LEGAL EAGLE EYE NEWSLETTER

January 2009 — *For the Nursing Profession* — Volume 17 Number 1

Morally Coercive Or Discriminatory Practices: New Regulations Take Effect January 20, 2009.

Excerpts From The New Regulations
45 CFR Part 88

(c) Entities to whom [these regulations] apply shall not:

(1) Discriminate against any physician or other health care professional in the employment, promotion, termination, or extension of staff or other privileges because he performed or assisted in the performance, or refused to perform or assist in the performance of a lawful sterilization procedure or abortion on the grounds that doing so would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions concerning abortions or sterilization procedures themselves;

(d) Entities to whom [these regulations] apply shall not:

(1) Require any individual to perform or assist in the performance of any part of a health service program or research activity funded by the Department if such service or activity would be contrary to his religious beliefs or moral convictions.

(2) Discriminate in the employment, promotion, termination, or the extension of staff or other privileges to any physician or other health care personnel because he performed, assisted in the performance, refused to perform, or refused to assist in the performance of any lawful health service or research activity on the grounds that his performance or assistance in performance of such service or activity would be contrary to his religious beliefs or moral convictions, or because of the religious beliefs or moral convictions concerning such activity themselves.

The word "entity" in the new regulations applies to any recipient of Federal funds.

Expressly included are hospitals, provider-sponsored organizations, health maintenance organizations, health insurance plans, laboratories, any other health care organizations or facilities, including components of State or local governments.

FEDERAL REGISTER December 19, 2008
Pages 78071-78101

Certification Requirements

Health care entities will be informed of their specific compliance-certification requirements at the time of grant or provider agreement renewal, the Department says.

Who Is Protected?

The Department's official comments indicate an intent to widen as broadly as possible the application of the regulations. That was the rationale for using the phrase "other health care personnel" instead of listing specific professions and occupations, as that might give the impression that those not expressly listed are not protected by the new regulations.

The Department's official comments, rather than the regulations themselves, state for purposes of clarification that the phrase "other health care professionals" as used in the regulations refers to nurses, pharmacists, occupational therapists, public-health workers and technicians, psychiatrists, psychologists, counselors and other mental health workers.

(Continued on page 4.)

Inside this month's issue ...

January 2009
New Subscriptions
See Page 3

Wrongful Discharge: Employee Refused To Commit An Illegal Act, Can Sue For Retaliation.

Investigators from the state department of health requested complete copies of the personnel files for six of the nurses who worked at the assisted-living facility.

The payroll clerk looked through the requested files and discovered that two of the nurses had been written up for suspicion of stealing patients' medications.

When she told the administrator what was in the personnel files the administrator told her simply to remove the write-ups in question before handing over the files.

The clerk refused. The administrator then allegedly took the files from her, removed the sensitive documents and turned the files over to the investigators herself.

The clerk reported it to other management-level employees, but that only seemed to raise the overall level of hostility toward her, until she was finally terminated.

Retaliation/Wrongful Discharge Lawsuit Upheld

The US District Court for the Southern District of Indiana validated the clerk's right to sue her former employer for retaliation and wrongful discharge.

The court looked at emerging case law from other US jurisdictions saying that employers, in healthcare and other fields, do not have the right to force their employees to choose between breaking the law or losing their jobs. **Rodriguez v. Westside Ltd. Partnership, 2008 WL 5247340 (S.D. Ind., December 15, 2008).**

Employment is a relationship presumed by the law to be at-will when there is no express employment contract or collective bargaining agreement.

At-will employment can be terminated by the employer at any time for any reason, as long as the employer's motivation does not violate a public policy.

It is a public policy that an employer has no right to force an employee to commit an illegal act to keep from being fired and no right to terminate anyone for refusing to commit an illegal act.

The clerk could have been prosecuted for obstruction of justice if she had gone ahead and removed documents from the files during a state investigation.

