

Chapter 5

Legal and Legislative Issues

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Purpose of Law and Legislation

- The **primary purpose** is to **protect** the patient and the nurse.
- Laws and legislation define the **scope of acceptable practice** and protect individual rights.
- Nurses who are aware of their rights and duties in legal matters are better able to protect themselves against liability or loss of professional licensure.

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Sources of Law

TABLE 5.1 SOURCES OF LAW

Origin of Law	Use	Impact on Nursing Practice
The Constitution	The highest law in the United States; interpreted by the U.S. Supreme Court; gives authority to other three sources of the law	Little direct involvement in the area of malpractice
Statutes	Also called <i>statutory law</i> or <i>legislative law</i> ; laws that are passed by the state or federal legislators and that must be signed by the president or governor	Before 1970s, very few state or federal laws dealt with malpractice. Since the malpractice crisis, many statutes affect malpractice.
Administrative agencies	The rules and regulations established by appointed agencies of the executive branch of the government (governor or president)	Some of these agencies, such as the National Labor Relations Board and health and safety boards, can affect nursing practice.
Court decisions	Also called <i>tort law</i> ; this is court made law and the courts interpret the statutes and set precedents; in the United States, there are two levels of court: trial court and appellate court.	Most malpractice law are addressed by the courts.

Question

Tell whether the following statement is true or false:
Nurse practice acts are examples of statutes.

- A. True
- B. False

Answer

A. True

Rationale:

- The 51 *Nurse Practice Acts* representing the 50 states and the District of Columbia are **examples of statutes**.
- These *Nurse Practice Acts* define and limit the **practice of nursing**, thereby stating what constitutes authorized practice as well as what exceeds the scope of authority

Types of Laws and Courts

Type	Burden of Proof Required for Guilty Verdict	Likely Consequences of a Guilty Verdict
Criminal	Beyond a reasonable doubt	Incarceration, probation, and fines
Civil	Based on a preponderance of the evidence	Monetary damages
Administrative	Clear and convincing standard	Suspension or loss of licensure

Question

A nurse is charged with administering a fatal dose of morphine to a patient on hospice. In which type of court would this nurse be charged?

- A. Civil
- B. Criminal
- C. Administrative
- D. None of the above

Answer

B. Criminal

Rationale:

- Nurses found guilty of **intentionally** administering fatal doses of drugs to patients would be charged in a criminal court.
- In civil cases, one individual sues another for money to compensate for a perceived loss.
- In administrative cases, an individual is sued by a state or federal governmental agency assigned the responsibility of implementing governmental programs.

Legal Doctrines Guiding Courts in Decision Making

- **Stare decisis** (let the decision stand): uses precedents as a decision-making guide
- **Res judicata** (a thing or matter settled by judgment): applies only when a competent court has decided a legal dispute and when no further appeals are possible
- **Respondet superior** (the master is responsible for the acts of his servants): an employer should be held legally liable for the conduct of employees whose actions he or she has a right to direct or control

Two Types of Negligence

- **Ordinary negligence**
 - is the failure to act as a reasonably prudent person.
 - It is the failure to exercise such care as the great mass of mankind ordinarily exercises under the same or similar circumstances.
 - Ordinary negligence is the want of exercise of ordinary care.
- **Professional negligence** (also called **malpractice**)

Nurses Are at Increased **Legal Liability** in the 21st Century Owing to the Following

- They have more authority and independence in decision making.
- They have increased legal accountability for decision making.
- They are performing more actions that used to be in the realm of medical practice.
- They are making more money.
- More nurses are carrying malpractice insurance.

Question

Which of the following accurately describes why nurses are at increased liability for malpractice suits?

- A. Their realm of responsibility has decreased.
- B. Fewer nurses have liability insurance.
- C. Nurses are making more money.
- D. Nurses currently have less independence in decision making.

Answer

C. Nurses are making more money.

Rationale:

- Higher salaries have corresponded to increased liability in the nursing profession.

Malpractice Insurance Dilemma

Nurses need **malpractice insurance** *because* of their **expanded roles**,

but they also incur a greater likelihood of being sued if they have malpractice insurance *because* **injured parties will always seek damages from as many individuals with financial resources as possible.**

Elements of Malpractice

- **Negligence:** the **omission** to do something that a reasonable person, guided by the considerations that ordinarily regulate human affairs, would do—or as doing something that a reasonable and prudent person would not do
- **Malpractice:** the **failure** of a person with professional training **to act** in a reasonable and **prudent manner**—also called **professional negligence**

Five Components Necessary for Professional Negligence to Occur

1. A standard of care is in place (minimal level of expertise delivered to a patient).
2. There is a failure to meet the standard of care (breach of duty).
3. Foreseeability of harm must exist (ignorance is not an excuse).
4. There must be a provable correlation between care and harm.
5. Actual patient injury must occur.

