

sixth edition

# MEDICAL LAW AND ETHICS



Bonnie F. Fremgen

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Sixth Edition

# Medical Law and Ethics

Bonnie F. Fremgen, Ph.D.

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*To my children, who have always been my inspiration for ethical behavior.  
And a special thanks to my husband for his continual support and help.*

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# Preface

The allied health professional has always been an important member of the medical team. This team awareness is even more critical in today's health care environment, because the physician no longer practices medicine alone. Therefore, the text discusses medical law and ethics as it relates to allied health care professionals, as well as the physician's duties and responsibilities.

*Medical Law and Ethics* is written in straightforward language that is aimed at the nonlawyer health professional who must be able to cope with multiple legal and ethical issues. This text is appropriate for those studying in a college or university who are working toward careers in the allied health field in a variety of settings, such as medical offices, hospitals, clinics, laboratories, rehabilitation facilities, and skilled-nursing facilities. Because most allied health care professionals work either with or for a physician, it is important to understand the physician's responsibilities and duties to the patient. Therefore, they are covered in this book. Included are examples of common legal and ethical issues that affect those working in the health care field. A wide range of pertinent topics are discussed, such as the legal system, professional liability and medical malpractice, public duties of the physician, the medical record, and ethical and bioethical issues. The intent is to help health care professionals to better understand our ethical obligation to ourselves, our patients, and our employers. A new addition to stimulate discussion is the Critical Thinking Exercise at the end of each chapter.

Many legal cases are sprinkled throughout the text to demonstrate the history of the law as it pertains to subjects such as patient confidentiality, managed care, federal regulations affecting the employee, death and dying, and abortion. In some examples, the cases may seem old, but because we as a country have a legal system based on case law, these laws are still pertinent today. A legal icon (scales of justice) appears in the margin to indicate legal case citations.

A special feature called Med Tips provides quick information about law and ethics. These brief scenarios and hints help to maintain interest in this vital subject. Each chapter includes glossary terms highlighted in bold on first reference, extensive end-of-chapter exercises, and one actual practice case. The appendices include a sample of codes of ethics that form a basis for current practice and legal case citations.

This text provides an overview of medical law and ethics. Practicing health care professionals should know the legal requirements in their own jurisdictions.

Finally, many educators have offered thoughtful comments as reviewers of this text. I am extremely grateful that they have shared their time and experience to help develop this textbook.

## Chapter Structure

- **Learning Objectives.** These include an overview of the basic knowledge discussed within the chapter and can be used as a chapter review.
- **Key Terms.** Important vocabulary terms are listed alphabetically at the beginning of each chapter and printed in bold the first time they are defined in the text.
- **Introduction.** Each chapter begins with an introductory statement that reflects the topic of the chapter.
- **Review Challenge.** A selection of short answer, matching, and multiple-choice questions are included to test the student's knowledge of the chapter material.
- **Case Study.** The case studies are based on real-life occurrences and offer practical application of information discussed within the chapter. These are included to stimulate and draw upon the student's critical-thinking skills and problem-solving ability.
- **Critical Thinking Exercise.** These exercises at the end of each chapter challenge the student to answer the question "What would you do if . . ." relating to many current health care and legal dilemmas in today's environment.
- **Bibliography.** These useful resources provide further information on the topics included within the chapter.

## Special Features

- **Med Tip.** Med Tips are placed at strategic points within the narrative to provide helpful hints and useful information to stimulate the student's interest in the topic.
- **Legal Case Citations.** Discipline-specific cases are used throughout the text to illustrate the topic under discussion. The cases reflect the many medical disciplines, including that of the physician, that come together in the care of the patient. Although this book

is not meant to be a law book, the cases cited are meant to emphasize the importance of the law for the students.

- **Points to Ponder.** Thought-provoking questions give students an opportunity to evaluate how they might answer some of the tough, medically related ethical dilemmas encountered in today's society. These questions can also be used for critical debate among students during a class activity.
- **Discussion Questions.** These end-of-chapter questions encourage a review of the chapter contents.
- **Put It into Practice.** These thought-provoking activities appear at the end of each chapter. They provide a clinical correlation with the topics discussed in the chapter and stimulate the student's own contemplation of legal and ethical issues that are apparent in everyday life.
- **Web Hunt.** This end-of-chapter Internet activity encourages the student to access the multitude of medical resources available through this medium.
- **Appendices.** Codes of Ethics are included in Appendix A; the case citations used throughout the book are listed in Appendix B.
- **Additional Examination Review Questions.** These are included in the Instructor's Resource Manual.

Visit our new Resource Page to accompany *Medical Law and Ethics*, 6th Ed. (<http://www.pearsonhighered.com/healthprofessionsresources/>) for a collection of downloadable quizzes, and reference materials.

## What's New in the Sixth Edition?

The sixth edition of *Medical Law and Ethics* has been thoroughly updated throughout. New sections and information in this edition include the following:

**Chapter 2** New sections on settling out of court and the trial process

**Chapter 3** New information on the two most frequent types of health care errors: patient falls and medication errors

**Chapter 4** A new section on the delegation of duties

**Chapter 5** A new section on the American Hospital Association "Patient Care Partnership"

**Chapter 7** A new section on the opioid crisis

**Chapter 8** Information on amendments to the Americans with Disabilities Act

**Chapter 9** A new section on the use of electronic health records (EHR) and personal health records (PHR)

**Chapter 10** New, updated, and expanded information on the Health Insurance Portability and Accountability Act (HIPAA) and the Health Information Technology for Economic and Clinical Health (HITECH) Act, the privacy of health records, voice recognition technology, and facial recognition technology

**Chapter 12** A new, uplifting section titled "Do the Right Thing"

**Chapter 14** Three new sections: "American Deaf Culture," "Blindness and Visual Impairment," and "Life Issues of the Elderly."

## Acknowledgments

This book would not have been possible without the assistance and guidance of many people. I am grateful to the editorial and production staffs at Pearson Education for their skill and patience with this project. I thank, Marlene Pratt, Acquisitions Editor and Faye Gemmellaro, Program Manager, for their leadership and guidance with this project. Their courtesy and thoroughness are greatly appreciated. And special thanks to Sandy Breuer, my Developmental Editor.

# A Letter to the Student from the Author

There is a lot of information in this book, some that you will use as soon as you begin your career in health care. Hopefully, some material and tips will be usable as soon as you read them. You are working in a field that is full of people: patients of all ages, hospital and health care facilities with a variety of caregivers, and numerous fellow employees. If you remember one thing from this letter to you, remember to care. You and your skills—and your caring—are the gifts that you give to your patients. Now, read on and prepare for that Ah-Ha! moment when you realize that you are doing what you should be doing.

It's a natural tendency to read some of the case examples in this book and think that they must be fictional as no well-trained health care professional would ever be so negligent. However, the short ethics cases at the beginning of each chapter are indeed real. Most of these cases are drawn from the author's experience, with the exception of the historical cases.

Throughout the book there are numerous examples of actual legal cases that usually resulted in suffering for patients, as well as for physicians and other health care professionals. The cases discussed are not meant to focus on particular health care disciplines, nor to exclude any disciplines. And these cases are not meant to frighten but, rather, to alert all of us to the potential risks to patients when health care professionals are not diligent about the care they provide. Do not memorize the case citations, but rather try to understand the circumstances and why the case was included in this book.

I have a great respect for *all* the disciplines mentioned in this book. My intent is to prepare students to promote good patient care, as well as to protect themselves and their employers from lawsuits.

For a successful start to your study of medical law and ethics, consider following the ABCs of classroom success: **Actively participate**, **Benefit** from the experience, and **Commit** to learning. It is necessary for you to attend class to truly benefit from your ethics education. So much happens in the classroom—especially the interaction between you and your classmates. The discussion portion of an ethics class is one of the most important components. You must be present to contribute. The text serves as an information source and as the first step in your education—the dynamics of classroom interaction between you, your

instructor, and the other students is critical for success in learning.

**Actively participate** when you attend class. It is necessary to absorb what takes place during the class session. Listen carefully to what your instructor and fellow students say. If you don't share your ideas, experiences, and questions, then the rest of the class is losing what you have to offer. The dialogue about ethics that you have with your instructor and fellow classmates is a meaningful experience.

**Benefit** from the experience and ideas of your peers (classmates). Listen to the opinions of others during class discussions. Pay particular attention to the opinions that differ from your own. As a member of the health care team, you will frequently hear opinions that differ from your own—both from your coworkers and your patients. You do not have to change your opinions or beliefs, but try to keep an open mind to the opinions of others.

**Commit** to learning by carefully reading and analyzing the textbook material. Look for new information and also for discussion points that both agree and disagree with your own perspective. Take this course seriously so that it is not a waste of your time. In fact, your ethics class can be one of the most important classes that you take! Communicate what you have learned. Your perspective is important for others to hear.

The law is dynamic and often is revised as changes take place in society. An example is the Healthcare Insurance Portability and Accountability Act (HIPPA). It has had an impact on health care organizations as well as physicians' offices. This textbook is not meant to be a study of the law, but rather to introduce students to the impact that law and ethics have on their professional lives. Societal ethical norms also change. Three current ethical concerns—dealing with the Deaf, dealing with the visually impaired, and life issues of the elderly—are discussed in the final chapter.

Finally, our goal as teachers is to help our students learn how to judge themselves and their actions. Because you won't have us with you in the workplace, we want you to be able to evaluate your own actions in light of their ethical and legal impact on others.

I wish you the very best in your health care career.

—Bonnie F. Fremgen

# How to Interpret Case Citations

Selected legal cases are used in this textbook to illustrate various legal principles. At the end of each case summary is a citation, such as *Moon Lake Convalescent Center v. Margolis*, 433 N.E.2d 956 (Ill. App. Ct. 1989). This citation, similar to a street address, tells you where you can find this case among the many sets of reported cases (called *reporters*) in the library. Most case citations end with information in parentheses, such as (Ill. App. Ct. 1989), which tells you what court (the Illinois Appellate Court) decided the case and the year (1989) of the decision, but you do not need that information when you are simply trying to locate a particular case in the library. The small *v.* between the litigants' names stands for "versus." For example, a case citation may consist of

- The italicized case name—usually the name of the plaintiff and the defendant. In our example, *Moon Lake Convalescent Center* (defendant) and *Margolis* (plaintiff).
- The name of the reporter(s) where the case is published (Northeast Reporter, 2d series).
- The volume number(s) of the reporter(s) where the case is published (433).
- The page number of the volume where the case begins (956).
- The year the case was decided (1989).
- For federal Court of Appeals cases, a designation of the circuit; for federal District Court cases, the state

and judicial district where the court is located; for state cases, an indication of the state if it is not apparent from the name of the reporter (Illinois Appellate Court).

Therefore, our example case between Moon Lake Convalescent Center and Margolis is found in volume 433 of the Northeast Reporter, 2d series, on page 956.

Abbreviations for other reporters (books) are:

A (Atlantic Reporter)  
P (Pacific Reporter)  
U.S. (United States Reporter)  
F.Supp. (Federal Supplement)  
F (Federal Reporter)  
NE (Northeast Reporter)  
NW (Northwest Reporter)  
NYS (New York Supplement)  
So (Southern Reporter)  
SW (Southwestern Reporter)

Most reporters have been published in two or more series, such as 2d, meaning second series. The student should not be concerned with memorizing the names of the reporters. The abbreviations for them are found at the beginning of most of the legal research publications that we use. As you do research within your own state, you will become familiar with the abbreviations that are most commonly used. Legal research can be done through a law library or via the Internet from Lexis-Nexis, which is a subscription service used by law firms and libraries.

# About the Author

Bonnie F. Fremgen, Ph.D., is a former associate dean of the Allied Health Program at Robert Morris College and was vice president of a hospital in suburban Chicago. She has taught medical law and ethics courses as well as clinical and administrative topics. She has broad interests and experiences in the health care field, including hospitals, nursing homes, and physicians' offices. She currently has two patents on a unique circulation-assisting wheelchair. She is the author of *Medical Terminology: A Living Language*, also published by Pearson.

Dr. Fremgen holds a nursing degree as well as a master's in healthcare administration. She received her Ph.D. from the College of Education at the University of Illinois. She has performed postdoctoral studies in medical law at Loyola University Law School in Chicago.

Dr. Fremgen has taught ethics at the University of Notre Dame, South Bend, Indiana; University of Detroit, Detroit, Michigan; and Saint Xavier University, Chicago, Illinois.





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## Chapter 1

# Introduction to Medical Law, Ethics, and Bioethics



## Learning Objectives

*After completing this chapter, you will be able to:*

- 1.1** Define the key terms.
- 1.2** Describe the similarities and differences between laws and ethics.
- 1.3** Discuss the reasons for studying law, ethics, and bioethics.
- 1.4** Describe how to apply the three decision-making models discussed in this chapter.
- 1.5** Explain why ethics is not *just* about the sincerity of one's beliefs, emotions, or religious viewpoints.

## Key Terms

Amoral	Indigent	Principle of justice
Applied ethics	Integrity	Principle of nonmaleficance
Bioethicists	Justice-based ethics	Quality assurance
Bioethics	Laws	Rights-based ethics
Comparable worth	Litigious	Sanctity of life
Compassion	Medical ethics	Sexual harassment
Cost/benefit analysis	Medical etiquette	Sympathy
Due process	Medical practice acts	Tolerance
Duty-based ethics	Morality	Utilitarianism
Empathy	Precedent	Virtue-based ethics
Ethics	Principle of autonomy	
Fidelity	Principle of beneficence	

## The Case of Jeanette M. and The Phone Call

Jeanette, an 80-year-old widow, called her physician early one morning complaining of shortness of breath. She spoke to the office receptionist who asked if she was having any other difficulty. Jeanette said no. The receptionist said she would give the message to the doctor.

The doctor's office was extremely busy that October day giving out flu shots. The receptionist immediately became busy answering telephone calls and admitting a long line of patients waiting for their annual flu shot. The telephone message from Jeanette was left unnoticed on the front office desk for several

*(continued)*

hours and was then placed in the physician's electronic record with other messages.

