Session Number 404 and 408

YIN/YANG: LEGAL & ETHICAL ISSUES IN NURSING PARTS 1 AND 2

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Content Description

This presentation presents the key concepts of ethical and legal issues in nursing practice. Real case studies will be presented and analyzed. Nurses need to be aware of such issues so that they can maintain safe practice.

Learning Objectives
At the end of this session, the participant will be able to:

Legal Issues

1. Define the major types of law.

2. Describe the 5 components of a malpractice case.

Ethical Issues

1. Identify an ethical theory that one can utilize in practice.

2. Describe ANA’s position on ethics in nursing.

3. Gain a better understanding about the interrelationship between law and ethics.

YIN & YANG:
Legal & Ethical Issues
in Nursing
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My Full Time Job
Drexel University
College of Nursing & Health Professions
Philadelphia, PA
• Associate Dean – Post Licensure
  Nursing Programs: RN to BSN;
  Graduate & Doctoral Programs; CNE
• Clinical Professor of Nursing

Logan – ”The Alpha Male”
Learning Objectives

- To gain a better understanding about the interrelationship between law and ethics.
- To define the major elements of a malpractice case.
- To identify an ethical theory that one can utilize in practice.
- To describe ANA's position on ethics in nursing.
Pursuant to Practice

- Dynamic environment
- Increasing awareness
- Duty
- Breach of duty
- Vigilance in preventing liability
- Safe practice

Interrelationships

Laws

Ethics

Morals

Legal Issues in Health Care

- The Definition of Law
- Types of Law
  - Public v. Private
  - Criminal v. Non-Criminal
  - Case v. Code-Based
Public v. Private

- Public law
  - Constitutional law, criminal law & administrative law
  - Defines citizen to government relationship
- Private law = Civil law
  - Defines citizen to citizen relationships
  - Includes
    - Personal responsibilities about things we own
    - Injuries we inflict or avoid
    - Contracts we make or break

Criminal v. Non-Criminal

- Criminal law
  - Federal or state government
  - Prosecuting an offense against society
  - Attempts to deprive personal liberty or life
  - Requires proof beyond a reasonable doubt
- Non-Criminal or Civil law
  - Disputes between two parties
  - Often settled with exchange of money
  - Requires convincing a jury that complaint is true
  - Relevant example - Medical malpractice

Case v. Code-Based

- Case law or Common law
  - Created by judges
  - Non-statutory
- Code law
  - Collection of laws
  - Created by legislation
Statutory Law

- Local governments also pass laws that influence the lives of individuals
- Known as ordinances these local laws are also subject to review by the courts
- Police power refers to the power of the state to legislate on public health
- States may also authorize the development of a board of health
- Boards of health generally administer legislative mandates such as prevention of communicable diseases & regulation of health care facilities

Legal Terminology

- Res Judicata
- Stare Decisis
- Respondeat Superior
- Charitable Immunity
- Res Ipsa Loquitor
- Tort

Res Judicata

The Thing Has Been Decided
Stare Decisis
To Stand By
That Which
Is Decided
Quinlan Case Study

Respondeat Superior
Let the Master Speak
- Vicarious liability
- Borrowed servant doctrine
- Captain of the ship rule
- Darling Case Study
- Carlino Case Study

Charitable Immunity
- Protection of charitable (non-profit) hospitals
- Immunity is never absolute
- Negligent conduct can nullify the C.I. Doctrine
  - Examples: Willful, wanton, gross, or reckless behaviors
- Only seven states apply charitable immunity doctrine to health care
- Flagiello Case Study
**Res Ipsa Loquitor**

The Thing

Speaks for Itself

Health Care Examples

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**Tort**

- Law includes negligence and professional negligence
- Law protects others from unreasonable & foreseeable risks of harm
- A civil wrong other than breach of conduct
- Law provides a remedy for injured person to seek damages

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**Reading the Medical Record In Front of a Jury**
Negligence & Professional Negligence

- Negligence
  - Conduct that falls below standard established by law
  - Protection from unreasonable risk of harm
    - Includes concept of foreseeability
- Professional negligence or professional malpractice
  - Conduct of professionals that falls below professional standard of due care
  - Conduct of care falls below standard minimum of special knowledge and ability

Corporate or Institutional Liability

- Liability of health care systems & breach of duty owed to its patients
- Duties implied:
  - Maintaining a safe facility and safe equipment
  - Providing competent-qualified-trained and licensed individuals to provide care
  - Providing proper orientation and supervision of the staff
  - Maintaining appropriate policies, procedures and bylaws

Brent, 2001

Anatomy of a Malpractice Case

- Duty to Provide Care
- Breach the Duty
- A Tort is Committed
- An Untoward Outcome Results
- Events Were Foreseeable
- Philadelphia Case Study
- Tarasoff Case Study
Standards of Care

- Regional
- National

Professional Negligence Claims Against Nurses

- Based almost exclusively on personal injury
- Resulted from various types of negligent conduct
- Involved product liability and most recently complimentary/alternative health care options

