasonable and prudent person would not do.

Medical malpractice is the failure of a

medical professional to follow the accepted standards of practice of his or her profession, resulting in harm to a patient. Usually, proving failure to comply with accepted standards of medical practice requires the testimony of someone with expertise in the relevant area of medical practice. Some states have special evidentiary rules applicable to malpractice claims.

Malpractice involves four elements. A plaintiff in a malpractice action must prove each of the four elements to recover damages.

1. *Duty of care* is the easiest element to prove, especially for nurses who practice in a hospital setting. To prove the existence of a duty of care, one must only prove that a relationship between the medical professional and the patient existed at the time of the alleged injury. The presence of a patient on a unit proves the existence of such a relationship, even if the patient was assigned to a different nurse than the nurse accused of malpractice. For example, imagine a nurse walks past the room of a patient who is not "assigned" to him or her, and the patient asks the nurse for assistance. If the nurse assists the patient, a relationship is established. If the nurse does not assist the patient, and an injury occurs to the patient as a result of the lack of assistance, a relationship is still established. A patient always has the right to rely on each member of a facility's nursing staff to act in the patient's best interests. If a nurse is not appropriately qualified to care for a patient, then an appropriately trained medical professional should be found for the patient.
2. *Breach of duty* in the medical malpractice context is the failure to adhere to a professional medical standard of care. The "test" for proving breach of duty is the reasonably prudent person doctrine, which essentially asks whether the defendant acted reasonably under the circumstances. Breach of duty is usually proven to a jury via expert testimony.
3. *Causation* means that the breach of duty committed by the healthcare practitioner caused or contributed to causing harm to the patient.
4. For an award of damages, a plaintiff must show that measurable harm occurred. That is, the patient must experience an *injury*, also referred to as damages, as a result of the negligence. The term injury includes physical harm, mental anguish, and other invasions of the patient's rights. Nurses may be found negligent but not liable for damages if the patient/claimant experienced no injury.

Money damages usually take into account both economic loss and non-economic loss, such as pain and suffering.

A departure from a standard procedure alone is not enough to allow a patient to recover damages for medical malpractice. If there is no proximate cause – no foreseeable link between the negligent act and the injury – no liability exists.

Professional Liability

The Doctrine of Respondeat Superior

Latin for "let the master answer," respondeat superior is a legal doctrine that makes a party responsible (and liable) for the acts of their agents. Under this doctrine, a hospital may be party to a lawsuit brought about by the negligent act of an employee.

Nursing errors that lead to respondeat superior claims often include one of the following:

- *Failure to follow a physician's order*. This act of negligence often involves the failure of the nurse to check doctors' orders and verify that no treatment changes have been made before administering a medication to a patient.
- *Failure to report significant changes* in a client's condition.
- *Failure to take correct telephone orders*. Nurses who disagree with a physician's order should not carry out an obviously erroneous order. If the nurse believes the order is incorrect, the nurse should confirm the order with the physician to see if there may have been a miscommunication of some sort. However, if the confirmed order is still obviously erroneous, then the nurse should notify a supervisor immediately and, if necessary, proceed up the chain of command in the medical facility until an appropriate, safe treatment has been ordered for the patient.
- *Failure to report defective equipment*. A nurse may be held liable if he or she fails to report a defect in equipment that is not hidden from sight, is known to be defective, and is the cause of a patient's injury.
- *Failure to follow established standard procedure*. This may involve the failure to follow proper isolation techniques, which may lead to cross contamination. Such procedural issues are a growing concern.
- *Patient falls*. Many malpractice cases are filed because of patient falls. Consequently, every patient should be assessed for fall risk. When a patient is at risk for falls, the risk must be communicated to all staff. Nurses should then: (1) teach the patient, if the patient is not impaired, to call for assistance when getting out of bed or a chair; (2) use 1/2 side rails at the head of the patient's bed and positioning aids if applicable and (3) use bed or chair alarms for any patient who is impaired because of medications and/or dementia. The best way to prevent falls is ensure clear communication between staff and patient family members. Some healthcare providers use yellow or other specially colored non-slip socks to alert staff that a patient is a fall risk. Many also use a computer-driven assessment scale that provides a numerical fall-risk score. Other factors that healthcare providers should consider in relation to fall risk are a diagnosis of osteoporosis, deconditioning of the patient, medications that affect

Yellow or other specially colored non-slip socks to alert staff that a patient is a fall risk

Source: https://api.army.mil/e2/c/images/2016/03/31/429091/original.jpg

judgment or reduce reflexes, a history of falls and/or fractures, and advancing age.

- *Patient burns*. Burns may occur when a negligent practitioner inadvertently leaves heating equipment on a client's skin for too long but also when a patient, for example, spills hot coffee on himself while reaching for another item on his dinner tray. If the patient is alert, oriented, and otherwise self-sufficient, then the nursing staff usually has no need to worry about a negligence charge. However, if the client who hurts himself is very old, very young, or mentally and/or physically impaired, then a negligence action may arise. The nurse may be blamed for the harm that resulted because of the nurse's failure to recognize and protect against the patient's vulnerabilities.
- *Medication errors*. A nurse's unfamiliarity with a particular drug can result in negligent nursing. The nurse is ultimately responsible for understanding all recommendations regarding potential drug interactions and side effects before administering any type of drug.
- *Sponge and instrument counts*. Occasionally, a sponge or surgical instrument may be left inside a patient during surgery. Such negligence causes a patient severe pain and suffering.

Nursing Practice Act and Standard of Care

Each state has statutory law that regulates the practice of nursing, commonly called the Nursing Practice Act. This Act sets forth standards of care for the nursing industry. The Act lists the standard of care for each area of practice and usually includes examples of violations and sanctions for each standard. A state-appointed board consisting of nurses and members of the public typically assists with the writing of these rules (laws) and the formation of any necessary disciplinary panels.