Jeanette became so exhausted from her shortness of breath that she fell asleep. When she awoke in the afternoon she could not catch her breath. She called her neighbor and just said, "Help." Paramedics arrived at Jeanette's home shortly after the neighbor called 911 and found Jeanette to be unresponsive. She was taken to the local emergency room where she was diagnosed and treated for pneumonia and congestive heart failure. The emergency room staff tried to determine who her personal physician was, but Jeanette had no personal belongings or medical information with her. She never regained consciousness and died that evening.

When her neighbor went over to Jeanette's home that evening to feed the cat, she noticed the light on the phone's answering machine. The doctor had returned Jeanette's call at 5:00 PM. She apologized for not calling sooner.

1. Do you believe that this case presents a legal or an ethical problem or both?
2. In your opinion, is *anyone* at fault for Jeanette's death?
3. Is the physician at fault? Is anyone on the physician's staff at fault?
4. What could have been done to prevent this problem?

*I long to accomplish a great and noble task, but it is my chief duty to accomplish humble tasks as though they were great and noble. The world is moved along, not only by the mighty shoves of its heroes, but also by the aggregate of the tiny pushes of each honest worker.*

—Helen Keller

## Introduction

Medical professionals encounter health care dilemmas that are not experienced by the general population. They are faced with individual choices that must, of necessity, always take into consideration the common good of all patients. Medical–ethical decisions have become increasingly complicated with the advancement of medical science and technology. The topics of medical law, ethics, and bioethics, while having specific definitions, are interrelated. One cannot practice medicine in any setting without an understanding of the legal implications for both the practitioner and the patient. Medical ethics is an **applied ethics**, meaning that it is a practical application of moral standards that are meant to benefit the patient. Therefore, the medical practitioner must adhere to certain ethical standards and codes of conduct. **Bioethics**, a branch of applied ethics, is a field resulting from modern medical advances and research. Many medical practitioners, patients, and religious organizations believe that advances in bioethics, such as cloning, require close examination, control, and even legal constraints.

Ethics experts explain that ethical behavior is that which puts the common good above self-interest. However, this textbook is not here to tell you *what* to think; it is here to tell you *to* think.

One teacher of medical law and ethics clearly stated, "Our primary goal is to teach students to think independently and become sensitive to the risks and issues that pervade the field." The ultimate goal in teaching this topic is to enable students to understand complex public health care policy from legal and ethical perspectives, regardless of personal beliefs. We want our students to be able to conduct themselves in a manner that is ethical, legal, and exemplary. We know you are learning when you begin to examine both (or *all*) sides of any issue.

## Why Study Law, Ethics, and Bioethics?

Without a moral structure for their actions, people would be free simply to pursue their own self-interests. In many cases, people would behave in a moral fashion within the constraints and framework of their culture and religious beliefs. However, upon



closer examination, it is clear that in a society where people live and act without the constraints and limitations imposed by moral standards and laws, a state of hostility could arise in which only the interests of the strong would prevail. The words *justice* and *injustice* would have little meaning. We all believe we know the difference between right and wrong. We may firmly believe that even when decisions are difficult to make, we would intuitively make the right decision. However, there is ample proof in medical malpractice cases that, in times of stress and crisis, people do not always make the correct ethical decisions. Because what is illegal is almost always unethical, it is important to have a basic understanding of the law as it applies to the medical world.

### Med Tip

We must always remember that our primary duty is to promote good patient care and to protect our patients from harm.

We should also understand that we live in a **litigious** society in which people have become excessively inclined to sue health care practitioners. In addition, health care agencies, hospitals, nursing homes, and manufacturers of medical products and equipment are all at risk of being sued by patients and their families. In fact, in our society anyone can sue anyone else. Lawsuits take a great toll in terms of stress, time, and money for all parties involved. While being sued does not indicate guilt, nevertheless it can affect the reputation of a person or an institution even if that person or institution is judged to be innocent in a court of law.

### Med Tip

A basic understanding of law and ethics can help protect you and your employer from being sued.

Another reason for studying ethics and the law is that people often convince themselves that what they are doing is not wrong. For example, plagiarism, which is using someone else's words or ideas, may be both unethical and illegal, depending on the circumstances. It's understandable that an author who has worked hard to write a book would not want another author to use his or her written material without permission and proper credit. In fact, lawsuits have been won when plagiarism is proven to have occurred. In this case, plagiarism is both illegal and unethical. But what happens when students have someone else do their work, or if they lift passages from a book and then claim the words as their own? Is this also illegal and unethical? It may be both.

A student entering the medical field is held to a high standard. Strong ethical values can begin with something as simple as turning in honest papers. There have been numerous examples of people lying on their job resume by embellishing duties and achievements in past jobs, stretching employment dates to cover gaps between jobs, inflating salaries, and even omitting criminal convictions. Many health care employers are sensitive to this problem and use consulting firms to perform background checks on potential employees. These examples illustrate current ethical, and even some illegal, acts.

Medicine is based on the professional skills of many persons, including physicians, nurses, physician assistants, medical assistants, radiology technicians, pharmacists, surgical technologists, phlebotomists, reimbursement specialists and coders, pharmacy technicians, and a multitude of other allied health professionals. The health care team, composed of these professionals, with the addition of health care administrators, often

must decide on critical issues relating to patient needs. In some cases, the decisions of these professionals are at odds with one another. For example, when an obstetrician withholds resuscitation attempts on a severely handicapped newborn, such as one born without a brain (anencephalic), he or she may be acting in opposition to the law in many states and the ethics of many people. Does a nurse have an ethical responsibility to override this order if he or she believes it to be wrong? Is there a better way to handle such an ethical dilemma without the patient's suffering in the process? It is generally understood that nurses and other allied health care professionals carry out the orders of their employer/physician. However, as illustrated in the previously mentioned case, in some situations, confusion arises about what is the right thing to do. In the Jeanette M. case at the beginning of the chapter, does the physician's receptionist have any responsibility for the physician's delay in returning the patient's call?

It is generally accepted that some behavior, such as killing, is always wrong. But even this issue has been in the news when, as Hurricane Katrina roared through New Orleans in 2005, several critically ill hospital patients who could not be moved, and would certainly die, were allegedly given a lethal injection of morphine by a doctor and two nurses. In 2007, a grand jury determined not to indict the physician and cleared her of all accusations. There have been 194 Katrina-related claims filed by a Louisiana state agency that manages malpractice lawsuits. There is a concern, resulting from this case, that prosecutions against hospitals and medical staff could prevent doctors from helping in times of a disaster. As a result, two state laws were passed in 2008 protecting medical staff during states of emergency.

### Med Tip

A study of law, ethics, and bioethics can assist the medical professional in making a sound decision based on reason and logic rather than on emotion or a "gut feeling."

Ethics asks difficult questions, such as "How should we act?" and "How should we live?" The answers to such questions are often subjective and can change according to circumstances, so it is realistic to ask, "Why study ethics?" The short answer is that, in spite of the many gray areas of ethics, we are expected to take the right action when confronted with an ethical dilemma. We must consider the consequences of wrongdoing. We must learn how to think about the ethics of an action and then how to translate those thoughts into action. So, even if the "right thing" isn't always clear, we can prepare our minds to think about an action and to see how the experiences of others can influence our own actions. The important thing is to be able to think and then take action!

Of course, not all illegal or unethical cases end up with a lawsuit or in a court of law. However, brief descriptions of actual court cases are sprinkled throughout the text to illustrate the topics that are discussed in the chapter. These cases alert us to the variety of situations that have negatively affected the careers of physicians and other health care professionals as well as the patients who were harmed.

### Med Tip

The reason we want to do the ethical thing is *not* because we could be named in a lawsuit but because we would not want poor care for anyone, including our family and ourselves.

While studying ethics, ask yourself the following questions. Do you know what you would do in each of the following situations? Do you know whether you are exposing yourself to a lawsuit?

- A fellow student says, “Sure, I stole this book from the bookstore, but the tuition is so high that I figured the school owed me at least one book.” What do you do? (Chapter 1, “Introduction to Medical Law, Ethics, and Bioethics”)
- An orderly working in a skilled-nursing facility is left alone in the dining room in charge of a group of elderly residents who are finishing their dinner. One of the residents does not want to eat but wishes to go back to his own room, which he cannot find by himself. The orderly has been instructed never to leave patients alone. Because he cannot leave the dining room full of patients, nor can he allow the one elderly resident to find his own room, the orderly locks the dining room door. The elderly resident claims he has been falsely imprisoned. Is he correct? (Chapter 2, “The Legal System”)
- You are drawing a specimen of blood from Emma Helm, who says that she doesn’t like having blood drawn. In fact, she tells you that the sight of blood makes her “queasy.” While you are taking her blood specimen, she faints and hits her head against the side of a cabinet. Are you liable for Emma’s injury? If you are not liable, do you know who is? (Chapter 3, “Essentials of the Legal System for Health Care Professionals”)
- You are a recently hired registered nurse working in the office of an internist. You have agreed to answer the phone calls in the physician’s office while the receptionist is having lunch. A patient calls and says he must have a prescription refill order for blood pressure medication called in right away to his pharmacy, because he is leaving town in 30 minutes. He says that he has been on the medication for four years and that he is a personal friend of the physician. No one except you is in the office at this time. What do you do? (Chapter 4, “Working in Today’s Health Care Environment”)
- Terry O’Rourke, a 25-year-old female patient of Dr. Williams, refuses to take her medication to control diabetes and is not following her dietary plan to control her disease. After repeated attempts to help this patient, Dr. Williams has decided that she can no longer provide care for Terry. The office staff has been advised not to schedule Terry for any more appointments. Is there an ethical or legal concern (or both) regarding this situation? Is there anything else that either Dr. Williams or her staff should do to sever the patient relationship with Terry? (Chapter 5, “The Physician–Patient Relationship”)
- You drop a sterile packet of gauze on the floor. The inside of the packet is still considered sterile; however, the policy in your office is to re-sterilize anything that drops on the floor. This is the last sterile packet on the shelf. The chances are very slight that any infection would result from using the gauze within the packet. What do you do? (Chapter 6, “Professional Liability and Medical Malpractice”)
- The pharmaceutical salesperson has just brought in a supply of nonprescription vitamin samples for the physicians in your practice to dispense to their patients. All the other staff members take samples home for their families’ personal use. They tell you to do the same, because the samples will become outdated before the physicians can use all of them. It would save you money. What do you do? Is it legal? Is it ethical? (Chapter 7, “Public Duties of the Health Care Professional”)
- You feel a slight prick on your sterile glove as you assist Dr. Brown on a minor surgical procedure. Dr. Brown has a quick temper, and he will become angry if you delay the surgical procedure while you change gloves. As there was just a slight prick and the patient’s wound is not infected, will it hurt to wear the gloves during the procedure? Who is at fault if the patient develops a wound infection? Is this a legal and/or ethical issue? (Chapter 8, “Workplace Law and Ethics”)
- Demi Daniels calls to ask you to change her diagnosis in her medical record from R/O (rule out) bladder infection to “bladder infection” because her insurance will

not pay for an R/O diagnosis. In fact, she tested negative for an infection, but the physician placed her on antibiotics anyway. What do you do? Is this legal? Is it ethical? (Chapter 9, “The Medical Record”)

- A physician from another office steps into your office and asks to see the chart of a neighbor whom he believes may have an infectious disease. He states that the neighbor is a good friend and that she will not mind if he reviews her medical chart. Is it legal for you to give the chart to this physician? (Chapter 10, “Patient Confidentiality and HIPAA”)
- A local hospital was attempting to arrange liver transplants for several patients. At the same time that a liver became available from an organ donor, it was learned that a prominent local politician also needed a new liver. The politician was moved to the head of the line for the available liver. What are the ethics of giving a scarce liver to a prominent politician ahead of other patients who have been waiting for some time? What are your thoughts about the statement “People should not be punished just because they are celebrities”? (Chapter 11, “Ethical and Bioethical Issues in Medicine”)
- Your neighbor’s 18-year-old unmarried daughter has just given birth to a baby boy. The neighbor is concerned that neither she nor her daughter can take care of this baby. She asks you what you can suggest. Is it a violation of ethics to tell her about the Safe Harbor Law? (Chapter 12, “Ethical Issues Relating to Life”)
- An elderly widow is rushed to the hospital in the middle of the night with a massive heart attack. She is in need of an emergency treatment that requires the services of a special surgical team. It takes almost two hours to gather the entire team as they had all left for the day. This patient has a good chance of recovering if the procedure is done within six hours after the heart attack occurs. But, as soon as the surgical team is together and the operating room is ready, another patient, a 45-year-old woman, is brought into the emergency room in need of the same procedure to save her life. It is agreed that the 45-year-old woman will receive the treatment first, but the procedure takes longer than expected. This procedure could not be performed on the widow because the six-hour “window of opportunity” to do the procedure had passed. The younger woman lives, and the elderly widow dies the next day. Is the decision on who will receive the procedure first an ethical or legal one, or both? (Chapter 13, “Death and Dying”)
- An elderly deaf man walks into a very busy hospital emergency room. The receptionist asks the man what his problem is but, getting no response, hands the man a form to complete. The receptionist then asks the man if he has any allergies they should know about when they examine him. He does not understand this question. Frustrated, he turns around and walks back out the door and gets in a cab to go home. After a 30-minute cab trip, the driver tells the man he is home but gets no response. The elderly man had died of a heart attack during the ride. What could/should have been done to prevent this from happening? (See discussion of Deaf Culture in Chapter 14, “Trends in Health Care.”)

These situations, and others like them, are addressed throughout this text.

## Medical Law

**Laws** are rules or actions prescribed by an authority such as the federal government and the court system that have a binding legal force. Medical law addresses legal rights and obligations that affect patients and protect individual rights, including those of health care employees. For example, practicing medicine without a license, Medicaid fraud, and patient rape are violations of medical laws that are always illegal and immoral or unethical.

