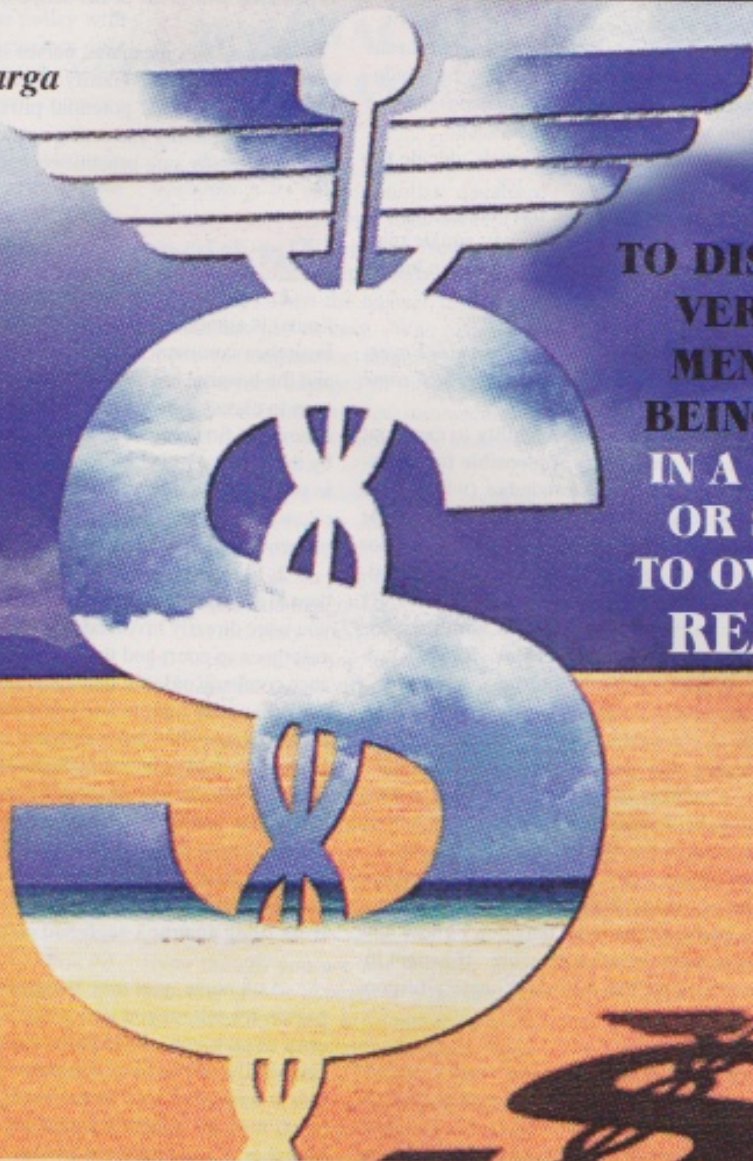


**HOW TO PROTECT YOURSELF AGAINST**

# **MALPRACTICE**

*by Ken Varga*



**TO DISMISS THE  
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*If you read newspapers or watch TV news, you are aware of the critical problems health care professionals are facing with malpractice insurance. As an independent insurance broker, I have learned that hospitals throughout the nation are being plagued with skyrocketing insurance rates or having their policies canceled by insurance companies.*

*A nurse who was "covered" by an institution's insurance now discovers that he/she has inadequate coverage or no coverage at all. The time when nurses didn't need liability insurance is a thing of the past. Many institutions which at one time paid an extra premium to cover nurses now find themselves faced with higher costs for the same coverage. It is, therefore, cheaper for them to recommend that employees enroll in and pay for their own liability insurance. Without their own insurance, nurses are dependent upon hospitals' fluctuating insurance status.*

*Being named in a suit, even if the suit is groundless or fraudulent, can affect your credit rating if your insurance limit is not adequate to cover the amount demanded by the suit. This can affect your ability to buy a home or a car or to finance your children's education.*

## The Reality

Many health-care professionals equate malpractice suits with malicious or stupid acts they couldn't possibly commit. But, by dismissing the very real menace of being sued, they overlook four fundamental realities:

1. Anyone can sue anyone else anytime he/she chooses, for any reason.
2. A defense must be mounted against any suit. That means lawyer's fees and court costs, and possibly more money for a judgment against you. Win or lose, few of us can sustain such an unexpected financial strain without adequate insurance.
3. Often lay juries, not health care professionals, decide the merit of malpractice cases.
4. Juries are more likely to identify with the plaintiff patient than with the defendant nurse or doctor. They may equate malpractice with any bad result, even one caused by errors in judgment or plain bad luck.

