

## **You Have Been Summoned: Now What? A Malpractice Primer**

### **NYSNA Continuing Education**

*The New York State Nurses Association is accredited as a provider of nursing continuing professional development by the American Nurses Credentialing Center's Commission on Accreditation.*

This course has been awarded 2.5 Contact Hours through the New York State Nurses Association Accredited Provider Unit.

*The New York State Nurses Association is accredited by the International Association for Continuing Education and Training (IACET) as is authorized to issue the IACET CEU.*

The New York State Nurses Association is authorized by IACET to offer 0.3 CEUs for this program. In order to receive contact hours and CEUs, participants must read the course material, pass the examination with 80%, and complete an evaluation. Contact hours will be awarded until July 30, 2022.

NYSNA has been granted provider status by the Florida State Board of Nursing as a provider of continuing education in nursing (Provider number 50-1437).

Declaration of Vested Interest: None

NYSNA wishes to disclose that no commercial support of sponsorship was received.

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## How to Take This Course

Please take a look at the steps below; these will help you to progress through the course material, complete the course examination and receive your certificate of completion.

### 1. REVIEW THE OBJECTIVES

The objectives provide an overview of the entire course and identify what information will be focused on. Objectives are stated in terms of what you, the learner, will know or be able to do upon successful completion of the course. They let you know what you should expect to learn by taking a particular course and can help focus your study.

### 2. STUDY EACH SECTION IN ORDER

Keep your learning "programmed" by reviewing the materials in order. This will help you understand the sections that follow.

### 3. COMPLETE THE COURSE EXAM

After studying the course, click on the "Course Exam" option located on the course navigation toolbar. Answer each question by clicking on the button corresponding to the correct answer. All questions must be answered before the test can be graded; there is only one correct answer per question. You may refer back to the course material by minimizing the course exam window.

### 4. GRADE THE TEST

Next, click on "Submit Test." You will know immediately whether you passed or failed. If you do not successfully complete the exam on the first attempt, you may take the exam again. If you do not pass the exam on your second attempt, you will need to purchase the course again.

### 5. FILL OUT THE EVALUATION FORM

Upon passing the course exam you will be prompted to complete a course evaluation. You will have access to the certificate of completion **after you complete the evaluation**. At this point, you should print the certificate and keep it for your records.

## **Course Objectives**

Upon completion of this course, the learner will be able to:

- Define negligence and malpractice.
- Identify examples of behaviors that would constitute a deviation in nursing standards within each of the five stages of the nursing process.
- Identify twelve sources for standards of care in nursing.
- Review the steps involved in the pretrial stage of the litigation process.
- Describe the review process to determine if a case is viable.
- Describe the methods used to serve a Summons and Complaint.
- Define the scope of discovery in legal matters.
- Identify two bases for denying discovery to a party.
- Describe the devices used by the attorney to obtain discovery from another party.
- Identify five resolutions to a civil action.

## **Introduction**

Nursing is being practiced in an ever-changing healthcare arena. Nurses are requested to do more and more, often with less and less. In order to provide excellent care to patients, nurses are challenged on a daily basis in their ability to practice in a manner that is professionally and ethically correct. Healthcare systems, including the healthcare financing and delivery systems, are stressed, particularly by the cost of providing excellent care. The nurse must be ever vigilant to those issues that impact on licensure and the possibility of malpractice. This course will provide important information to help nurses to continue to practice nursing in a professionally responsible and safe manner.

## **About the Author**

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Carol Lynn Esposito, Ed.D., JD, MS, RN-BC, NPD is currently the Director of Nursing Education and Practice for the New York State Nurses Association (NYSNA). Dr. Esposito has been the past Director of Labor Education for the NYSNA, and a past Associate Director of the NYSNA collective bargaining program. Dr. Esposito has been an Adjunct Professor at Adelphi University's School of Nursing, Excelsior College School of Nursing, and Hofstra University's College of Continuing Education. She received her Ed.D. from Dowling College, her JD from Brooklyn Law School, her MS from Excelsior College, and her Baccalaureate degree from Adelphi University.

Dr. Esposito has taught Introduction to Law, Civil Litigation, Risk Management, Medical Malpractice, Birth Injuries, Ethics, Introduction to Hospital Management, Collective Bargaining, and Introduction to Research and Writing at various colleges and universities. She has been Of Counsel to Wagner, Doman, & Leto, a Long Island, New York defense firm concentrating in medical malpractice, has worked for several malpractice firms both on Long Island and in New York City, and has worked for the United States Attorney's Office in the Eastern District of New York.