The Nursing Practice Act also addresses issues related to nursing licensure, delegation, continuing education, chemical dependency abuse, and other standards related to nursing practice.

Standards of Care

A standard of care is defined as "those acts performed or omitted that an ordinary prudent person would have performed or omitted." The nursing standard of care is a measure against which the nurse's conduct is compared. Each state may define specific standards in its administrative rules. Examples of nursing standards are:

1. **Assessment**. The registered nurse is responsible for data collection and analysis that includes pertinent objective and subjective data regarding the health status of the client.
2. **Safety and Delegation**. The nurse is responsible for the safety of the client and for delegating selected nursing functions to others according to their education, credentials, and demonstrated competency. The nurse is responsible for supervising the persons to whom responsibilities are delegated.
3. **Communication**. Nurses shall communicate significant changes in the client's status to appropriate members of the healthcare team. This communication shall take place in a time period consistent with the client's need for care.
4. **Health Teaching**. The nurse assesses learning needs – including learning readiness for patients and families – develops plans to meet those learning needs, implements the teaching plan, and evaluates the outcome.

Each licensed nurse should be familiar with the laws of the state(s) in which he or she is licensed and be aware of the state's standard of care. A nurse may obtain a state's Nursing Practice Act online or by requesting a copy from the relevant state's regulatory agency.

Administering Medications with Care

Unfamiliarity with medications can result in acts of negligence in nursing. Nurses are ultimately responsible for understanding potential drug interactions, therapeutic benefits, and adverse side effects of any drug before administering that drug.

A good rule for nurses to follow is to always listen to the patient. Typically, patients are aware of changes in their medication. If a patient says that a change has been made or that a prescribed treatment is incorrect, the nurse should listen and clarify orders with the doctor who ordered the treatment. The fact that a physician ordered the medication does not excuse the nurse from responsibility for the patient's well-being.

Historically, the rule for the safe administration of medication in nursing care is to ***TRIPLE CHECK*** the medication. The nurse should check the medication when removing it from its shelf or cart, when dispensing the medication, and when replacing the medication. Over time, this has progressed to an ever-growing "rights" list.

A jury may assume that a nurse bears the ultimate responsibility for competency in administering appropriate medications, even if the assigned doctor has made a prescribing error.

- ☑ Right patient
- ☑ Right medication
- ☑ Right dose
- ☑ Right time
- ☑ Right route
- ☑ Right reason
- ☑ Right education
- ☑ Right documentation
- ☑ Right expiry
- ☑ Right assessment
- ☑ Right effects/response
- ☑ Right of patient to refuse

Example of a "rights of medication administration" checklist.

Informed Consent

Every human being of adult years and sound mind has a right to determine what shall be done with his or her own body. All types of medical treatment require a patient's consent. Informed consent in a medical ethics context refers to the idea that a person should be completely informed about and understand the potential benefits and risks associated with treatment options. Uninformed persons are at risk of making inappropriate or even dangerous decisions that do not reflect their own treatment wishes and may have a negative effect on their health status. Patients can decide to make their own medical decisions, or they can delegate decision-making responsibility to another person.

The elements of consent are as follows:

1. The consent must be voluntary.
2. The patient must be informed of all the information related to the proposed

treatment before the consent is given; and

3. The patient must be capable of giving consent.

Laws in different states designate different processes for obtaining informed consent when a patient is unconscious or incapacitated. Usually a person who is appointed by the patient or the patient's family will have decision-making authority.

In certain situations, though, medical treatment can be initiated without the patient's consent. This may happen when a patient is mentally incapable of understanding the treatment and of making a decision. In this case, the physician treating the incapable person may elect the treatment regimen, though the treatment must be for the benefit of the patient, and the physician must exercise good faith in providing treatment. Additionally, no consent is required in case of a medical emergency. For example, a surgeon can operate on a child without waiting for consent from the parents where it appears impracticable to timely secure consent.

When documenting a discussion of informed consent, the nature of the procedure along with its risks and benefits, reasonable alternatives with their risks and benefits, and an assessment of the patient's understanding of the discussion should be noted.

Medical Documentation

"If you didn't chart it, you didn't do it!" In a medical malpractice case, the patient's chart can be a nurse's lifesaver or executioner. The following guidelines should be kept in mind when documenting a patient's treatment:

1. A nurse should NOT make derogatory remarks about a patient's behavior in a patient's medical chart, even if the remarks are true. In a liability case, a plaintiff who shows a jury that a nurse described him or her as "rude, belligerent, abusive," etc. is likely to strengthen his or her case against the nurse. The plaintiff could even imply that an injurious act was committed because the nurse did not like the patient. Thus, instead of using negative terms to describe the patient, a nurse should focus on describing the behavior that the patient displayed that led the nurse to conclude that the patient was uncooperative or abusive. Then the jurors may draw their own conclusions about the patient's behavior.
2. A nurse should NOT include incident reports in a patient's chart, unless specifically required to do so by a hospital's policy manual. If a nurse does include such an incident in a patient's chart and that patient files a malpractice claim, the patient's attorney can introduce evidence of the incident report to the jury. Otherwise, the claimant's attorney may never even learn of the incident report – unless it is among documents specifically requested in a pre-trial "request for production."
3. A nurse should NOT attempt a cover-up, no matter how embarrassing an incident. Trial attorneys will most almost certainly discover the truth and reveal the incident in a court of law. Honest disclosure of all information will prevent such courtroom embarrassments.
4. A nurse should NOT use a patient's medical chart to blame other caregivers for providing or not providing care for a patient. These issues should be addressed at staff meetings or during one-on-one confrontations.
5. A nurse SHOULD make each entry in the chart neat and legible. The chart reflects the nurse's level of professionalism. Sloppy handwriting, poor grammar, and misspellings are unprofessional and can lead to poor client care when other staff members cannot read or understand chart entries. (Additionally, entries added to a patient's chart belatedly are often a red flag for legal professionals looking for evidence of a cover-up.)
6. A nurse SHOULD quote the client directly or paraphrase what he or she has said, especially when making chart entries for non-compliant clients. A nurse should use quotation marks when directly quoting the patient, as the patient's actual statements may provide a clearer picture of the situation to a jury. A chart noting that the patient stated, "Look here honey, I'm not going to take that medication because I just don't feel like it, so get out," is likely to be much more revealing than a chart that states that "the client was abusive and uncooperative for the length of the shift."