Potential Nursing & APN Liabilities

Failure To:

- Provide for patient’s safety
- Properly assess and diagnose a patient
- Incorrectly treat a patient, i.e. order the wrong medication
- Collaborate with physician when necessary
- Failure to look for the “Zebra”

Brent, 2001
Common Allegations Of Negligent Conduct

- Inadequate assessment
- Inadequate communication
- Improper medication ordering/administration
- Poor documentation
- Improper ordering or use of equipment
- Failure to follow policy, procedure or protocol
- Nofer Case Study

Brent, 2001

Expert Witness: Cases Settled

1. Wiggins versus Correctional Medical Services 1994
   Albuquerque, New Mexico
   Case settled out of court for nominal sum
   Improper Assessment, Documentation, & Transport

2. Villagran versus Correctional Medical Services 1999
   Las Vegas, Nevada
   Case settled out of court
   Failure to Communicate Pertinent CT Scan Results

3. Nofer versus Substance Abuse Treatment Center 2005
   Morristown, New Jersey
   Case settled in court for $1.5 million dollars for Plaintiff
   Improper Assessment, Lack of Communication, Failure to Protect Pt.
   (Note: I was an expert on the Plaintiff’s side)

Expert Witness: Case Settled

- Family vs. County Justice Facility 1988
  Atlantic County, NJ
  Case Settled out of Court for Minimal Sum
  Improperly Performed CPR
Contract Law

- Promises made
- Enforcement once a legal right is created
- Application in healthcare
  - Nurse employer – nurse manager – nurse-practitioner
  - Nurse entrepreneur
- A contract is:
  - Voluntary agreement
  - For the benefit of two or more individuals
  - Legally qualified

Contracts

- Verbal
- Written
- Implied
- Informed Consent

Other Legal Issues

- Sexual Harassment
- Comparable Worth
Other Legal Issues

- Discrimination
  - Affirmative Action (Civil Rights Act of 1964)
  - Title VII of Civil Rights Act of 1964
  - The Age Discrimination in Employment Act of 1967
- Employees at Will
  - Protects employer and employee
  - Employment can be ended at the will of either party for a good reason, a bad reason, or for no reason

Nursing & APN Liability Categories

**Failure To:**
- Order appropriate medications and other treatments
- Order a treatment or procedure according to standards of care
- Document a patient's condition, treatment & response to treatment

Brent, 2001

Defenses Against Allegations of Professional Negligence

- **Untimely filing of the case**: files after the statute of limitations runs out
- **Assumption of risk**: the plaintiff knew "it" was dangerous, had facts about the danger and chose to take on the danger
- **Immunity from suit**: one common one is "Good Samaritan act"
Best Defense: Good Offense

Harm to a patient can arise from intentional or non-intentional acts

- **Intentional acts** of harm can include: defamation, invasion of privacy, assault & battery, false imprisonment, or infliction of emotional distress
- **Non-intentional acts** of harm can include: omission or negligence

Aiken, 1994

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Interrelationships

- **Laws**
- **Ethics**
- **Morals**

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Ethics Definition

- Ethics is a discipline in which one attempts to identify, organize, analyze, and justify human acts by applying certain principles to determine the right thing to do in a given situation
Ethical Premise for Nursing Practice

- Help Regain Health
- Help Maintain Health
- Help Attain a Maximum Potential
- Help the Dying

Ethical Theories

- Act Utilitarianism (Teleological)
  - focus is on the consequence of the actions. The approach here is to do good...
  - or to provide the greatest amount of happiness for the greatest number of people
  - or the least amount of harm to the greatest number of people.

Ethical Theories (continued)

- Libertarianism (Egoism) - this position maintains a focus on the individual person. This position seeks a solution that is best for that person.
- The rights of each member of society are paramount.
Ethical Theories (continued)

- **Formalism (Deontological or Egalitarianism)**

  - Focus of this theory is centered on the *rules* that govern a situation.
  - Democratic principles are emphasized.
  - Concepts of quality and comparable worth are paramount.
  - *Universality* is the major theme guiding or directing the decision-making process.

Deontology

- Ethical principles guide a nurse’s action not the consequences of the actions
- Deontology is Greek for duty
- Ethical decisions are based on the duty of the nurse

Act Deontology

- Actions are based on moral beliefs or values
- Actions result from the situation at hand
- Actions are based on a duty to the patient

Burkhardt & Nathaniel, 1998
Rule Deontology

- Actions are based on rules and standards
- Rules and standards are fixed and inflexible
- Actions are based on nursing standards of care and rules of law

Burkhardt & Nathaniel, 1998

Ethical Theories (continued)

- Humanitarianism (Fairness) —
  - Focus of this theory is concerned with the distribution of benefits and burden in society.
  - Concepts of fair opportunity, basic needs, and individual needs are emphasized.
  - Fairness may not be the same as equality.

Ethical Theories (continued)

- Rawlsian —
  - Focus of this theory is that the least advantaged should not be hurt.
  - The overriding principle is justice. Each person is entitled to quality and access of medical care.
Ethical Theories (continued)

- Naturalistic
  - Focus of this theory is "it is what it ought to be." That is, if you have a terminal illness, you are meant to die.
  - The major principle here is utmost rationality.