Dr. Esposito has been an honorarium speaker for Catholic Medical Center School of Nursing, Winthrop University Hospital, Sigma Theta Tau, and the American Association of Legal Nurse Consultants. She has authored articles on Informed Consent and Malpractice Insurance, Transcultural Nursing, Patient Satisfaction, Short Term Medical Missions, End-of-Life Care, Continuous Nursing Education, Leadership Development, and Nursing Ethics, and has developed course and text materials for the National Center for Professional Development. Dr. Esposito taught medical/surgical and pediatric nursing through BOCES and has practiced as a medical/surgical and cardiac nurse.

## What is Malpractice?

In our society, when one person harms another, the courts provide a remedy for the victim in the form of a lawsuit for monetary compensation. Historically, society provided a remedy under **tort law** in order to:

- Preserve the peace between individuals by providing a substitute for personal vendettas
- Discourage the wrong-doer from committing the same **tort** or civil wrong again
- Provide an objective analysis of the wrongdoing
- Provide compensation to the victim

A **tort** is a civil or personal wrong committed by one person against another person. **Negligence** is a tort committed by a non-professional. A person is guilty of negligence when:

- They fail to use such care as a reasonably prudent and careful person would use under similar circumstances (an **omission**).
- They do some act which a person of ordinary prudence would not have done under similar circumstances (a **commission**).

**Malpractice** is professional negligence or misconduct. Professionals are guilty of malpractice when:

- They fail to exercise that degree of skill and learning as the reasonably prudent and average member of that profession would use under similar circumstances (an **omission**).
- They do some act which the reasonable prudent and average practitioner would not have done under similar circumstances (a **commission**).

Common malpractice claims arise against nurses when nurses fail to:

- Assess and monitor
- Follow standards of care
- Use equipment in a responsible manner
- Communicate
- Document
- Act as a patient advocate and follow the chain of command

Not all unfortunate events in nursing are caused by malpractice. Despite what may be a common societal belief, not all unexpected, unintended, or even undesired healthcare results can be attributed to the fault of the healthcare provider. The law recognizes that much of nursing care requires clinical judgment. Consequently, a patient must prove 4 requisite elements to establish a malpractice case.

In keeping with our criminal law and the general rule that one is “innocent until proven guilty”, our judicial system requires that the victim of malpractice prove the negligence of the provider before s/he may obtain monetary compensation. This is no easy task. Before damages are provided by the courts, a victim (patient), or **plaintiff**, must prove **all** of the following elements:

- A **duty** or obligation was owed by the provider of care to the victim, and that obligation is a legally recognized standard of care (a nurse-patient relationship was established and the scope of the duty owed has been determined)
- The provider of care **breached** her/his duty or deviated from the recognized standard of care
- The victim actually suffered an injury or **damages**
- The injury was directly caused or **proximately caused** by the failure to adhere to the obligation owed, and not by some intervening or unforeseeable cause

A plaintiff will receive nothing unless s/he can provide sufficient evidence to outweigh the evidence presented by the provider of care, or **defendant**, on all of the elements.

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## **The Nursing Process in Litigation**

The **nursing process** is the foundation for nursing practice and documentation. A deviation in carrying out the nursing process in any one or more of its stages may subject a nurse to a malpractice suit. In working up her/his case, an attorney will look to each of the five stages of the nursing process to determine if the nurse failed to properly carry out any one of the steps within the nursing process.

### ***The Assessment Stage***

The nurse fails to collect the appropriate data about the patient's status. For example, if the OB nurse fails to notice that the fetal monitor shows potentially dangerous drops in the fetal heart rate and then compounds the problem by failing to take a scalp pH, he/she may be the primary target in a lawsuit.

### ***The Diagnosis Stage***

The nurse fails to correctly identify the patient's problems. For example, the OB nurse fails to recognize the signs of fetal distress, which include persistent variable decelerations described as abrupt U shaped or V shaped decelerations that are unresolved by position change, oxygen, cessation of oxytocins, etc. (See American College of Obstetricians and Gynecologists Technical Bulletins).

### ***The Planning Stage***

The nurse fails to develop short term and long term goals and a plan of care to address the patient's problems. For example, the OB nurse fails to recognize that he/she needs to change the position of the mother, administer oxygen or discontinue the oxytocin in order to meet the short term goal of assisting with a successful vaginal birth.

### ***The Implementation Stage***

The nurse fails to properly carry out the treatment plan. For example, the OB nurse changes the position of the mother, but neglects to turn off the oxytocin which continues to run for the next three hours.

### ***The Evaluation Stage***

The nurse fails to evaluate the patient's response to treatment and make modifications in the plan of care accordingly. For example, the OB nurse changes the position of the mother, administers oxygen, discontinues the oxytocin, but fails to recognize that the persistent variable decelerations continue for the next hour.

## Standards of Care

Standards of care help to identify the duty owed by the medical and/or nursing practitioner to the patient in healthcare situations. A plaintiff will look to various standards of care in order to prove that a provider breached the duty owed and expected by the patient.