UNITED STATES DISTRICT COURT
INDIANA
December 15, 2008

End-Stage COPD: Was Morphine Overdose The Cause Of Death?

During a previous admission for her COPD, after being weaned from the respirator, the seventy-nine year-old patient reportedly told her physician she did not want to be intubated again if she went into respiratory arrest.

The patient was admitted again for end-stage COPD with orders for 2 mg of morphine q 30-60 minutes prn for pain.

After she coded and was revived without being intubated the physician verified with her daughter that the patient should not be resuscitated if she coded again. Then the physician ordered and the nurse gave 20 mg of morphine, and the patient soon passed away.

The Court of Appeals of Georgia ruled the nurse and physician were not entitled to a summary judgment of dismissal, that is, the family will have their day in court.

The question will be whether the 20 mg of morphine was the cause of death, in which case the family will have grounds for a wrongful-death lawsuit, or whether the morphine merely eased the patient's suffering as she passed from her underlying COPD, in which case there will be grounds for a defense verdict. **Pruette v. Phoebe Putney Mem. Hosp., __ S.E. 2d __, 2008 WL 5248973 (Ga. App., December 18, 2008).**

The family of the deceased has alleged the nurse violated the nursing standard of care by administering an overdose of morphine.

The nurse and the physician claim that the elderly patient's COPD was the cause of death and that the morphine merely eased her suffering in her final hours.

COURT OF APPEALS OF GEORGIA
December 18, 2008

Perioperative Nursing: Shoulder Chair Attachment Comes Loose.

The patient was intubated and under general anesthesia. The orthopedist was positioning him for arthroscopic shoulder surgery when the shoulder chair attachment came loose and the patient fell to the floor and struck his head.

His closed head injury required three days hospitalization and allegedly disabled the patient from returning to work.

The jury in the Superior Court, Mendocino County, California awarded the patient $859,948 based on the negligence of the hospital's perioperative nurses not knowing how to set up and secure the recently-patented shoulder chair attachment device. **Staley v. Ukiah Valley Med. Ctr., 2008 WL 5120718 (Sup. Ct. Mendocino Co., California, November 19, 2008).**

Psychiatric Care: No Discharge Planning, Hospital Held Liable For Homeless Veteran's Suicide.

The fifty-six year-old patient was admitted to the psychiatric service at the VA hospital following an overdose of heroin and cocaine, stating that he was having suicidal and homicidal thoughts. He began treatment for alcoholism and paranoid schizophrenia.

He was a combat veteran who had picked up addictions to alcohol and drugs in Vietnam which plagued him the rest of his life.

His medical history included chronic drug and alcohol abuse, major depression, diabetes, hypertension, a stroke and prior suicide attempts.

His current social history at the time of admission was that he was unemployed and homeless but was receiving a $900 monthly disability check.

For more than six months the patient received inpatient psychiatric and substance-abuse treatment at the facility, then was phased into a transitional residential setting where he was allowed to leave the hospital on passes in anticipation of discharge into the community.

After six months in the transitional setting he was abruptly discharged because it was felt he no longer fit the criteria for acute inpatient care.

The patient was put out on the street after long-term inpatient care for alcoholism and schizophrenia with a one-month supply of his medication and his personal belongings.

He returned to the emergency room intoxicated two hours later and asked to be re-admitted. He was told to go find a shelter.

He just sat in the waiting area for seven hours until a security guard found him unconscious slumped over in the chair.

He had committed suicide by ingesting the entire one-month supply of his medication he was given earlier that day.

He was disabled, unemployed and homeless, but his adult children are still entitled to compensation.

UNITED STATES DISTRICT COURT
ILLINOIS
December 10, 2008

Discharge Planning Found Inadequate

According to the record in the US District Court for the Northern District of Illinois, the hospital staff made no effort to find an appropriate community placement for the patient except for some phone calls to a niece which were not returned.