Staffing Issues

A hospital is legally liable for negligence if its staffing fails to meet the standards of care outlined in state licensure regulations. For example, certain departments may require specially trained nurses.

Though proper staffing is the hospital's responsibility, each nurse is responsible for proper and safe adherence to standards of care. This means that a nurse bears responsibility for ensuring that he or she is able to provide patients' treatments safely and as prescribed. If a nurse suspects that he or she will not be able to manage a certain assignment or treatment, the nurse should inform a supervisor immediately. If the response is inadequate and possibly negligent, or if a client's condition worsens and the nurse feels unable to handle the situation, the nurse should climb the chain of command to ensure safe, competent medical care. (The same course of action is recommended if weekends, holidays, or preferred shifts tend to cause staffing issues/shortages at a particular medical institution, and a nurse believes that such shortages will interfere with ensuring safe, appropriate medical care for all of his or her patients.)

Patient Teaching

If a nurse does not document "patient teaching," the nurse could lose a malpractice case. Documenting patient teaching and the client/family response to the teaching enables a nurse to truthfully claim that he or she provided a "reasonable standard of care" by providing instruction to the client and/or family.

The court will look for the following information to determine whether a nurse provided proper patient teaching:

1. Evidence that the nurse identified the client/family's learning needs and documented a teaching plan as part of the nursing care plan.
2. Evidence that the nurse evaluated the client/family's response to the teaching and their understanding.

Should a nurse refer a client to another healthcare professional for teaching – a dietitian, for example – the nurse must document the referral and include the subject of the referral. Some clients may not care to learn to care for their own needs and may tell the nurse that someone else will care for them after their discharge. A nurse's best defense in such a case is to document the client's exact words when he or she refuses teaching and then to arrange to meet with the caregiver and document his or her response to the teaching.

Importance of Communication

Legal and ethical conflicts in medicine are often related and can be traced to a lack of communication. Failures of communication between patients, families, caregivers, and healthcare providers can lead to disagreements and conflicts. These communication breakdowns can be resolved by opening comprehensive lines of communication.

One such form of communication is a **Do Not Resuscitate Order (DNR)**. A DNR is an advance directive that communicates the patient's preference to die rather than to be resuscitated if the patient experiences a medical issue, such as heart stoppage, that prevents the patient from communicating such a preference at the time of the incident. Laws regarding

DNRs vary by state, so nurses should be aware of the laws in their state.

Nurse Rights, Legal Defenses

Several legal defenses commonly arise in medical malpractice claims against nurses. These defenses include:

1. *Contributory negligence*. If the patient's own negligence contributed to or caused the injury, some jurisdictions may limit or even prohibit an award of damages. For example, if a patient fails to follow an instruction from a nurse about how to get out of bed and is subsequently injured while getting out of bed, the patient may be guilty of contributory negligence, and the damages stemming from the incident may be reduced or thrown out altogether.
2. Comparative negligence. Damages may be limited based on calculating the patient's negligence in comparison with the healthcare provider's negligence.
3. *No breach of duty*. Because different healthcare providers have different standards, not all providers owe the same duty of care to a patient. A plaintiff may struggle to prove that a particular provider breached the duty of care that that provider owed.
4. *Uncertain damages*. Damages must be calculable. If the harm incurred by the patient is too vague or uncertain, a court is unlikely to issue an award for damages.
5. *Intervening cause*. An event that occurs after an initial act of negligence and that causes additional injury or harm to the patient is referred to as an intervening cause. This defense may be used by a defendant whose negligent act against the plaintiff was followed by a second act that also caused harm to the plaintiff. Under this fact pattern, the defendant may argue that the person who committed the second injurious act bears responsibility for the entirety of the plaintiff's injury.
6. *Wrong party*. Proving negligence requires proof that a particular party caused the damages in question. If the harm cannot be traced to a specific party or parties, negligence is unlikely to be provable.
7. *Good Samaritan*. Good Samaritan laws shield persons who aid individuals in medical distress. If a healthcare professional provides care to someone in an emergency situation, that professional may be protected from liability if the care results in injury or death in a jurisdiction with a Good Samaritan law. (Most of the time, though, healthcare professionals are subject to the same duty of care in an emergency situation as would be expected of a reasonably competent healthcare provider in a similar situation.)
8. *Statute of limitations*. State laws place time limits on a plaintiff's ability to file a lawsuit for medical injury. In some states, the statute of limitations "period" begins when the injury is first discovered – not when it actually occurred.
9. *Assumption of risk*. A plaintiff may be denied recovery if the plaintiff was aware of a risk, voluntarily consented to the risk, and was subsequently injured.

HIPAA and Confidentiality

HIPAA is an acronym for the Health Insurance Portability and Accountability Act, which was passed by the federal government in 1996. The act outlines rules designed to ensure that all patient medical records, billing records, and accounts meet consistent standards for documentation, handling, and privacy. Any healthcare provider who electronically stores, processes, or transmits medical records, medical claims, remittances, or certifications must comply with all HIPAA regulations.

HIPAA requires that all patients be able to access their own medical records, correct errors in those records, and be informed and educated about how personal information is shared.

