LEGAL EAGLE EYE NEWSLETTER

November 2002 *For the Nursing Profession* Volume 10 Number 11

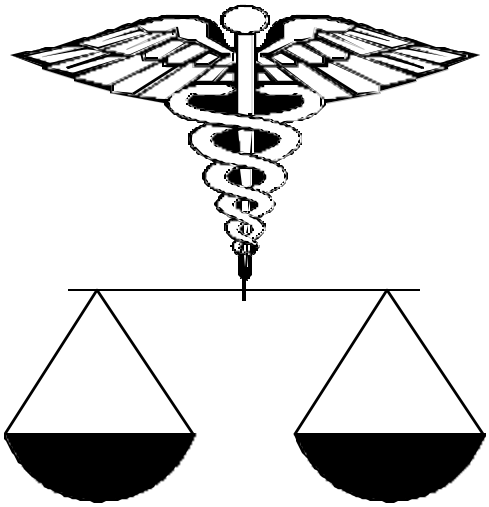
Cardiorespiratory Arrest: Court Faults Expert's Conclusions, Dismisses Case.

After an otherwise routine cholecystectomy the patient was still having pain. He was returned to the operating room the next day for an endoscopic retrograde cholangiopancreatography (ERCP) to determine if he had a stone in his common bile duct as the physicians suspected.

Thirty-five minutes into the procedure, while the patient was getting IV Demerol for pain and Versed for conscious sedation, he went into sudden cardiorespiratory arrest. He was intubated and resuscitated but experienced anoxic encephalopathy.

He expired five days later. The widow and daughter sued the physician, his medical group and the hospital for negligence. The suit alleged the physician doing the ERCP and the hospital's nurses did not properly monitor the patient during the procedure or respond in a timely and competent manner at the moment of his arrest.

Together the defendants' attorneys filed objections to the lawsuit on the grounds that the family's attorneys had not filed an expert witness report as required by state law. A physician's report was on file, to be sure, but the defendants claimed the report was defective and therefore they were entitled to dismissal of the case.



An expert's report must detail the specific conduct of the defendant that is being called into question.

An expert's report must convince the court the plaintiff patient has proof of all the elements of a negligence case.

A report is inadequate that merely states the expert's conclusions without identifying the factual basis.

COURT OF APPEALS OF TEXAS
October 9, 2002

Expert's Report Was Conclusory

The Court of Appeals of Texas agreed with the lower court judge that the expert's report was defective and ruled that the case should be dismissed.

The court acknowledged the report put forth a valid recitation of the standard of care for physicians and nurses caring for a patient intraoperatively.

There must be constant careful surveillance of a conscious sedated patient, with blood pressure and pulse taken at frequent intervals and EKG and pulse oximetry constantly monitored. The physician and nurses must be trained in recognition and treatment of complications that can arise during conscious sedation. At a minimum at least the physician should be certified to treat cardiac and/or pulmonary arrest in accordance with ACLS guidelines.

That being said, however, the court still found the expert's report wanting. A recitation of the standard of care and a conclusory statement the patient was not properly monitored is not enough. There was nothing specific in the report stating how the physician and the nurses should have recognized the signs of impending arrest any sooner or how they should have reacted differently when he went into arrest.

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Life Insurance: In-Home Exam By A Nurse Is Not A Medical Examination, Court Rules.

A life insurance salesman came to the home to try to sell the couple a policy on the husband's life.

The husband told him he had high blood pressure and was hospitalized for a stroke ten years earlier but was in good health now.

A registered nurse came to the home, took his blood pressure and obtained a urine sample.

A week later the couple received written confirmation a policy had been issued. The salesman came back and obtained the husband's signature on an application form with what he had told him at the first meeting typewritten on it.

Three months later the husband died of massive heart failure.

The insurance company balked at paying the widow the $60,000 face-value benefit of the policy. The widow sued.