The sources of standards in healthcare include:

*The United States Constitution* - The United States Supreme Court has declared that the Bill of Rights provides each American with the undeniable right to privacy. In that regard, a Jehovah Witness may, in most cases, legitimately refuse a transfusion of blood, even if the refusal will result in the patient's death. A healthcare practitioner will be liable in tort if s/he interferes with the patient's exercise of this right.

*The Federal Legislature* – Similarly, the federal government has recognized that patients have the undeniable right to determine what, if any, treatment they will be subjected to. For example, the Patient Self-Determination Act declares that the patient, and not the patient's healthcare provider or family, shall decide if cardio-pulmonary resuscitation shall be administered, or if a respirator will be implemented.

*The State Legislature* – Each state has promulgated laws that deal with healthcare issues. For example, some of the laws related to healthcare issues in New York State are:

- Section 6902 of the State Education Law embodies the Nurse Practice Act. This defines the scope of practice of registered professional nurses, licensed practical nurses, nurse practitioners, and clinical nurse specialists in New York State. Exceeding the scope of practice would subject the practitioner to a malpractice action.
- Section 2805-d of the Public Health Law embodies the Informed Consent Statute. This statute defines the duties owed to the patient regarding informed consent and describes the defenses to a claim of lack of informed consent.
- Section 2980 of the Public Health Law embodies the Health Care Proxy Statute. This law allows a patient to assign an agent who can make healthcare decisions for that patient in the event that the patient no longer has capacity to make healthcare decisions.
- Section 4300 of the Public Health Law embodies the Anatomical Gift Act Statute. This law allows an individual to make a gift of a body part and guides the medical practitioner in receiving the gift.

*The Federal Administrative Law* – The federal administrative agencies have promulgated law related to healthcare. For example, the National Institute of Health (NIH) regulates standards for mammography testing nationwide. These standards are used in cases related to the failure to diagnose breast cancer.

*The State Administrative Law* – The state administrative agencies have also promulgated law relative to healthcare. For example, the New York Code of Rules and Regulations (10 NYCRR) have embodied the following:

- Minimum standards for nursing services in a hospital (10 NYCRR 405.5)
- The hospitalized patient's Bill of Rights (10 NYCRR 405.7)
- Standards for incident reporting for hospitals (10 NYCRR 405.8)
- Minimum standards for the content of hospital records (10 NYCRR 405.10)

*State Case Law* – Most of our tort "causes of action" (or reasons for suing) are derived from case law. This is the law that is derived from judicial decisions. When a new legal principle has been espoused by the court system, this new "law" will become the **precedent**, or way that subsequent factually similar cases will be resolved. **Stare decisis** is a term that means that factually similar cases will be resolved in the same or similar way. Some examples of judicially created causes of action include:

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- **False imprisonment.** This cause of action includes not permitting a patient to leave the hospital without paying the bill or the improper use of physical restraints.
- **Abandonment.** This cause of action is defined as the unilateral severance of the professional relationship by the practitioner without reasonable notice to the patient and a reasonable time allowed for the patient to obtain care from another practitioner at a time when the patient still needs attention. Leaving the floor without reporting would be an example of abandonment by a staff nurse.
- **Defamation.** This cause of action is defined as an injury to a person's reputation or character caused by the false statements made by another and communicated to a third person. An action for defamation may arise out of an injurious employee evaluation or gossip. In Kraus v. Brandsletter, 167 AD2d 445, 562 NYS2d 127 (2<sup>nd</sup> Dept. 1990), a nursing supervisor was awarded monetary damages when the hospital disseminated a publication from the Medical Board which read, in part, "...this Medical Board is unanimous [sic] in a vote of no confidence in the Vice President of Nursing Services, Mrs. Barbara Kraus."
- **Assault and battery.** Assault is defined as the fear or threat of harm. If a nurse threatened physical punishment, s/he would be liable for an assault. Battery is defined as an actual unwanted touching. A physical injury is not necessary. All that is required to sustain this cause of action is an unwanted touching, even if the touch has a beneficial result. Examples of battery include performing a physical examination without consent or removing a body part not included on the informed consent.