HIPAA regulations are separated into five categories:

1. **Privacy Rule**: The privacy rule establishes national standards to protect individual medical records and other personal health information for any health care institution that conducts healthcare transactions electronically. HIPAA's privacy rule requires appropriate safeguards to protect the privacy of personal health information and also sets limits and conditions on the use and disclosure of such information (which may be made available without patient authorization in certain circumstances). The privacy rule also gives patients the right to examine/review and obtain a copy of their health records and to request changes or corrections to those records.
2. **Security Rule**: The security rule defines national standards, methods, and procedures for protecting electronic personal health information that is created, used, or maintained by an entity covered by HIPAA. The HIPAA Security rule enforces security safeguards. Healthcare organizations adhere to these rules by assigning a HIPAA security compliance team and limiting physical access to electronic equipment and data.
3. **Transaction Rules**: Under HIPAA, code sets are required for administrative transactions related to diagnosis, medical procedures, and drugs.
4. **Unique Identifiers Rule**: Three identifiers help promote standardization, efficiency, and consistency under the HIPAA Administrative Simplification Regulation. These identifiers are the Standards Unique Employer Identifier, the National Provider Identifier, and the National Health Plan Identifier.
5. **Enforcement Rule**: The HITECH Act (Health Information Technology for Economic and Clinical Health) expanded the scope of the HIPAA Privacy and Security Rules and increased the penalties for HIPAA violations. The Act also provides Medicare and Medicaid money to hospitals and physicians for adopting electronic health records (EHR) and provides grants for the development of a health information exchange.

Strict adherence to HIPAA regulations helps healthcare providers protect patients and themselves. Failure to uphold HIPAA regulations may result in consequences for all providers involved in a patient's care.

Patient Rights

Medical professionals should prioritize understanding and accurately implement patient preferences in patient treatment plans. Accurate documentation and communication are of vital importance during all phases of a patient's medical treatment. The following relate to patient rights:

Autonomy: The principle of autonomy recognizes the rights of patients to make decisions about their own health care. Autonomy has become more important in recent years as medical standards of care have shifted to quality outcomes that are centered on patient desires rather than on the desires of medical professionals.

Advance Directives: Advance directives are written instructions regarding a patient's medical care and preferences. The patient's family, physician, and caregivers will consult the advance directive if a patient is unable to make his or her own healthcare decisions. Advance directives include the following:

Living Will: A written legal document that specifies the types of medical treatment and life-sustaining measures that the patient either requests or refuses – such as mechan-

ical breathing, tube feeding or nutritional sustenance, or resuscitation. In some states, living wills may be called healthcare declarations or healthcare directives.

Do Not Resuscitate (DNR) Order: A DNR is an advance directive that specifies that the patient prefers not to be resuscitated if he or she experiences a medical issue, such as a catastrophic heart attack, that prevents him or her from communicating the preference at the time of the incident.

Medical or Healthcare Power of Attorney (POA): The medical POA is a legal document that designates an individual – referred to as a healthcare agent or proxy – to make a medical decision for a patient in the event that the patient is unable to make his or her own decision.

Because a living will cannot cover every possible situation, a patient may also want a medical POA to designate someone as the patient's healthcare agent. Such an agent should be guided by the patient's living will but also has the authority to interpret the patient's wishes in any situation that is not described in the living will.

A medical POA may be especially necessary if the patient's family is divided or opposed to the patient's own healthcare wishes. A medical POA does not authorize the designated individual to make financial transactions for the patient.

Advance Care Planning

Advance care planning is a process that supports patients at any stage of health in planning their goals and preferences regarding future medical care. Advance care planning is especially common when a patient is likely to die within twelve months, is aged 55 or older, or has a chronic illness and has lately been experiencing symptoms that result in hospitalizations.

Objectives for advanced care planning include the following:

- To assist the practitioner in engaging the patient in a discussion of goals, preferences, and priorities regarding the patient's care at different stages of life.
- To recommend tools and interventions to address advance care planning across the patient population.
- To design concise guidelines that are focused on key components of advance care planning.
- To achieve significant, measurable improvements in advanced care planning through the development and implementation of common, evidence-based clinical practice guidelines.

Advance Care Planning Practices

Healthcare providers, patients, and patient family members involved in advanced care planning should become familiar with the following topics:

- The advance care planning process
- The patient's goals and preferences (which should be revised annually)
- The value of making one's wishes known, both verbally and in writing
- The importance of early conversations with family in a non-crisis situation
- The value of identifying and consenting to the appointment of a surrogate decision-maker
- The value of cultural sensitivity
- For appropriate patients, the value of having a Physician's Orders for Life-Sustaining Treatment (POLST)

Any individual – including physicians, nurses, social workers, clergy, and trained facilitators – can start a conversation about advance care planning. However, these individuals should seek training to handle the sensitive nature of such discussions. As a patient's health deteriorates, any trained facilitator should have experience with and knowledge of the patient's specific condition (e.g. congestive heart failure, end-stage renal disease, cancer, etc.)

Completion of an Advance Directive

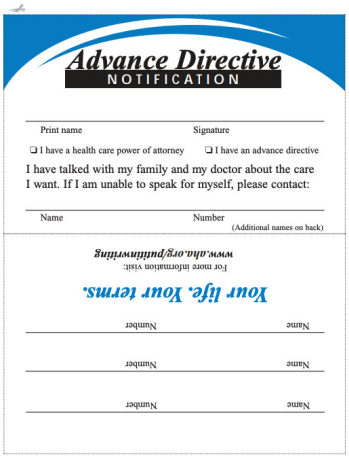
An advance directive is part of an advance care plan. Best practices for advance directives involve the following:

- Review the patient's goals and preferences for end-of-life care and advance directives at least annually
- Work with the patient to update his/her advance directives, specifically addressing potential scenarios
- Any significant diagnosis or change in prognosis (e.g. metastatic cancer, oxygen-dependent chronic obstructive pulmonary disease, progressive heart failure) should prompt a new discussion about advance care directives
- If a patient has a limited life expectancy, specific requests for end-of-life care should be discussed

Record-Keeping

Healthcare providers engaged in advance care planning should do the following:

- Place a copy of any advance directive or other document specifying the patient's goals and preferences for end-of-life care in the patient's record
- Share such documentation throughout the health system as appropriate, including with nursing homes, emergency medical services (EMS) companies, etc.
- Help the patient identify a surrogate who will make decisions on the patient's behalf if the patient loses decision-making capacity
- Identify the patient's values, perspectives on end-of-life care, and general wishes for end-of-life care
- Encourage the patient to discuss these wishes with the surrogate, family members, spiritual counselors, and others.