Medical Exam versus No Medical Exam

The Appeals Court of Massachusetts pointed out it is easier for a life insurance company to deny coverage when the company has obtained a medical examination before issuing a policy. The law sets a higher burden of proof for the insurance company to refuse to pay when there has been no medical examination.

If a policy is issued without a medical examination, to deny coverage the insurance company must prove the insured made statements which were willfully false, fraudulent or misleading.

If the policy was issued after a medical exam, to deny coverage the insurance company need only show that the insured made a misrepresentation with an actual intent to deceive or that the insured's misrepresentation increased the risk of loss.

The lower court ruled for the insurance company. The Appeals Court of Massachusetts reversed. An incorrect statement does not necessarily prove fraud or willful intent to deceive, the Appeals Court ruled, and there was no medical exam before the policy was issued.

The court recognizes that nurses and nurse practitioners now assume many of the duties of physicians.

However, the term "medical examination" in the life-insurance statute must be given the literal dictionary meaning the legislature originally intended.

When a life insurance company is refusing to pay on a policy it has issued, the term "medical examination" means an examination by a physician.

APPEALS COURT OF MASSACHUSETTS
October 11, 2002

The upshot of the ruling is to make it more difficult for a life insurance company to dispute coverage when a nurse and not a physician examined the insured prior to the life insurance policy being issued.

A Nurse's Assessment Is Not A Medical Examination

By definition, the Court of Appeals ruled, a nurse's assessment is not a medical examination for life insurance purposes.

The nurse only weighed the man, took his blood pressure twice and his pulse once, tested his urine sample for albumin and sugar and mailed it off to a lab. She left the spaces on the exam form blank relating to abnormalities of the eyes, blood vessels, respiratory organs or nervous system and did not note whether heart murmurs could be detected. However, the thoroughness of the nurse's technique is not the point, the court said. It just is not a medical examination. **Robinson v. Prudential Life Insurance Company of America, __ N.E. 2d __, 2002 WL 31261392 (Mass. App., October 11, 2002).**

Mental Health: Nurses Can Testify As Acquaintance Witnesses For Involuntary Commitment.

The Court of Appeals of Arizona recognized that nurses can testify in support of a court petition to hold and treat a mental health patient involuntarily.

Nurses who have cared for a patient during a short-term hold can testify as acquaintance witnesses in the court hearing held to determine if there will be a long-term commitment.

The nurses are not part of the evaluation team who examine the patient and give expert opinions as to the patient's psychiatric diagnosis, disability and danger to self or others.

Instead, the nurses testify about their daily observations of the patient's demeanor, verbalizations and willingness or unwillingness to take meds and participate in treatment.

COURT OF APPEALS OF ARIZONA
September 26, 2002

Nurses who have cared for the patient can testify as acquaintance witnesses. They have frequent close contact with their patients, the court said, and can be very enlightening as to the need for hospitalization and treatment for a mental disorder. **In re Maricopa County Superior Court No. MH 2001-001139, __ P. 3d __, 2002 WL 31121083 (Ariz. App., September 26, 2002).**

Sexual Assault: Court Recognizes Nurse As Expert Witness In Criminal Court Proceedings.

An individual was convicted of the crime of forcible sodomy and animate object penetration based upon a match between a DNA sample taken from him when he was a criminal suspect and a sample obtained during the victim's examination in a hospital emergency room.

He appealed his conviction, objecting to the testimony of a registered nurse who was the coordinator of the hospital's Sexual Assault Nurse Examiner program.

The judge at first sustained an objection to the nurse's testimony, but after more thorough review of her qualifications allowed the jury to hear her testimony.

She had not examined the victim herself. She was not called upon to testify about the assessment data she herself had observed about the patient.

Instead, the nurse was called upon to testify as an expert witness that the injuries observed by others who examined and assessed the patient were consistent in general terms with forced, non-consensual sexual penetration.

The Court of Appeals of Virginia agreed with the trial judge that this nurse had the qualifications to render an opinion in this case as an expert witness. The defendant's conviction was upheld.