In support of the family's wrongful-death lawsuit, the court accepted expert medical testimony from a psychiatrist that the standard of care for treating a patient like the deceased requires securing a safe environment for the individual where the individual feels comfortable and cared for and has the opportunity to bond with other people.

Without the opportunity to transition directly into such an environment the individual would be expected to suffer anxiety and mental anguish.

Final Emergency Room Visit Was Below the Standard of Care

The family's psychiatric expert went on to state that an individual like the deceased would be expected to experience further feelings of rejection leading to high anxiety from being basically ignored when he went back to the hospital emergency department asking for help.

According to the expert, the patient's death by suicide was caused by the facility's failing to secure a proper discharge placement for him and then ignoring his request for help when he returned the day of discharge. **McKinnis v. US, 2008 WL 5220504 (N.D. Ill., December 10, 2008).**

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Morally Coercive/Discriminatory Practices/Regulations (Continued.)

(Continued from page 1).

In the preamble to the new regulations, the US Department of Human and Health Services states that the Department is concerned about the development of an environment in sectors of the health care field that is intolerant of individual objections to abortion or other individual religious beliefs or moral convictions.

Such developments, the Department says, may discourage individuals from entering health care professions. Such developments also promote the mistaken belief that rights of conscience and self-determination extend to all persons, except health care providers.

Additionally, religious and faith-based organizations have a long tradition of providing medical care in the US, and they continue to do so today--some of these are among the largest providers of health care in this nation, the Department points out.

According to the Department, such institutions may have traditions of issuing guidance to inform the members of their workforces of the parameters under which they should operate in accordance with the organization's overall mission and ethics. A trend that excludes some among various religious, cultural and/or ethnic groups from participating in the delivery of health care is especially troublesome when considering current and anticipated shortages of health care professionals in many medical disciplines and regions of the country.

Availability of Reproductive Services Is Not Affected

According to the Department, the ability of patients to access health care services, including abortion and reproductive health services, is long-established and is not changed in this rule.

Instead, the new regulations implement Federal laws protecting health care workers and institutions from being compelled to participate in, or from being discriminated against for refusal to participate in, health services or research activities that may violate their consciences, including abortion and sterilization, by entities that receive certain funding from the Department.

We have placed the full text of the DHHS announcement on our website at http://www.nursinglaw.com/DHHS121908.pdf

The regulations themselves appear at the end of the document starting at Federal Register page 78096, which is pdf page 26.

DHHS has provided the following contacts:

For further information regarding this rule, contact:

Brenda Destro

(202) 401-2305

Office of Public Health and Science,

Department of Health and Human Services,

Room 728E, Hubert H. Humphrey Building,

200 Independence Avenue, SW.,

Washington, DC 20201.

For information regarding how to file a complaint with the Office for Civil Rights contact:

Vernell Lancaster

(202) 260-7180

Office for Civil Rights,

Department of Health and Human Services,

Room 533F, Hubert H. Humphrey Building,

200 Independence Avenue, SW.,

Washington, DC 20201.

FEDERAL REGISTER, December 19, 2008
Pages 78071-78101

Skin Care: Substandard Care Did Not Cause Death.

The Court of Appeals of Texas ruled that the medical expert's opinion filed in support of the family's wrongful-death lawsuit outlined a correct statement of the legal standard of care for an elderly patient admitted to long-term care with existing breakdown in skin integrity.

However, the evidence was lacking that substandard long-term nursing care had anything to with his death from atherosclerotic heart disease and COPD.

Standard of Care

Patient With Breakdown of Skin Integrity

First, the nursing staff must develop a care plan to address issues with existing pressure ulcers and altered nutritional and hydration status.

Next, the care plan must be implemented and its implementation fully documented.

The care plan called for the patient to be turned every two hours, but records of actual turning could only be found in the chart for one nursing shift on one particular day during his final admission.

No use of pressure-relief devices could be found documented, except one progress note of waffle boots being put on.

