Need for Statutory Legitimation of the Roles of Physician's Assistants

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A significant constraint on new categories of health manpower is the absence of statutory legitimation of their roles. Licensure has been evolved as an effort to assure high-quality health care, but recently it has been a barrier to effective and innovative use of manpower. Medical and Nurse Practice Acts generally define the practices of medicine and nursing, but they do not define clearly the scope of these practices. Thus, these acts subject physicians to undue risks in delegating responsibilities and Type A assistants (nurses or non-nurses with special training) to undue risks in accepting those functions. Furthermore, only vague guidelines are provided to protect the public and to assure adequate quality control. To date, 35 States have enacted legislation to provide statutory legitimation of Type A assisants and to permit physicians to delegate appropriate responsibilities to new types of health manpower. It is hoped that this legislation will diminish barriers to effective use of health manpower.

MORE THAN HALF A DECADE has passed since physician's assistants were accepted as members of the health care team. Why then has there not been more widespread use of these assistants? Why have programs been slow in starting and in making the transition from an experimental to an operational status? Many factors are implicated—the length of training before employment, the "watch and see" attitude of many physicians and consumers, the evolution of health care delivery systems, and the legislative and judicial constraints.

It is obviously necessary to increase the productivity of health manpower in order to overcome the shortage of health services. Any diminution of the gap between supply and demand is highly dependent upon obtaining the appropriate mix of manpower in the right numbers. Innovative manpower utilization is necessary.

Legal constraints have been a prominent barrier to innovation, and two major areas need delineation to evaluate impact—legislative statutes and judicial opinions. These legal constraints are primarily statutory. They affect the new health professional who is capable of collecting historical and physical data as well as integrating and interpreting these findings and exercising a degree of independent judgment, whether that person is a nurse or a non-nurse with special training—the Type A assistant, as defined by the National Academy of Sciences (*1*). The less highly trained Type B and Type C assistants are primarily technicians who do not perform functions or make judgments that might result in legal limitations to their effective use.

The three types of physician's assistants have been defined as follows (*1*):

> The Type A assistant is capable of . . . collecting historical and physical data, organizing these, and presenting them in such a way that the physician can visualize the problem and determine appropriate diagnostic or therapeutic steps. . . . He is distinguished by his ability to integrate and interpret findings on the basis of general medical knowledge and to exercise a degree of independent judgment.
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> The Type B assistant . . . possesses exceptional skill in one clinical specialty or, more commonly, in certain procedures within such a specialty. . . . Because his knowledge and skill are limited to a particular specialty, he is less qualified for independent action.
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> The Type C assistant is capable of performing a variety of tasks over the whole range of medical care under the supervision of a physician although he does not possess the level of medical knowledge necessary to integrate and interpret findings. . . He cannot exercise the degree of

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independent synthesis and judgment of which the Type A assistant is capable.

In this paper, the current statutory constraints on Type A assistants are delineated, and the impact of judicial decisions on them is evaluated.

Medical and Nurse Practice Acts of Texas

In defining the constraints licensure places upon Type A assistants, it is necessary to understand the specific laws. The Medical and Nurse Practice Acts of Texas provide many insights, and these statutes will be used as the basis for the discussion. The relative uniformity of medical practice acts in many States with respect to the definition of the practice of medicine and the exceptions cited make these statutes and their judicial interpretations equally germane to the issues in States other than Texas.

Medical Practice Act. The Medical Practice Act of Texas, in Article 4510, provides the statutory definition of the practice of medicine:

> Any person shall be regarded as practicing medicine within the meaning of this law:
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> 1. who shall publicly profess to be a physician or surgeon and shall diagnose, treat, or offer to treat, any disease or disorder, mental or physical, or any physical deformity or injury by any system or method or to effect cures thereof;
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> 2. or who shall diagnose, treat, or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury by any system or method and to effect cures thereof and charge therefor, directly or indirectly, money or other compensation; provided, however, that the provisions of this article shall be construed with and in view of Article 4504 [Exceptions].

In defining the practice of medicine the act identifies three elements: (*a*) diagnosing, treating, or offering to treat any disease or disorder; (*b*) professing to be a physician or surgeon; and (*c*) charging for these services, either directly or indirectly. A person is considered to be practicing medicine under the Medical Practice Act if he is pursuing the first element and either the second or third. Not only may a person face criminal charges for practicing medicine as defined without proper licensure, but the Texas Penal Code permits prosecution for professing to be a physician or surgeon without the appropriate credentials. Hence, it is illegal for a person to diagnose, treat, or offer to treat any disease or disorder in combination with either the second or third element —(*b*) or (*c*), or merely to profess to be a physician or surgeon without the appropriate license. Violation of the Medical Practice Act is a misdemeanor under Article 742 of the Texas Penal Code.

