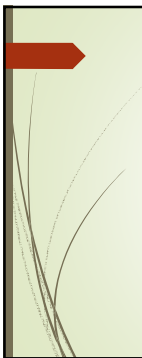





Hot Liability Topics for Nurses

2019 TAANA Annual Conference
Minneapolis, Minnesota



LEARNER OBJECTIVES

- Describe legal/ethical reasoning in preventing extension of liability in the clinical setting.
- Articulate actions that might trigger an anti-kickback violation and possible legal remedies.
- Discuss legal/ethical issues that might arise for on-line nursing faculty.
- Compare communication techniques that either support or endanger interdisciplinary communications.



LEGAL ETHICAL ISSUES FOR ONLINE NURSING FACULTY

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RISKS IN ONLINE LEARNING

- Under staffed and ill prepared for implementation and delivery
 - How many people in education department
 - Course creation
 - Managing Learning Management System
 - Marketing courses
 - Not being prepared for amount of work

RISKS IN ONLINE LEARNING

- Bad course design
 - Repurposed course design
 - Tons of text on slides
 - Aesthetics or presentation style is boring and tedious
 - No person to person contact

METRICS TO WATCH

- Has student met the minimum requirements?
- How timely is the student in submitting assignments?
- Is the student having difficulty with university-level American English?
- First week is critical. Student falls behind, difficult to catch up.
- Email communication

LIABILITIES

- Nursing student acted while under supervision of nurse educator
- Neglected to follow standards and procedures that other nurse educators follow
- Harm caused to patient direct result of nurse educator's negligence

AVOID LIABILITIES

- Document student skills
- Communicate weekly with preceptor
- Require low-performing students to obtain more practice in specific area
- Notify students of poor performance and how to improve
- Protect student safety
- Facilitate student due process

**LEGAL & ETHICAL ISSUES
RELATED TO
THE ANTI-KICKBACK LAW**

RISKS, LIABILITIES, SAFEGUARDS & ETHICS

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THE ANTI-KICKBACK STATUTE
42 U.S.C. § 1320a-7b.

- The Anti-kickback Statute is a criminal law that prohibits the knowing and willful payment of "remuneration" to induce or reward patient referrals or the generation of business involving any item or service payable by the Federal health care programs, e.g. drugs supplies or health care services for Medicare or Medicaid patients.
- Remuneration includes anything of value and can take many forms besides cash such as free rent, hotel stay, etc.

WHO IS AT RISK?

- Nurse practitioners, registered nurses and other health professionals can be a target for kickback schemes when they are a source of referrals to other health professionals and suppliers.
- Companies and others want the business connections and referrals from health care professionals and would pay those providers to send business to them.

RISKS & LIABILITIES
Examples of Kickback Payment Schemes

- Rewards for referrals.
- Waiving of required copays of Medicare and Medicaid patients.
- Taking money or gifts from a drug or device company or a durable medical equipment supplier.
- Accepting a trip or discounted airline tickets.
- Doing research for payment when it is unnecessary research.
- Getting free tickets to a big game.

AVOIDING LIABILITY: SAFEGUARDS

- Knowledge.
- Be Aware of the Kickback Schemes.
- Know and Utilize Safe Harbor Statutory Exceptions as developed by the Office of the Inspector General.

SAFEGUARDS TO AVOID LIABILITY

- Do Not Accept or Give Gifts or Cash Payments, coupons or bonuses, travel payments or other discounts.
- Do Not Accept Grants for Research Studies when the Study is of Questionable Scientific Value.
- Do Not Employ or Contract with Excluded Individuals or Entities When Your Patient is in a Federal Health Care Program.
- KNOW WHERE TO REVIEW CURRENT SAFE HARBORS.

THE UNETHICAL & ILLEGAL RESULT OF KICKBACKS

KICKBACKS ARE A FUNDAMENTAL ETHICAL VIOLATION

- Kickbacks Violate the Treating Provider-Patient Relationship.
- Kickbacks Compromise a Health Professional's Health Care Judgement with Personal Financial Decisions.
- Kickbacks Influence Health Care Treating Decisions.