*Discussion of malpractice does not lend itself to a quick overview. There are many ramifications. However, there are some useful caveats:*

1. Even though nurses have a legal responsibility to carry out the orders of a physician, they are equally responsible for knowing within the scope of their nursing knowledge (which may include checking the Physician's Desk Reference or with the pharmacist) that what is ordered is correct for that particular patient. If there are questions related to dosage, mode of administration, or appropriateness for that patient, it is not only acceptable but mandatory to discuss the question with the physician ordering the drug. Incomplete orders or sloppy handwriting are particularly dangerous. Some hospitals now have a policy that spells out this responsibility and gives nurses guidance as follow-up steps if physicians are uncooperative.

2. It is not enough to just chart serious changes in a patient's condition. According to a number of court rulings, a nurse must notify the physician and if she/he does not respond or take action, the nurse must take this through the administration hierarchy, including the administrator, if necessary, who has the legal responsibility for seeing that the patient receives appropriate care.

3. Nurses should not attempt to do what they don't know how to do, regardless of peer or administrative pressure. If patient injury occurs, the person who gave the care is ultimately responsible.

*In case of a malpractice suit, the defendant nurse is judged by the "standard of care" in the particular community, that is, what the "reasonably prudent nurse" would do or not do under the circumstances. Who makes that judgement? The judge or jury will, based on testimony that may include:*

1. Highly credential expert witnesses employed by both plaintiff and defendant, who will testify that the defendant did or did not take appropriate action.
2. A determination as to whether the nurse practices according to the findings of the most recent nursing literature and education.
3. A determination as to whether the nurse followed hospital policy and manuals or procedure books, adjusting them to the individual needs of that specific patient, using professional nursing judgement.

4. Referral to the profession's standards, such as those published by the American Nurses' Association.

5. Referral to the patient's chart, and what the nurse recorded. (It is wise to remember the basic principals of charting learned early in nursing education.)

6. Referral to nurse practice acts of that state to determine whether the nurse fulfilled the stated definition of nursing and functioned within his or her scope of practice.

Does all this mean that nurses should be in a state of terror about potential suits? Hardly. Common sense, clinical competence, recognition of potential pitfalls, and a sense of professional responsibility and caring create a reasonable prudent nurse who is a legally safe practitioner.

## Problem Situations

1. This is where a determined amount of money (called limits) is agreed upon as the maximum amount an institution's insurance company will pay in the event of a lawsuit. If you and the hospital are codefendants and are found liable for damages in excess of that agreed amount, the hospital or institution is covered first, you, are second. So, if the limits are exhausted by the hospital or institution, you are on your own. You'll have to pay out of your own pocket unless you have individual malpractice insurance. Many nurses share the delusion that the employer-hospital's policy will cover them.

2. In this situation, the hospital alone is named as a defendant in a malpractice charge stemming from an incident in which you were directly involved. You are named in the lawsuit. The case goes to court and the hospital is found guilty. The insurance company pays the damages. Now they, the insurance company, have the right to sue you for negligence (in original incident) because they have suffered a loss through your actions. Under standard common law, in some states you might be held liable. This doesn't necessarily mean that you will be found guilty, but you could. In other words, you would still suffer a financial loss, if you didn't have your own malpractice insurance, because guilty or not, you'd have to pay your lawyer's fee and the court costs. Many of these cases of subrogation and cross filing against a negligent employee occur each year.

As a nurse, you may be legally and financially liable if a person for whom you are caring is injured as a result of your error or omission. As an individual, you also can be legally and financially responsible if another person is injured or suffers loss as a result of your personal negligence, whether you are on or off the job. Whether a mistake is held to be professional in nature or of a personal nature your liability insurance program can protect you.

## Type of Insurance

Regardless of the specific nature of your education and activities, each time you are involved with a patient when bodily injury results, a claim for negligence can be brought against you. You thus can be held legally and financially liable if some-

one is injured as a result of your professional error or omission, and you can be held liable for injury and damage resulting from your personal acts on or off the job. Often it is difficult to determine whether a court will decide that a particular incident is the result of personal or professional negligence. The only type of plan that will protect you in either event is one policy with one company. Separate policies not only will cost you more, but they will leave you exposed to dispute as to which company must defend you.

Compare the duration of the insurance company's liability. You're probably familiar with the terms "claims-made coverage" and "occurrence-based coverage."

**Claims-made coverage** means that the policy would cover you only for claims made during the policy period. Under such a policy, even if the injury giving rise to the suit occurred during the policy period, but the lawsuit wasn't filed until after your policy lapses, the insurance company wouldn't have any obligation to you.