It is easy to become confused when studying law and ethics, because, while the two are different, they often overlap. Some illegal actions may be quite ethical—for example, exceeding the speed limit when rushing an injured child to the hospital. Of course, many unethical actions may not be illegal, such as cheating on a test. Law and ethics both exist in everyday life and, thus, are difficult to separate. An insurance company denying payment for a life-saving heart transplant on a 70-year-old male is not illegal in most cases, but it may well be unethical.

### Med Tip

In general, an illegal act, or one that is against the law, is always unethical. However, an unethical act may not be illegal. For instance, a physician traveling on a plane does not have a legal obligation to come forward when an announcement is made requesting a doctor to assist with an emergency. But it may be an unethical action if the passenger dies without the help of an available doctor.

There is a greater reliance on laws and the court system, as our society and medical system have become more complex. In fact, some physicians have been practicing a form of medicine called “defensive medicine.” This means that they may order unnecessary tests and procedures in order to protect themselves from a lawsuit, because then they can say “I did everything that I could to treat the patient.” This type of preventive medicine is not only costly but also may put the patient through needless and uncomfortable tests and procedures. In some cases, physicians may even avoid ordering tests or procedures that may carry a risk for the patient because they do not want to take a chance that a lawsuit may result if the patient outcome is poor.

The law provides a yardstick by which to measure our actions, and it punishes us when our actions break the laws. Many of the actions punishable by law are considered morally wrong, such as rape, murder, and theft. The problem with measuring our actions using only the law, and not considering the ethical aspects of an issue, is that the law allows many actions that are morally offensive, such as lying and manipulating people. Laws against actions such as adultery, which most people agree is immoral, exist, but they are rarely enforced. Some situations involving interpersonal relationships between coworkers, such as taking credit for someone else’s work, are difficult to address with laws. Other work issues such as lying on job applications, padding expense accounts, and making unreasonable demands on coworkers are usually handled on the job and are typically not regulated by laws.

A further caution about relying on the law for moral decision-making: the requirements of the law often tend to be negative. The standards of morality, on the other hand, are often seen to be positive. The law forbids us to harm, rob, or defame others; but in most states it does not require us to help people. Morality would tell us to give aid to the drowning victim even if the law does not mandate that we do so.

Many people believe that something is wrong, or unethical, only if the law forbids it. Conversely, they reason that if the law says it’s all right, then it is also ethical. Unfortunately, these people believe that until the law tells them otherwise, they have no ethical responsibility beyond the law. Finally, laws are often reactive and may lag behind the moral standards of society; slavery is the most obvious example. Sexual harassment and racial discrimination existed as moral problems long before laws were enacted to suppress this behavior.

There are a multitude of laws, including criminal and civil statutes (laws enacted by state and federal legislatures) as well as state medical practice acts that affect health care professionals. **Medical practice acts**, established in all 50 states by statute, apply specifically to the way medicine is practiced in a particular state. These acts define the meaning of the “practice of medicine” as well as requirements and methods for

licensure. They also define what constitutes unprofessional conduct in that particular state. While the laws vary from state to state, the more common items of unprofessional conduct include the following:

- Practicing medicine without a license
- Impaired ability to practice medicine because of addiction or mental illness
- Conviction of a felony
- Insufficient record keeping
- Allowing an unlicensed person to practice medicine
- Physical abuse of patients
- Prescribing medication in excessive amounts

As we study law and ethics as they relate to medicine, we will frequently use court cases to illustrate points. For our purposes it is not necessary to memorize the specifics of a lawsuit, such as the legal citation, that has been decided in a court of law. But it is important to keep in mind that unless a decided case is overturned in an appeals court, it is considered to have established a **precedent**. This means that the decision of the case acts as a model for any future cases in which the facts are the same.

## Ethics

Medical law addresses rights and obligations that affect patients and protect one's rights; ethics also addresses issues that affect patients and their rights. **Ethics** is the branch of philosophy related to morals, moral principles, and moral judgments. Ethics is often about making choices. A more practical explanation from ethics experts tells us that ethical behavior is that which puts the common good above self-interest. Ethics is concerned with the obligation of what we "should" or "ought to" do. **Morality** is the quality of being virtuous or practicing the right conduct. A person is said to be **amoral** if he or she is lacking or indifferent to moral standards. However, the terms *ethics* and *morality* are used interchangeably by many people.

Ethics, as part of philosophy, uses reason and logic to analyze problems and find solutions. Ethics, in general, is concerned with the actions and practices that are directed at improving the welfare of people in a moral way. Thus, the study of ethics forces us to use reason and logic to answer difficult questions concerning life, death, and everything in between. In modern terms, we use words such as *right*, *wrong*, *good*, and *bad* when making ethical judgments. In other cases, people refer to issues or actions that are *just* and *unjust* or *fair* and *unfair*.

**Medical ethics** concerns questions specifically related to the practice of medicine. This branch of ethics is based on principles regulating the behavior of health care professionals, including practitioners such as physicians, nurses, and allied health professionals. It also applies to patients, relatives, and the community at large.

### Med Tip

Ethics always involves people. This includes patients, health care professionals, other caregivers, and the general public.

Ethics is meant to take the past into account, but also to look to the present and future and ask, "What should I do now?" and "What will be the outcome?" Unfortunately, using moral views based only on those of parents and peers can lead to radical subjectivism that can make ethical discussion of issues such as euthanasia, abortion, or cloning difficult, if not impossible. Many of our beliefs are based on emotions—for



example, we believe that something is wrong if we feel guilt when we do it. While most health care practitioners, other than physicians, will not be required to make life-and-death decisions about their patients, it is still important for everyone to develop his or her own personal value system. Whenever you are involved in an ethical dilemma, you must analyze actions and their consequences to all concerned parties. Law also does this by directing actions into “legal” and “illegal” human actions. Ethical issues are not so easily divided into two categories such as “right” and “wrong.”

As we study ethics, we will also analyze various actions and their effects. When following a moral line of reasoning it is advisable to carefully take apart the issues, restate them in your own words, and offer an interpretation, and even a criticism, of them.

### Med Tip

Remember that ethics always involves formal consideration of the interests of others in deciding how to act or behave. In fact, some philosophers believe that almost every decision to do anything is an ethical decision.

## Theories of Ethics

Basic questions relating to the study of ethics have been the subject of much debate and analysis, particularly among philosophers. Various philosophers have defined ethics under several categories, such as utilitarianism, natural rights, or rights-, duty-, justice-, and virtue-based ethics. A division is often made between *teleological* and *deontological* theories in ethics. A teleological theory asserts that an action is right or wrong depending on whether it produces good or bad consequences. Utilitarianism is an example of this theory. Deontological ethical theory asserts that at least *some* actions are right or wrong and, thus, we have a duty or obligation to perform them or refrain from performing them, without consideration of the consequences. Duty-based ethics is an example of deontological theory. These ethical theories are the basis for many of our country's regulations, such as the Occupational Safety and Health Act (OSHA), and the norms of our society.

### Utilitarianism

**Utilitarianism** is an ethical theory based on the guiding principle of the greatest good for the greatest number of people. This ethical theory is concerned with the impact of actions, or final outcomes, on the welfare of society as a whole. In other words, the “rightness” or “wrongness” of an act is determined solely by its consequences. This view looks at what would satisfy the interests, wants, and needs of *most* people. Additionally, utilitarianism is a consequences-based ethical theory that follows the premise that the ends (consequences) justify the means (methods for achieving the ends). For example, in the case of limited financial resources, money would be spent in a way to benefit the greatest number of people. In this respect, utilitarianism is considered to be an efficient allocation of resources. In a professional context, a **cost/benefit analysis** justifies the means of achieving a goal. In other words, if the benefit of a decision outweighs the cost (financial or otherwise) of achieving a goal, then the means to obtain the goal would be justified. A problem arises when utilitarianism, or cost/benefit analysis, is used for making ethical decisions, because when a decision benefits *most* people, *some* people will inevitably “fall through the cracks.” This could result in serious consequences if a person is denied treatment and eventually suffers and/or dies because of this denial.

The nation's Medicare system, in which persons over the age of 65 and other qualified individuals receive health care benefits, is one example of utilitarianism. Congress has limited amounts of funds to allocate for medical coverage and uses those funds

to cover the elderly and others, such as the disabled, under the federal government Medicare Act. However, not *all* people require the benefit. In the case of Medicare, for example, not all elderly persons need to have medical coverage provided for them by this act, because some are wealthy and can afford their own coverage. On the other hand, there are people with low incomes who are not yet 65, and are not **indigent** (impoverished) enough to qualify for Medicaid, a state government program, but still require some type of medical insurance.

Another example of utilitarianism occurs when there is a limited supply of donor organs. Under a utilitarianism approach, patients with the most immediate need (and who would benefit the most) would receive the organ. Using this approach for organ distribution, terminally ill or elderly persons with a limited lifespan would not be the first to receive a scarce resource such as a new heart. A weakness of the utilitarianism approach to moral reasoning is that it is impossible to quantify all the variables. Therefore, it can result in a biased allocation of resources, ignoring the rights of some vulnerable people such as the young, sick, handicapped, or elderly who lack representation or a voice.

### Rights-Based Ethics

**Rights-based ethics**, or a natural rights ethical theory, places the primary emphasis on a person's individual rights. This ethical theory states that rights belong to all people purely by virtue of their being human. Under our rights-based democracy, all Americans have the right to freedom of speech. Employees have the right to due process, which entitles them to a fair hearing in the case of dismissal from their jobs. In the previous example of limited donor organs, using a rights-based ethical approach, every patient needing a donor organ would have the same right to receive the available organ.

The strength of rights-based ethics is a strong attempt to protect the individual from injury. Laws such as OSHA (Occupational Safety and Health Act) benefit society as a whole because everyone in the workplace is protected by this act. The downside to this approach is that there can be incidents of individualistic selfish behavior which is independent of the outcomes (consequences). For example, unions protect their membership while excluding the rights of the non-union members of society.

### Duty-Based Ethics

**Duty-based ethics** focuses on performing one's duty to various people and institutions such as parents, employers, employees, and customers (patients). This line of moral reasoning follows the belief that our actions should be universal, which means that everyone would act the same way with the same set of circumstances. For example, Americans have some duties, such as to adhere to laws enforced by government authorities. Duties also arise from our own actions. Therefore, we have a duty to keep promises, not to lie, and to make reparations to those whom we have harmed. These reparations include compensation for any damage to another person. An example is the financial compensation a medical practitioner would make if he or she caused harm to a patient.

One of the problems encountered with this moral line of reasoning is the mandate to do things out of a sense of duty regardless of the consequences. In addition, we may hear conflicting opinions about what our "duty" or responsibility is in particular circumstances. If our employer asks us to do something that we are sure is wrong or unethical, we have a duty not to perform the action. (You will come across some malpractice cases later in the text that demonstrate this.) However, this violates our duty to our employer. Most religions have statements that address one's duty as a member of that faith or religion. However, many people do not accept their faith's beliefs concerning issues such as birth control and working on the Sabbath, but do adhere to other doctrines of their religion. Many people claim that a sense of duty is not enough when dealing with ethical dilemmas. Rules do not always work. And people from different cultures may have a different sense of what "duty" means.



## Justice-Based Ethics

**Justice-based ethics** is based on an important moral restraint called “the veil of ignorance.” The philosopher John Rawls believed that all social contracts, such as who should receive a scarce organ donation, should be handled so that no one would know the gender, age, race, health, number of children, income, wealth, or any other arbitrary personal information about the recipient. This “veil of ignorance,” meaning we would not *see* the recipients of our choices, would allow the decision-makers (such as Congress or medical experts) to be impartial in their decisions. The so-called “veil of ignorance” means that no one person is advantaged or disadvantaged. In effect, the “least well off” person would then have the same chance for scarce resources and justice as the more educated and wealthy. Rawls, who equated justice with fairness, assumed that people have a self-interest when forming social contracts such as who will receive medical care. The justice-based model of ethics infers that every citizen should have equal access to medical care. For example, children with genetic diseases that would require large financial resources deserve good care simply as a matter of justice. Proponents of justice-based ethics believe insurance premium rates and risk should be spread over all members of the nation such as in a federal single-payer system like Medicare.

Opponents of this theory believe it is unfair for the healthy to subsidize the unhealthy. Furthermore, under the current gigantic health care system and media coverage it is impossible to have the “veil of ignorance” that is demanded by this ethical model.

Justice, according to John Rawls (Rawlsian Justice), requires the following:

- Using a democratic and fair approach to others
- Maintaining a fair distribution of benefits and burdens
- Protecting the interests of the weak or powerless
- Allocating resources fairly

## Virtue-Based Ethics

A moral virtue is a character trait that is morally valued. The emphasis of **virtue-based ethics** is on persons and not necessarily on the decisions or principles that are involved. Most people agree that virtues are just good habits, such as fairness and honesty. Other examples of virtues and good character traits are integrity, trust, respect, empathy, generosity, truthfulness, and the ability to admit mistakes.

Virtue-based ethics, or seeking the “good life,” is our legacy from the philosopher Aristotle. According to him, the goal of life, for which we all aim, is happiness. He believed that happiness is founded not solely on what we gain in life, but also on who we are. For example, the joy of being a medical professional cannot be present without having the traits or virtues that make one a good physician, nurse, medical assistant, technologist, or other health care professional. These virtues include perseverance, integrity, compassion, and trust. Aristotle’s theory is considered inadequate by many because it does not take into account the consequences of an action, as in utilitarianism, or the rights of others, as in rights-based ethics. In addition, there are some who believe that people might take advantage of someone who is too trusting.

## Comparing the Five Theories of Ethics

While each of these five ethical theories can have positive outcomes and are useful in certain circumstances, no one ethical theory or system is perfect.

Ethical standards that relate to the medical profession are set and defined by professional organizations such as the American Medical Association. All professional disciplines, such as nursing and medical assisting, have their own organizations and standards of guiding ethical codes of conduct. Codes of ethics are discussed more fully in Chapter 5.