Example of patient Advanced Directive wallet card

Source: https://www.aha.org/system/files/2018-01/piiw-walletcard.pdf

Medical Record Review Job Summaries

Certified Legal Nurse Consultant (CLNC®): Registered nurse who uses nursing experience/medical expertise in combination with specialized legal training to assist attorneys in researching and developing legal cases involving medical issues.

Such nurses must pass a comprehensive exam to achieve certification. A comprehensive medical record review performed by a CLNC® is designed to do the following:

- Identify factors that caused or contributed to the injury
- Identify and recommend potential defendants
- Identify and review relevant medical records, hospital policies and procedures, and other essential documents and tangible items
- Assist the assigned attorney in interviewing plaintiff and defense clients, key witnesses, and experts
- Develop specialized written reports, chronological timelines, and summaries, as requested by the case attorney
- Thoroughly assess and organize all

medical records, identifying missing and/or irrelevant information
- Look for inaccuracies or inconsistencies in the documentation of a patient's condition
- Determine if staffing issues occurred, particularly if weekends or holidays are at issue in the case.
- Address specific missing records and direct the attorney to request records when he or she makes a "request for production" from the defense or plaintiff
- Employ specialized training to assess the relevant medical records for evidence of tampering
- Review all relevant patient medical records for evidence of pre-existing conditions
- Review/analyze medical records for evidence of any deviations from the standard of care or any other institutional policies or procedures
- Provide appropriate literature explaining treatments and standards of care to the attorney assigned to the case and help the attorney integrate relevant information
- Locate medical experts to provide testimony (The CLNC® has specialized training and may also serve as a consulting expert for the case.)

The CLNC® certification is acquired through the Vickie Milazzo Institute.

Legal Nurse Consultant Certified (LNCC®): A registered nurse who passes the LNCC® examination and has 1) current licensure, 2) a minimum of five years of experience as a registered nurse, and 3) evidence of 2000 hours of legal nurse consulting experience within the past five years. The LNCC® credential is the only credential recognized by the Accreditation Board for Specialty Nursing Certification (ABSNC), the only accrediting body specifically for nursing. Registered nurses need not complete a specific course before taking the LNCC® exam.

Maintaining an LNCC® credential requires passing the LNCC® exam every five years and continuing to meet the eligibility criteria. The credential reflects overall competency and a nurse's broader knowledge of legal concepts in a wide range of medical-legal arenas.

Forensic Document Examiners: Specially trained legal professionals who utilize specialized equipment to detect fraud and tampering in medical documents.

Forensic document examiners may identify different paper or ink, indentations in paper, and handwriting inconsistencies to make determinations about chronological inconsistencies and tampering in a medical record. Medical document tampering that can be proven in a court of law may dramatically swing the jury's opinion in favor of a plaintiff.

Some forensic document examiners may also be trained in computer forensics or digital forensic science.

Computer Forensic Document Examiners: Forensic specialists who assist legal professionals with complex and sensitive litigation matters involving electronic evidence.

These specialists follow digital trails to detect fraud, financial tampering, computer crimes, employee misconduct, and other wrongdoing. They help ensure that no digital evidence is overlooked in a medical malpractice case and assist at any stage of a forensic investigation or litigation – regardless of the number or location of computers involved.

Data Preservation: Computer forensic experts provide cost-effective methods for preserving electronic data. Legal proceedings involve a tremendous volume of complex data. By analyzing digital clues, computer forensic experts can determine whether some of this data was manipulated – on purpose or by accident – or even deleted. Such experts should employ forensically sound, best-practice methodologies to gather electronic data for forensic analysis or for discovery in a legal proceeding.

Any expert who provides testimony in a proceeding involving medical malpractice must have the necessary experience and credentials to credibly serve as an expert witness.

To protect themselves and their institutions, nurses should document patient treatment accurately, honestly, and thoroughly, and remember that professional experts will be able to analyze medical documentation for evidence of tampering.

Discovery

Discovery is a vital part of pre-trial litigation procedure. Discovery allows parties to obtain evidence from other parties involved in the legal proceeding by means of discovery tools such as interrogatories, requests for production of documents, requests for admission, and depositions.

The evidence obtained during discovery enables attorneys to plan their trial strategies or even negotiate a settlement before the trial begins.

Types of Discovery

Interrogatories

Interrogatories are questions drafted by one party to a legal proceeding to elicit specific information from another party to the proceeding. According to the Federal Rules of Civil Procedure, each interrogatory should be limited to a "one question/one fact" format. This means that each interrogatory can ask for only one fact. The use of compound questions is generally not allowed. An example interrogatory is the following: Was the MRI machine owned by XYZ Hospital functioning properly on January 26, 2020, when it was used to perform a scan Mr. Smith?

Interrogatories typically work best for obtaining background information related to the legal proceeding.

Requests for Admissions

A request for admission is a discovery device that allows one party in a legal proceeding to **request** that another party admit or deny the truth of a statement. Responses to a request for admission are given under oath. If the respondent admits that a statement is true, the statement is considered true for all purposes of the related litigation. Once a statement is confirmed as true, the parties no longer have to litigate that facts of the statement – which can make a trial shorter and more efficient.