Other Tortious Causes of Action Include:

- **Infliction of Emotional Distress.** This cause of action occurs when the defendant intentionally, recklessly, or negligently causes severe emotional distress to the plaintiff because of the defendant's outrageous conduct. An example includes a recent case of a surgeon carving his initials into the plaintiff's surgical site.
- **Fraud.** This cause of action occurs when a defendant engages in a deliberate or negligent misrepresentation, misstatement, or deceit. An action in fraud may arise when the defendant dentist deliberately withholds information to the patient that a drill bit was left in the patient's jaw.
- **Wrongful Death.** This cause of action arises when the defendant's actions result in the death of the patient.
- **Informed Consent.** The doctrine of informed consent applies to the provider's failure to inform the patient of risks and benefits of the proposed treatment, alternative treatments, and refusing treatment.
- **Loss of Consortium.** This is a claim for compensation brought by a patient's spouse against the defendant who caused injury to the patient-plaintiff. Compensation is made for the lost services of the injured spouse. This cause of action is not permitted in New York when the injured spouse dies from the negligent actions (wrongful death cause of action).
- **Invasion of Privacy.** This cause of action arises when a defendant breaches the HIPAA law, or whose actions result in one of the following outcomes:
  - Intrusion upon seclusion or solitude, or into the private affairs of the patient;
  - Public disclosure of a patient's embarrassing private facts;
  - Publicity which places a patient in a false light in the public eye; and.
  - Appropriation of the patient's name or likeness for personal use.

*Joint Commission on Accreditation of Healthcare Organizations (Formally JCAHO, Now the JC)* – About 80% of all hospitals and a smaller percentage of nursing homes and long term care facilities are accredited by the JC. Participation in Medicare/Medicaid is dependent upon JC accreditation; therefore, accreditation by JC provides a national standard used by attorneys in defining the standard of practice for hospitals.

*Facility and Unit Policies and Procedures* – Attorneys will look to a facility's policies and procedures to determine the institution's standards of practice. Deviation from the institution's own policies and procedures is prima facie (on first appearance, but subject to further evidence or information) evidence of

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negligence. For example, if a hospital's policy declares that oxytocin is contraindicated in the presence of fetal distress where delivery is not imminent, the hospital, the physicians and the nurses would be liable if pitocin were continued in the following circumstances:

- A persistent fetal heart rate above 160 beats per minute
- Diminished beat to beat variability
- No change in the pattern for 10 minutes or longer

*Professional Organizations* – The American Nurses Association (ANA) has developed standards that define the professional practice of nursing. The organization's *Standards of Care* and *Standards of Professional Performance* are accompanied by criteria that permit measurement of each standard. Similarly, other specialty nursing organizations have also developed standards for various specialty practices within nursing.

*Authoritative Textbooks* – The *Physician's Desk Reference (PDR)* is frequently used by attorneys as an authoritative text on drug interactions and precautions. Similarly, *Williams on Obstetrics* is used by attorneys as an authoritative text in obstetrical cases. In deposing (questioning a defendant practitioner under oath), the attorney will attempt to have the defendant testify as to what texts the practitioner deems authoritative. Any deviation in practice by the defendant from the printed materials will be submitted as evidence of negligence.

*Equipment Manuals* – These are used in the same way as are authoritative texts. An attorney will attempt to have the deponent admit that they have received training and in-service education from a particular manual and then attempt to show that the practitioner deviated from the training.

*Job Descriptions* – State administrative and statutory laws require a hospital to describe and document all job descriptions. Deviation from a documented job description, or assignment of a job to a person not qualified to perform that function will render the hospital liable in negligence.

## Overview of the Legal Process

The legal process can be divided into three stages: 1) the initiation of the lawsuit, or the pretrial stage; 2) the discovery stage; and 3) the resolution stage.

### The Pretrial Stage

To begin with, a client must contact an attorney about a potential claim. Then the attorney must conduct the **client interview**, in which the attorney interviews the client to gather relevant facts about the potential claim.

Then the attorney and her/his litigation team will obtain all pertinent medical records in order to **review and evaluate the records**. This is done in order to **determine if any breaches** in the standard of practice have occurred. The attorney will: a) conduct medical/legal research to determine what standards are applicable to the case at hand; b) review the records to determine if any breaches in the standard of practice have occurred; and c) identify those parties who have committed malpractice and if the hospital has committed negligence.

The attorney then makes a **determination if any legally recognizable damages have occurred**. The attorney will identify all potential “causes of action” or reasons for suing, and determine if those causes of action are viable. For example:

In *O’Toole v. Greenberg*, 64 N.Y.2d 427, 477 N.E.2d 445, 488 N.Y.S.2d 143 (1985), a husband and wife brought a medical malpractice action seeking recovery of the ordinary costs of raising a healthy, normal child born after unsuccessful birth control operation. The Court of Appeals held that such a claim is properly characterized as a claim for “wrongful conception” but would not allow the action to proceed because it did not state a legally cognizable claim.

