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Criminalization of Nurses for Unintentional Medical Errors

Issue

The Wisconsin Department of Justice is charging registered nurses and other health care professionals who commit unintentional medical errors, with violating Wisconsin's Medicaid Fraud Statutes, sec. 940.295(3), which reads: "recklessly abuses or recklessly neglects a patient". The injury or death of a patient at the hands of a health care worker calls for review and action. WNA agrees that acts by health care practitioners and providers that are intended to cause harm to patients and acts that, despite the known risks to the patient, demonstrate a conscious disregard for the health, safety or welfare of patients fall within the realm of the criminal justice system. However, not every case in which a patient is injured or dies is a crime. Such is the case when there is an unintentional medical error.

Wisconsin's criminal justice and regulatory systems provide a continuum of options for protection to patients in health care settings. Without the presence of aggravating factors, the criminal justice system should not be used to prosecute individuals for acts of simple negligence; isolated, unintended acts of failing to follow protocol; or single acts of malpractice. These acts fall appropriately within the jurisdiction of the regulatory oversight agencies like the Department of Health Services, Division of Quality Assurance and Board of Nursing. There is also the civil court system where damages can be addressed.

Some of the significant philosophies of pursuing criminal prosecution are 1.) Provide specific deterrence to the individual who committed the act and 2.) Generally deter others from committing the same or similar acts. It is important to bring criminal charges when the conduct calls for the most serious consequences. A criminal record and the loss of liberty upon conviction are life-changing consequences for anyone. WNA does not believe that pursuing criminal charges is appropriate when a health care professional simply, unintentionally and mistakenly fails to follow protocol, even when the result is the death of a patient.

Hospitals, skilled nursing facilities, and other health care entities across the country clearly are in need of qualified nurses. RNs are expected to practice in a safe and competent manner in a work environment that is physically and emotionally stressful. These factors are contributing to the nursing shortage. Bringing criminal charges against one otherwise good registered nurse who happened to make a mistake is one more discouraging factor in either entering or remaining in the profession.

Bringing criminal charges for violations of protocol; well-intended, but mistaken judgment; or single, simple acts of malpractice will have a chilling effect for RNs and other health care providers from openly and fully examining the root causes of incidents for fear of criminal prosecution. WNA supports the adoption and an ongoing philosophy of a culture of safety in all health care settings as recommended by the Institute of Medicine, *Keep Patients Safe: Transforming the Work Environment of Nurses (2004)*. In order to accomplish safe health care systems, there needs to be effective quality assurance and assessment programs that systematically evaluate all accidents and incidents, recognize emerging risks, trends and patterns, encourage full and frank disclosure by the health care team and

promote self-reflection without fear of prosecution. Without the ability to examine and respond to mistakes, malfunctions or errors in judgment, we all are placed at risk.

Death or serious injury to a patient due to an unintentional medical error is a RN's worst nightmare. As RNs, we have a Code of Ethics that drives our practice that includes "Do no harm". When something goes terribly wrong with a patient and if it is the result of an unintentional error the impact on the RN is one of devastation, remorse and guilt. Nurses want to provide support and be able to communicate to the patient and/or family about how and why the error occurred. In addition, RNs disclose the details of the error to the employer. This needs to change given the current interpretation of the law of allowing prosecutors direct access to the RN's statement of the incident. RNs should not have to self-incriminate. WNA is recommending that nurses retain a criminal defense attorney prior to any disclosure to the employer.

Statutory Fixes

There are three statutes in need of amending in order to restore the trust that is necessary for an effective culture of patient safety within our health care settings. These statutes involve redefining and re-clarifying non-criminal conduct and criminal conduct. In addition, safeguards are needed for facility quality improvement programs and practices in regards to investigations and summaries along with access of information collected by regulatory agencies. The specific statutes WNA wants addressed are as follows:

1. **Criminal conduct – Amend State Statute 940** (Crimes against life) by including the language found in Administrative Code HFS 13 that describes what abuse and neglect is and is not. This clarifying language, "absence of reckless conduct or criminal intent", is not criminal conduct and therefore, could not be misinterpreted by the prosecution.
2. **Peer Review and Administrative Information – Amend State Statute 146** (Health care services – confidentiality) to prohibit peer review records from being used in criminal actions as proof of the conduct. Peer review, quality improvement activities and any other information (written or spoken) that a regulatory agency requires a health care provider or facility to produce will not be admissible in a criminal action case as proof of the conduct.
3. **Peer Review and Administrative Information – Amend State Statute 904** (Evidence & Relevancy) by adding conditions where the information collected by state regulatory agencies could not be used as proof of the conduct in a criminal action against a health care provider or facility.

Other Considerations

As nurses, we do not want to be perceived as wanting "blanket immunity" for all nursing actions. We have all heard about those bad actors who, for whatever reason, want to intentionally cause harm, injury or death to a patient. This legislative strategy will not exempt those individuals. This legislative strategy is about assisting RNs and perhaps other health care providers to feel comfortable and assured that the information provided regarding a medical error or near miss will be accepted and framed within a philosophy of improving safety systems and in the absence of criminal prosecution.

It is our hope that interested legislators will pursue this legislative strategy shortly after the 2009-2011 Wisconsin Legislature convenes.

For more information contact Wisconsin Nurses Association at: 1-608-221-0383 or info@wisconsinnurses.org