The patient was supposed to receive complete assistance when eating as part of the comprehensive care plan to address his needs for nutrition and hydration and nutritious snacks were supposed to be made available on a consistent basis. Staff were also supposed to monitor and record his intake and output, weigh him regularly and review the results of any lab work that might be ordered by his physician.

Again, almost none of this necessary care could be corroborated from the documentation in the chart. Many of the ADL flow charts were missing, implying either that forms left blank were deleted after the fact or that proper documentation was never started in the first place. **Regent Health v. Wallace, __ S.W. 3d __, 2008 WL 4982433 (Tex. App., November 25, 2008).**

Nurse As Patient Advocate: Court Tones Down Scope Of Labor & Delivery Nurses' Responsibility.

The Court of Appeals of Minnesota began its discussion of the legal issues by pointing out that the hospital in question is not a tertiary care facility and is not well equipped to handle neonates with special medical needs.

Polyhydramnios Increased Risk of Diaphragmatic Hernia

The court accepted the family's medical experts' opinions that excessive amniotic fluid late in pregnancy can present a heightened risk of diaphragmatic hernia in the neonate.

The court also acknowledged that the mother's obstetrician had been treating her for polyhydramnios and then the infant was correctly diagnosed with a diaphragmatic hernia about two hours after birth.

Nurses Acted Within Standard of Care

One of the labor and delivery nurses who assisted in the birth took the baby to the nursery, closely monitored his condition and reported back to the obstetrician he was having continuing respiratory problems. The hernia showed up on x-ray and the blood gases were not good, so the process was started to transfer him to the specialized children's hospital in a large city.

Nurses Did Not Fail To Advocate for Patient

The court rejected the family's allegation that the mother's polyhydramnios diagnosis put the responsibility on the labor and delivery nurses as patient advocates to assemble on their own a physician team including a neonatologist and anesthesiologist with the expertise to ventilate a neonate with a diaphragmatic hernia.

Nurses are required to substitute their own judgment only when the physician's action or inaction is obviously negligent or in cases when an obvious emergency exists. **Huisman v. Chambers, 2008 WL 5136271 (Minn. App., December 9, 2008).**

Arbitration: Arbitration Agreement Is Valid.

The nursing home decided to fight the deceased patient's probate estate's personal-injury civil-court lawsuit by arguing that the case should be decided out of court in arbitration.

The Court of Appeals of Mississippi ruled the case belongs in out-of-court arbitration under the rules of the American Health Lawyers Association and will not go before a jury in civil court.

Two years before admission to the nursing home the patient had signed a durable power of attorney for healthcare decisions giving his wife wide-ranging authority to execute legal documents in order to fulfill his healthcare needs.

COURT OF APPEALS OF MISSISSIPPI
December 16, 2008

Wife Had Authority to Sign

As a general rule a spouse or other family member has no authority to sign a contract for a spouse or other family member. In this case, however, the patient, before becoming incompetent, had signed a durable power of attorney for healthcare decisions naming his wife.

Agreement Was Valid

An arbitration agreement, like any other legal contract, is valid and binding only if the person who signed the contract fully understood and agreed to its terms.

This arbitration agreement was separate from the rest of the admissions papers, was explained to the wife and was offered to her as completely voluntary, that is, she could still admit her husband even if she refused to agree to arbitration in the event of a future dispute. **Bedford Health Properties v. Davis, __ So. 2d __, 2008 WL 5220594 (Miss. App., December 16, 2008).**

Arbitration: Nurses Are Not Protected By The Arbitration Agreement.

The elderly patient died unexpectedly only eleven days into what was expected to be a short-term recuperative stay at the nursing home.

The daughter, as probate administrator, filed a civil wrongful-death lawsuit in court against the nursing home's parent corporation and three nurses who had cared for the deceased.

No court has yet passed judgment on the underlying allegations of negligence. It has been determined, however, that the case belongs in arbitration, but only as far as the case pertains to the nursing home.