However, in *B.F. v. Reproductive Medicine Assoc. of NY, LLP, Dennehy v. Copperman*, No.126-127, 2017 WL 6375833 (Dec. 14, 2017), two couples brought medical malpractice claims against a fertility specialist whom they alleged failed to perform adequate screening of their egg donor for the Fragile X mutation and failed to notify that they did not screen for this trait. The plaintiffs alleged that these negligent acts and omissions caused them to consent to in vitro fertilization (IVF) procedures and go forward with pregnancy, resulting in conception and birth of plaintiffs’ impaired children. It was only after both births that doctors learned that the egg donor had tested positive for the Fragile X trait, a chromosomal abnormality that can result in intellectual disability and other deficits. Plaintiffs sought recovery for the extraordinary expenses associated with care and treatment of a child with a disability. Although New York does not recognize claims for “wrongful life” where it is claimed the child never should have been born at all, recovery is permitted based upon wrongful birth where parents can provide evidence of their expenses related to child care. *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807 (1978).

In *Liff v. Schildkrout, et. Al.*, 49 N.Y.2d 622, 404 N.E. 2d 1288 (1980), an action was brought on behalf of a decedent’s widow for damages for loss of consortium on a wrongful death action. The Court of Appeals held that a surviving spouse may not maintain a common-law (or “judge-made” law) cause of action for loss of consortium (loss of love, society and affection) due to death, nor may loss of consortium be asserted as an element of damages within the statutory wrongful death cause of action (with the exception of the time between injury and death).

If the attorney concludes there is a viable cause of action, s/he then **drafts the summons and complaint**. If the action is for negligence or personal injury, the attorney simply drafts the summons and complaint. If the action is for medical/nursing malpractice, then the attorney must contact a physician and discuss the deviations in the standards of practice. If the physician agrees that there was, with a reasonable degree of medical certainty, a deviation in the standard of practice, then the attorney will file

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an affidavit (a sworn statement) called a **certificate of merit**. This document is required by statute, and its purpose is to avoid the filing of frivolous lawsuits.

**The service of the summons and complaint** occurs next and can be effectuated in any one of the following manners (see CPLR Sections 308, 312-a, 316, 318):

- **Personal service.** A process server, that is, one who is 18 years of age and is not a party to the action, must personally serve the actual defendant, then file proof of service with the clerk of the court. The fee for the process server is paid by the plaintiff.
- **Personal service by mail.** The defendant is mailed a copy of the summons and complaint, along with a letter of acknowledgment, thereby informing the plaintiff he is in actual receipt of the summons and complaint. If the defendant does not return the acknowledgment letter, a process server must be engaged to effectuate personal service; however, the fee for the process server will be paid by the defendant. Proof of service is filed with the clerk of the court.
- **Suitable age and discretion.** If the actual defendant cannot be found at their home or place of business, a person of suitable age (in federal actions, a person 16 years of age; in state actions, a person 12 years of age) and discretion (one who appears to have all cognizable abilities) is served instead. This person could be, for example, a child or a secretary, or anyone that the process server believes to be "suitable". A follow-up mailing of the summons and complaint is made to the defendant's last known residence. Proof of service is filed with the clerk of the court.
- **Nail, mail and file.** Neither the defendant, nor a person of suitable age and discretion has been located after a due diligent search to find one of these individuals. The summons and complaint is actually "fixed" to the defendant's residence, and a follow up mailing of the summons and complaint is made to the defendant's last known residence. Proof of service is filed with the clerk of the court.
- **Publication.** When the defendant is unknown, the plaintiff may make an application to the court to effectuate notice by publication (in local papers, etc.). The court will direct the plaintiff in the manner in which notice must be made.
- **Agent.** When the defendant has an agent, that agent may accept service on behalf of the defendant. The identification of the designated agent must be filed with the clerk of the court.

Once the defendant has been served, **pre-answer motions, the answer and pre-trial motions** occur next. If the defendant is served only with a summons and notice that an action has been commenced, then the attorney for the defendant **files a notice of appearance and demands the complaint**. If however, the summons and complaint were served to the defendant, then the attorney for the defendant **makes a motion about the complaint**. Pre-answer motions include (see CPLR, Section 3211):

- A **motion to dismiss the complaint** because it does not state a legally recognizable claim, such as "wrongful conception", or the action has not been brought by a party with the legal capacity to sue, such as a minor.
- A **motion to strike** a part of the complaint because that part fails to state a legally recognizable cause of action, such as a claim for loss of consortium in a wrongful death lawsuit.

Then the defendant must **answer the complaint**. The defendant must admit or deny each and every allegation in the plaintiff's complaint and then assert affirmative defenses, which may include:

- Lack of personal jurisdiction (you didn't serve me properly)
- Statute of limitations (you didn't file this lawsuit in a timely fashion and may not bring it now)
- Contributory/comparative negligence (you contributed to your own injuries and I am not liable for that)
- Res judicata (you have already sued me for this and you can only do so once)
- Culpable conduct (you aggravated your injuries and I am not liable for the aggravated injuries)

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The defendant may **demand a change of venue**. The defendant may demand that the place of the trial be moved because a) plaintiff's choice is extremely inconvenient to material witnesses and justice will not be promoted; b) an impartial trial cannot be had in the place chosen by plaintiff; or c) plaintiff's choice was not in a proper county to begin with (see CPLR Section 510).

