

# Protecting yourself from malpractice claims

Greater nursing autonomy comes at the price of increased legal exposure. Learn how to reduce your liability.

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**HAVE YOU EVER** been called to give a deposition for a lawsuit? Do you wonder what it would be like to be sued for malpractice? Want to know how to reduce your chance of being named in a malpractice suit?

Every day, nurses analyze facts and circumstances on a case-by-case basis, and then act on these analyses. Increasingly, we're being held accountable for these nursing judgments—and the outcomes that ensue. Poor judgment can set the stage for a patient injury that leads to a malpractice claim.

Being named in a malpractice suit is traumatic. Aside from the potential financial devastation, it can wreak emotional havoc and strike a fatal blow to your self-confidence and self-esteem. This article can help you avoid being sued for malpractice in the first place—and tells you what to do if you're sued or called on to give a deposition. The advice and guidelines we present are based on trends in nursing malpractice suits, as well as our experience as legal nurse-consultants who've reviewed

and testified in malpractice suits involving healthcare professionals.

## Defining malpractice

Malpractice is negligence, misconduct, or breach of duty by a professional person that results in injury or damage to a patient. In most cases, it includes failure to meet a standard of care or failure to deliver care that a reasonably prudent nurse would deliver in a similar situation.



## LEARNING OBJECTIVES

1. Identify the four elements of a malpractice lawsuit.
2. Discuss the most common causes of malpractice claims against nurses.
3. Describe how you should respond if named in a malpractice suit.
4. Discuss at least four guidelines to help prevent malpractice claims.

## Standards of care and professional practice

Standards may originate from several sources.

- *Standards of care*—the care a patient should expect to receive under similar circumstances—are based on the professional literature (text and journals), protocols, and expert opinions.
- *Standards of nursing practice* derive from facility policies and procedures, job descriptions, professional standards and scopes of practice (such as those of the American Nurses Association or the American Association of Critical-Care Nurses), state nurse practice acts, and expert nurses who provide information on what is reasonable, careful, and prudent care.

Many lawsuits don't come to fruition for years after the incident, so the court will try to establish the standards of care and practice at the time of the incident in question.

## Elements of a malpractice suit

To prove malpractice, the plaintiff (the party who initiated the complaint) must prove all of the following:

- *The nurse had a duty to the patient.* By taking on the care of a patient, the nurse assumes a legal duty.
- *The nurse breached that duty.* If the three other malpractice elements are present, the nurse may be considered negligent if she breached her duty to the patient. To establish breach of duty, the standard of care must be known.
- *A patient injury occurred.* The nurse's failure to carry out a professional duty caused patient injury. No injury means no malpractice—even if the three other malpractice elements are present. However, not all patient injuries necessarily involve malpractice.
- *A causal relationship exists between breach of duty and patient injury.* The nurse's deviation from the standard of care could reasonably have caused the patient's injury.

## Most common malpractice claims against nurses

Over the years, experts have analyzed nursing malpractice suits to determine the most common issues involved. Most malpractice claims against nurses center on one of the six causes described below.

### Failure to follow standards of care

Standards of care apply to numerous patient-focused or nurse-focused actions; some may change from year to year or even month to month. Examples we've seen in our work include:

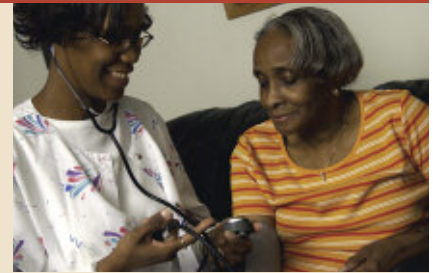
- failure to institute a fall protocol
- failure to follow the proper procedure for a specific skill (such as giving medications or inserting a nasogastric tube)
- failure to apply antithrombosis stockings.

## Avoiding communication breakdowns

Many malpractice claims against nurses center on communication failures—particularly those that involve:

- shift-to-shift reports
- other healthcare providers, especially physicians
- other departments (such as radiology)
- other units or facilities (particularly involving patient transfers)
- patient discharge instructions
- patient teaching (including medications and dressing care)
- delegation and supervision.

To help avoid lawsuits stemming from failure to communicate, be sure to convey all pertinent information to other healthcare team members, other facility departments, and patients or family members, as appropriate.



### Failure to use equipment in a responsible manner

Failure to use equipment responsibly may seem like an obvious breach, but it's not always so clear cut. For instance, you could find yourself in legal jeopardy if you rig equipment for a use other than what the manufacturer intended. Or you may decide to use equipment you aren't completely familiar with or haven't been adequately trained to use. If the equipment misuse harms the patient, you're in legal jeopardy.

