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Physician's Assistants: Legal Issues

The physician is concerned about two forms of liability under tort law. Under the long established master - servant doctrine, he is responsible for the acts of his employee. A patient who suffers injury because of the negligence or improper decisions of a physician's assistant may sue the physician and the assistant for his damages. In addition, the physician could be held liable for negligence through failure to provide adequate supervision or through delegating a task beyond the assistant's competence. In both forms of liability, the physician's responsibility and his added risk are the same as for his other employees, such as the office nurse. There is little reason to expect that any form of legislative action will diminish this risk. The recourse of a patient for negligence on the part of the physician or his employee should always be available, and should impel physicians to use the services of all assistants with great care.

There are additional legal dangers to the physician using an assistaint, resulting from the licensure system which has been developed for health care personnel. Most health occupations are governed by licensure laws, which were generally developed to ensure the competence of those performing in these occupations. However, the long term effect of these laws has not always been favorable. Each occupation has a defined scope of practice. The definitions, drawn up at one point in time, have not kept pace with new technological developments or expanded capabilities. Licensure has often had the effect of impending entry into and advancement within an occupation, and emphasizing formal educational requirements while failing to acknowledge on-the-job experience. Licensure has also been used to serve professional jealousies by protecting the vested interests of an occupational group.

The physician's assistant has been, in most states, an unlicensed individual performing skilled, responsible taskes among traditionally licensed personnel. There is some reason for concern, since this lack

of legislative recognition might be construed as an indication of incompetence or illegality. He might be accused of practicing medicine without a license, or his physician employer might be inferred to be negligent in delegating tasks to him. Legislative actions proposed in several states are aimed at eliminating such possibilities.

Legislative Actions: Several states have passed laws recognizing physician's assistants. These laws differ significantly, and reflect sharp differences in the philosophy underlying their development.

The traditional approach to a new health occupation would be to establish a new licensure act, defining the requirements for entry into the new profession and the permissible scope of activities. This approach was taken in Colorado in licensing Child Health Associates, a new category of personnel providing assistance to pediatricians. The advantages of such an approach lie in its enhancement of the status of the category, and its protection of the public through specifying training and functions.

The difficulties inherent in such an approach have been implied above. These include its tendency to freeze roles at levels which later become unrealistic, and to impede occupational mobility. In addition, there is a growing feeling that the existing licensure system is not meeting its primary objective of assuring professional competence. A single exam or even a periodic update exam is seldom sufficient to assure competence in rapidly developing fields. The American Medical Association and the American Hospital Association have reflected those opinions by urging a moratorium on further licensure legislation until an overall evaluation of the system is accomplished.

The most popular legislative approach to "regularizing" physician's assistants has been that of framing an exception to the state's medical

practice act, authorizing supervised delegation of tasks by the physician. Such statutes have existed in several states prior to the formal establishment of physician's assistant programs (Arizona, Colorado, Kansas and Oklahoma). The basic objective of such an approach is to allow the physician to receive assistance without fear of incurring liability by delegating to unlicensed personnel. The potential liability of the physician for an assistant's incompetent performance is assumed to provide adequate and effective assurance of the patient's welfare.

Some states have combined such exceptions to the medical practice act with an assignment of certain regulatory functions to the state's board of medical examiners. For example, the California law requires the board to approve training programs, individual assistants, and physicians to supervision of two assistants.

The recently enacted North Carolina law also provides that the Board of Medical Examiners approve prospective assistants and develop general guidelines for their activity. These guidelines include such matters as proper identification of the assistant to preclude confusion regarding his role, ethical behavior, prohibition of unauthorized actions, etc. The North Carolina Law also specifies that the physician make application for approval on behalf of his assistant, and provides for automatic termination of such approval in case this employment relationship is terminated.

A specific example, which might be put forth as a model, is the bill recently passed by the 1971 North Carolina Legislature:

A BILL ENTITLED

AN ACT TO MAKE AN EXCEPTION TO THE MEDICAL PRACTICE ACT RELATING TO ASSISTANTS TO PHYSICIANS.

G.S. 90-18 (General Statutes: section entitled "Practicing Without License, practicing defined, penalties") is hereby amended by adding a new subdivision (14) and to read as follows:

"(14) Any act, task or function performed by an assistant to a personal licensed as a physician by the Board of Medical Examiners when

a. such assistant is approved by and annually registered with the Board as one qualified by training or experience to function as an assistant to a physician, except that no more than two assistants may be currently registered for any physician, and

b. such act, task or function is performed at the direction or under the supervision of such physician, in accordance with rules and regulations promulgated by the Board, and

c. the services of the assistant are limited to assisting the physician in the particular field or fields for which the assistant has been trained, approved, and registered;

provided that this subdivision shall not limit or prevent any physician from delegating to a qualified person any acts, tasks or functions which are otherwise permitted by law or established by custom."

It should be noted that the above is an amendment to that section of the Medical Practice Act listing those acts of a medical or quasi-medical nature, done by non-physicians, yet permissible under the law. There are thirteen such

"exceptions", including self medication, treatment of ones own child by home remedies, etc. The above section becomes exception fourteen.

The act calls for rules and regulations, which are not spelled out in the law, but are formulated and published by the Board. The North Carolina Board of Medical Examiners is currently preparing such rules and regulations, which will include moral and ethical standards, educational standards, standards regarding supervision, proper identification of the assistant, etc.

The North Carolina law is a permissive act, while the California act is a mandatory act, as expressed in Section 2377.5, Chapter 5, Division 2 of Business and Professional code, relating to medical practice:

> "2377.5 The use, supervision or employment by a physician of a graduate of an approved program as defined in Section 2511, without the approval of the Board of Medical Examiners of the State of California, constitutes unprofessional conduct within the meaning of this chapter"

Those responsible for forming the North Carolina act reasoned that a physician desiring the legal protection of the new act would apply for registration on a voluntary basis, yet those currently utilizing on-the-job trained personnel (such as office secretaries who take parts of the history) would not be placed in increased jeopardy.

Those who wish to modify state laws to incorporate the physician's assistant should be aware of the fact that such legislation has often triggered attempts by optometrists, chiropractors, podiatrists and dentists to prohibit assistants from performing functions in their area of permitted activity.

In California, the physician's assistant is not permitted to measure vision and/or refractive states, or to fit lenses. He is also prohibited from

practicing dentistry or dental hygine. Similar restrictions were narrowly defeated in the North Carolina Legislature.

In summary, three legislative techniques are available for incorporating a physician's assistant into the legal structure of the medical professions in the state. A separate practice act, a mandatory registration act, and a permissive registration act are the three techniques. North Carolina's physicians, who helped frame the North Carolina law, clearly favor the last alternate.