Table 1.1 Strengths and Weaknesses of Five Ethical Theories

Theory	Strengths	Weaknesses
<b>Utilitarianism</b>		
The greatest good for the greatest number	<ol style="list-style-type: none"><li>1. Encourages efficiency and productivity</li><li>2. Consistent with profit maximization—getting the most value (benefit) for the least cost</li><li>3. Looks beyond the individual to assess impact of the decision on all who are affected</li></ol>	<ol style="list-style-type: none"><li>1. Virtually impossible to quantify all variables</li><li>2. Can result in biased allocations of resources, especially when some who are affected lack representation or voice</li><li>3. Can result in ignoring the rights of some people to achieve a utilitarian outcome</li></ol>
<b>Rights-Based Ethics</b>		
Individual's rights to be protected	<ol style="list-style-type: none"><li>1. Protects the individual from injury; consistent with rights to freedom and privacy</li></ol>	<ol style="list-style-type: none"><li>1. Can encourage individualist, selfish behavior that, if misinterpreted, may result in anarchy</li></ol>
<b>Duty-Based Ethics</b>		
Based on absolute moral rules	<ol style="list-style-type: none"><li>1. Absolute rules or principles help us determine what our duty is toward others</li><li>2. Determines what our duty is to one another</li><li>3. A mandate for respect and impartiality</li></ol>	<ol style="list-style-type: none"><li>1. Hard to identify who should determine the rules and principles of moral behavior</li><li>2. May tend to treat people as a means to an end</li></ol>
<b>Justice-Based Ethics</b>		
Fair distribution of benefits and burdens	<ol style="list-style-type: none"><li>1. A democratic approach</li><li>2. Based on a “veil of ignorance”</li><li>3. No one person is advantaged or disadvantaged</li></ol>	<ol style="list-style-type: none"><li>1. Some believe it is unfair for the healthy to subsidize the unhealthy</li></ol>
<b>Virtue-Based Ethics</b>		
Based on belief that we have a duty or responsibility to others	<ol style="list-style-type: none"><li>1. Exemplifies the premise that our actions are universal</li><li>2. Virtuous behavior includes perseverance, courage, integrity, compassion, humility, and justice</li></ol>	<ol style="list-style-type: none"><li>1. Concern that people can be taken advantage of if they are too complacent or trusting</li></ol>

In general, people believe an action is wrong or unethical if it:

- Causes emotional or physical harm to someone else.
- Goes against one’s deepest beliefs.
- Makes a person feel guilty or uncomfortable about a particular action.
- Breaks the law or traditions of their society.
- Violates the rights of another person.

Because no one ethical theory is perfect, the medical community and the health care professional use a combination of many theories to determine the correct action to take. See Table 1.1 for comparison of the strengths and weaknesses of the five ethical theories.

Principles or Values That Drive Ethical Behavior

Most people have established, throughout their lifetime, their own set of principles or values that drive their ethical behavior. Benjamin Franklin included in his list of virtues such things as cleanliness, silence, and industry. In today’s world, we don’t think of these things as virtues; they are assumed by many people to be a part of everyday life.

Med Tip

One should not perform an action that might threaten the dignity or welfare of another individual.



**FIGURE 1.1** Beneficence: Helping Others

However, in today's fast-paced health care environment, it is important to slow down enough to consider some of the most respected virtues. Some of these virtues include beneficence, empathy, fidelity, gentleness, holistic care, humility, justice, perseverance, responsibility, sanctity of life, tolerance, and work.

- **Beneficence**—The action of helping others and performing actions that would result in benefit to another person. It cautions all those working in the health care field to do no harm to anyone. In fact, when we prevent harmful actions from happening to our patients, we are using this virtue to its fullest extent (Figure 1.1).
- **Empathy**—An objective awareness of the feelings, emotions, and behavior of another person. (Also called compassion.)
- **Fidelity**—Loyalty and faithfulness to others. Fidelity implies that we will perform our duty. We must use caution when practicing fidelity. A strict adherence to a sense of duty or loyalty to an employer does not mean that we must perform actions that are wrong or harmful to our patients.
- **Gentleness**—A mild, tenderhearted approach to other people. Gentleness goes beyond compassion because it can exist in the absence of a person's pain and suffering. A gentle approach to patient care is considered by patients to be one of the most welcome virtues. Both men and women have the ability to demonstrate gentleness.
- **Holistic care**—A comprehensive total care approach to a patient including physical, emotional, and spiritual.
- **Humility**—Acquiring an unpretentious and humble manner. Humility is considered to be the opposite of vanity. It has been said, "honesty and humility are sisters." This means that to be truly humble, we must be entirely honest with ourselves. Humility requires that we recognize our own limits. Vanity and a sense of self-importance have no place in medicine. When mistakes are made, they must be reported so that corrections can take place. It takes a humble—and honest—person to admit mistakes.
- **Justice**—Fairness in all our actions with other people. It means that we must carefully analyze how to balance our behavior to be fair to all. Justice implies that the same rules will apply to everyone. This means that as health care workers we cannot demonstrate favoritism with our patients or our coworkers. The four cardinal virtues are justice, temperance, prudence, and courage. Of these four, only justice is considered to be an absolute good. To emphasize this point, the philosopher Immanuel Kant said, "If legal justice perishes, then it is no longer worthwhile for men to remain alive on this earth."
- **Perseverance**—Persisting with a task or idea even against obstacles. This virtue implies a steady determination to get the job done. For example, it takes

perseverance to complete one's education. This is an outstanding virtue for a health care worker to have. It implies that one will finish the job even if it is difficult.

- **Responsibility**—A sense of accountability for one's actions. Responsibility implies dependability. A sense of responsibility can become weakened when one is faced with peer pressure. Medical professionals must be able to "answer" or be accountable for their actions. Taking responsibility is a sign of maturity.
- **Sanctity of life**—The sacredness of human life. All human beings must be protected. This means that we may have to become an advocate for people who cannot speak out for themselves, such as children and many elderly.
- **Tolerance**—A respect for those whose opinions, practices, race, religion, and nationality differ from our own. Tolerance requires a fair and objective attitude toward opinions and practices with which we may or may not agree.
- **Work**—An effort applied toward some end goal. Work, if performed well, is clearly a virtue that almost everyone enters into at one time or another. In its broadest sense, work is part of our everyday existence that includes activities such as studying, child rearing, home maintenance, gardening, hobbies, and religious activities. The work we do to earn a living can be performed with pride or can be performed poorly and grudgingly. The most satisfying work involves achieving a goal that we believe is worthwhile and worthy of our talent.

### Med Tip

Not all patients are easy to care for. Many patients do not feel well or may be saddened by a diagnosis. All patients have a right to our respect and understanding.

## Interpersonal Ethics

The expectation of employees in the workplace is that they will be treated ethically with respect, integrity, honesty, fairness, empathy, sympathy, compassion, and loyalty. Professional health care employees are no different in their expectation of receiving such treatment.

### Med Tip

Remember to treat each person, whether patient or coworker, the way you wish to be treated.

- **Respect** implies the ability to consider and honor another person's beliefs and opinions. This is a critical quality for a health care worker because patients come from a variety of racial, ethnic, and religious backgrounds. Coworkers' opinions must also be respected, even if contrary to one's own.
- **Integrity** is the unwavering adherence to one's principles. People with integrity are dedicated to maintaining high standards. For example, integrity means that health care professionals will wash their hands between each patient contact even when no one is looking. Dependability, such as being on time for work every day, is a key component of integrity. Integrity is so important that many professions include a statement regarding this quality in their code of ethics. For example, the Pharmacy Technician Code of Ethics states that this health care professional "supports and promotes honesty and integrity in the profession, which includes a duty to observe the law, maintain the highest moral and ethical conduct at all times, and uphold the ethical principles of the profession."

Integrity includes:

- Doing the right thing even when nobody is looking
- Showing concern for others
- Using ethically acceptable behavior
- Fairness
- Accepting responsibility for one's actions
- **Honesty** is the quality of truthfulness, no matter what the situation. Health care professionals must have the ability to admit an error and then take corrective steps. Anyone who carries out orders for a physician has a duty to notify the physician of any error or discrepancy in those orders.
- **Fairness** is treating everyone the same. It implies an unbiased impartiality and a sense of justice. This is a particularly important characteristic for supervisors.
- **Empathy** is the ability to understand the feelings of others without actually experiencing their pain or distress. Acting in this caring way expresses sensitivity to patients' or fellow employees' feelings.
- **Sympathy**, on the other hand, is feeling sorry for or pitying someone else. Most people, including patients, react better to empathetic listeners than to sympathetic ones.
- **Compassion** is the ability to have a gentle, caring attitude toward patients and fellow employees. Any illness, and in particular a terminal illness, can cause fear and loneliness in many patients. A compassionate health care professional can help to ease this fear.
- **Loyalty** is a sense of faithfulness or commitment to a person or persons. Employers expect loyalty from their employees. This loyalty should be granted unless the practice of one's employer is unethical or illegal. For example, it is never appropriate to recommend that a patient seek the services of another physician unless instructed to do so by the employer. By the same token, employees expect loyalty, or fair treatment, from their employer.

### Med Tip

Loyalty to one's employer does *not* mean hiding an error that has been committed by that employer or by a physician. If you're not sure, ask.

Additionally, there are specific issues that affect the workplace, such as privacy, due process, sexual harassment, and comparable worth.

- **Privacy**, or confidentiality, is the ability to safeguard another person's confidences or information (Figure 1.2). Violating patient confidentiality is both a legal and an ethical issue that carries penalties. Employees have a right to expect the contents of their personnel records to be held in confidence by their employer. By the same token, it is inappropriate for employees to discuss the personal life of their physician/employer.
- **Due process** is the entitlement of employees of the government and public companies to have certain procedures followed when they believe their rights are in jeopardy. The Fourteenth Amendment acts to prevent the state's deprivation or impairment of "any person's life, liberty, or property without due process of the law." The Fifth Amendment also restricts the federal government from depriving individuals of these rights without due process of the law. In a work environment, this means that employees of the government and public companies accused of an offense are entitled to a fair hearing in their defense. Due process is also a protection guaranteed to health care workers as it relates to their state certification,



**FIGURE 1.2** Confidentiality Regarding Patient's Identity

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license, or registration to practice. To remove a person's license to practice his or her profession is the same as removing a person's livelihood. Thus, the removal of this documentation is not to be taken lightly. If there are allegations (accusations) made claiming that a health care worker, such as a medical technologist, nurse, or physician, has committed malpractice, then that person's right to defend himself or herself and right to due process must be protected. This means that the person must receive a notice of the charges, an investigation of the allegations, and a hearing if enough evidence is found. If these allegations are proven to be false, then the individual must not be penalized.

- **Sexual harassment**, or gender harassment, is defined in the Equal Employment Opportunity Commission guidelines, which are part of Title VII of the Amended Civil Rights Act of 1964:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (3) such conduct has the purpose or effect of interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

### Med Tip

Any type of gender harassment, whether male or female, is seen as one person exerting power over another.

Both males and females working in the health care field have reported sexual harassment.

- **Comparable worth**, also known as pay equity, is a theory that extends equal pay requirements to all persons who are doing equal work. The principle of fairness and justice dictates that work of equal value performed by men and women in the workplace should be rewarded with equal compensation. However, research demonstrates that there is a wage gap, with some estimates as high as 36 percent, because of the undervaluation of work performed by women. This results in injustice; equals are not treated equally. Because pay scales are the same for males and females in many of the health care professions, the situation is not as intense as it

**Table 1.2** Common Sense Approach to Ethics

Avoid harming others	Keep promises and contracts	Be fair
Respect the rights of others	Obey the law	Reinforce these imperatives in others
Do not lie or cheat	Help those in need	

is in the business world. However, employers and supervisors who are involved in the hiring process must be committed to providing equal pay for equal work.

While it is important to reflect on the previous concepts, many ethical topics relating to the medical field fall into categories of common sense. See Table 1.2 for examples that might fall into the category of a “common sense” approach to ethics.

## Models for Examining Ethical Dilemmas

The decision-maker must always be objective when making ethical decisions. It is critical to examine all the facts of a given situation by gathering as much information or data as possible. Alternative solutions to the problem must be assessed if they are available. All sides of every issue should be studied before ethical decisions are made. The following are three decision-making models that can be helpful when resolving ethical issues: the Blanchard-Peale three-step ethics model, a seven-step decision model, and Dr. Bernard Lo’s three-step clinical model.

### The Blanchard-Peale Three-Step Ethics Model

Kenneth Blanchard and Norman Vincent Peale in their book *The Power of Ethical Management* advise the use of a three-step model when evaluating an ethical dilemma. The steps are to ask yourself each of the following three questions: *Is it legal? Is it balanced? How does it make me feel?*

1. *Is it legal?* When applying the three-step model, if the situation is clearly illegal, such as inflicting bodily harm on another, then the matter is also clearly unethical, and you do not even have to progress to the second question. However, if the action is not against the law, then you should ask yourself the second question.
2. *Is it balanced?* This question helps to determine if another person or group of people is negatively affected by the action. In other words, is there now an *imbalance* so that one person or group suffers or benefits more than another as a result of your action? For example, in the case of a scarce resource such as donor organs, does one group of people have greater access?
3. *How does it make me feel?* This final question refers to how the action will affect you emotionally. Would you be hesitant to explain your actions to a loved one? How would you feel if you saw your name in the paper associated with the action? Can you face yourself in the mirror?

If you can answer the first two questions with a strong “Yes” and the final question with a strong “Good,” then the action is likely to be ethical.

For example, student cheating is clearly unethical. By using the three-step ethics model, we have an even clearer idea of why it is unethical to look at even one answer on another student’s test. We ask the three questions:

1. *Is it legal?* Yes, as far as we know there is no law against cheating.
2. *Is it balanced?* No, it is not. This question is where the model really helps us. One group or person (in this case the cheater) does have an advantage over another group or person. In addition, the grades will be skewed for the entire class, because the person who cheated will receive a higher grade than the one actually earned.

3. *How does it make me feel?* Remember that we have to live with ourselves. The philosopher Thomas Aquinas said, “We become what we do,” meaning that if we lie, we become a liar. Or in this case, if we cheat, we become a cheater.

### Med Tip

The Blanchard-Peale three-step ethics model is a quick way to check yourself when you are uncomfortable about an ethical decision. Use it often!