To testify as an expert a witness must have sufficient knowledge, skill or expertise to render the witness competent to testify as an expert on the subject matter before the court.

Nurses as a general rule can testify as to objective data they have observed regarding their patients but they are not allowed to render opinions about medical causation.

Nevertheless, a sexual assault nurse examiner is qualified to testify not only about the data she has observed but also can testify in general terms about the causation of injuries experienced by a victim of a sexual assault whom she has not examined or treated.

A certified sexual assault nurse examiner need not be licensed to practice medicine to form opinions, even about a victim she has not herself examined.

COURT OF APPEALS OF VIRGINIA
September 17, 2002

Nurse's Role As Expert Witness
Traditional View

As a general rule, nurses are recognized as experts only when the legal standard of care for nurses is an issue.

The need for a nurse to testify as an expert witness generally comes up only in civil malpractice cases where nursing negligence has been alleged.

There is a long-standing rule that nurses are not allowed to render opinions as expert witnesses as to medical issues.

Facts versus Opinions

Nurses can testify as to factual data they have observed but cannot state medical opinions.

Hypothetically a nurse could testify that a patient's BP was 150/100 but could not state an opinion that the patient had renal as opposed to essential hypertension or that X versus Y medication should have been given or that giving the patient Y instead of X caused the elevated BP.

Nurse's Role As Expert Witness
Sexual Assault Case

The court recognized that a nurse with specialized training in the area of assessment and care for victims of sexual assault has the specialized expertise to state a medical opinion as an expert witness in a sexual assault case.

The nurse in this case went into detail on the physiologic mechanisms of normal sexual arousal to distinguish it from involuntary penetration during a criminal assault. Her expert opinion was accepted that the victim's injuries in this case were consistent with a criminal assault. **Mohajer v. Commonwealth, __ S.E. 2d __, 2002 WL 31056600 (Va. App., September 17, 2002).**

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Cardiorespiratory Arrest: Court Faults Expert's Conclusions, Dismisses Case (Continued).

(Continued from page 1)

The specific language in the report with which the court took issue was:

It is my opinion that Dr. __ and the nurses violated the standard of care regarding conscious sedation by (1) failing to properly monitor [the patient], (2) failing to timely identify the signs and symptoms of cardiorespiratory arrest and (3) failing to properly institute treatment in a timely fashion upon development of cardiorespiratory complications. These violations of the standard of care by Dr. __ and the nurses assisting him proximately cause the death of [the patient].

The expert's report had started out by indicating that he was a licensed physician and board-certified and re-certified in surgery as well as certified in advanced cardiac life support. He went on to say he had done over 400 laparoscopic cholecystectomies and had participated in ERCP procedures.

There was no problem with his qualifications. The court rejected his report as conclusory because it only stated a conclusion that negligence occurred without stating any specifics as to how the physician and the nurses failed to monitor the patient properly, what monitoring took place, what monitoring should have taken place and how the monitoring was insufficient that did take place.

The report did not state what signs of impending cardiorespiratory arrest actually began to appear and should have been identified, or by whom.

The report concluded that resuscitation should have come in a more timely fashion, but that conclusion was stated without defining what would be timely or untimely under the circumstances, without specifying what treatment was instituted, why it was untimely, why it was substandard and, again, by which member or members of the team such efforts should have been instituted.

In summary, the court ruled the expert's report stated conclusions unsubstantiated by facts and was insufficient to support a malpractice claim. **Doades v. Syed, __ S.W. 3d __, 2002 WL 31249906 (Tex. App., October 9, 2002).**

Child Abuse: Civil Suit Against Health Care Professionals

A child was seen by nurses and by a pediatrician at the hospital and seen again two weeks later by nurses and an emergency-room physician.

Then three weeks later the child was severely beaten by her father. He was convicted of first-degree criminal assault.

Physicians, nurses and other healthcare professionals who knowingly and willfully fail to report child abuse as required by law can be held liable in a civil suit for damages.