Being Sued for Malpractice

- “Just following physician orders” is *not* a defense for malpractice.
- Nurses have an **independent responsibility** to take appropriate steps to **safeguard patients**.

Question

Tell whether the following statement is true or false:

Following a physician’s order is a valid excuse in a malpractice case.

- A. True
- B. False

Answer

B. False

Rationale:

- Nurses have a **responsibility to safeguard** their patients, independent of physician's orders.

Reducing the Risk of Malpractice Claims

- Practice **within the scope** of the nurse practice act.
- Observe agency **policies and procedures**.
- Model practice after established standards by using **evidence-based practice**.
- Always put patient's **rights and welfare** first.
- Be aware of relevant **law** and **legal doctrines**.
- Practice within the area of **individual competence** and **upgrade** technical skills consistently.

Incident Reports (Adverse Event Forms)

- Records of unusual or unexpected incidents that occur in the course of a client's treatment
- Generally considered confidential communications and cannot be subpoenaed by clients or used as evidence in their lawsuits in most states
- A copy of an incident report should not be left in the chart, and no entry should be made in the patient's record about the existence of an incident report.

Intentional Torts

- Assault and battery
 - Assault and battery exists in both the tort law context and the criminal law context. ... In an act of physical violence, assault refers to the act which causes the victim to apprehend imminent physical harm, while battery refers to the actual act causing the physical harm.
- False imprisonment
 - In healthcare, **false imprisonment** happens when a patient is held involuntarily in a hospital, **nursing** home, other health facility or institution, or even in an ambulance. A critical element of the claim is consciousness of confinement. In other words, the person held had to reasonably believe they could not leave.
- Invasion of privacy
- Defamation of character - derogatory and/or false statement regarding another
 - Slander (spoken)
 - Libel (written)

Question

Which is *not* an intentional tort?

- A. False imprisonment
- B. Defamation of character
- C. Invasion of privacy
- D. Negligence

Answer

D. Negligence

Rationale:

- An intentional tort requires that the act be **committed with the awareness** of the perpetrator.

Responsibilities of the Nurse-Manager

- Reporting dangerous understaffing
- Checking staff credentials and qualifications
- Carrying out appropriate discipline

Guidelines for Informed Consent

The person(s) giving consent must fully comprehend:

1. The procedure to be performed
2. The risks involved
3. Expected or desired outcomes
4. Expected complications or side effects that may occur as a result of treatment
5. Alternative treatments that are available

Consent may be given by:

1. A competent adult
2. A legal guardian or individual holding durable power of attorney

Guidelines for Informed Consent—(cont.)

3. An emancipated or married minor
4. Mature minor (varies by state)
5. Parent of a minor child
6. Court order

Patient Medical Records

- Patient owns the information, but the record belongs to the facility that made it and is storing it.
- Patients must have reasonable access to the record.
- Collaboration between health-care providers and patients, and documentation thereof, is a good indication of well-provided clinical care.



Patient Self-Determination Act (PSDA)

- Required health-care organizations that received federal funding (**Medicare and Medicaid**) to provide education for staff and patients on issues concerning treatment and end-of-life issues
 - Includes the use of *advance directives (ADs)*, written instructions regarding desired end-of-life care
 - Also likely includes durable **power of attorney for health care** (health-care proxy)

Good Samaritan Laws

- Suggest that health-care providers are typically protected from potential liability if they volunteer their nursing skills away from the workplace (generally limited to emergencies),
 - provided that actions taken are not grossly negligent
 - and if the health-care worker does not exceed his or her training or scope of practice in performing the **emergency services**



Health Insurance Portability and Accountability Act of 1996

- Provides patient right to confidentiality
 - **The Health Insurance Portability and Accountability Act of 1996 (HIPAA)** is a federal law that required the creation of national standards to protect sensitive patient health information from being disclosed without the patient's consent or knowledge.
- Essentially represents two areas for implementation
 - Administrative simplification plan
 - electronic health care transactions and code sets, unique health identifiers, and security.
 - Privacy rules
 - regulations protecting the privacy and security of certain health information

Common Causes of Professional Nursing License Suspension or Revocation

- Professional negligence
- Practicing medicine or nursing without a license
- Obtaining a nursing license by fraud or allowing others to use your license
- Felony conviction for any offense substantially related to the function or duties of an RN
- Participating professionally in criminal abortions
- Not reporting substandard medical or nursing care
- Providing patient care while under the influence of drugs or alcohol

Common Causes of Professional Nursing License Suspension or Revocation—(cont.)

- Giving narcotic drugs without an order
- Falsely holding oneself out to the public or to any health-care practitioner as a “nurse practitioner”