Analysis is the ability to carefully take apart issues, restate them in your own words, and offer an interpretation, and even criticism, of them. The following two models require careful analysis of the problem.

## A Seven-Step Decision Model

A number of seven-step decision-making models have been developed. Here is a typical seven-step model:

1. *Determine the facts by asking the following questions:*

What do we need to know?

Who is involved in the situation?

Where does the ethical situation take place?

When does it occur?

2. *Define the precise ethical issue.*

For example, is it a matter of fairness, justice, morality, or individual rights?

3. *Identify the major principles, rules, and values.*

For example, is this a matter of integrity, quality, respect for others, or profit?

4. *Specify the alternatives.*

List the major alternative courses of action, including those that represent some form of compromise. This may be a choice between simply doing or not doing something.

5. *Compare values and alternatives.*

Determine if there is one principle or value, or a combination of principles and values, that is so compelling that the proper alternative is clear.

6. *Assess the consequences.*

Identify short-term, long-term, positive, and negative consequences for the major alternatives. The short-term gain or loss is often overridden when long-term consequences are considered. This step often reveals an unanticipated result of major importance.

7. *Make a decision.*

The consequences are balanced against one's primary principles or values. Always double-check your decision.

This seven-step decision model forces us to closely examine the facts before we make an ethical decision. This model is helpful when making a decision that has many subdecision questions to examine: for example, “Who should the physician treat first?” “Should I look at the exam paper of the person sitting next to me?” or even “What career choice should I make?” Obviously, some of these decisions require a quick response, while others, such as selection of a career, require more time and research. This model can be used to examine all of the end-of-chapter cases in this textbook.



## The Lo Three-Step Clinical Model

Bernard Lo, MD, author of *Resolving Ethical Dilemmas: A Guide for Clinicians*, has developed a clinical model for decision-making to ensure that no important considerations relating to patient care are overlooked. He believes this approach can be used to help resolve important patient care issues, such as when to proceed with life-sustaining interventions (e.g., cardiopulmonary resuscitation [CPR] or kidney dialysis). His model also includes the patient's preferences and viewpoints:

1. *Gather information.*
  - a. If the patient is competent, what are his or her preferences for care?
  - b. If the patient lacks decision-making capacity, has he or she provided advance directives for care?
  - c. If the patient lacks decision-making capacity, who should act as surrogate?
  - d. What are the views of the health care team?
  - e. What other issues complicate the case?
2. *Clarify the ethical issues.*
  - a. What are the pertinent ethical issues?
  - b. Determine the ethical guidelines that people are using.
  - c. What are the reasons for and against the alternative plans of care?
3. *Resolve the dilemma.*
  - a. Meet with the health care team and with the patient or surrogate.
  - b. List the alternatives of care.
  - c. Negotiate a mutually acceptable decision.

Dr. Lo emphasizes that patients should play an active role in decisions about their care. Everything should be done to ensure that the patient has been well informed by providing information in an easy-to-understand way. This model cautions the health care team to seek the patient's decision on advance directives. He requires that the entire health care team—including medical students, nurses, social workers, and all others who provide direct care for the patient—be involved in the decisions. These caregivers should voice any moral objections they have to the proposed care. Finally, the patient's best interests must always be protected. This model is more commonly used in a hospital or clinic setting.

## In Summary

The ethical decision-making models just presented all provide valuable guidance, which can be summarized as follows. When dealing with ethical dilemmas:

1. Make sure you know and understand the issue/issues.
2. Consider all the facts and alternatives for action.
3. Evaluate all alternatives: ask is it legal, is it fair, and is it balanced?
4. Carefully select the best alternative.
5. Move ahead and act on your decision.

### Med Tip

When following a moral line of reasoning, it is always advisable to examine all of the facts rather than to predetermine what should be done.

## What Ethics is Not

Ethics is not just about how you feel, the sincerity of your beliefs, or your emotions; nor is it only about religious viewpoints. Feelings such as in the statement “I feel that capital punishment is wrong” are not sufficient when making an ethical decision. Others may feel that capital punishment is right in that it helps to deter crime. All people have feelings and beliefs. However, ethics must be grounded in reason and fact. In this respect law and ethics are similar. For example, a statement such as “I feel that cheating is wrong” doesn’t tell us why you believe it is wrong to cheat. A better statement reflecting ethics would be, “I think cheating is wrong because it gives one student an unfair advantage over another student.” That “advantage” may mean that one person may be hired rather than another simply because the grades were the deciding factor.

The sincerity with which people hold their beliefs is also not an adequate reason when making an ethical decision. For example, Hitler sincerely believed that he was right in exterminating more than 6 million Jews. His sincerity did not make him right.

Emotional responses to ethical dilemmas are not sufficient either. Emotions may affect why people do certain things, such as the woman who kills her husband in a rage after discovering he had an affair. However, we should not let our emotions dictate how we make ethical decisions. We may have helplessly watched a loved one die a slow death from cancer, but our emotions should not cloud the issue of euthanasia and cause us to kill our ill patients.

Ethics is not just about religious beliefs. Many people associate ideas of right and wrong with their religious beliefs. While there is often an overlap between ethics and what a religion teaches as right and wrong, people can hold very strong ethical and moral beliefs without following any formal religion.

Ultimately, we study ethics to assist us in providing compassionate and competent care to all our patients.

### Med Tip

Our determination of what is ethical or moral can have serious consequences in human action. If you know it’s wrong, don’t do it!

## Bioethics

Bioethics, also known as biomedical ethics, is one branch of applied, or practical, ethics. It refers to moral dilemmas and issues prevalent in today’s society as a result of advances in medicine and medical research. Bioethics is the study of the ethical problems arising from scientific advances, especially in biology and medicine. The term *bio*, meaning life, combined with *ethics* relates to the moral conduct of right and wrong in life and death issues. Ethical problems of the biological sciences, including research on animals, all fall under the domain of bioethics. Some of the bioethical issues discussed in this text include the allocation of scarce resources such as transplant organs, beginning-of-life issues, cloning, harvesting embryos, concerns surrounding death and dying, experimentation and the use of human subjects, who owns the right to body cells, and dilemmas in the treatment of catastrophic disease.

Bioethics uses a form of moral analysis to assist in determining the obligations and responsibilities relating to unique issues in modern health care. Today’s medical care requires that decision-makers carefully examine facts, identify the moral challenges, and then look carefully at all alternatives. There are four basic principles that can serve as guidelines when confronting bioethical dilemmas. They are the principles of autonomy, beneficence, nonmaleficence, and justice.

The **principle of autonomy** means that people have the right to make decisions about their own life. The concept of “informed consent” is included in this principle. It means that patients must be informed and understand what they are told before they can provide consent for a treatment. They must be told what the treatment involves, the risks involved, the chance for success, and the alternatives.

The **principle of beneficence**, or the principle of doing good, means that we must not harm patients while we are trying to help them. This principle recognizes that medical science must do what is best for each individual patient. If there are risks involved, then the principle of autonomy must be invoked so that decisions are made in conjunction with the patient’s wishes.

The **principle of nonmaleficance** is based on the Latin maxim *Primum non nocere*, which means “First, do no harm.” This is a warning to all members of the health care professions. Nonmaleficance completes the principle of beneficence because we are now asking the medical profession to not only do good for the patient, but also to do no harm in the process. In some cases the risks of a treatment may outweigh the benefits. For example, when a surgeon removes a pregnant woman’s cancerous uterus to save her life, her unborn child will not live. The principle of nonmaleficance causes the medical profession to stop and think before acting.

Finally, the **principle of justice** warns us that equals must be treated equally. The same treatments must be given to all patients whether they are rich, poor, educated, uneducated, able-bodied, or disabled.

These four bioethical principles are guidelines for physicians and health care professionals to use when patients are unable to provide their personal wishes. For example, there have been cases of “wrongful life” in which a fetus is delivered too soon before development is complete. Many of these infants, if they survive, may have severe disabilities. Physicians may be requested by parents to “do nothing” to resuscitate or save their undeveloped child. Issues such as these weigh heavily upon the shoulders of all medical professionals. Having a set of guidelines, such as the previous four principles, to follow has helped in some of the decision-making.

**Bioethicists**, specialists in the field of bioethics, give thought to ethical concerns that often examine the more abstract dimensions of ethical issues and dilemmas. For example, they might ask, “What are the social implications of surrogate motherhood?” Bioethicists are often authors, teachers, and researchers. This branch of ethics poses difficult, if not impossible, questions for the medical practitioner. Examples of some of the difficult ethical and bioethical situations that face the health care professional are listed under “Points to Ponder” at the end of this chapter.

## The Role of Ethics Committees

Hospitals, as well as other health care organizations and agencies, have active ethics committees that examine ethical issues relating to patient care. This type of oversight committee consists of a variety of members from many health care fields as well as other disciplines, including physicians, nurses, clergy, psychologists, ethicists, lawyers, health care administrators, and family and community members. The ethics committee can serve in an advisory capacity to patients, families, and staff for case review of difficult ethical issues, especially when there is a lack of agreement as to what is in the patient’s best interests. They also develop and review health policies and guidelines regarding ethical issues such as organ transplantation. After examining the facts surrounding the ethical issue, the committee often determines a recommendation based on predetermined criteria. These criteria might include the severity of the patient’s medical condition, the age of the patient, and the chance for ultimate recovery.

The ethics committee may examine issues such as when hospitalization or treatment needs to be discontinued for a patient. For example, a hospital ethics committee

will assist in determining the best action to take for a terminally ill patient who is on a respirator. In some cases, the committee may be asked to examine if a patient received the appropriate care.

Ethics committees have tremendous power in today's health care environment. Patients are holding their doctors and hospitals to a high standard of care. While it is necessary for the committee meetings to be confidential in order to protect the patient's privacy, nevertheless, there should be a strong set of policies that govern how the meetings are conducted.

Unfortunately in some cases, members of an ethics committee will never see or talk to the patient whose life and care they are discussing. Mistakes can be made when a group of people makes a judgment without reviewing all the facts.

### Med Tip

It has been suggested that ethics committees make an effort to have disabled people represented on their committee either as a member or as a resource person to represent the viewpoint of the handicapped patient.

## Quality Assurance Programs

In addition to ethics committees, most hospitals and health care agencies have a quality assurance (QA) program. These programs were established in the early 1960s as a response to the increasing demand from the public for accountability in quality medical care. **Quality assurance (QA)** is gathering and evaluating information about the services provided, as well as the results achieved, and comparing this information with an accepted standard.

Quality assessment measures consist of formal, systematic evaluations of overall patient care. After the results of the evaluations are compared with standard results, any deficiencies are noted and recommendations for improvements are made (Figure 1.3). Types of issues that are reviewed by a QA committee include:

- Patient complaints relating to confidentiality.
- Errors in dispensing medications.
- Errors in labeling of laboratory specimens.
- Adverse reactions to treatments and/or medications.
- Inability to obtain venous blood on the first attempt.
- Safety and monitoring practices for radiology and laboratory areas.
- Infection control.

**FIGURE 1.3** Quality Assurance Committee Meeting



## Medical Etiquette

There are certain rules of **medical etiquette**, or standards of professional behavior, that physicians practice in their relationship and conduct with patients and other physicians. These are general points of behavior and are not generally considered to be medical ethics issues. For instance, physicians may expect that their telephone calls to fellow physicians will be taken promptly and that they will be seen immediately when visiting a physician's office. This courtesy is extended to physicians because they are often consulting about patients with other physicians. However, ethical issues are present when one physician overlooks or "covers up" the medical deficiencies of another physician.

### Med Tip

The outdated medical courtesy of physicians providing free medical care to their colleagues is not advisable. If their colleagues were to need further treatment, their insurance coverage may be in jeopardy because of the initial "free" care.

In addition, physicians should be referred to as "Doctor" unless they request to be called by their first name. The same courtesy is required for the patient. Many patients, especially the elderly, prefer to be addressed by their surname (with Ms., Miss, Mrs., or Mr.). Many nurses and other allied health professionals prefer to be addressed in this manner also. There are allied health care professionals who have decades of experience and do not wish to be addressed by either the patient or physician by their first name.

### Med Tip

"All that is necessary for evil to triumph is for good men to do nothing."—Edmund Burke, Irish-born British statesman, orator, and author (1729–1797)

# 1

## Chapter Review

### Points to Ponder

1. Should an alcoholic patient, who may die of liver disease, be eligible for an organ transplant?
2. Should a suicidal patient be allowed to refuse a feeding tube?
3. Should prisoners be eligible to receive expensive medical therapies for illnesses?
4. Is assisting with suicide ever ethically justified?
5. Should medical personnel suggest other treatment modes or suggest the patient request a consultation with another physician?
6. Under what circumstances should you report a colleague or physician who is physically, psychologically, or pharmacologically impaired?

7. Is experimentation on human subjects ever justified?
8. When, if ever, should you disclose a patient's medical condition to the family?
9. Should parents be allowed to refuse medical treatment, such as chemotherapy, for their child?
10. If you are an employee in a medical office with access to medical records, should you protect your friend by telling him that you know that his partner has tested positive for AIDS?

These questions, and others like them, are addressed throughout this textbook.

## Discussion Questions

1. In the case of Jeanette M. at the beginning of the chapter, what additional training for taking telephone messages should the receptionist have had?
2. Discuss the difference between the terms *legal* and *moral*.
3. Give an example for each of the following: a medical ethics dilemma, a bioethics situation, and a medical-legal problem.
4. Determine if the ten questions under "Points to Ponder" are ethical or legal issues or both.
5. Describe five ethical situations that you may face in the profession you intend to follow.

## Review Challenge

### Short Answer Questions

1. Why do we study law, ethics, and bioethics?  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_
2. What is the purpose of the Medical Practice Acts?  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_
3. What are five theories of ethics?  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_
4. What are ten virtues that drive ethical behavior?  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_
5. What are the three steps of the Blanchard-Peale Model?  
 a. \_\_\_\_\_  
 b. \_\_\_\_\_  
 c. \_\_\_\_\_
6. What is bioethics?  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_
7. What is the role of an ethics committee?  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_
8. Discuss what's wrong with the following rationalizations for unethical behavior:  
 a. "Everybody does it!"  
 b. "It's not *really* illegal."  
 c. "No one will find out."  
 d. "My employer will protect me."  
 e. "It's not wrong to do it just this once."