**THE UNETHICAL & ILLEGAL
RESULT OF KICKBACKS**

KICKBACKS ARE A FUNDAMENTAL ETHICAL VIOLATION

- Kickbacks Result in Over-Utilization.
- Kickbacks Bring Increased Costs to Beneficiary & Federal Programs.
- Kickbacks are a Form of Unfair Competition.

**ANTI-KICKBACK
SAFE HARBOR EXAMPLES
42 CFR § 1001.952**

- REFERRAL SERVICES
- LEASE OR RENTAL OF OFFICESPACE OR EQUIPMENT
- GROUP PURCHASING ORGANIZATIONS
- PERSONAL SERVICE AND MANAGEMENT CONTRACTS
- WAIVER OF BENEFICIARY COINSURANCE AND DEDUCTIBLE AMOUNTS
- DISCOUNTS BY MANUFACTURERS ON DRUGS FURNISHED TO BENEFICIARIES UNDER THE MEDICARE COVERAGE GAP DISCOUNT PROGRAM.
- PHARMACY WAIVERS OF COST-SHARING UNDER ALL FEDERAL HEALTH CARE PROGRAMS

**ANTI-KICKBACK
SAFE HARBOR REGULATIONS**

Office of Inspector General
Federal Anti-kickback Safe Harbor Regulations

<https://oig.hhs.gov/compliance/safe-harbor-regulations/index.asp>

The "safe harbor" regulations describe payment and business practices that are not treated as actionable kickback violations pursuant to the Anti-Kickback Statute.

Criminal Prosecution of Nurses for Issues Related to Nursing Practice

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Is the Prosecution of Nurses Rising for Incidents Related to Nursing Practice?

- Anecdotal evidence appears to support this notion
 - No systematic studies available
- Sources of criminal cases against nurses
 - Complaints from patients/family members, facilities and licensing agencies
 - DEA: Advanced Practice Registered Nurses and improper prescribing practices
 - Medicare Contractors (RAC or UPIC) and Medicaid Fraud Control Units: Fraud, Anti-Kickback, False Claims and other allegations
 - Local Prosecutors: Drug diversion allegations and infamous practice errors

Winkler County, Texas

- The Facts:
 - Two long-time nurses Anne Mitchell and Vicki Galle, at a west Texas Critical Access Hospital filed a confidential complaint with the Texas Medical Board regarding a physician, Victor Arafiles
 - The complaint alleged multiple issues with Arafiles practices, including quality issues, improper surgery and use of "alternative" remedies

Winkler County, Texas

- The Facts:
 - Mitchell and Galle were administrators with responsibility over the medical staff and quality improvement
 - Arafiles had a prior disciplinary action from the Texas Medical Board restricting his ability to supervise APRN's and PA's
 - Most importantly, Arafiles had become fast friends with County Sheriff Robert Roberts

Winkler County, Texas

- How did it become a criminal matter:
 - Arafiles complained to Roberts, alleging the complaint was harassment
 - Roberts obtained the confidential complaint by claiming he was investigating his friend, Arafiles
 - Roberts shared the complaint with hospital administrator Stan Wiley
 - Wiley was able to identify Mitchell and Galle as the source of the complaint

Winkler County, Texas

- How did it become a criminal matter:
 - Roberts obtained a search warrant for Mitchell and Galle's computers and found the complaints.
 - Also, it was discovered that Mitchell and Galle sent patient information to the Texas Medical Board
 - Mitchell and Galle were charges with felony misuse of information

Winkler County, Texas

- What happened:
 - The case drew national attention and the nurses received financial support from the American Nurses Association and the Texas Nurses Association
 - Texas Medical Board Executive Director noted that criminal charges in this case could have a "significant chilling effect" on reporting physicians
 - Charges against Galle dropped before trial

Winkler County, Texas

- What happened:
 - Mitchell went to trial with the County Attorney, Scott Tidwell, a political supporter of the Sheriff and personal attorney for Arafiles, prosecuting
 - Jury trial returned a non guilty verdict after the relationship between Roberts and Arafiles brought out at trial