Ethical Theories (continued)

- Consequential
  - Focus of this theory is **scientism**, that is, scientific and objective data guide the ethical decision making process.
  - No feelings enter into the equation.
    - Basis is rationality.

Ethical Terms or Principles

<table>
<thead>
<tr>
<th>Autonomy</th>
<th>Beneficence</th>
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<tbody>
<tr>
<td>Fidelity</td>
<td>Justice</td>
</tr>
<tr>
<td>Nonmaleficence</td>
<td>Veracity</td>
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**Autonomy**

- Freedom to be self regulating
- Primary objective in patient care
- Can be ignored or refused under some circumstances

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**Fidelity**

- Duty to be faithful & loyal and to honor promises made
- Having a license is to honor promises made to the state (laws) and to nursing boards & professional organizations (code of ethics)

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**Accountability**

Is Based in Fidelity

- Ethical dilemmas
- Result when a nurse’s duty requires loyalty to 2 opposite interests
- Accountable to Patients
- Accountable to Self
Justice

- Duty dictates fair & equitable access & care to everyone seeking health care
- **Distributive** Justice: is based on organization and government decisions as to who gets what in the form of goods & services
- **Procedural** Justice: is based on clear and known fair process within distributive justice

Burkhardt & Nathaniel, 1998

Beneficence

- Duty to be a patient advocate
- Society believes strongly that a nurse will do good for a patient and also prevent harm or evil to the patient

An Ethical Principle that sometimes causes great angst for nurses

Aiken, 1994

Nonmaleficence

- Duty to provide care without intentional or unintentional harm
- Duty to protect those who cannot protect themselves
- Duty to prevent experiments that will harm the patient
- Duty to prevent unnecessary procedures done as learning experiences
Veracity

- Truthfulness. Truth is viewed as a cornerstone of nursing practice.
- Both legal and ethical.
- Not absolute in the case where telling a patient “everything” may cause additional harm to the patient.

Ethical Decision-Making Model

- Identify the Problem
- Tease-Out the Ethical Problem/Dilemma
- Gather Objective and Subjective Data
- Look at Alternatives
- Study the Consequences of Alternatives

Ethical Decision-Making Model (con’t)

- Select the most appropriate alternative
- Compare the selected alternative with your own value/values system
1. Does the patient understand the risks and benefits of the treatment and/or procedure?
2. Does the patient choose to accept or reject the offered health care?
3. Does the patient give up the right to choose a health care option?

O'Keefe, 2001

Principled Ethics

- Patient autonomy often is the primary ethical base
- Other principles which may be in conflict:
  - beneficence
  - nonmaleficence
  - justice

Clinical Ethics

- Patient autonomy is the primary principle
  IF the patient is able to have his or her preferences known
- Nurses should ask 2 questions
1. From the patient’s viewpoint, what will the quality of life be WITH or WITHOUT the treatment?

2. From varied viewpoints, what is the socioeconomic impact of the decision on all parties concerned?

O’Keefe, 2001

The Role of the Nurse in Ethics

- Acquire knowledge of ethical theory
- Assess the ethical situation at hand
- Implement the decision-making model/process
- Identify the specific theory in use

Creating the Ethical Workplace

- Commitment to the Patient
- Commitment to Self
- Duty to Support an Ethical Environment
- Contributing to the profession
The Yin and Yang Of It All

Masculine Viewpoint of Ethics
- Focus on rights and justice
- Focus on fairness and equality

Feminine Viewpoint of Ethics
- Focus on psychology of relationships
- Focus on qualities of courage, generosity, commitment and responsibility

Gilligan, 1981
Bandman & Bandman, 1995

Ethical Issues Today

Conflicts & Dilemmas
Landmark Cases

- **Karen Ann Quinlan** - Courts not needed for ethical decisions; Permitted surrogate decision-making; Based on Right to Privacy in US Constitution
- **Nancy Ellen Jobes** - Reaffirmed Quinlan decision with other types of artificial interventions
- **Cruzan** – Patient Self Determination Act
- **Terri Schiavo** – Demonstrated importance of communication & consensus; Legal rights and surrogate decision-making

Nancy Beth Cruzan
Tombstone

Ethical Encounters

- Advance Directives & Right to Live/Die
  - Euthanasia
  - Do Not Resuscitate Orders
  - Rights of a Dying Patient
  - Use of Life Sustaining Equipment
- Lack of respect for patient’s dignity
- Stem Cell Research
- HIV and AIDS
  - A Nurse with HIV
  - A Patient with HIV
Ethical Encounters

- Human cloning
- Research on the mentally ill
- Research on embryos
- Patient autonomy and the Patient Self-Determination Act (1990)
- Organ Donation Issues
- Incompetent Health Care Providers
  A Peer...A Nurse...A Physician
- Operative issues
  - Inadequate consents

That's All Folks!!

- Questions?
- Discussion
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