A clause could have been put in the nursing home's arbitration agreement stating that the agreement applies to the nursing home's employees as well as the nursing home itself.

Such language is commonly included in nursing home admission contracts, but happens to be absent in this particular case.

APPEALS COURT OF MASSACHUSETTS
December 18, 2008

The Appeals Court of Massachusetts ruled the nursing home's arbitration agreement was worded validly and the patient's signature was authentic, informed and voluntary.

However, the agreement was drafted in such a way that it only protected the nursing home from civil lawsuits and, therefore, does not apply to the nurses, who will have to defend a civil court lawsuit. **Constantio v. Frechette, __ N.E. 2d. __, 2008 WL 5235637 (Mass. App., December 18, 2008).**

Emergency Room: Medical Emergency Justifies Body Cavity Search, Urinary Catheterization.

The US District Court for the District of Arizona dismissed a civil rights lawsuit filed against the local police department and a local hospital where an individual was taken for medical evaluation following her arrest on an outstanding warrant.

After using the restroom by herself at the police station the subject announced that she wanted to kill herself and had just taken a large dose of Valium in the bathroom and had more Valium in her vagina. The officers took her to the nurse in the jail, who insisted she be taken to a hospital.

Existence of Medical Emergency Documented in Hospital Records

A nurse who was on duty in the emergency room that night was able to reconstruct events from his own recollections and from the patient's chart.

The patient told the emergency room staff she was suicidal, had just taken a large dose of Valium and had more Valium pills concealed inside her vagina.

A note was penned in her chart expressly stating that, "removal of vaginal Valium considered emergent."

Examination Conducted In Medically-Reasonable Manner

The patient was escorted to a private examination room and asked for a urine sample which she could or would not give. A physician did a pelvic exam and catheterized her for a urine sample without resistance from the patient.

A female police officer stood by during the exam. Having assaulted an officer while trying to run away from the police station earlier that evening, the patient was considered a security and flight risk. The officer, however, did not request that the medical staff search the patient for contraband as part of a criminal investigation or tell the medical staff how to do their job.

Hospital medical personnel documented their judgment that a medical emergency existed and carried through with a wholly appropriate response. **Rogers v. Phoenix Police Dept., 2008 WL 5156092 (D. Ariz., December 9, 2008).**

Hospital staff were justified in believing a medical emergency existed.

The patient told the nurse at the county jail she had just taken Valium to try to kill herself and had forty more Valium pills concealed in her vagina.

The jail nurse had no choice but to have her transported to the hospital for medical clearance.

At the hospital the physician determined that to treat the suicidal patient, who did appear to be under the influence of drugs, it was medically necessary immediately to conduct a body-cavity search and to obtain a urine sample for toxicology.

The patient was taken to a private examination cubicle in the emergency department and her vagina was examined by a physician with a female police officer present to prevent her escape.

No drugs or other contraband was found.

The patient would not or could not give a urine sample, so one was obtained by catheterization.

The sample proved positive for Valium and methamphetamine.

UNITED STATES DISTRICT COURT
ARIZONA
December 9, 2008

Emergency Room: Court Questions The Existence Of A Medical Emergency.

The patient's story was that she went outdoors partially clothed first thing in the morning to get her overnight bag from her car parked at an acquaintance's apartment complex following a late-night party where alcohol and drugs were consumed, only to realize she had forgotten her car keys and could not remember exactly which apartment she had come out of.

A police car spotted her and stopped to investigate. She gave a false name and was unable or unwilling to supply proof of who she was, where she lived or what she was doing, so she was taken to the hospital for a mental health evaluation.

At the hospital she was evasive about identifying herself or supplying a relative's name. Her anger and her caregivers' impatience escalated to combativeness that led to her being disrobed by a male nurse and a security guard, placed in four-point restraints and forcibly catheterized without being asked to give a sample voluntarily.

The hospital can point to nothing in the medical chart to justify forced stripping, catheterization and deployment of restraints.