### Failure to communicate

An element in most malpractice suits, poor communication may exist between a nurse and a physician, a nurse and other healthcare providers (including those to whom she has delegated a task), or a nurse and patient.

For instance, a nurse might fail to:

- communicate all pertinent patient data to the physician
- provide all relevant discharge information to the patient
- communicate important assessment findings to the nurse for the oncoming shift. (See *Avoiding communication breakdowns*.)

In some cases, failure to communicate can cause or contribute to failure to rescue (failure to act on a patient condition, resulting in a code or a patient's death).

Because many conversations aren't documented, failure to communicate can be difficult to sort out during the discovery process, which occurs when both the plaintiff and defendant's sides gather more evidence and take statements from those involved in the case. To protect yourself, document all conversations related to patient care. Normally, you'd document in the patient's chart; but if a disagreement about care arises, that documentation should go through the appropriate chain of command and reporting system in your facility—never in the patient's chart.

### Failure to document

In the eyes of the court, if something wasn't documented, it wasn't done. Your physical assessment may reveal crackles of new onset, but if you don't document this finding, other healthcare providers lack the information they need to formulate an appropriate plan of care for the patient.

Lack of documentation also can result in a nursing intervention being done twice. Say you administer a medication dose but fail to document this action, and then a colleague administers the same dose. Your failure to document could place the patient at risk for injury from an excessive dose. So be sure to document all patient information, evaluation findings, and interventions. This not only promotes continuity of care; it also helps substantiate your care from a legal standpoint.

### **Failure to assess and monitor**

Determining the frequency of patient assessment and monitoring is a nursing judgment. Sometimes a facility's policy or written standard specifies how often to perform patient assessment, but this is more the exception than the rule.

In most cases that involve failure to assess and monitor, nursing expert opinions are critical—and these opinions hinge on the standard of what a reasonably careful (or ordinary) and prudent nurse would do in a similar situation. For instance, if your patient has a heart rate of 160 beats/minute, how long should you wait before checking the heart rate again? Should you check other vital signs along with the heart rate? What other assessments should you perform to try to determine the cause or effect of the rapid rate? All of these are nursing judgments you must make based on your experience, training, and understanding of nursing care.

Remember—simply following unit protocol or a physician's order to assess and obtain vital signs every 4 hours isn't enough. If the patient's condition warrants more frequent assessment and monitoring, you're responsible for providing that care, reporting abnormalities to the attending physician or advanced practice nurse, and documenting your findings.

## **“Six rights” of delegation**

Any task you delegate to unlicensed assistive personnel (UAP) or another health-care provider must be “right” in the six ways described below.

- **Right task:** The task must be appropriately delegable for the specific patient. Consider the patient's condition, task complexity, the UAP's capabilities, and amount of supervision the UAP will need.
- **Right person:** The right employee must delegate the right task to the right person, to be performed on the right patient.
- **Right time:** In many cases, the task must be completed at a specific time. For example, vital signs typically should be taken 20 minutes after the patient received a blood pressure medication; a blood glucose stick commonly should be done before a meal.
- **Right information:** You must provide the UAP with clear, concise instructions about the task, including its goal, limitations, and expectations.
- **Right supervision:** You must provide appropriate monitoring, evaluation, intervention and, as needed, feedback for the task.
- **Right follow-up:** You must provide follow-up to make sure the delegated task was done properly.

### **Failure to act as patient advocate**

Failure to act as patient advocate is an increasingly common element in malpractice suits. Frequently, patient advocacy relates to challenging physician orders. Physician challenges may involve medications, respiratory management, discharge decisions, and many other aspects of patient care. It may also involve a request that the patient be moved to a different unit or even a different facility to receive optimal care.

If you think a physician's order could harm your patient, first discuss the situation with the physician; if this doesn't resolve your concern, activate the chain of command within your facility's nursing hierarchy. The chain usually starts with the charge nurse or unit manager.

Nurses typically pride themselves on being patient advocates and on being the last safety check. But sadly, physician intimidation or unsupportive management may prevent full advocacy efforts by nurses.

### **How delegation can lead to malpractice claims**

In an effort to contain costs and cope with nursing shortages, many hospitals and health maintenance

organizations require registered nurses (RNs) to delegate certain tasks to licensed practical nurses (LPNs), licensed vocational nurses (LVNs), or unlicensed assistive personnel (UAP). But delegation can put you in legal jeopardy: if you delegate a task improperly, you may be subject to a malpractice suit.