Having established this definition and the basis for criminal action, the Texas act proceeds to make certain exemptions. Article 4504 of the Revised Civil Statutes states:

> . . . The provisions of this chapter do not apply to dentists, duly qualified and registered under the laws of this State, who confine their practice strictly to dentistry; nor to duly licensed optometrists, who confine their practice strictly to optometry as defined by Statute; nor to duly licensed chiropractors who confine their practice strictly to chiropractic as defined by Statute; nor to nurses who practice nursing only; nor to duly licensed chiropodists who confine their practice strictly to chiropody as defined by Statute; nor to masseurs in their particular sphere of labor; nor to commissioned or contract surgeons of the United States Army, Navy, or Public Health and Marine Hospital Service in the performance of their duties, and not engaged in private practice; nor to legally qualified physicians of other states called in consultation, but who have no office in Texas, and appoint no place in this state for seeing, examining or treating patients. . . .

This law is an attempt to define, by elimination, the scope of practice of each profession named and gives support to the current licensure system. The practice of medicine is all encompassing, and the exception clause permits different health professions to function within their more limited competencies as defined by statute. However, the boundaries placed upon health professionals by the statutes are largely artificial, and in their vagueness and lack of definition they have encouraged an overlap in function in the day-to-day activities of the different occupations.

The Medical Practice Act further delineates those situations in which the Board of Medical Examiners may refuse to admit persons to the practice of medicine. Regarding the employment of Type A assistants, the board may deny a license to a person who acted unprofessionally or displayed dishonorable conduct, violated any provision of the Medical Practice Act, impersonated a licensed practitioner, or permitted another to use his license to practice medicine. The board may suspend or revoke the license of a person who has been "guilty of any fraudulent or dishonorable conduct or of any malpractice."

The net result of these inadequate guidelines has been a reluctance by many physicians to delegate new responsibilities to other health workers that traditionally have been in the realm of the physician's function.

Nurse Practice Act. Because "nurses who practice nursing only" are exempted from the limitations of the Medical Practice Act under Article 4504, it is crucial to define the functions legiti-

mized by the legislature within the scope of nursing. Article 4518 of the Revised Civil Statutes defines "professional nursing" as follows:

Section 5. "Professional Nursing" shall be defined for the purposes of this Act as the performance for compensation of any nursing act (a) in the observation, care and counsel of the ill, injured or infirm; (b) in the maintenance of health or prevention of illness of others; (c) in the administration of medications or treatments as prescribed by a licensed physician or dentist; (d) in the supervision or teaching of nursing, insofar as any of the above acts require substantial specialized judgment and skill and insofar as the proper performance of any of the above acts is based upon knowledge and application of the principles of biological, physical and social science as acquired by a completed course in an approved school of professional nursing. The foregoing shall not be deemed to include acts of medical diagnosis or prescription of therapeutic or corrective measures.

This Texas law, patterned after the American Nursing Association model, is similar to the Medical Practice Act in that it is a mandatory one, requiring all those who practice nursing or profess to be nurses to be licensed. The "nursing act" is poorly defined but may encompass the acts of "observation," "care," "counseling," and "maintenance of health" in addition to the "administration of medications or treatments" and provides the nurse with wide latitude in functions related to patient care. Only "acts of medical diagnosis or prescription of therapeutic or corrective measures" are prohibited, and this circumvents many of the limitations imposed by the Medical Practice Act upon non-nurse Type A assistants.

Judicial and Related Opinions

It is now essential to look at judicial interpretations of aspects of Medical Practice Acts as they apply to the legitimacy of a licensed physician employing a Type A assistant and delegating functions traditionally reserved for the licensed physician. The statutes are vague in their definitions, and the courts are called on to interpret legislative intent. In so doing, the courts have created problems relating to the practice of medicine and nursing and to malpractice.

The practice of medicine. It has been firmly established that a person who is illegally practicing medicine or using a restricted designation may be prosecuted. The physician delegating functions may face suspension or revocation of his license for aiding and abetting in that act. This is particularly relevant for the Type A assistant who will be assuming some of the physician's responsibilities while remaining under his control. To analyze this matter further, I will summarize judicial decisions concerning the definition of the practice of medicine as they pertain to the Type A assistant.