Another possibility in the pre-trial stage is to **remove the case from state to federal court**. The defendant may have the case removed to the federal court system if it properly belongs there. This is done for defensive purposes because the likely result in the federal court would be more beneficial to the defense. For example, a lawsuit against a Health Maintenance Organization (HMO) would be removed from the state court and placed in the federal court because the plaintiff's remedy (resolution of the action) is severely limited under the Employee Retirement Income Security Act (ERISA) laws. These are federal laws that set minimum standards for benefits

## The Discovery Stage

In the discovery stage information is discovered and shared between parties and non-parties. CPLR, Section 3101 states that a party to an action is entitled to receive from the other party “all matter material and necessary in the prosecution or defense of an action”. Inherent in this stage, are the following rules:

**The relevancy rule** – all material requested is relevant to the action.

**The good faith rule** – all material requested is made in good faith and not with the intent to harass or cause unnecessary cost or delay of the lawsuit.

There are exceptions to Discovery; a party may deny a request for information if that request is:

**Not relevant.**

**Privileged.** If the material requested is considered privileged, a party can deny the request in most cases. Some examples of privileges include:

- A party is not entitled to the medical records of the litigant unless that party has placed her/his physical condition at issue (i.e.: a personal injury action, a worker’s compensation action, a medical malpractice action).
- A party is not entitled to information communicated to one’s attorney unless the communication pre-existed the attorney-client relationship.
- A party is not entitled to documents and tangible things prepared by either the client, representatives of the client, attorney for the client or the client’s litigation team unless:
  - The information sought is purely factual information
  - The information sought is the requesting party’s personal statement
  - The information sought cannot be obtained by any other means without undue hardship
  - The information sought was generated by the opposing party in the ordinary course of business.

There are many devices attorneys use to obtain information from the other parties. These **types of discovery devices** are set forth in CPLR Section 3102:

**Independent Medical Evaluations.** If the mental or physical condition of a party has been placed at issue, a defendant may demand that the plaintiff submit to a physical, mental or blood examination by a physician designated by the defendant. The examining physician is permitted to review the plaintiff’s medical records prior to the examination. Following the examination (to determine if plaintiff is, indeed, injured in the manner alleged), the physician must execute a detailed written report of the examination. All parties who request a copy of the report are entitled to one (see CPLR Section 3121).

**Depositions.** All parties are entitled to depose other parties. A deposition is the sworn, oral testimony of a party. A transcript of the deposition testimony is taken. Depositions may also be videotaped (see CPLR Section 3106).

**Interrogatories.** Any party may serve upon another party written interrogatories, which are written questions requiring written answers, under oath. A party may not serve written interrogatories on another party AND also demand a bill of particulars (defined below) of that same party. In personal injury and wrongful death actions, a party may not serve interrogatories on another party AND also conduct a deposition of that same party without the permission of the court (see CPLR Section 3130).

**Bills of Particulars.** Any party may demand that another party particularize their individual claims. For example, in a personal injury action, defendant may demand that the plaintiff particularize:

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- The date and approximate time of day of the alleged occurrence
- The approximate location of the occurrence
- A general statement of the acts or omissions constituting the negligence claimed
- A statement of when and to whom actual notice was given
- A statement of the injuries alleged
- A statement as to which injuries are claimed to be permanent, and which are claimed to be temporary
- The length of time confined to bed and home
- The length of time incapacitated from employment
- The total amounts claimed as damages, including physicians' fees, hospital fees, etc. See CPLR Rule 3043

*Request for production of documents and things for inspection, testing, copying, or photographing.* A party may request of both another party or a non-party, any relevant thing in the possession of that party or non-party for the purpose of inspecting, copying, photographing, measuring, surveying, sampling, testing, or recording (see CPLR Rule 3120).

*Demand for authorizations.* A party may demand that another party give written consent (an authorization) for the requesting party to receive copies of medical records, reports of diagnostic studies, copies of x-ray films, etc. (see CPLR Section 3121).

*Requests for admissions.* Any party may request that any other party either admit or deny the genuineness of any paper or document, the correctness or fairness of representation of a photograph, or the truth of any factual statement. The purpose of this discovery device is to limit the issues at trial (see CPLR Section 3123).

