

Proposal 2007-1

Protection of Nurses From Criminal Prosecution for Unintentional Medical Error

Subject:

Health Care Errors

Proposed by:

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Type of Proposal:

New Action Proposal

Rationale:

Advocates of criminal charges against nurses should be held accountable for their actions and argue that criminal charges protect the public from future harm. Robert Grant the prosecuting District Attorney who charged three Denver registered nurses with criminally negligent homicide wrote an open letter to the nursing community stating, "Nurses do not need to fear being prosecuted for simple mistakes. However, if their care falls to a level of criminal negligence, such as when a doctor's orders regarding the route of administration are knowingly changed without authorization, leading to deadly consequences, they cannot expect to be immune from responsibility."

Opponents of criminal charges advocate that sanctions against nurses should be managed by State Boards of Nursing. Leslie Morrison, JD, MS, RN, of The American Association of Nurse Attorneys stated "Criminal prosecution without criminal intent is the wrong way to go, as long as there are civil sanctions, such as suspending the license. Accidents happen. They shouldn't be condoned, but going through licensing channels is more important than pressing charges."

Most, but not all criminal charges involve some element of wrongful intent (sometimes described as "*mens rea*" or guilty mind) on the part of the defendant in order to sustain a conviction. Statutes that provide for prosecution of criminal negligence do not contain the common element of wrongful intent. Instead, the "State must satisfy jurors beyond a reasonable doubt that the defendant engaged in conduct which under all the circumstances present, the defendant should have realized created a substantial and unreasonable risk of death or great bodily harm to another person." For example the State of Wisconsin (*State vs Thao*) set out to prove that the nurse was so oblivious to known safety standards and procedures that her actions were the functional equivalent of the speeding motorist who chooses to speed on a busy street with many pedestrians present and as a result maims or kills a pedestrian without having intended to do so.

Nurse Practice Acts have provided for a State Board of Nursing to establish specific rules and regulations that both define and govern nursing practice. The board has the power to license qualified nurses, approve education programs and has the power to

conduct an investigation and discipline the license of nurses who violate the provisions of the nurse practice act.

As noted in *Wall of Silence*, health care professionals have much to learn from other industries in which it is expected that co-workers check on one another's work and intervene if a potential mistake is in progress, without fear that someone's ego will be hurt. The professions have a long way to go before medical errors are reported without fear of reprisal so that processes and systems can be revamped to prevent future errors of similar origin. Threat of criminal prosecution will only drive reporting further underground.

There is concern across the nation that criminal prosecution of medical errors could drive medical errors underground and impede quality improvement measures and adversely impair recruitment into the healthcare industry leading to a significant reduction in patient's access to health care services, particularly in rural areas.

Recommendations:

The Nebraska Nurses Association shall:

1. Collaborate with ethicists, litigators and legislators to develop policies to define and separate intentional criminal activity from unintentional medical error and differentiate legal criminal consequences from civil action.
2. Disseminate information in the Nebraska Nurse regarding nursing culpability regarding performance in the line of duty.
3. Collaborate with ANA regarding position statements in this regard.

Past House Actions:

None

Relation to Mission/Vision Statement:

Advancement of Professional Security for Nurses

References:

American Nurses Association (2007) *Legal Basics for Professional Nursing: Nurse Practice Acts*. Silver Spring, MD: American Nurses Association.

Frankel, Mark (2006). Human Error or Criminal Conduct-How Can One Tell the Difference? Godfrey & Kahn Health Law Vantage Point. Retrieved June 17, 2007 from <http://www.gklaw.com/docs/healthcarevantagepointNov2006.cmf?pf=1&SCRIPTMODE=edit&INIBIT...>

Gibson, Rosemary, and Singh, Janardan Prasad. *Wall of Silence*. Washington, DC: Lifeline Press, 2003

Lyon, C. (1998). Crime and punishment? Could you go to jail for a medication error? Retrieved June 17, 2007 from http://www.nurseweek.com/features_98-5/crime.html.

Wisconsin Medical Society. General Health. Retrieved June 17, 2007 from http://www.wisconsinmedicalsociety.org/health_topics/general_detail.cfm?id=717.

Proposed Implementation Activities:

1. Work in collaboration with Nebraska Coalition on Patient Safety to promote a non-punitive culture for incident reporting and processing information in an effort to reduce future errors.
2. Legislative liaisons to promote legislation for protection from criminal prosecution for unintentional medical error.
3. Articles in the Nebraska Nurse regarding ANA and Nebraska Coalition on Patient Safety initiatives.

Range of Direct Costs:

None anticipated

Funding from Alternative Sources:

Not Applicable