The first element in the practice of medicine is to "diagnose, treat or offer to treat, any disease or disorder, mental or physical, or any system or method or to effect cures thereof." The term "treatment" is an all encompassing term as defined by the courts, for example, as stated in *Kirschner* v. *Equitable Life Assurance Society of the United States,* 284 N.Y.S. 506, 510 (New York, 1935):

Treatment is a broad term covering all the steps taken to effect a cure of the injury or disease. The word includes examination and diagnosis as well as application of remedies.

Diagnosis is considered to be the discovery of the source of a patient's illness or the determination of the nature of his disease from a study of its symptoms. It is said to be "little more than a guess, enlightened by experience" (*Griswold* v. *New York Central and Hudson Railroad Company,* 21 N.E. 726 (New York, 1889)). The definition was expanded in a New York State decision in 1938 (*People* v *Zinke,* 7 N.Y.S. 2d 941, 947) when a chiropractor held that he had not practiced medicine because he had not "diagnosed." The court, however, declared:

Defendant diagnosed. His history taking, examination . . . and his statements as to the causes of conditions of the patient show that he had made a determination which he deemed sufficient for the purposes of treatment. . . . It is, in medical terminology, a "sizing up" or a comprehending of the physical or mental status of a patient. It is the conclusion itself rather than the procedures upon which the conclusion is based which constitutes a diagnosis per se. No particular language need be used and no disease need be mentioned, for the diagnostician may make or draw his conclusion in his own way.

Both treatment and diagnosis received very broad interpretations by the courts in these judicial decisions.

The conditions being diagnosed or treated must also be evaluated to determine if it is a "disease or disorder, mental or physical, or any physical deformity or injury," as required by the Texas Medical Practice Act. In 1956, a Texas court ruled that a midwife was not prohibited from assisting in the delivery of children because "childbirth is a normal function of womanhood" and therefore not a disease or disorder within the meaning of the act. The fact that she received compensation was held immaterial (*Banti* v. *State,* 289 S.W. 2d 244 (Texas, 1956)). In an earlier decision, a New Jersey court had made a similar

distinction with regard to blood pressure (*State Board of Medical Examiners* v. *Plager,* 193 A. 698, 699 (New Jersey, 1937)).

> Abnormal blood pressure, generally speaking, is not a disease in itself; that the taking of blood pressure is, at most, but another modern method of ascertaining a fact in aid of making a proper diagnosis . . . The announcement by defendant of the result of the systolic blood pressure . . . was the mere statement of fact; and it was not a diagnosis of a disease or of a physical condition.

These cases reemphasize that to practice medicine a person must not only diagnose and treat, but that such actions must be directed toward a "disease or disorder."

"Publicly profess[ing] to be a physician or surgeon" constitutes the second element in the practice of medicine. The Medical Practice Act is mandatory and thus prohibits unlicensed persons from holding themselves out "to the public as being engaged in the business of diagnosing, treating, etc. patients" (*Louisiana State Board of Medical Examiners* v. *Craft,* 93 So. 2d 298, 306 (Louisiana, 1957)). Receiving compensation for services is the third element, and this may be either a direct or an indirect payment. The court very succinctly summarized the grounds for the charge of "practicing medicine illegally" in *Singh* v. *State,* 146 S.W. 891, 895 (Texas, 1912):

> Anyone who holds himself out as a physician or surgeon is liable under the law, whether he receives compensation or not, while one who does not so hold himself out must be shown to have received compensation either directly or indirectly.

In exonerating a husband from criminal prosecution for delivering his own child, the Attorney General of Texas clearly delineated the three elements of the practice of medicine (Opinion of the Attorney General of Texas, No. WW 1278, 1962.):

> . . . who receives no compensation . . . and who does not profess to be a physician or surgeon, and does not diagnose, treat, or offer to treat any disease, disorder or injury is not violating the medical practice act of this State.

The Type A assistant may, in fact, be performing many of the functions encompassed in "diagnose, treat, or offer to treat" and may indirectly receive compensation for these services. Does the fact that the assistant will be functioning under the control of a licensed physician alter the legal restrictions? In the past this relationship has not protected the assistant from criminal prosecution.

In *State* v. *Paul* (76 N.W. 861 (Nebraska, 1898)), the court said that a person who was not within the exceptions and practiced medicine was liable to the penalties of the statute, even though the operation was performed and the medicines were administered and given under the direction of a registered physician. It was not essential to represent, claim, or advertise oneself to be a legal practitioner of medicine to be subject to the sanctions of the law.