That is, a healthcare professional can be held responsible if the child goes on to suffer further abuse.

NEW YORK SUPREME COURT
APPELLATE DIVISION
October 1, 2002

The New York Supreme Court, Appellate Division, agreed with the jury there was insufficient evidence that the nurses and physicians in the emergency room could have recognized signs of abuse.

The court did state in general terms that healthcare providers must be cognizant they can be sued in these situations.

The court said institutions should provide continuing in-service education for all staff what to look for as potential signs of abuse and what their legal responsibilities are if abuse is suspected.

The court agreed it is not just physicians but nurses and any other healthcare facility staff who can be sued if guilty of knowing and willful failure to report signs of child abuse. **Bowes v. Noone, __ N.Y. S.2d __, 2002 WL 31172999 (N.Y. App., October 1, 2002).**

Measles, Mumps, Rubella (MMR) Vaccine: New Recommendations From CDC Re Pregnancy.

On October 10, 2002 the Centers for Disease Control and Prevention (CDC) published a recommendation in the Federal Register that pregnant women should wait to get the measles, mumps and rubella (MMR) vaccine until after they have given birth.

According to the CDC, women should be advised by caregivers when they administer the MMR vaccine to avoid becoming pregnant for four weeks.

Federal law requires any caregiver administering a vaccine for MMR, diphtheria, tetanus, pertussis, polio, Hep B, Hib, varicella or the pneumococcal conjugate vaccine to provide the patient at the time of vaccination with a copy of the CDC's current vaccination information materials specific to the vaccine.

Complete information and camera-ready examples of all the current required vaccine information forms are available on the CDC's website http://www.cdc.gov/nip/publications/vis/.

FEDERAL REGISTER, October 10, 2002
Page 63106

Latex Allergy: US Court Says Nurse Not Disabled From Gainful Employment, Not Entitled To Long-Term Disability Benefits.

A registered nurse worked as infection control/employee health nurse at a rehab hospital.

She went to see a board-certified allergist/immunologist who diagnosed her with a Class IV allergy to latex, based on a radioallergosorbent test (RAST).

Six months after the diagnosis was made the nurse was suspended and then terminated by her employer for poor work performance.

The nurse attributed her work deficiency that led to her termination to her latex allergy.

Shortly before her termination the nurse applied for disability benefits under the disability policy the employer provided as a fringe benefit for its nurses.

The policy provided up to twelve months of short-term benefits if the insurance company determined the employee was disabled from performing the material and substantial duties of the employee's regular occupation.

After twelve months the employee would receive long-term disability benefits if unable to perform the duties of any gainful occupation for which the employee was reasonably fitted by education, training or experience.

Latex Allergy Established
Short-Term Benefits Paid

The nurse supported her application for disability benefits with written statements from seven physicians establishing that the had a severe latex allergy. Exposure to latex could result in a potentially life-threatening allergic reaction.

The insurance company paid disability benefits for twelve months, some of it retroactive, because the nurse could not work in her regular occupation as an infection control/employee health nurse in an acute-care setting.

However, the insurance company insisted on an independent medical examination before it would consider payment of long-term disability benefits.

A Federal law, the Employee Retirement Income Security Act (ERISA), gives a person the right to sue in Federal court who is denied benefits provided under an insurance plan received as a fringe benefit of employment.

If a benefit administrator turns down a benefit application it is subject to review in Federal court.

The Federal court will uphold the plan administrator's decision unless the administrator has been guilty of an abuse of discretion in reaching its decision.

The court looks only at the integrity of the decision-making process and does not review the evidence independently.

The disability insurance company had the nurse seen by a board-certified immunologist. He said she could be gainfully employed in a latex-free work environment.

The disability insurance company hired a vocational analyst who stated she had skills that were transferable to a latex-free environment.