Requests for admissions typically involve a simple declaration, which the responding party can admit or deny. (For example, "Admit or deny that the medical expenses listed in Exhibit 2 are related to treatment for injuries sustained by the plaintiff on January 26, 2020, when he underwent an MRI scan at XYZ Hospital.") A party's responses to requests for admission become part of the legal record and are held as true unless the judge withdraws the responses or allows the party to amend them.

Request for Production/Document Requests

A request for production, or document request, is a discovery device used to gather documents or other items relevant to the legal proceeding. A request for production typically includes multiple, numbered requests for specific documents. The language of each request is broad so that the responding party will produce as many documents as possible. For example, a defense attorney in a fraud case may request all documents related to financial transactions during a certain period.

In fact, requests for production are often accompanied by a "subpoena duces tecum," which indicates that the respondent should produce all documents related to the proceeding.

Respondents may refuse to produce certain documents if they consider a request impossible (such as when the party does not have access to the requested documents) or too broad (when the effort required to obtain the documents is far greater than the value of the documents to the legal proceeding). Respondents may also refuse to produce documents if those documents are subject to privilege (such as the privilege between spouses).

Depositions

A deposition is a tool employed during pre-trial discovery when an attorney for one

party to a lawsuit demands the sworn testimony of an opposing party, witness, or expert who will be called by the opposition to testify during the succeeding trial.

The Federal Rules of Civil Procedure typically allow a maximum of seven hours of total deposition time per deponent. Notice of a deposition should be provided in advance and scheduled at the convenience of all parties.

Importance of a Lawyer during the Discovery Process

Mistakes in the discovery process can lead to court fines, sanctions, and/or a failure to obtain information important to developing an appropriate legal strategy for the case. Failure to respond to discovery requests may result in all admissions being answered in the affirmative or in having future discovery requests limited. Utilizing an experienced lawyer during the discovery process will ensure that discovery is conducted in an efficient and appropriate way. An attorney will also protect clients by directing them to answer only relevant and legally-allowed questions and ensuring that no privileged material is turned over to an opposing party.

Alternative Dispute Resolution (ADR)

A legal process used to resolve disputes outside of the courtroom, alternative dispute resolution (ADR) includes negotiation, conciliation, mediation, and arbitration. Benefits of ADR include reduced costs, faster resolution of disputes, flexibility, and privacy.

In a **negotiation**, participation is voluntary, and no third party facilitates the resolution process or imposes a resolution.

In a **mediation**, a third-party "mediator" facilitates the resolution process (and may even suggest a resolution, known as a "mediator's proposal"). The mediator encourages communication between the parties but does not decide the case. If the parties do not reach an agreement, they may proceed to trial.

In a **conciliation**, a third party, who is usually but not always neutral, attempts to help the parties find a way to settle their dispute. The third party is not able to impose a binding resolution if another of the parties does not agree.

In an **arbitration**, participation is usually voluntary, and third party acts as an arbitrator who makes a determination that binds all parties. Arbitrators should be impartial and possess a degree of expertise in the subject matter of the dispute.

Less common types of alternative dispute resolution include the following:

- Case evaluation: A non-binding process – meaning that the decision can be ignored or dismissed unless all parties agree to it – in which parties present the facts of the matter to a neutral case evaluator who then advises the parties on the strengths and weaknesses of their positions and assesses how the dispute is likely to be decided by a jury.
- Early neutral evaluation: A process that takes place soon after a case has been filed in which the case is referred to an expert who is asked to provide a neutral evaluation of the dispute. The evaluation of the expert can assist the parties in assessing the strength of their positions and may enable a settlement.
- Neutral fact-finding: A process in which a neutral third party, selected either by the disputing parties or by the court, investigates an issue and reports or testifies about the issue in court. This process is especially helpful for resolving complex scientific and factual disputes.
- Ombudsman: Legal representative, often appointed by an organization or government entity to investigate complaints made about the organization or entity.

Basic Summary of the Litigation Process

The plaintiff, or injured party, usually with the aid of an attorney, files a legal complaint that serves as the first notification of a civil action. The complaint must state the cause of the legal action and ask for damages or relief from a defendant who is alleged to have caused the injury. The complaint must also outline the legal and factual reasons supporting the plaintiff's belief that the defendant is responsible for the plaintiff's injury.

After the complaint is filed, the clerk of the court issues a summons to the defendant. Either the sheriff or a licensed server formally delivers the summons to the defendant. The summons includes notice of the lawsuit and a copy of the complaint.

The defendant or the defendant's lawyer is required to file a document referred to as an "answer". The answer addresses the facts and the legal claims contained in the complaint and communicates to the court which facts the defendant agrees with and/or disagrees with.

Early Stage Motions

Once the complaint and answer have been filed with the court, attorneys for both sides consider proper motions, which are requests to the court to issue orders. The defense may file a *motion to dismiss*, stating the complaint does not contain facts that support defendant liability. The plaintiff may file a *motion for summary judgment*, essentially asking the judge to determine that the facts that support defendant liability to the plaintiff are not in dispute. If a judge grants either of these motions, the lawsuit may effectively end. If no motion is granted, the lawsuit will proceed. Mutually consented legal settlements are permitted throughout the trial process (and, in fact, most cases end in negotiated settlement.)

Discovery and Pre-trial

Discovery is an important part of all pre-trial preparations. During discovery, the parties exchange information and documents that relate to the plaintiff's complaint and the defendant's answer.

As discovery proceeds, the parties have pre-trial conferences with the judge. The parties advise the judge of their progress and discuss potential settlements. The judge aids in negotiations and sets schedules for the completion of discovery.

During the pre-trial phase, lawyers may request that the judge bar specific evidence, witnesses, or arguments as legally inappropriate. The judge will either grant or deny each of these requests. If the parties fail to reach a settlement during this phase, they will proceed to trial.

Trial and Judgment

After the pre-trial phase, the parties present evidence to a judge in a bench trial or to a group of citizens in a jury trial.