State nurse practice acts and boards of nursing govern task delegation. To properly delegate, you must analyze the complexity of the task to be performed and assess patient acuity to determine what type of nursing care the patient needs. Then you must assess the abilities and knowledge of the available LPNs, LVNs, and UAP to determine which person can best provide the required care.

When delegating a task, always be specific and use measurable terms to describe the task. Keep in mind that you may not delegate a task (except to another RN) if the patient requires a health assessment analysis, teaching, or nursing judgment about his or her care. Also, make sure to assign procedures and responsibilities only to a professional who's legally permitted to perform the specific task. (See “Six rights” of delegation.)

## How a malpractice claim proceeds

Because malpractice claims come under state jurisdiction, the manner in which they're processed may vary from state to state. Also, many states limit the amount of damages plaintiffs can recover in an effort to curb frivolous lawsuits and keep healthcare providers' insurance premiums at a reasonable rate.

In some states, pretrial arbitration or a review panel may take place. Generally, though, when the suit is filed, it names defendants—persons the plaintiff believes had a duty to the patient and caused patient injury by breaching that duty.

## What to do if you're named in a suit

If you've been named in a malpractice lawsuit, 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 probably will 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 deadline.

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,

## Keeping your cool in the courtroom

Giving a deposition or testifying in court is nerve-wracking. When you're nervous, it's easy to make mistakes—and in a lawsuit, mistakes can exact a high price. To help you avoid common mistakes, your attorney will provide instructions such as those below to help you keep your composure and steer you away from dangerous territory.

- Listen carefully to the question. Before responding, wait until it has been asked fully.
- Give your attorney a chance to object to the question. If you're unsure whether to answer a question during a deposition, ask your attorney.
- If you don't understand the question, ask for clarification.
- Think through your response before answering, and answer only the question that has been posed.
- Don't speculate about why something might have occurred or about the standards of care for other healthcare providers.
- If you don't remember the incident in question, respond by saying, "I do not recall the situation."
- Don't lie.

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 suit, 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 will advise you on how to conduct yourself and will review with you the patient's record and the questions you're likely to be asked. The attorney also will tell you which documents and discus-

sions 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. (See *Keeping your cool in the courtroom*.)

## Taking a proactive approach

To avoid malpractice claims, take the time to understand the legal principles of malpractice, and incorporate these into your nursing

# Take time to understand the legal principles of malpractice, and incorporate these into your nursing practice.

practice. Be sure you're familiar and compliant with your state's nurse practice act, your facility's policies and practices, and applicable standards of care related to your practice area.

Here are other guidelines that can help reduce your liability risk—or help cushion the financial blow if you're sued:

- Perform only those skills that are within your practice scope.
- Stay current in your field or specialty area by attending in-service programs and other continuing education opportunities. Be active in professional organizations.
- Know your strengths and weaknesses. Don't accept assignments if you're not sure you're competent to perform them.
- Attend equipment in-service programs and make sure you know how to detect equipment failures.
- Never make a statement that a patient or family member may construe as an admission of guilt or fault.
- Document all patient care activities and communications.
- Know how to invoke the chain of command in your facility, and don't hesitate to do so

when needed.

- Maintain open, honest, respectful communication with patients and their families. They're less likely to sue if they believe the nurse has been caring and professional.
- Carry your own malpractice insurance. That way, if you're named in a suit, you'll have an attorney dedicated solely to your interests. Without insurance, you must rely on the facility's attorney, whose first priority is to defend the facility.

## More autonomy, greater legal risk

As nurses, we've become increasingly integral to healthcare delivery and more autonomous in our practice. Along with our increased role comes greater responsibility and accountability—not just for our own actions but for those of personnel to whom we delegate tasks. We're being held to higher standards than ever.

Staff reductions and limited resources place even greater demands on nurses. Often, we must act quickly in high-pressure situations. What's more, the patients' rights movement has emboldened

more patients to sue healthcare providers.

All of these factors make nurses more vulnerable to malpractice claims. To help shield yourself, always practice within the boundaries of your professional licensure. Although we can't guarantee you'll never be named in a malpractice suit, we're confident that the advice in this article will help you recognize—and avoid—malpractice pitfalls and perils. ★

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For a complete list of selected references, visit [AmericanNurseToday.com](http://AmericanNurseToday.com).

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**Purpose/goal:** To provide registered nurses with information on how to prevent being named in a malpractice lawsuit and which actions to take if they are named.