COURT OF APPEALS OF KENTUCKY
December 19, 2008

On grounds of jury confusion, the Court of Appeals of Kentucky threw out a jury verdict in favor of the hospital and ordered a new trial.

The court saw no justification in the medical records, from the mere fact the patient could not corroborate her story, for hospital personnel to believe a medical emergency existed at the onset of the behavioral escalation that resulted basically in an assault and battery upon the patient. **Straub v. St. Luke Hosp., 2008 WL 5264284 (Ky. App., December 19, 2008).**

Labor & Delivery: Nurses Waited To Phone Ob/Gyn.

The mother reportedly was having labor contractions when she checked into the hospital the evening before her scheduled cesarean delivery.

She was considered a high-risk obstetric patient based on a history of placental abruption in a prior pregnancy .

Ob/Gyn Was Not Informed Of High-Risk Patient's Arrival

The obstetrician at the hospital was reportedly not advised that a high-risk patient in labor had checked into the hospital, and left the hospital to go home for dinner.

The labor and delivery nurses monitoring the patient's labor began to see signs of fetal distress. Fifteen minutes after signs of trouble were first seen the fetal heart rate dropped below 90 and at that point the nurses phoned the obstetrician to come to the hospital. The obstetrician arrived twenty-five minutes later. The mother had had another placental abruption.

The jury in the Superior Court, King County, Washington returned a verdict of $4,250,000 for the child who has cerebral palsy and only a twenty-one year life expectancy. **Tavares v. Evergreen Hosp., 2008 WL 5020967 (Sup. Ct. King Co., Washington, September 8, 2008).**

Discrimination: Deaf Patient Gets Legal Settlement.

A hospital reportedly paid a $90,000 settlement to a deaf patient whose family repeatedly requested a sign-language interpreter to explain things to him during three weeks of stroke rehab.

On the last day a nurse finally got him an interpreter to explain the physician's discharge instructions, which the patient's attorney was prepared to argue showed the hospital knew he really needed an interpreter on all along. **Salzman v. North Broward Hosp., 2008 WL 5119701 (S.D. Fla., November 18, 2008).**

Patient Not Restrained, Falls From Bed: Lawsuit Against Nursing Home Is Dismissed.

The decision to impose bodily restraints, either chemical or physical, on an elderly patient with Alzheimer's or other dementia is a decision that can only be made by a physician.

This patient's physician decided only to order a half-rail put up on the side of the bed to prevent the patient rolling off the bed.

Imposing more restrictive bodily restraints on elderly persons like this patient to prevent them getting up on their own or falling out of bed carries its own set of risks to the patient and thus is not warranted across the board in all cases.

A physician familiar with the care of elderly dementia patients should have specialized knowledge of the mental capacity and behavioral proclivities of the particular patient in order to apply the complicated risk/benefit analysis of whether restraining the patient exposes the patient to more potential harm than good.

In any case, the nursing facility is not to be faulted for staying within the physician's orders for this high-fall-risk patient.

COURT OF APPEALS OF TENNESSEE
November 25, 2008

The eighty-eight year-old patient was admitted to the extended-care facility with a diagnosis of Alzheimer's disease.

She was identified on admission as a high-fall-risk patient.

After she fell out of bed without sustaining any injury her attending physician, the facility's medical director, ordered her bed mattress lowered to the lowest level, the bed pushed against the wall and a half-side rail raised on the exposed side to prevent her from falling again.

Ten days later, at 2:30 a.m., the nursing staff found her on the floor with a cut over one eyebrow and bruising to her face, apparently from falling from the foot of the bed. The physician examined and treated her later that day.

After the patient passed from causes unrelated to the fall the patient's son, as executor of the probate estate, sued the nursing home for negligent supervision. The core allegation of the lawsuit was that an elderly person falling in a nursing home, in and of itself, is evidence of negligence.