**Occurrence-based coverage** means that the policy would cover you against any injuries (or alleged injuries) that occurred within the policy period, even if the injured person didn't file suit against you until after the policy lapsed. That is obviously superior to a claims-made policy because a patient usually has two years to file a suit (longer, if he doesn't discover his injury immediately).

To find out the kind of coverage your policy offers, look for the phrase "during the policy period," then look back at the beginning of the sentence. If the beginning of the sentence states that the company is obligated to pay for "injury arising...during the policy period," then this means it's an occurrence-based policy that will cover all injuries during the policy period even if the lawsuit is filed afterward.

One more phrase in policies that is important is "professional services personally committed by the individual insured." This means nursing care provided by the policyholder. Some policies also offer coverage for damages from professional nursing services "rendered by a person acting under the personal direction, control or supervision of the insured." ***If you ever supervise others, you should get a policy that offers this valuable protection.*** You could be sued by a patient whose injury was caused by a student or another staff member if the patient claimed you should have (or could have) prevented the injury by

properly supervising the student or staff member.

## WHO NEEDS PROFESSIONAL MALPRACTICE INSURANCE?

Perhaps the best way to answer that question is by asking another question: Who needs automobile insurance? The answer is easy. Anyone and everyone who owns an automobile must have automobile insurance. Then the answer to the first question is just as easy. Who needs professional (malpractice) insurance? Anyone and everyone engaged in the health field needs liability (malpractice) insurance, even though the law, as in automobile insurance, does not require it.

A nurse who does not have malpractice insurance takes a serious risk that he/she will never be involved in a lawsuit that could result in the loss of his/her present and future financial resources.

At the many workshops I give on "Legal Aspects of Nursing," a statement made by many nurses is, "But I'm not working now, so why do I need insurance?"

You can still be named in a lawsuit simply by being a nurse. Not working does not limit your liability or eliminate it. If a neighbor stops by your home to seek help, and you give assistance, your neighbor can now name you in a lawsuit. Or if you happen to stop by an accident to render aid, you can still be named in a lawsuit. Even though you are not working now, you may still be exposed to a lawsuit and the cost of legal fees and court costs could cost you many thousands of dollars if you don't carry insurance.

Another statement that really fascinates me is, "I heard from work from another nurse that if you have insurance, then a patient will sue you simply because you have insurance." This is far from the truth. To find out that you have insurance, a patient must first sue you. Then and only then will he find out that you have insurance. But, once named in a lawsuit, you have to hire an attorney; this is where the costs without insurance comes in. So, do yourself a favor! When people say this, tell them what I have just said and maybe they will realize

the value of having their own insurance.

Nurses should protect themselves with an individual liability program or, if you believe your employer has a policy that will protect you, check and double check. Most likely, you are covered under a group employee contract and not as an individual. If premiums get too high an institution may decide not to cover employees. Will they let you know that they have dropped the coverage for employees? You can be certain of being covered when you have your own insurance.

*The following questions are those you should ask employers if they say you are covered under their insurance policy:*

1. What are the limits of liability? For example, a \$10,000 limit of liability won't be enough if you are involved in a \$25,000 lawsuit. A reasonable amount today is \$1,000,000.
2. Does the hospital's policy have a deductible? If so, for how much of the deductible might you be held liable? For example, do you have to pay the first \$1,000 of a claim? Is that good insurance for you?
3. Is the policy a "claims made" or "occurrence" form?
4. Is there a subrogation clause?
5. Will you be named on the institution's policy? It is important that you be named in the institution's insurance policy since otherwise the insurance company might say you were not listed as an employee and therefore, you would have to provide your own legal counsel.
6. Does the institution's policy provide you with personal liability coverage?
7. Will you be covered off the job?
8. Most Important: Will you get a copy of the policy? Without a copy of the policy, you are at the mercy of hearsay as to the coverage of the policy and your limits, and with no proof that you are insured.

*[KEN VARGA has been insuring nurses for over 31 years and is respected in the industry as the leader in enhancing the insurance as the times change. For a free report "The 5 Questions Your Employer Doesn't Want You To Ask Regarding Malpractice," call 1-800-545-4724 ext. 15 and visit their web site on the Internet at [www.npg.com](http://www.npg.com), for the Malpractice Case of the Week and other interesting information.]*

SUMMER 1998 ART 6 TEXT

How To Protect Yourself Against Malpractice

By Ken Varga

Synopsis -To dismiss the very real menace of being named in a lawsuit or sued is to overlook reality. This article is must. Everything you always wanted to know about malpractice insurance.