## Matching

Match the responses in column B with the correct term in column A.

### COLUMN A

- \_\_\_\_\_ 1. medical etiquette
- \_\_\_\_\_ 2. ethics
- \_\_\_\_\_ 3. applied ethics
- \_\_\_\_\_ 4. laws
- \_\_\_\_\_ 5. medical ethics
- \_\_\_\_\_ 6. beneficence
- \_\_\_\_\_ 7. veil of ignorance
- \_\_\_\_\_ 8. three-step ethics model
- \_\_\_\_\_ 9. R/O
- \_\_\_\_\_ 10. gut feeling

### COLUMN B

- a. justice-based
- b. decision based on emotion
- c. binding rules determined by an authority
- d. principle of doing good
- e. standards of professional behavior
- f. practical application of moral standards
- g. rule out a diagnosis
- h. moral conduct to regulate behavior of medical professionals
- i. branch of philosophy
- j. Kenneth Blanchard and Norman Vincent Peale's approach to ethics

## Multiple Choice

Select the one best answer to the following statements:

1. A problem that occurs when using a duty-based approach to ethics is
  - a. the primary emphasis on a person's individual rights.
  - b. determining the greatest good for the greatest number of people.
  - c. the conflicting opinions regarding what our responsibility is.
  - d. remembering the three-step model approach to solving ethical dilemmas.
  - e. understanding the difference between what is fair and unfair.
2. Moral issues that occur as a result of modern medical technology are covered under what specific discipline?
  - a. law
  - b. medicine
  - c. philosophy
  - d. bioethics
  - e. none of the above
3. When trying to solve an ethical dilemma, it is necessary to
  - a. do what everyone else is doing.
  - b. use logic to determine the solution.
  - c. do what we are told to do by others.
  - d. base the decision on religious beliefs only.
  - e. allow our emotions and feelings to guide us.
4. The three-step approach to solving ethical dilemmas is based on
  - a. asking ourselves how our decision would make us feel if we had to explain our actions to a loved one.
  - b. asking ourselves if the intended action is legal.
  - c. asking ourselves if the intended action results in a balanced decision.
  - d. a, b, and c.
  - e. none of the above.
5. A utilitarian approach to solving ethical dilemmas might be used when
  - a. allocating a limited supply of donor organs.
  - b. trying to find a just decision in which everyone will benefit.
  - c. finding a decision based on a sense of duty toward another person.
  - d. making sure that no one will "fall through the cracks" and not receive access to care.
  - e. none of the above.
6. An illegal act is almost always
  - a. hidden.
  - b. unethical.
  - c. performed with the full knowledge of the health care worker.
  - d. obvious.
  - e. all of the above.

7. A practical application of ethics is
  - a. philosophy.
  - b. the law.
  - c. illegal.
  - d. applied ethics.
  - e. b and d.
8. An employee who is entitled to a fair hearing in the case of a dismissal from a job is an example of
  - a. duty-based ethics.
  - b. utilitarianism.
  - c. rights-based ethics.
  - d. justice-based ethics.
  - e. c and d.
9. Laws that affect the medical profession
  - a. often overlap with ethics.
  - b. have a binding force.
  - c. are always fair to all persons.
  - d. are determined by a governmental authority.
  - e. a, b, and d.
10. Modern laws
  - a. may allow some unethical acts such as lying on job applications.
  - b. are interpreted by some people to require no ethical responsibility beyond what the law requires.
  - c. are not used as a type of yardstick for group behavior.
  - d. a and b only.
  - e. a, b, and c.

## Discussion Cases

1. Analyze the following case using the five theories of ethics discussed in this chapter.

*It has become necessary to ration a vaccine for a contagious disease. There is only enough vaccine available to cover 75 percent of the U.S. population. It is necessary to determine an appropriate method for doing this.*

- a. Utilitarianism:

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- b. Rights-based ethics:

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- c. Duty-based ethics:

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- d. Justice-based ethics

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- e. Virtue-based ethics:

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2. Using the three-step ethics model (Blanchard-Peale), analyze the following case:

*A student knows that two other students who sit next to each other in class are cheating on exams because they talk about it after class. Is this an ethical dilemma? What, if anything, should the student do?*

- a. \_\_\_\_\_

- b. \_\_\_\_\_

- c. \_\_\_\_\_

## Put It Into Practice

Talk to someone who is currently working in the medical field that you are working in or plan to enter. Ask him or her for a definition of medical ethics. Then compare it with the textbook definition. Does it match? Discuss with that person an ethical dilemma that he or she has faced and handled.



## Web Hunt

Search the website of the American Society of Law, Medicine, and Ethics ([www.aslme.org](http://www.aslme.org)). Check on **Instant Ethicist**. Read and summarize the entry for today.

## Critical Thinking Exercise

What would you do if you are in charge of passing patient medications and a fellow employee asks you for an aspirin from your medication cart for his headache?

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## Part 1

# The Legal Environment

- Chapter 2** The Legal System
- Chapter 3** Essentials of the Legal System for Health Care Professionals
- Chapter 4** Working in Today's Health Care Environment

# Chapter 2

## The Legal System



### Learning Objectives

*After completing this chapter, you will be able to:*

- 2.1** Define the key terms.
- 2.2** Discuss why an understanding of the legal profession is necessary for the health care professional.
- 2.3** Describe the sources of law.
- 2.4** Describe the steps for a bill to become a law.
- 2.5** Discuss the difference between civil law and criminal law, explaining the areas covered by each.
- 2.6** List six intentional torts and give examples of each.
- 2.7** List examples of criminal actions that relate to the health care worker.
- 2.8** Discuss the difference between a felony and a misdemeanor.
- 2.9** Describe the types of courts in the legal system.
- 2.10** Explain the trial process.
- 2.11** Discuss why an expert witness might be used during a lawsuit.

### Key Terms

Administrative law	Defamation of character	Municipal ordinances
Assault	Defendant	Negligence
Battery	Deposition	Plaintiff
Beyond a reasonable doubt	Discovery	Pleadings
Breach	Embezzlement	Preponderance of evidence
Breach of contract	Expert witness	Probate court, or estate court
Case law	Expressed contract	Prosecutor
Checks and balances	False imprisonment	Regulations
Civil law	Felony	Slander
Class action lawsuit	Fraudulent	<i>Stare decisis</i>
Closing arguments	Implied contract	Statutes
Coding up	Indictment	Subpoena
Common law	Intentional torts	Subpoena <i>duces tecum</i>
Competent	Invasion of privacy	Summary judgment
Consideration	Jurisdiction	Tort
Constitutional law	Libel	Tort law
Contract law	Litigation	Unintentional torts
Criminal case	Malpractice	Waive
Criminal law	Misdemeanor	

## The case of Jacob and the Diseased Leg

Jacob is an outstanding quarterback on his high school football team who has been offered a college scholarship when he graduates. Unfortunately, Jacob was injured during a late summer practice just before his senior year. He suffered a compound fracture of the fibula bone in his lower leg. Because the fracture broke through his skin, he required a surgical repair to align or set the bone and close the skin. Dr. M., an orthopedic surgeon, kept Jacob in the hospital for three days and ordered intravenous antibiotics to be administered. When he was discharged from the hospital, Jacob was told to come in for an office visit once a week for six weeks.

At six weeks, Jacob's parents took him into the surgeon's office for his cast removal, and except for a slightly inflamed and draining area around his stitches, Jacob's broken bone seemed to be healing. After his cast was removed, Jacob was told to wait for a few minutes while the surgeon went across the hall to check on another patient. Dr. M. removed his gloves, washed his hands in Jacob's exam room, and then went across the hall to examine another patient, Sarah K. The doors between the exam rooms were left open and Jacob's parents could see and hear Dr. M. examine Sarah's infected leg. They could tell that Dr. M. did not replace his gloves. He told Sarah that he was glad to see that her osteomyelitis (a serious bone infection) was almost

better and he told her to come back in another week. Dr. M. then came back into Jacob's room, still without gloves, and examined Jacob's leg more carefully. He was concerned about the inflammation around the incision site and told the parents to keep the area clean and dry. He wrote Jacob a prescription for an oral antibiotic and said he could start to put a little weight on his leg. When Jacob came back the following week, his leg was grossly infected with a large abscess. Jacob had to have further surgery to drain the abscess. The pathology report of tissue specimens from Jacob's leg determined that he had developed osteomyelitis. This infection took several months to heal. The delay in his recovery meant that Jacob was unable to play football that fall and lost his chance at a college scholarship. Jacob's parents asked Dr. M. to provide them with the results of the tissue test. They then sued Dr. M. for negligence.

1. What obvious mistake did Dr. M. make?
2. Did Jacob or his parents contribute in any way to his condition?
3. What could all of the involved parties have done to prevent this situation from occurring?

## Introduction

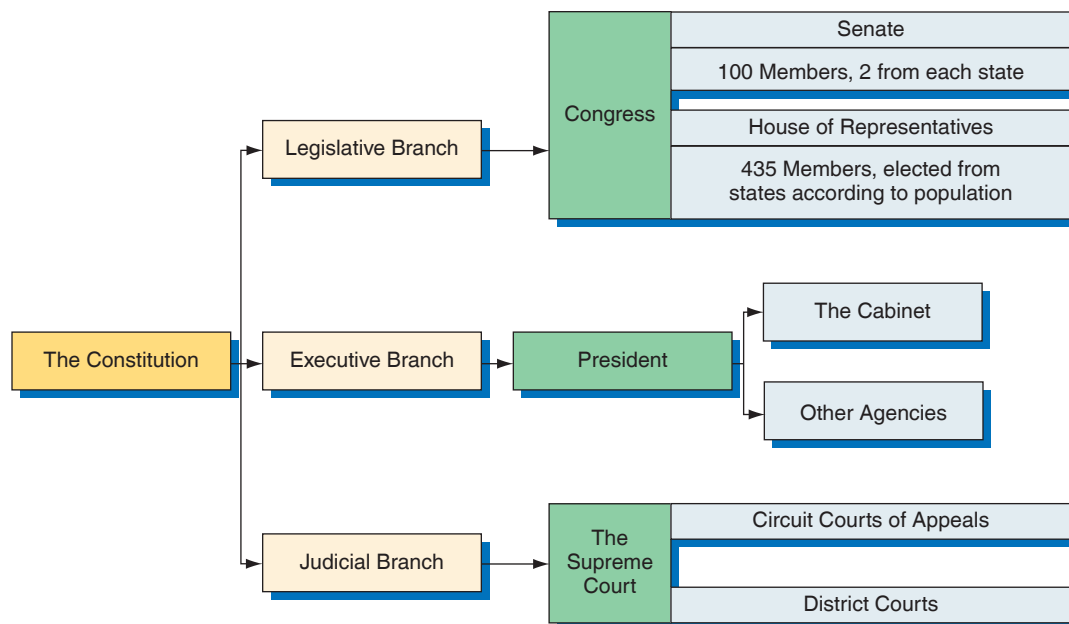
Health care professionals must have a good understanding of the legal system for a variety of reasons. The advanced state of medical technology creates new legal, ethical, moral, and financial problems for the consumer and the health care practitioner. Today's health care consumer demands more of a partnership with the physician and the rest of the health care team. Patients have become more aware of their legal rights. Court cases and decisions have had a greater impact than ever on the way health care professionals practice business in the medical field. It's important to remember that while laws do protect an individual's rights, they are made for the protection of society as a whole. Laws tell us how we must conduct ourselves during interactions with other people as well as in business transactions, such as in providing health care services.

### Med Tip

Every effort should be made to provide a quality of care for patients that will not only help them recover their health but will also avoid lawsuits.

## The Legal System

The U.S. legal system has one federal legal system and 50 separate and unique state systems. For example, the federal government administers the U.S. Tax Court and the U.S. Bankruptcy Court. The state governments administer courts such as traffic and small claims courts. State governments also administer medical licensing acts. The majority of criminal cases originate in state courts. Most states have at least three court levels: trial, appellate, and supreme. The jurisdiction of a particular court refers to the subject

**FIGURE 2.1** Branches of U.S. Government

matter of a particular case, territory the case occurred in, or people that a court has lawful authority over. An appellate court has the authority to review a decision made by a lower court, such as a trial court.

The court system is only one part of the government, however. In establishing a federal government, the U.S. Constitution separated the government's power into three branches: legislative, executive, and judicial. Each branch complements the others but does not take on the power of the other branches. The separation between the three branches created a system of **checks and balances** and was designed by the framers of the Constitution so that no one branch could have more power than another branch. See Figure 2.1 for an illustration of the branches of the U.S. government.