Winkler County, Texas

- The aftermath:
 - Mitchell and Galle filed a civil rights and wrongful termination lawsuit – settled for \$750K
 - Roberts, Wiley, Tidwell and Arafiles all convicted of various charges
 - Texas Department of State Health Services fined the hospital for the terminations
 - Arafiles Medical license was revoked

Vanderbilt University

- The Facts:
 - Nurse at Vanderbilt University Medical Center gave a dose of vecuronium, a strong paralytic, rather than a dose of midazolam, a sedative
 - Nurse overrode several safeguards, including multiple warnings at the medication cabinet and a printed warning on the top of the medication bottle

Vanderbilt University

- The Facts:
 - Nurse admitted that she should have known when she had to reconstitute the medication
 - Nurse also admitted thinking she had just killed the patient after the error was discovered
 - Patient died as a result of the medication error

Vanderbilt University

- How did it become a criminal matter:
 - Patient death triggered an investigation by Medicare after the report
 - Vanderbilt reported to Department of Health in Tennessee, but they took no action against the nurse's license
 - However, the District Attorney in Davidson County picked up the case and charged the nurse with reckless homicide

Vanderbilt University

- The aftermath:
 - Case is still pending
 - Significant support from the nursing community, including a legal defense fund
 - Family of the patient is reportedly against the criminal prosecution

DEA Investigations

- Huge potential for liability for APRN's
- Case Example:
 - Nurse Practitioner in the Dallas area worked in pain management for years in a facility
 - Decided to leave the facility to work with a group practice doing pain management
 - Nurse missed multiple warning signs that the clinics were essentially fronts

DEA Investigations

- Case Facts:
 - Nurse Practitioner went to work for a series of clinics run by a physician (but not owned by the physician) that were billed as medical clinics, but primarily treated patients with pain complaints
 - A majority of the patients ended up receiving prescriptions for an opioid, a short-acting benzodiazepine, and a muscle relaxer
 - Nurse practitioner wrote prescriptions for over 20,000 tablets of opioids over about 18 months

DEA Investigations

- How it became a criminal matter:
 - State-wide DEA investigation into the clinics, four located in the Dallas area
 - Extensive surveillance and use of undercover DEA agents as "fake" patients
 - Filed initially as a sealed indictment and unsealed in parts

DEA Investigations

- The aftermath:
 - Physician went to trial and was convicted as responsible for more than a million units of opioids prescribed, sentenced to 13 years in prison
 - Numerous guilty pleas including the primary physician, the co-owners of the clinics and several nurse practitioners and physician assistants
 - Nurse Practitioner received 33 months in prison
 - Co-owners received 135 months and 97 months respectively

State-level Prosecutions of Nurses

- Medicaid Fraud Control Units and local police are even looking at individual nurses in facilities on alleged diversion issues
- Texas Health & Safety Code has a cause of action for conversion of a controlled substance by a health care provider

State-level Prosecutions of Nurses

- **Case #1**
 - Registered Nurse working in Emergency Department setting was removing a large amount of diphenhydramine from pyxis
 - Nurse was administering diphenhydramine in place of opioid analgesics to patients, then taking the opioids home and injecting them
 - Nurse was indicted on felony charges of conversion of a controlled substance

State-level Prosecutions of Nurses

- **Case #1**
 - As to the criminal case, nurse accepted a plea bargain and pled guilty to a reduced charges of possession of a controlled substance, no prison
 - Nurse voluntarily entered the Texas Peer Assistance Program for Nurses immediately after termination from the employer (and before the criminal charges)
 - Disciplinary cases before the Nursing Board and Health and Human Services Commission (nurse is also a paramedic) still ongoing

State-level Prosecutions of Nurses

- **Case #2:**
 - Licensed Vocational Nurse alleged to have taken a single dose (two tablets) of hydrocodone from a medication cart and failed to give the medication to a patient
 - Evidence presented includes a video of the nurse taking the medication from the cart and putting it in a medicine cup, then in her pocket. And a neurologically impaired nursing home patient stating they didn't receive their medication the next morning

State-level Prosecutions of Nurses

- Case #2:
 - Nurse indicted for conversion of a controlled substance for this single episode of alleged conversion
 - Facility was unable to produce the medication administration record for the case
 - Case is currently pending trial on September