Jury selection for a jury trial begins when potential jurors are summoned by the court. These potential jurors are then questioned by the judge and the attorneys for the plaintiff and the defendant in a procedure called voir dire, which means "to tell the truth." Each party's attorney is entitled to disqualify potential jurors who should not participate in a trial because of issues such as pre-existing bias toward one of the parties. The attorney for each party is also entitled to six peremptory strikes, meaning that the attorney may dismiss a potential juror from the jury pool for any reason (except race, ethnicity, or gender).

After the jury is selected, the trial begins. The plaintiff presents evidence first, and then the defendant has the opportunity to present a defense. The plaintiff has the burden of proving his or her case by a "preponderance of the evidence." This legal standard requires that the jury find that it is more likely than not, that the claims of the plaintiff are true. The preponderance of the evidence standard is much lower than the standard involved in criminal trials – the "beyond a reasonable doubt" standard.

Both sides present their cases, and then the jury (or the judge, in the case of a bench trial) makes a determination about the plaintiff's

claim(s). If the jury or judge finds against the plaintiff, the judge enters a judgment in favor of the defendant and releases the defendant from liability for the plaintiff's claims.

If the jury or judge finds in favor of the plaintiff, then the defendant is liable to the plaintiff for damages. The judge then enters a judgment in favor of the plaintiff and orders the defendant to pay damages. This order terminates the trial process.

Appeals

The losing party may file an appeal if the party believes the outcome was legally incorrect. An appellate court will then dismiss the appeal, hear and affirm the judgment, reverse the judgment, or send the case back to the trial court with instructions to correct legal errors. Lawsuits may move between the appellate court and trial court multiple times before final resolution.

Enforcement

When a judgment becomes final in favor of the defendant, the plaintiff may not file another lawsuit based on the same facts. If the court's ruling favors the plaintiff, the defendant must adhere to all the terms of the judgment. If the defendant does not adhere to the judgment, he or she will be found "in contempt of court" and may face penalties. A plaintiff may seek to enforce a financial judgment against a defendant by obtaining a court order to seize the defendant's property in order to satisfy the defendant's debts.

In Conclusion

This course was written to help nurses and healthcare providers better understand patient and provider rights and responsibilities and the complex interactions between the medical and legal industries.

All healthcare professionals should be aware of the way healthcare interacts with the law. Key concepts include negligence, consent, accountability, confidentiality, and liability. Knowledge and understanding of these concepts can help healthcare providers protect patients from injury and themselves from litigation.

References & Suggested Readings

American Hospital Association "Put It in Writing" https://www.aha.org//2017-12-11-put-it-writing Last accessed January 21, 2020

ANA Standards of Excellence® https://www.nursingworld.org/ana/about-ana/standards/ Last accessed January 21, 2020

Cerminara KL, Meisel A, Hastings Center Bioethics Briefings for Journalists, Policymakers, and Educators, End of Life Care https://www.thehastingscenter.org/briefingbook/end-of-life-care/ Last accessed January 22, 2020

Giordano, K. "Examining Nursing Malpractice, A Defense Attorney's Prospective" Critical Care Nurse April 2003, 23(2) http://accounts.smccd.edu/felixf/NURS232/ExaminingNursingmalpracticeAdefenseAttorney Perspective.pdf Last accessed January 22, 2020

HIPAA: Health Information Privacy, U.S. Department of Health and Human Services: "HIPAA Regulations." http://www.hhs.gov/ocr/privacy/ Last accessed: January 22, 2020

Kennedy MS. "Editorial: Protectors in Need of Protection." AJN, American Journal of Nursing, Jun 2011, 111(6) p7 https://www.nursingcenter.com/journalarticle?Article_ID=1172860&Journal_ID=54030&Issue_ID=1172859> Last accessed: January 22, 2020

Legal Eagle Eye Newsletter: "EMTALA: Nurses Screening Met Hospital's Legal Responsibilities, Lawsuit Dismissed, October 2012, 20(10) http://www.nursinglaw.com/EMTALA-nurse-hospital-legal.pdf Last accessed January 22, 2020

Legal Definitions and & Legal Terms Defined, Free Legal Dictionary https://definitions.uslegal.com/ Last accessed January 21, 2020

Legal Information Institute [LII]. "Get the Law." https://www.law.cornell.edu/lii/get_the_law Last accessed January 22, 2020

McGowan CM. "Legal Aspects of End-of-Life Care." Critical Care Nurse, Oct 2011, 31(5) p64-9 http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.989.9666&rep=rep1&type=pdf Last accessed January 22, 2020

National Institutes of Health Advance Care Planning Healthcare Directives https://www.nia.nih.gov/health/advance-care-planning-healthcare-directives Last accessed January 22, 2020

Nolo's Free Dictionary of Law Terms and Legal Definitions https://www.nolo.com/dictionary Last accessed January 21, 2020

Tanga HY, Nurse drug diversion and nursing leader's responsibilities: legal, regulatory, ethical, humanistic, and practical considerations. JONA'S Healthcare Law Ethics, and Regulation, Jan-Mar 2011, 13(1) p13-6

Tovino, Stacey A., "Conflicts of Interest in Medicine, Research, and Law: A Comparison" (2013). Scholarly Works. Paper 752. http://scholars.law.unlv.edu/facpub/752 Last accessed January 21, 2020

Legal Terminology:

Arbitration: An alternative dispute resolution method with one or more persons hearing a dispute and rendering a binding decision. An agreement to arbitrate disputes can be made before or after a specific dispute arises. Since the parties can agree to the rules of arbitration (e.g., selecting qualified arbitrators with knowledge of the issues), they can save costs as compared to litigation.

Advance Directives: A legal document that takes effect if one cannot make decisions due to illness or incapacity. Different types of advance directives exist. Some, such a living will, give instructions on which measures can be used to prolong life. Others simply name a surrogate decision-maker for medical questions.