*The subpoena.* Any party may compel the appearance of any person via subpoena. The subpoena requires the appearance of any person and that person must give sworn testimony. A subpoena duces tecum requires the production of the person's books, papers and other things in the possession of the person summoned (see CPLR Section 2301). Hospital records may also be subpoenaed (see CPLR Section 2306).

## The Resolution Stage

A lawsuit may be resolved by any one of the following means:

**Dismissal upon motion.** The case may be disposed of on a motion by one of the parties. For example, a defendant hospital may have the case dismissed because the only other named party, the attending physician, is an independent contractor and the hospital is not liable for the negligent acts of its attending physicians.

**Mediation.** The parties appear before an impartial third person who encourages the parties to come to a settlement that is acceptable to all. The mediator cannot impose any particular resolution.

**Arbitration.** The parties' dispute is adjudicated by an impartial third person, known as an arbiter or arbitrator. The arbitrator has the power to make a final determination in the case.

**Settlement.** The parties may agree to settle the case. This is a contractual agreement wherein the plaintiff agrees to forgo his right to sue if the defendant pays an agreed upon sum of money.

**Trial.** The case may proceed to trial. In a jury trial, the jury has the final say on the credibility of the witnesses and the facts to be considered. The judge makes all decisions of law. In most cases, both parties will need a qualified expert to testify (give evidence) about what a competent nurse would have done in the situation and whether the omission or commission caused the injury. In New York, a qualified expert for nursing negligence can be voir dired (questioned) to determine his/her qualifications. Frequently, objections are made when the plaintiff's expert is a non-specialist doctor, as opposed to a nurse or someone else trained in the specific nursing field at issue.



## Who is Responsible?

Often, a key issue in nursing malpractice cases revolves around who is responsible for the nurse's negligent acts: the hospital, the attending doctor, the nurse?

A hospital may be legally and financially responsible for nursing malpractice if:

- the nurse was an employee of the hospital;
- the nurse was fulfilling a job duty when the patient was injured; and
- an independent doctor (that is, one not employed by the hospital) was not in control of the nurse's actions.

If an attending doctor is responsible for supervising the nurse or has brought in his/her own team of nurses, the hospital may be off the hook. Whether the nurse is under the supervision of the doctor when the misdeed occurs depends on:

- whether the doctor was present; and
- whether the doctor had control and should have prevented the nurse's malpractice.

Because most nurses are employees of hospitals, hospitals are frequently a defendant in nursing malpractice cases. The issue of whether or not the doctor could control the nurse at the time of the negligence is normally a dispute between the doctor and the hospital -- the outcome does not change whether an injured patient can recover for malpractice, it just determines who pays.

Nevertheless, even if the doctor supervised the nurse, the hospital still might be liable if the doctor gave improper orders and the nurse should have known they were improper but followed them anyway.

In addition to liability arising out of the vicarious liability of the nurse, a hospital may also have separate institutional or corporate liability. Among its responsibilities, a hospital has a duty to the patient:

- to ensure the competency of its nursing and medical staff;
- to provide regular staff development training, competency training, and orientation to its nursing and medical staff;
- to provide nursing and medical staff in adequate numbers to meet the needs of the patient;
- to provide a safe environment; and
- to provide sufficient, working equipment.

## **What to do if you are named in a Lawsuit**

If you've been named in a malpractice action, notify your malpractice insurance carrier immediately. If you're still employed at the facility where the incident occurred, notify that facility. If you don't have your own malpractice insurance, the facility's legal counsel will most likely represent you.

If you kept on-the-job notes or journals, review them as a memory aid. But be aware that you may be required to turn over these notes during the legal process—and that they can be used against you.

Your insurance carrier may ask you to prepare written documentation, including the time and location of the incident and the names of any witnesses. Be sure to convey this information to your carrier within the time frame specified by your policy; most carriers deny coverage if you don't meet their deadlines.

If you don't have personal malpractice insurance, hire an attorney. Some facilities may provide you with an attorney, but others may withdraw their support of a nurse if a suspicion of guilt exists or if they decide they need to cut their financial losses.

Finally, don't discuss the case with anyone except your attorney, who may tell you not to discuss it even with your employer or representatives of the facility involved.

### Giving a deposition

If you're named as a defendant in a malpractice action, expect to give a deposition—sworn pretrial testimony in response to written or oral questions and cross-examination, recorded by a certified court reporter. Depositions also are taken from the plaintiff, other defendants, and experts for both the plaintiff and defendant.

Defendants' depositions are meant to clarify and amplify what the patient record shows and to determine what the defendant intends to claim. Experts' depositions are taken to explore the scope of written expert opinions. During a deposition, experts usually are asked if they'll be offering other opinions not contained in the written opinions already advanced.

Before your deposition (or your trial, if it comes to that), your attorney should advise you on how to conduct yourself and should review with you the patient's record and the questions you're likely to be asked. The attorney also should tell you which documents and discussions you're not obligated to discuss, such as risk management documents (for example, incident reports) and your discussions with attorneys.