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT
October 2, 2002

Latex Allergy Questioned
Long-Term Benefits Denied

During the independent medical examination at a physician's office there was no reaction to latex. The nurse insisted beforehand and understood that the exam was to be conducted in a latex-free environment. However, there were no latex-free examination rooms. The physician did obtain a pair of vinyl gloves to use during the exam.

Even though he observed no reaction to latex present in the environment the independent medical examiner did conduct a RAST test which did indicate a Class IV IgE reaction to latex.

He also noted the nurse had a history of multiple food allergies and a history of mild asthma that, he said, could account for certain allergic episodes.

The nurse, he believed, was capable of working in a latex-free environment such working at home or in an office where latex products were not present.

Standards For Judicial Review

The US Court of Appeals for the Eighth Circuit noted in these situations the court does not review the evidence independently to reach its own decision.

The court looks only at the integrity of the insurance company's decision-making process to see if the insurance company committed an abuse of discretion in denying benefits.

In this case the insurance company had to choose between two board-certified experts who agreed the nurse had a significant latex allergy. There was no abuse of discretion, the court stated, in refusing to accept the nurse's treating physicians' opinions about her non-suitability for employment in a latex-free environment.

The insurance company had an opinion from a vocational analyst, the court pointed out, that she had skills that were transferable to a latex-free office environment. **Smith v. UNUM Life Insurance Company of America, __ F. 3d __, 2002 WL 31174916 (8th Cir., October 2, 2002).**

Disability Discrimination: Court Denies Nurse's Claim That Employer Acted On False Perception Of Impairment From Injuries.

A registered nurse was employed at a hospital for twenty-seven years before her termination.

Five years before termination she injured her shoulder and needed surgery. Her physician allowed her to return to work part-time on light duty. The hospital honored the restrictions imposed by her physician by modifying her work responsibilities. The hospital assigned her to new-employee orientation, a part-time position which required minimal, if any, physical activity.

When she was released to return to work full-time with no physical restrictions the hospital assigned her to a computer project. She was told it was not a demotion from patient-care staff work and she continued to receive the same pay.

When the computer project was completed she was offered a part-time staff position on the skilled nursing unit. She was told there were no full-time positions for staff nurses anywhere in the facility.

On the skilled nursing unit she injured her back and was diagnosed with sciatica. She continued working and was put on a twenty-five pound lifting restriction by her physician. She injured her left arm and was diagnosed with lateral epicondylitis. Her lifting restriction was tightened to ten pounds.

Then she had another injury to her upper back and shoulder. When it resolved her lifting restriction was upgraded to thirty-five pounds, then fully eliminated. Her physician released her to work full-time with no restrictions.

However, after returning from a family leave to care for her husband she was told her unit was closing and her job was being eliminated. She was given a temporary position as a registration clerk, at full RN pay. She worked at that position for a short time. She was terminated allegedly for being lazy and not being a team player.

She sued the hospital for disability discrimination.

A nurse can pursue a disability discrimination claim against her employer without proving she suffers from an actual disability.

The Americans With Disabilities Act (ADA) protects not only disabled employees but also protects employees who are perceived by their employers to have disabilities who are not actually disabled.

An individual can succeed with a disability discrimination lawsuit if the individual can satisfy the court that the employer or a potential employer, quoting the Eighth Circuit Court of Appeals, "Entertained misperceptions about the individual and believed either that there was a substantially limiting impairment that the individual actually did not have or believed an actual impairment was limiting when in fact it was not."

The ADA is meant to root out archaic attitudes, erroneous perceptions and myths that disadvantage persons with or regarded as having disabilities.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
September 16, 2002

No Actual Disability

The hospital argued that temporary back, neck, shoulder and arm injuries that resolve are not disabilities as disability is contemplated by the courts under the ADA. If the employee's condition is not a disability as defined by law, the employee is not eligible to assert a disability discrimination claim.

The US District Court for the Northern District of Iowa agreed with the hospital on that point, citing precedents from the Eighth Circuit Court of Appeals.

Employer's Perception of Disability

However, the nurse raised a more subtle argument for the court to consider.