Type A assistants are thus not absolved of liability by being under the control of a licensed physician. They have, however, functioned under the "direction and supervision" of a licensed physician in almost all employment settings, and this term must be analyzed to determine its implications for effective use of manpower.

"Direction and supervision" has historically been held not to require physical presence but merely overseeing and advising in the performance of specific functions. However, a 1961 court decision adopted a stricter interpretation by defining "acting under proper supervision of legally qualified personnel" as requiring "the actual personal supervision of the professional person. That does not mean by telephone or written communication but direct personal supervision." (State ex rel. *Reed* v. *Kuzirian,* 365 P. 2d 1046 (Oregon, 1961)).

Two important court decisions place much of the discussion in perspective and demonstrate the possible ramifications of the foregoing definitions of the practice of medicine on future Type A assistants. In *Magit* v. *Board of Medical Examiners* (366 P. 2d 816 (California, 1961)), a foreign-trained, unlicensed anesthetist administered anesthetics without a license. The anesthetist was found guilty of practicing medicine without a license, and the supervising physician was found guilty of unprofessional conduct. This decision related not to competence or negligence, but to the violation of a statute.

A second decision raised the question of whether being unlicensed is equivalent to being negligent. A practical nurse was convicted in *Barber* v. *Reinking* (411 P. 2d 861 (Washington, 1966)) of having performed functions reserved for physicians and professional nurses. A 2-year-old child was given an injection by a licensed practical nurse. The needle broke when the child moved, and the child suffered an injury. Washington laws specifically prohibited persons other than physicians and professional nurses from administering medications, "whether or not the severing or penetration of tissues is involved."

The court made a momentous decision in this case:

> In accordance with the public policy . . . we read this instruction [the Nurse Practice Act] to require that one who undertakes to perform the services of a trained or graduate nurse must have the knowledge and skill possessed by a licensed registered nurse. The failure of Nurse Reinking to be so licensed raises an inference that she did not possess the required knowledge and skill to administer the inoculation in question.

The court expressed the view that the legislature, by requiring the licensure of personnel and delineating the scope of practice, determined the limits of permissibility. Custom and usage could not be used as a justification for expanding the defined functions. The court permitted the inference of negligence from the evidence that the defendant had violated the statute by performing functions not specifically delineated to be within her scope of practice.

In contrast, most courts have held that the mere absence of a license to practice medicine or surgery does not permit the inference of negligence (*Andrews* v. *Lofton*, 57 S.E. 2d 338 (Georgia, 1950)). The clearest statement of this viewpoint was made in (*Hardy* v. *Dahl*, 187 S.E. 788, 791 (North Carolina, 1936)):

> If the defendant had been engaged in treating diseases in violation of the statute he is liable to indictment, and upon conviction, to suffer the prescribed penalty; but in civil action, bottomed upon the law of negligence, the failure to possess a state certificate is immaterial on the question of due care.

Other jurists, however, have held that the "burden of proof of negligence is substantially reduced if the defendant violated a State statute and the violation of the statute has caused injury" (*2*). *Barber* v. *Reinking* (411 P. 2d 861 (Washington, 1966)) established a more extreme interpretation, permitting the inference of negligence from the violation of a statute. Although most courts have upheld the view that the failure to be licensed is immaterial on the issue of negligence, the *Barber* v. *Reinking* decision stands as an awesome reminder of the risks inherent in employing personnel who are not officially sanctioned by the legislative process.

The practice of nursing. Because of the legitimation of the functions of the professional nurse by the legislature, the nurse Type A assistant is at a greatly reduced risk of being accused of "practicing medicine illegally." The Texas Nurse Practice Act vaguely defines professional nursing as the observation, care, and counseling of the ill, the maintenance of health and prevention of illness, and the administration of medications or treatments. Only "medical diagnosis or prescription of therapeutic or corrective measures" are prohibited from the practice of nursing and reserved for the practice of medicine. Certainly, the nurse in observing and interpreting facts makes decisions on the basis of these facts, and although she may not practice medicine, she may, and in cases of emergencies must, act upon her observations. Anderson states (*3*):

> These statutes [the Nurse Practice Act] contain nebulous definitions, expressing essentially that the practice of nursing is the carrying out of the physicians' orders, the application of nursing skills and the supervision of others with lesser degrees of training. The fact that a particular procedure is within the scope of medical practice does not mean that it is exclusively the practice of medicine. The particular functions a nurse may legally perform are not delineated.
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> In addition, there is a marked overlap in the technical areas common to medical and nursing practice. The same act may be clearly the practice of medicine when performed by a physician and the practice of nursing performed by a nurse.