Allegation: A claim of fact not yet proven to be true.

Assault: The definition of assault varies by jurisdiction, but is generally defined as intentionally putting another person in reasonable apprehension of an imminent harmful or offensive contact. Physical injury is not required.

Battery: In criminal law, battery is a physical act that results in harmful or offensive contact with another person without that person's consent. In tort law, battery is the intentional causation of harmful or offensive contact with another's person without that person's consent.

Common Law: Law that is derived from judicial decisions instead of from statutes.

Consent: When a person voluntarily and willfully agrees to undertake an action that another person suggests. The consenting person must possess sufficient mental capacity.

Decedent: Deceased person.

Defamation: A statement that injures a third party's reputation. The tort of defamation includes both libel (written statements) and slander (spoken statements).

Defendant: The party sued in a civil lawsuit or the party charged with a crime in a criminal

prosecution.

Deposition: A witness's sworn out-of-court testimony. It is used to gather information as part of the discovery process and, in limited circumstances, may be used at trial.

Discovery: The entire efforts of a party to a lawsuit and his/her/its attorneys to obtain information before trial through demands for production of documents, depositions of parties and potential witnesses, written interrogatories (questions and answers written under oath), written requests for admissions of fact, examination of the scene and the petitions and motions employed to enforce discovery rights.

Harm or Injury: Harm done to a person by the acts or omissions of another. Injury may be physical or may involve damage to reputation, loss of a legal right, or breach of a contract.

HIPAA (American Health Insurance Portability and Accountability Act): A federal statute that allows healthcare coverage on an immediate and continuing basis for employees who change employers. HIPAA also provides a set of rules to be followed by doctors, hospitals, and all health care providers. These rules help ensure that all patient medical records, medical billing, and patient accounts meet consistent documentation, handling, and privacy standards. Any healthcare provider that electronically stores, processes, or transmits medical records, medical claims, remittances, or certifications must comply with all HIPAA regulations.

Interrogatories: A set or series of written questions directed to a party in a lawsuit requiring written responses.

Liability: An obligation one has incurred or might incur through any act or failure to act.

Living Will: A type of advance directive that lists a person's wishes about medical treatment in the event that the person cannot give informed consent or refusal. A living will commonly include specific directives on which life-sustaining measures can and cannot be used in cases of extreme disability without reasonable expectation of recovery.

Malpractice: The tort committed when a professional fails to properly execute their duty to a client. The duty of a professional to a client is generally defined as the duty to follow generally accepted professional standards. Of course, the other elements of a tort (breach, proximate cause, actual cause and damages) must also be shown. Malpractice suits are most common against doctors and lawyers.

Mediation: An alternative dispute resolution method with a neutral person helping the parties find a solution to their dispute. Since mediation is less rigid than both litigation and arbitration, it allows for creative techniques that would not be acceptable in other settings.

Medical Power of Attorney (POA): A power of attorney is an agreement between two parties: a principal and an attorney in fact. Some jurisdictions allow special powers of attorney for certain situations. Most often, special powers of attorney are used to appoint people to make medical decisions on the principal's behalf when the principal is incapacitated.

Negligence: A failure to behave with the level of care that someone of ordinary prudence would have exercised under the same circumstances. The behavior usually consists of actions, but can also consist of omissions when there is some duty to act (e.g., a duty to help victims of one's previous conduct).

Negotiation: A give-and-take discussion that attempts to reach an agreement or settle a dispute.

Plaintiff: A person who brings a case against another in a court of law.

Prima Facie: Latin for "at first sight." Prima facie may be used as an adjective meaning "sufficient to establish a fact or raise a presumption unless disproved or rebutted."

Privileged Communication: In the law of evidence, certain subject matters are privileged, and can not be inquired into in any way. Such privileged information is not subject to disclosure or discovery and cannot be asked about in testimony.

Proximate: An actual cause that is also legally sufficient to support liability. Although many actual causes can exist for an injury (e.g., a pregnancy that led to the defendant's birth), the law does not attach liability to all the actors responsible for those causes. The likelihood of calling something a proximate cause increases as the cause becomes more direct and more necessary for the injury to occur.

Request for admission: A discovery device that allows one party in a legal proceeding to request that another party admit or deny the truth of a statement.

Request for production: A request to another party in a lawsuit to produce certain documents or tangible items.

Res Ipsa Loquitur: Latin for "the thing speaks for itself." A doctrine of law applicable to cases wherein the defendant had exclusive control of the thing that caused the harm and where the harm ordinarily could not have occurred without negligent conduct.

Respondeat Superior: "Let the master answer." The employer is responsible for the legal consequences of the acts of the servant or employee while acting within the scope of employment. (Don't be fooled by this one; the hospital can then turn around and sue the employee for damages.)

Standard of Care: The degree of care (watchfulness, attention, caution, and prudence) that a reasonable person should exercise under the circumstances. If a person does not meet the standard of care, he or she may be liable to a third party for negligence.

Stare Decisis: Latin for "let the decision stand." The legal principle indicating that courts should apply previous decisions to subsequent cases involving similar facts and questions.

Statute of Limitations: Any law that bars claims after a certain period of time passes after an injury. The period of time varies depending on the jurisdiction and the type of claim.

Subpoena: Requires the individual to appear at a designated time and place to give testimony.

Subpoena duces tecum: A type of subpoena that requires the witness to produce a document or documents pertinent to a proceeding.

Suit: Court proceeding in which one party seeks damages or other legal remedies from another.

Tort: An act or omission that gives rise to injury or harm to another and amounts to a civil wrong for which courts impose liability. In the context of torts, "injury" describes the invasion of any legal right, whereas "harm" describes a loss or detriment in fact that an individual suffers.

Tort-feasor: One who commits a tort.

Voir dire: A preliminary examination of a witness or a juror by a judge or counsel.