The US Supreme Court has expanded the ADA to cover discrimination against an individual whose employer takes adverse action based on an unsubstantiated belief as to the existence of a disability or a false perception that limitations stem from a genuine condition, who does not have a disability or who has a disability which does not limit the ability to function in the workplace.

Claim of Perceived Disability Dismissed

The District Court nevertheless dismissed the nurse's claim. The court's logic was that the sequelae of a nurse's temporary back, neck, shoulder and arm injuries that resolve are not disabilities.

For purposes of disability discrimination it is irrelevant whether a nurse's employer is fully up to speed on the current status of a nurse's medical restrictions from back, neck, shoulder and arm injuries, the court said.

It does not matter if an employer acts upon a false perception that a nurse has an existing medical restriction from such an injury, and assigns, reassigns, demotes or refuses to offer work to a nurse following such injuries, because those injuries are not legally recognized disabilities in the first place. **Simonson v. Trinity Regional Health System, __ F. Supp. 2d __, 2002 WL 31094775 (N.D. Iowa, September 16, 2002).**

Sex Discrimination: Court Denies Nurse's Claim Based On Supervisor's Remarks.

When a new supervisor came on the unit she changed a male nurse's hours from 4:00 p.m. to midnight, then changed them again to 9:00 a.m. to 5:30 p.m. on weekdays and 11:00 a.m. to 8:30 p.m. on weekends.

Then she changed his hours again to 11:00 a.m. to 5:30 p.m. on weekdays and weekends.

He protested on the grounds those were the busiest hours in the unit, the emergency department, and working those hours would give him the heaviest workload of any nurse working any shift.

His supervisor said, *"You're a man, you'll just have to tough it out."*

That remark by the supervisor eventually led to a sex discrimination lawsuit, after a fairly complex set of events took place.

The US District Court for the Northern District of Illinois dismissed the case. As of this writing the court's opinion has not been selected for publication in the Federal Supplement.

Male Nurse / Sex Discrimination

As a general rule, men working in traditionally female occupations can invoke Federal as well as state laws against gender-based discrimination. Male nurses are considered a protected class of persons under our anti-discrimination laws when the supervisor is female just like when the roles are reversed in other settings.

Direct versus Indirect Evidence of Discrimination

As a general rule in discrimination cases the court first looks for direct evidence that a decision-maker was motivated by discriminatory intent when making a critical decision adversely affecting an employee who has legal protection from discrimination.

When there is direct evidence the court has an easier time satisfying itself it is making a correct decision.

Direct evidence of discriminatory intent can come in the form of biased statements from the decision-maker reflecting a negative opinion of a protected class of persons.

To prevail on a claim of discrimination a plaintiff must show that the defendant intentionally discriminated against him.

The plaintiff may offer evidence either through direct or indirect methods of proof.

Under the direct proof method the plaintiff must show either an acknowledgment of discriminatory intent by the defendant or its agents or circumstantial evidence that provides the basis for an inference of intentional discrimination.

Under the indirect method of proof the plaintiff must show all the elements of differential treatment, that is, the plaintiff was treated less favorably than others simply because of race, color, religion, sex, national origin or disability.

The plaintiff must be a member of a protected class, be qualified for the job, meet the employer's legitimate expectations and suffer an adverse employment action.

It is also necessary that the employer treated similarly situated persons more favorably who are not in the protected class of persons.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
September 30, 2002

Stray Remarks Do Not Prove Discriminatory Intent

Assuming a decision-maker has said something disparaging about a gender or racial minority or disabled persons, etc., the court still has to distinguish stray remarks from direct evidence of discriminatory intent.

To distinguish stray remarks from actual evidence of discriminatory intent the court in this case noted the male nurse's supervisor's remark was made months before he was actually discharged, his discharge being the actual focus of his discrimination lawsuit.

Indirect Evidence of Discrimination Differential Treatment

An employee who is in protected class of persons can prove discrimination indirectly by showing that he has been treated differently that comparable persons outside the protected class.