The new skills acquired by the nurse may be viewed as increasing the number of sources from which the nurse gathers data for making nursing judgments. The identification of abnormalities may be classified as an observation or screening function. Routine and periodic examinations, immunizations, chronic care followup, and information and counseling services related to growth and development, child-parent relationships, and behavioral problems are encompassed in the maintenance and prevention of illness. Medications are given in response to standing orders of a physician. Adequate training and demonstrated competence to perform the particular activities permit the nurse to function as a Type A assistant.

The courts generally have upheld the evolution of expanded nursing roles. In contrast to a case mentioned earlier (*Magit* v. *Board of Medical Examiners*, 366 P. 2d 816 (California, 1961)), where a foreign-trained, unlicensed physician was prohibited from being an anesthetist, in *Chalmers-Francis* v. *Nelson*, 57 P. 2d 1312, 1313 (California, 1936) it was held that a licensed nurse could administer anesthetics:

> Nurses in the surgery, during the preparation for and progress of an operation, are not diagnosing or prescribing. [Within] the meaning of the Medical Practice Act, it is the legally established rule that they are but carrying out the orders of the physicians to whose authority they

are subject. The surgeon has the power, and therefore the duty, to direct the nurse and her actions during the operation.

In functions which do not involve "disease or disorder," no restrictions have been placed upon nursing activities, as was seen in *Banti* v. *State* (289 S.W. 2d 244 (Texas, 1956)), which involved midwifery.

Thus, the nurse is not prohibited from functioning in most spheres of medicine provided no "medical diagnosis or prescription or therapeutic or corrective measures" are made. This lack of restraint has served as the basis for the expansion of nursing roles without legal constraints.

Discussion

The major statutory constraints that affect the use of health manpower were initially not meant to be constraints but were evolved as guarantees of quality—to separate the qualified from the incompetent, the trained from the quack. But the rigid definitions have been subject to speedy obsolescence, and the question of whether it is medically appropriate to delegate a particular function to the new health professionals has been transformed into the question of whether it is legal for them to perform that function.

The Medical Practice Acts of most States define the practice of medicine and the grounds for criminal prosecution, but in their lack of clear definition of the scope of the practice of medicine, they subject the physician to undue risks in delegating responsibilities and the Type A assistant to undue risks in accepting these functions. Furthermore, only vague guidelines are provided to protect the public and assure adequate quality control.

The non-nurse Type A assistants face the most significant legal constraints, and the physician, facing potential criminal charges for delegating functions to an unlicensed person and the possibility of civil liability, may be reluctant to employ them. Nurse Type A assistants are largely protected because of the legitimation of their functions under Nurse Practice Acts. Similarly, Types B and C assistants, while performing appropriate functions, are not at risk of practicing medicine illegally because of the limited scope of their responsibilities.

What is the next step? Where must attention be directed? The answer must be an attempt to fuse the credentialing of health manpower with the public interest. Thirty-five States have now enacted legislation to legitimize the role of the physician's assistant and to permit the physician to delegate responsibilities to new types of health manpower (*4*). This legislation is largely a reflection of the growing necessity to expand health services and of the realization that there are constraints on the effective use of Type A assistants.

The mechanisms that have been delineated for the legitimation of Type A assistants differ. Several State legislatures merely provide for exceptions to Medical Practice Acts, permitting physician's assistants to function under appropriate supervision. Others subject the Type A assistants to both personal and program approval and periodic reapproval. Some legislatures have incorporated into the Medical Practice Acts procedures for review of qualifications and job functions for Type A assistants and physicians. This latter approach provides a means of legitimation for Type A assistants and some assurance of quality control for the public and the physician, as well as guidelines for the functions that are considered appropriate for delegation. In addition, flexibility, which has been eliminated by previous licensing procedures, is provided.

A new era in manpower utilization has begun, and statutory constraints can play a major role in inhibiting the acceptance of Type A assistants. Legislative initiative has been encouraging in this area, but more action is needed. As stated by Kowalewski (*5*):

> Yes, there are legal problems. And the State legislators and Federal legislators are going to have to shape up to this because what we might have, gentlemen, which would be a terrible thing, we might educate and prepare a lot of people and find them completely illegal and no place to go. We have got to set the stage.

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