During a deposition, the deposing attorney (the plaintiff's representative), your attorney, and the court reporter are present. Other persons also may be there—the patient, patient's family, and lawyers representing other defendants in the case.

Typically, the deposition begins with the deposing lawyer inquiring about your background, education, and experience and then asking questions about your care of the patient. Depending on how the questioning evolves, your attorney or other defendants' attorneys may ask clarifying questions.

Remember—depositions can be used in a trial, and deposition testimony that doesn't match trial testimony will become a point of contention during the trial.

## **Conclusion**

As advances continue in the healthcare industry, the duties and responsibilities of the nurse expand in response. Nursing today requires specialized training, a wide variety of skills and a continuously updated knowledge base. As nursing duties expand and become more complex, the nurses' potential exposure to malpractice increases. With the overview information provided regarding malpractice, the nurse is better able to navigate the legal arena to protect the nursing license.

To help minimize the risk of a malpractice action, nurses should:

- Know and follow your state's nurse practice act and your facility's policies and procedures.
- Stay up to date in your field of practice.
- Assess your patients in accordance with policy and their physicians' orders and, more frequently, if indicated by your nursing judgment.
- Promptly report abnormal assessments, including laboratory data, and document what was reported and any follow-up.
- Follow up on assessments or care delegated to others.
- Communicate openly and factually with patients and their families and other health care providers.
- Document all nursing care factually and thoroughly and ensure that the documentation reflects the nursing process; never chart ahead of time.
- Promptly report and file appropriate incident reports for deviations in care.

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## You Have Been Summoned: Now What? A Malpractice Primer

### Course Exam

After studying the downloaded course and completing the course exam, you need to enter your answers online. **Answers cannot be graded from this downloadable version of the course.** To enter your answers online, go to the e-learn web site, [www.elearnonline.net](http://www.elearnonline.net) and click on the Login/My Account button. As a returning student, login using the username and password you created, click on the "Go to Course" link, and proceed to the course exam.

**Note:** Contact hours/CEUs will be awarded for this online course until July 30, 2022.

1. Negligence is
  - A. The omission of care that a reasonably prudent person would use under similar circumstances.
  - B. A tort; the civil or personal wrong committed by one person against another person.
  - C. The commission of an act that a person of ordinary prudence would not have done under similar circumstances.
  - D. All of the above.
2. Malpractice is professional negligence or misconduct.
  - A. True.
  - B. False.
3. A nurse is caring for an inpatient on a psychiatric unit. The patient has a long history of anxiety with somatic complaints. Currently, he is complaining of chest pain that began when he started playing a game of ping pong. The nurse fails to recognize the signs of cardiac distress and myocardial infarction and gives the patient a prn dose of Ativan 1mg. The patient subsequently has an MI. Which step of the nursing process did the nurse fail to carry out?
  1. The implementation stage.
  2. The assessment stage.
  3. The planning stage.
  4. The diagnosis stage.
  - A. 1 and 3
  - B. 2 and 4
  - C. 3 only
  - D. none of the above
4. The following are sources of Standards of Care that identify the duty owed by the practitioner to the patient EXCEPT:
  - A. State case law.
  - B. Professional organizations.
  - C. Schools of nursing.
  - D. Authoritative textbooks.
5. During the pre-trial stage of litigation, the nurse can expect
  1. To be interviewed by the attorney to gather relevant facts about a potential claim.

2. That the attorney will make a determination if any legally recognizable damages have occurred.
  3. That a summons and complaint will be drafted and served.
  4. That pre-answer, answer and pre-trial motions are made.
    - A. 1 only
    - B. 2 and 3
    - C. 1,2 and 4
    - D. all of the above
6. A certificate of merit is an affidavit that is filed by an attorney
- A. After a physician's review and determination that a deviation in the standard of practice occurred.
  - B. Its purpose is to avoid the filing of frivolous lawsuits.
  - C. Supports the "causes of action" (reasons for suing).
  - D. All of the above.
7. The service of the summons and complaint can be effectuated in the following manners EXCEPT:
- A. Publication.
  - B. Announcement.
  - C. Personal service.
  - D. Nail, mail and file.
8. The scope of Discovery means that a party to an action is entitled to receive from the other party "all matter material and necessary in the prosecution or defense of an action".
- A. True.
  - B. False.
9. The following are types of discovery devices EXCEPT:
- A. Extortion
  - B. Depositions
  - C. Interrogatories
  - D. Subpoenas
10. A lawsuit may be resolved by any one of the following EXCEPT:
- A. Settlement
  - B. Trial
  - C. Bills of Particulars
  - D. Arbitration