If differential treatment has occurred, the employer has to prove there was no actual intent to discriminate.

In this case the male nurse was discharged after he became severely disabled from Guillain-Barre syndrome. His physician related it to a flu shot he was required to obtain and did obtain on the job.

There was a complicated history of interaction between the nurse and his employer as his disability slowly resulted in an inability to work and as he fought to have his claim recognized as a legitimate worker's compensation case.

The telling point for the court was this: To prove gender discrimination the nurse would have to prove that as a male nurse he was treated differently by his employer than female nurses who had actually gone through the same process of developing a rare syndrome and trying to prove it was related to the job.

Without a comparable basis for comparison to other employees a claim of differential treatment fails. The court ruled the nurse's subjective belief bias was present was not enough to support a lawsuit. **Hennon v. Principi, 2002 WL 31174454 (N.D. Ill., September 30, 2002).**

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For the Nursing Profession

Laparotomy versus Laparoscopy: No Informed Consent, Hospital Pays Settlement.

In an opinion that has not been released for publication, the Court of Appeal of California made note that a laparoscopy and a laparotomy are two very different surgical procedures.

A laparoscopy involves only small incisions, minimal scarring and a relatively short recuperation period. A laparotomy is a full-scale open abdominal procedure.

Apparently the unit clerk mistakenly filled in the word "laparoscopy" on the consent form. The circulating nurse had the patient sign it, then nodded her assent when the surgeon asked her in the O.R. if the patient had signed the consent form. The hospital settled for $10,000. Then the case went to trial against the surgeon. The jury absolved him from liability for doing the planned laparotomy. **Stone v. Wilcox, 2002 WL 31002599 (Cal. App., September 6, 2002).**

Theft From A Healthcare Facility: Court Upholds Sentence Enhancement For Breach Of Trust.

Theft or embezzlement of funds from a health care facility is a Federal offense.

Federal law was recently applied to an administrative assistant in a nursing home who used her responsibility for making bank transactions to embezzle over $30,000.

In an opinion that has not been selected for publication, the US Court of Appeals for the Ninth Circuit approved the handing down of an exceptionally long prison sentence for this individual.

Federal law provides for enhancement of the sentence when a person has used a position of trust to commit or conceal the commitment of a criminal offense. **US v. Montoya, 2002 WL 31133353 (9th Cir., September 26, 2002).**

Home Health: Aide Driving Home, Not In Course Of Employment, No Worker's Comp Awarded.

While commuting to and from work an employee is not considered to be working and is not covered by worker's compensation if there is an accident, as a general rule.

While employees are using their personal vehicles for purposes associated with the employer's business they are covered by worker's compensation and have the right to claim benefits when they are injured in motor vehicle accidents, on the other hand.

An aide worked for a home health agency. The Court of Appeals of North Carolina pointed out that agency employees were reimbursed for mileage to some extent, but reimbursement in and of itself does not determine whether an employee is on the job as opposed to commuting to and from the job.

The "going and coming" rule means that an accident occurring while an employee is commuting to and from work is not covered by worker's compensation.

On the other hand, home health workers are covered by worker's comp while using their own cars to transport patients, run errands for patients or to travel between patients' homes.

COURT OF APPEALS
OF NORTH CAROLINA
October 1, 2002

An employee with one fixed place of employment is commuting when going and coming from work. In this case the aide had only one patient, so her patient's home was the aide's fixed place of employment, the court ruled.

Home health workers with varying assignments are on the job and are covered by worker's compensation while driving to patients' homes from their own homes or returning home.

More straightforward situations come up when home health workers are driving from one patient's home to another's or running errands for patients or for the company in their personal vehicles. They are on the job and they are covered by worker's compensation. **Hunt v. Tender Loving Care Home Care Agency, Inc., __ S.E. 2d __, 2002 WL 31162401 (N.C. App., October 1, 2002).**