Court Declines to Impose Liability

The Court of Appeals of Tennessee accepted the testimony of the treating physician/medical director as an expert in the care of elderly Alzheimer's patients.

Restraining an elderly Alzheimer's patient in bed to keep the patient from falling is not appropriate in many cases. Physical restraints carry with them significant risks of their own.

It was her professional judgment not to restrain this patient. The nursing staff could not and should not have restrained the patient with the physician having decided restraints were not appropriate.

The patient's records demonstrated that the nursing staff fully complied with facility rules, rules which were within the legal standard of care, to check on patients at least every two hours during the night and were not expected to have discovered her on the floor any sooner. **Cannon v. McKendree Village, 2008 WL 5048250 (Tenn. App., November 25, 2008).**

LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession

Definition Of Family Member: Court Allows Suit Against Critical-Care Nurse Who Excluded Life-Partner From Room.

The Court of Appeals of Washington did not rule definitively that the hospital's critical-care nurse was wrong to excluded the female patient's female seventeen-year life-partner from the ICU room during the patient's last hours.

The Court ruled only that the lower court judge was in error to throw out the life-partner's lawsuit against the nurse without allowing a jury to hear all of the evidence and decide the case.

Was the Nurse Motivated By Prejudice or By Medical Necessity?

The issue is whether the nurse excluded the life-partner because she felt a same-sex life-partner was not appropriate as a family member or, on the other hand, because it was medically necessary at times to ask her to leave the room.

Nurse's Arguments

The life-partner's presence in the room interfered with the patient resting, that is, her presence agitated the patient and by doing so compromised her extremely fragile respiratory status.

The nurse also claimed it was difficult to work around the life-partner while performing necessary hands-on nursing care. The nurse asked the life-partner to leave at times and offered to call her back from the waiting area when she was done, but the life-partner insisted on staying glued to the bedside at all times.

Life-Partner's Arguments

The patient's physician was allowing the life-partner and the patient's siblings in the room, two persons at a time, before the nurse came on duty. The patient begged her life-partner not to leave her alone. A life-partner has the fundamental right to be treated like a husband or wife.

The Court of Appeals acknowledged that family members have a right to sue for their own mental anguish and emotional distress for being excluded from a loved one's presence in the final hours, that is, if there was no medical justification. **Reed v. ANM Healthcare, 2008 WL 5157869 (Wash. App., December 8, 2008).**

Nursing Documentation: Court Points To Nursing Progress Note, Dismisses Patient's Lawsuit.

The medical specialists at the hospital were having a difficult time sorting out the patient's symptoms and the results of extensive diagnostic tests.

The neurologist consulted with a cardiac surgeon and with a cardiologist about the likelihood the patient had a dissection of the ascending aorta.

The physicians concluded there was only a five percent chance the patient actually had a dissection of the aorta, but they also knew that if she did have an aortic dissection it certainly was a life-threatening situation.

The cardiac surgeon made the difficult decision to recommend going forward with a complex surgery to open the mediastinum for inspection, which in the end proved negative for any evidence of aortic dissection.

The medical records include a nursing progress note on the day of the procedure stating that a nurse spoke with the patient at length regarding the pending surgery and allowed time for the patient's questions.

In addition, the perioperative nursing record included a checkmark next to the statement, "Clear and concise explanation given to patient/family."

COURT OF APPEAL OF LOUISIANA
December 10, 2008

The patient sued the cardiac surgeon for negligence and for lack of informed consent. The Court of Appeal of Louisiana concurred with the lower court's decision to dismiss the case.

The surgeon was able to testify as to his discussions with the patient about the medical rationale for the procedure as well as the risks involved.

However, the only actual documentation the court could find indicating that the patient knew and agreed to what was going on was a nursing progress note from the day of surgery and the perioperative nursing flow chart.

Going ahead with surgery was the right course according to the expert medical testimony the court heard. **Lowrey v. Borders, __ So. 2d __, 2008 WL 5158243 (La. App., December 10, 2008).**