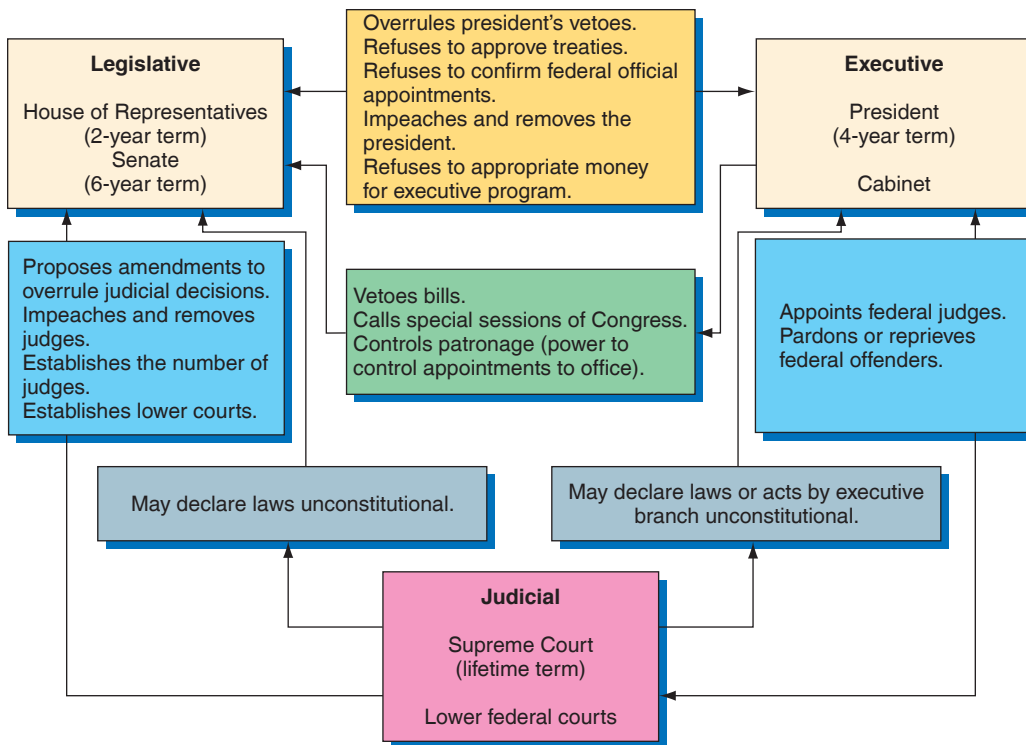
The legislative branch, referred to as Congress, is the lawmaking body. It is composed of members of the Senate and House of Representatives and is responsible for passing legislation into law. The executive branch (consisting of the President of the United States, his or her cabinet, and various advisers) administers and enforces the law. The judicial branch (consisting of judges and the federal courts, including the Supreme Court) interprets the laws. Congress has the power to make laws, but the President has the power to veto these laws, although Congress can then override the veto with a two-thirds majority vote. The President can appoint all federal and Supreme Court judges, but Congress must confirm appointments. The judicial branch can review legislation and interpret the laws passed by Congress and the President, but the President must enforce the law. Congress can, in many instances, pass new laws to replace laws that are deemed unconstitutional by a judicial decision. See Figure 2.2 for an illustration of the separation of powers.

The states all have their own constitutions, which in many respects mirror the U.S. Constitution. The state constitutions likewise establish legislative, executive, and judicial branches within each state. See Figure 2.3 for an illustration of the federal court system.

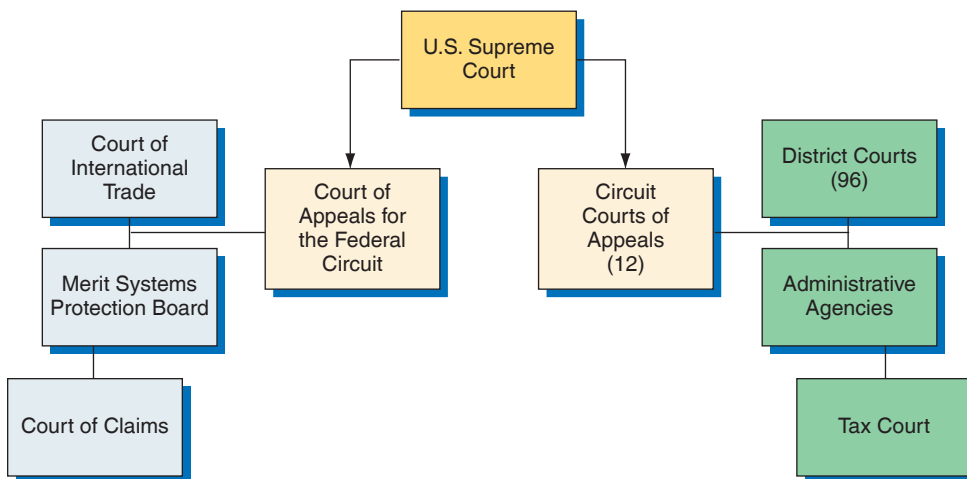
### Med Tip

Federal law is administered the same in all states. However, individual states may vary on how they interpret and implement laws relegated to the states. Therefore, interpretation of legal acts for allied health professionals varies greatly from state to state.





**FIGURE 2.2** Separation of Powers in the Federal Legal System



**FIGURE 2.3** Federal Court Structure

## Sources of Law

All laws—those enforceable rules prescribed by a government authority—must come from somewhere. Let's say that you are pulled over and given a ticket for driving 70 miles an hour, when the speed limit is only 55. You obviously broke a law. But where did that law come from? Did someone just walk down the highway and put up signs saying how fast he or she thought you should drive? Of course not. The speed limit, like all other laws, originated from a government body authorized to establish rules. These rules fall into four different categories: constitutional, statutory, regulatory, and common (or case) law.

## Constitutional Law

The U.S. Constitution is the country's highest judicial authority. It sets up the government, defines the government's power to act, and sets limits on the government's power (e.g., individual rights such as the right to free speech). It takes precedence over all state laws and the state constitutions.

**Constitutional law** derives from both the U.S. Constitution and the constitutions of the individual states. It is the body of laws that define the role, powers, and structure of entities that fall within the three branches of government—legislative, executive, and judicial—as defined by the U.S. Constitution and the state constitutions.

It is important to realize that the Constitution only addresses the relationship between individuals and their government; it does not apply to the relationship between private entities, whether they are individuals or businesses.

## Statutory and Regulatory Law

**Statutes** are laws passed by legislative bodies, either Congress or a state legislature. This is called statutory or legislative law. Congress and the state legislatures have the authority to pass laws because in setting up our form of government, the Constitution authorized the legislature to make laws. Statutory law consists of ever-changing rules and regulations created by the U.S. Congress, state legislatures, local governments, or constitutional lawmakers. These statutes are the inviolable rights, privileges, or immunities secured and protected for each citizen by the U.S. Constitution. They include written codes, bills, and acts (also called regulations).

Legislatures sometimes authorize agencies to make laws. The legislature does this by passing a statute, called enabling legislation. This statute creates an agency and authorizes it to pass laws regarding specific issues. For instance, the Food and Drug Administration is a federal agency that can pass rules governing the sale of food and drugs. The rules or laws made by agencies are called **regulations**.

Statutes begin as bills submitted by legislators at the state or federal level. The first step is taken when the bill is introduced in either of the two legislative houses, Senate or House of Representatives. If the bill does not “die” (fails to be acted upon) in one of the houses, it then goes to a committee for discussion and consideration. (Note that 85 percent of all bills die before they reach a committee.) The committee studies the bill and may hold a hearing to gain more facts about the bill. This first committee issues a report, including a recommendation to either pass or fail the bill. The bill then goes back to the house (Senate or House of Representatives) in which it originated, where a discussion and vote takes place. After the bill passes in one house, it becomes an act. The act is then sent to the other house, where it goes through the same steps as it did as a bill. The act can always be amended by the second house, which results in its being returned to the originating house for a discussion and vote on the amendment. There may be a reconciliation conference between members of both houses to settle any discrepancies between the two versions.

If the second house passes the act (or if both houses pass the reconciled version), then the heads of each house—Speaker of the House of Representatives and the President Pro Tem of the Senate (the Vice President of the United States, in the case of a federal act)—sign it. The act is then sent to the chief executive, who is, in the case of a federal act, the president, and for a state act, the governor. The act becomes a law if it is signed by the chief executive or if it is not vetoed within 10 days. If vetoed, the bill goes back for an override vote. A presidential veto can be overridden by a two-thirds majority of both houses of Congress. After this complicated process, the act is referred to as a public law or statute.

### Med Tip

A public law is designated by the initials P.L., the five or six digits that follow indicate the Congress that passed the law (the first two or three digits) and which piece of legislation the law was in that Congress. For example, a new law is issued with a public law number, such as PL 94-104, which indicates that it was the 94th Congress that passed the law (the first two or three digits) and the 104th piece of legislation in that Congress.

Laws that are passed by city governments are called **municipal ordinances**. Federal laws have precedence over state laws; state laws have precedence over city or municipal laws. In other words, a state or city may make laws and regulations more stringent than the federal law, but cannot make laws less stringent.

## Common Law (or Case Law)

The final source of law is common law. Unlike the laws established by legislative bodies (statutory laws), common law is made by judges when they apply previous court decisions to current cases. This means it is based on the judicial interpretation of previous laws, leading to a common understanding of how a law should be interpreted. Thus, **common law**, as established from a court decision, may explain or interpret the other sources of law. Because common law evolves on a case-by-case basis, it is also called **case law**. For instance, the way a case is argued and settled and any written statements from the judge at the conclusion of the case may explain or elaborate on what a provision of the constitution, a statute, or a regulation means. In addition to interpreting the other sources of law, common law defines other legal rights and obligations. For example, a doctor's obligation to use reasonable care in treating a patient (i.e., not to commit medical malpractice) is a legal obligation created from actual court decisions.

Common law (or case law) based on decisions made by judges was a legal concept originally established by English courts in the twelfth century and brought to America by the early colonists. The only state that doesn't follow English common law is the state of Louisiana, which bases its law on early French law. Common law is based on precedent, the ruling in an early case that is then applied to subsequent cases when the facts are the same. Each time common, or judge-made, law is applied, it must be reviewed by the court to determine if it is still justified and relevant or has not been overturned by existing laws. As a result of this constant review of common law, many laws have been changed (or updated) over the years. The ultimate arbiter, or interpreter, of common law is the state supreme court or, if the law involves a federal question, the U.S. Supreme Court. The legal principle of *stare decisis*, or "let the decision stand," comes to us from the precedence of basing decisions on similar past case decisions.

### Med Tip

Taken literally, *stare decisis* means to abide by, or adhere to, decided cases.

Many old case decisions, such as the ones described in the case law example, still influence today's medical practitioner.

### Example of Case Law

In the 1616 case of *Weaver v. Ward*, Weaver sued Ward after Ward's musket accidentally fired during a military exercise, wounding Weaver. Weaver won, and Ward had to pay damages for Weaver's injury. The court concluded that Weaver did not have to show that Ward intended to injure him. Even though the injury was an accident, Ward was still liable (*Weaver v. Ward*, 80 Eng. Rep. 284, 1616). In *Lambert v. Bessey*, decided in 1681, the court stated, "In all civil acts the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering" (*Lambert v. Bessey*, 83 Eng. Rep. 220, 1681). Cases such as these established the precedent that the person who hurt another person by unavoidable accident or self-defense was required to make good the damage inflicted.



Even though the facts of these cases are antiquated, we can still see their relevance when a patient suffers an injury while undergoing medical treatment. In the late nineteenth century, the courts recognized that there should be liability for a pure accident. Therefore, a person (defendant) may be liable for an injury to another person (plaintiff), even if the defendant did not intend to hurt the plaintiff.

## Classification of Laws

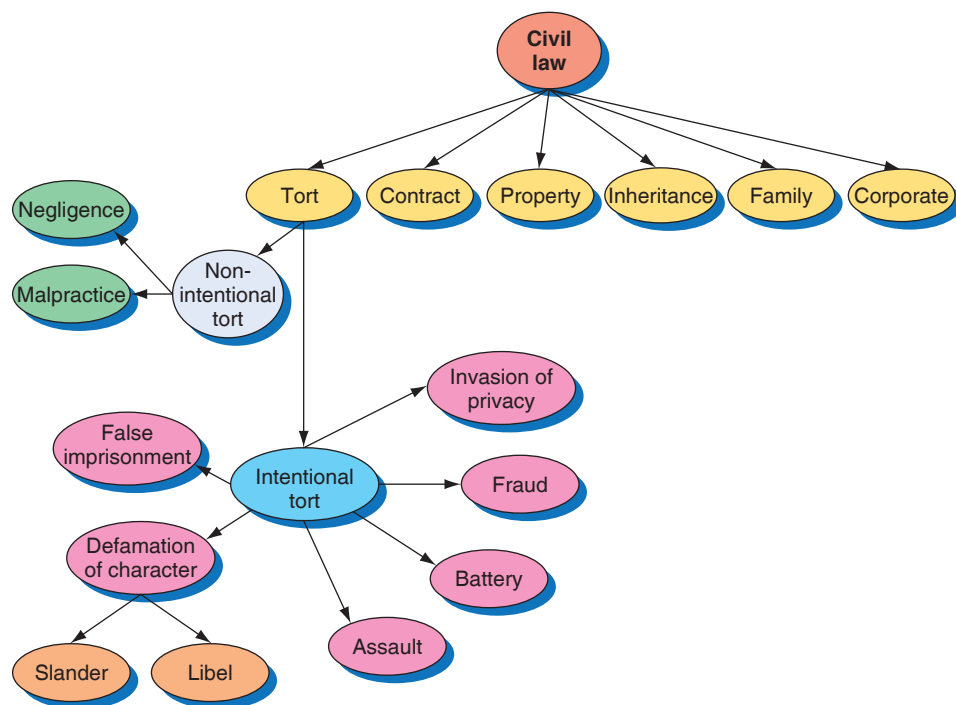
Laws are classified as private and public. Private (or civil) laws can be divided into six categories: tort, contract, property, inheritance, family, and corporate law. Only tort and contract law are discussed here, as they most often affect the medical professional. Public law can be divided into four categories: criminal, administrative, constitutional, and international law. This chapter discusses criminal and administrative law.

### Civil (Private) Law

**Civil law** concerns relationships either between individuals or between individuals and the government. It involves all the law that is not criminal law, although the same conduct may violate criminal and civil law. For instance, murder is a crime that the government prosecutes in order to punish the defendant by inflicting a prison term or even death, while the surviving family members can sue the person in a civil suit for wrongful death and receive compensation for their loss. Civil law cases generally carry a monetary damage or award as compensation for harm or injury. An individual can sue another person, a business, or the government. Some civil law cases include divorce, child custody, auto accidents, slander, libel, and trespassing.

Civil law includes tort law and contract law. **Tort law** covers private or civil wrongful acts that result in harm to another person or that person's property. A tort can result in money damages having to be paid. **Contract law** includes enforceable promises and agreements between two or more persons to do, or not do, a particular action. Health care employees are most frequently involved in cases of civil law, in particular, tort and contract law. Most medical malpractice lawsuits fall within the category of the civil law of torts. See Figure 2.4 for the components of civil law.

**FIGURE 2.4** Components of Civil Law



In a civil law case there must be a **preponderance of evidence**, meaning the fact of the issue is more probable than not, in order to receive a determination of guilty. This means that it is more likely than not that the incident did occur.

### Med Tip

In many cases, civil law matters are handled and settled outside of the courtroom.

## Tort Law

A **tort** is a civil injury, or wrongful act, that is committed against another person or property, resulting in harm, and is compensated by money damages. To sue for a tort, a patient must have suffered a mental or physical injury that was caused by the physician or the physician's employee. A tort case is tried before either a judge or a jury. In certain cases in which a jury trial has been waived, a "bench trial" may take place in which the trial is held before a judge sitting without a jury. Torts can be either intentional or unintentional, and the patient may recover monetary damages. In order to recover damages there must be "fault" on the part of the defendant.

### Med Tip

Under tort law, if a wrongful act has been committed against another person and there is no harm done, then there is no tort. However, in medical practice, every wrongful act or error must be reported, because patients may experience a resulting harm sometime later than when the tort occurs.

**INTENTIONAL TORTS** **Intentional torts** occur when a person has been intentionally or deliberately injured by another. Intentional torts include assault, battery, false imprisonment, defamation of character, fraud, and invasion of privacy. Table 2.1 provides a description and example of each.

**ASSAULT** No health care professional would knowingly perform a tort against a patient or any other person. However, even a trained professional can make a mistake if he or she is not aware of what constitutes a "wrongful act" under these torts. For example, for a tort of **assault**, it is sufficient for the patient to just fear that he or she will be hurt or has an "imminent apprehension of bodily harm." So, if a health care

**Table 2.1** Intentional Torts

Tort	Description	Example
Assault	<i>Threat</i> bodily harm to another; there does not have to be actual touching (battery) for an assault to take place	Threatening to harm a patient or to perform a procedure without the informed consent (permission) of the patient
Battery	Actual bodily harm to another person without permission; referred to as unlawful touching or touching without consent	Performing surgery or a procedure without the informed consent (permission) of the patient
False imprisonment	Violation of the personal liberty of another person through unlawful restraint	Refusing to allow a competent patient to leave an office, hospital, or medical facility when he or she requests to leave
Defamation of character	Damage caused to a person's reputation through spoken or written word	Making a negative statement about another physician's ability
Fraud	Deceitful practice that deprives another person of his or her rights	Promising a miracle cure
Invasion of privacy	Unauthorized publicity of information about a patient	Allowing personal information, such as test results for HIV, to become public without the patient's permission

professional threatens a patient by saying, “If you don’t lie still, we will have to hold you down,” and the patient believes this will cause him or her injury or harm, this is considered a tort of assault. Shaking of one’s fist in a patient’s face in a threatening manner can also be considered assault.

**BATTERY** The tort of **battery** requires bodily harm or unlawful touching (touching without the consent of the patient) and not just the fear of harm. No procedure, including drawing blood for a laboratory test, can be performed without the patient’s knowledge and consent. When a patient offers an arm or rolls up a sleeve for the phlebotomist, this constitutes a form of consent (implied) for the procedure. When a surgeon has a patient sign an informed consent for a specific surgical procedure, then it is considered battery if he or she does anything to the patient that is not listed on the informed consent form. (This does not include emergency life-saving procedures such as CPR.) For example, if, during surgery for a hysterectomy (removal of the uterus), a surgeon notes that the patient’s appendix is inflamed, he or she cannot remove that appendix unless this procedure was stated on the consent form. The surgeon would have to complete the surgery for the hysterectomy and then, after the patient is awake, discuss the need for surgical removal of the appendix. Often assault and battery occur together.

Other examples of battery include hitting a patient or forcing competent patients to do anything against their wishes, such as having therapy or getting out of bed.

**FALSE IMPRISONMENT** **False imprisonment** in health care occurs when a medical professional, or a person hired by that professional, takes an action to confine a patient. There have been cases in which patients were not allowed to leave a room or building when they wished, and had no reasonable means of escape, resulting in a tort of false imprisonment in which the patient (plaintiff) won the case. This occurred in a Texas case in which the patient, who was assessed as being competent, was detained against his will from leaving a nursing home (*Big Town Nursing Home v. Newman*, 461 S.W.2d195, Tex. Civ. App. 1970).



A more common situation occurs when a patient wishes to leave a hospital against medical orders. In this case, the patient is asked to sign a statement that says he or she is leaving against the advice of the physician. There have also been a few cases of false imprisonment, resulting from hospitals trying to hold patients until their bills were paid (*Williams v. Summit Psychiatric Ctrs.*, 363 S.E.2d 794, Ga. App. 1987). However, no such cases have been reported in the last few years because hospitals now understand that this practice is unacceptable.



**DEFAMATION OF CHARACTER** Making false and/or malicious statements about another person constitutes **defamation of character** if the person can prove damages. Defamation can be in two forms: slander or libel. According to *Black’s Law Dictionary*, **slander** (oral defamation) is speaking false and malicious words concerning another person that brings injury to his or her reputation. There are four recognized exceptions that require no proof of actual harm to a person’s reputation in order to recover damages for slander: accusing a person of a crime; accusing someone of a “loathsome” disease, such as a sexually transmitted disease; using words against a person’s business or profession; and calling a woman unchaste. **Libel** is, in general, any publication in print, writing, pictures, or signs that injures the reputation of another person. Physicians and nurses are protected against an accusation of libel when complying with a law to report disease or cases of abuse. See Chapter 7, “Public Duties of the Health Care Professional.”

**FRAUD** **Fraudulent** practices consist of attempts to deceive another person. For example, making a statement to a cancer patient that “Dr. Williams is a miracle worker; she’ll have you feeling better in no time” is a false promise, because there are too many variables when dealing with cancer. However, a more common type of medical fraud consists of false billing practices (for example, billing an insurance company or government



agency for a diagnosis with a higher compensation rate than the actual diagnosis, also known as “**coding up**”), especially relating to Medicare and Medicaid.

Physicians are prohibited from accepting kickbacks, or payments of any kind, for the referral of Medicare and Medicaid patients under the Medicare-Medicaid Anti-fraud and Abuse Amendments. In some cases, physicians have received kickbacks from medical technology companies for using their products on patients. This is considered a criminal offense under the antifraud law and could result in a large penalty and even imprisonment.

**Embezzlement**, a form of fraud, is the illegal appropriation of property, usually money, by a person entrusted with its possession. It can occur in a physician’s or dentist’s office when a trusted office manager has total control over the office finances. To embezzle means to willfully take another person’s rightly owned property or funds. For control purposes, more than one person should receive payments, issue receipts for payments, audit the accounts, and deposit the money.

**INVASION OF PRIVACY** An **invasion of privacy** can occur at any time during a patient’s treatment, even after the patient has granted permission to allow publicity. For example, in the case of allowing photographs or videotapes to be taken, the patient may cancel the permission at any time. In *Estate of Berthiaume v. Pratt*, an invasion of privacy case was tried after a patient with cancer of the larynx died. The deceased patient had allowed his physician to take several photographs that were to be used for the medical record but not for publication. A few hours before the hospitalized patient died, the surgeon and a nurse attempted to take more photographs in spite of the patient’s indication he did not want this done and his wife’s protests. The wife sued the surgeon for assault, because he had moved the patient’s head during the photo taking, as well as invasion of privacy. An appeals court found in favor of the plaintiff and stated that taking photographs in spite of the patient’s protests was an invasion of his legal rights to privacy (*Estate of Berthiaume v. Pratt*, 365 QA.2d 792, Me. 1976).



The famous Supreme Court case in 1973, *Roe v. Wade*, gave strength to the argument that a woman had a right to privacy over matters that related to her body, which included pregnancy (*Roe v. Wade*, 410 U.S. 113, 1973).



**UNINTENTIONAL TORTS** **Unintentional torts**, such as negligence, occur, for example, when the patient is injured as a result of the health care professional’s not exercising the ordinary standard of care. The term *standard of care* means that the professional must exercise the type of care that a “reasonable” person would use in a similar circumstance.



*Morrison v. MacNamara* illustrates the standard of care issue. In this case, MacNamara, a technician, took a urethral smear from the patient, Morrison, while the patient was standing. Morrison fainted, hit his head, and permanently lost his sense of smell and taste. An expert witness from Michigan testified that the national standard of care for taking a urethral smear requires the patient to sit or lie down. Thus, the court found in favor of the patient (*Morrison v. MacNamara*, 407 A.2d 555, D.C. 1979). Standard of care is discussed more fully in Chapter 3.



An unintentional tort exists when a person had no intent of bringing about an injury to the patient. Health care professionals can be sued for a variety of situations, but most lawsuits relate to the unintentional tort of negligence.

**Negligence** is the failure or omission to perform professional duties to an accepted standard of care, such as a “reasonable person” would do. In other words, negligence occurs when a person’s actions fall below a certain level of care. Negligence can involve doing something carelessly or failing to do something that should have been done. It can also involve doing something reckless such as performing a procedure without adequate training. Physicians and other health care professionals usually do not knowingly indulge in acts that are negligent, so negligence usually falls within the classification of unintentional tort. **Malpractice**, which is misconduct or demonstration of an unreasonable lack of skill, relates to a professional skill such as

**Table 2.2** Unintentional or Negligent Torts

- Altering or tampering with a medical record
- Failure to adequately assess or monitor a patient's condition
- Failure to maintain a safe environment
- Failure to dispense the correct medication
- Failure to document in a timely manner
- Failure to follow policies and procedures

medicine or the law. Malpractice is a particular type of negligence that can be thought of as “professional negligence.” While anyone can be accused of being negligent, only professionals can be sued for malpractice. Examples of professionals who are sued for malpractice include physicians, nurses, lawyers, accountants, pharmacists, and physical therapists.

Negligence and malpractice are similar in that both relate to wrongdoing. In medical malpractice, negligence is considered the predominant theory of liability. You can only be sued for malpractice if you are negligent in something done within your professional capacity. The topics of negligence and malpractice are discussed further in Chapter 6.

See Table 2.2 for some actions that are considered unintentional or negligent torts.

### Med Tip

Remember that it is easier to prevent negligence than it is to defend it.

## Contract Law

Contract law addresses a **breach**, or neglect, of a legally binding agreement between two parties. The agreement or contract may relate to insurance, sales, business, real estate, or services such as health care.

A contract consists of a voluntary agreement, written or oral, that two parties enter into with the intent of benefiting each other. Something of value, which is termed **consideration**, is part of the agreement. In the medical profession, the consideration might be the performance of an appendectomy for a specific fee. An agreement would take place between the two parties that would include the offer (“I will perform the appendectomy”) and the acceptance of the offer (“I will allow you to perform the appendectomy”). Therefore, a surgeon who has consent to perform a hysterectomy on a patient may not perform an appendectomy at the same time unless there is consent from the patient for both procedures.

In order for the contract to be valid (legal), both parties must be **competent**. The concerned party (patient) must be mentally competent and not under the influence of drugs or alcohol at the time the contract is entered into. If there is a question as to whether an individual is mentally competent, this must be adjudicated in a court of law.

**TYPES OF CONTRACTS** A contract can be either expressed or implied. An **expressed contract** is an agreement that clearly states all the terms. It can be entered into orally or in writing.

### Med Tip

Most contracts are enforceable, even if oral.

Each state identifies certain types of contracts that must be in writing. The sale of property, mortgages, and deeds are required to be in writing by most state statutes.

There are state statutes and federal laws regarding contracts that relate to the medical profession. For example, if a third party agrees to pay a patient's bill, a contract must be put in writing and signed by the third party. A copy of this document should be kept in the patient's chart or file. If physicians agree to allow their patients to pay bills in four or more installments, the interest (if any) must be stated in writing (Truth in Lending Act of 1969, discussed in Chapter 8).

A signed permit to receive a vaccine would be an example of an expressed or written contract in a medical situation.

An **implied contract** is one in which the agreement is inferred from signs, inaction, or silence. For example, when a patient explains his or her symptoms to the physician, and the physician then examines the patient and prescribes treatment, a contract exists, even though it was not clearly stated, and both parties must follow through on the implied agreement. This can cause problems for both parties if there is not a clear understanding of the implied contract. For example, a New York court found an implied contract to pay for medical services existed when a physician listened to a patient describe his symptoms over the telephone (*O'Neill v. Montefiore Hosp.*, 202 N.Y.S.2d, 436, App. Div. 1960). An implied contract can exist when a patient brought into an emergency department clearly needs and receives immediate treatment.



## Med Tip

Breach of contract refers to the failure, without legal excuse, to perform any promise or to carry out any of the terms of a contract.

**TERMINATION OF THE CONTRACT** A **breach of contract** occurs when either party fails to comply with the terms of the agreement. For example, if a physician refuses to perform a medical procedure he or she had agreed to perform, the physician has breached the contract. If a patient does not pay an agreed-upon fee, then the patient breached the contract with the physician.

The termination of a contract between patient and physician generally occurs when the treatment has ended and the fee has been paid. However, issues may arise that cause premature termination of a contract. It should be noted that both physicians and patients have the right to terminate the contractual agreement. A breach of contract occurs when one of the parties that entered into the contract does not keep his or her promise as, for example, when a patient refuses to pay a bill. A physician may be liable for breach of contract if he or she has promised to cure a patient and then failed to do so. The breach of contract can occur even if there was no negligence on the part of the physician.

When terminating a contract, physicians should be careful that they are not charged with abandonment of the patient. To protect against an abandonment charge, any letter from the physician to the patient should indicate the date his or her services will be terminated. A copy of this letter to the patient should be placed in the patient's record. In addition, there should be a notation in the patient's chart that a notification of termination letter was sent. It is also a good idea to use certified mail and include "signature required" when the letter is sent and to ask for proof of delivery from the postal or other delivery service, keeping those receipts with the patient's records. That extra step should the case go to court is vital. See Chapter 5 for a complete discussion of abandonment. Some of the reasons for premature termination of a medical contract are:

- Failure to follow instructions
- Missed appointments
- Failure to pay for service