Study on Resolution 17-410

OBJECTIVE: To conduct research to propose legislation or regulatory changes that prohibit non-physician clinician supervision as a term of employment and protect physicians' right to decline supervision of non-physicians.

BACKGROUND: At the 2017 FMA Annual Meeting, the House of Delegates referred Resolution 17-410 to the Board of Governors for study and report back (see Attachment 1). The Resolution provides as follows:

> *RESOLVED, that the FMA affirm the rights of physicians to decline to supervise non-physician clinicians based on patient safety issues such as inadequate supervision time, lack of cooperation from non-physician clinicians, or quality of care concerns.*
>
> *RESOLVED, that the FMA conduct research to propose legislation or regulatory changes that prohibit non-physician clinician supervision as a term of employment and protect physicians' right to decline supervision of non-physicians.*

The Board of Governors discussed this resolution at the January 2018 BOG meeting and passed a motion to have FMA staff study the issue presented by the resolution and report back at the May BOG meeting. This Resolution claims that in many facilities, physicians are being replaced by non-physician clinicians. Florida statute allows physicians to supervise multiple non-physician clinicians at more than one site[1], and therefore physicians may be contractually required to supervise multiple non-physician clinicians as a term of employment. There is concern as physicians are legally responsible for the care provided by non-physician clinicians and yet may not be involved in the hiring process or disciplinary process. Furthermore, supervising physicians may face punitive measures such as termination of employment for complaints against non-physician clinician care. The following analysis will examine the legal and legislative impacts that this legislation may have on physicians and the FMA.

ANALYSIS:

Legal Study

National Landscape

Across the nation, there are differing laws and regulations regarding the level of physician supervision, if any, that Advanced Registered Nurse Practitioners (ARNPs) must have in order to practice. While ARNPs have complete independent practice in 22 states, including Washington, D.C., the following states still maintain supervision requirements:

- Florida
- Georgia
- South Carolina
- North Carolina
- Virginia
- Texas
- California
- Missouri
- Oklahoma
- Michigan
- Tennessee
- Massachusetts

[1] Fla. Stat. §458.348.

The following states have less restrictive requirements for supervision but still do not allow full independent practice:

- Louisiana
- Mississippi
- Alabama
- Kentucky
- West Virginia
- New York
- Pennsylvania
- Ohio
- Wisconsin
- Kansas
- Utah
- Illinois
- Indiana
- Delaware
- New Jersey
- Arkansas

Upon a legal search, and in consultation with the legislative attorneys for the American Medical Association, there does not appear to be any laws in the abovementioned states that prohibit hospitals from including the supervision of non-physician clinicians as a term of employment. While not necessary, it is generally beneficial to have the opportunity to learn from another state's journey when pursuing unique legislation. Without this benefit, it is unknown what kind of legal challenges, if any, may arise.

Freedom to Contract

A potential legal implication that must be carefully considered is the freedom to contract. The Fourteenth Amendment to the Constitution of the United States forbids the States to make or enforce any law which shall abridge the privileges or immunities of its citizens, or deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws.[2] The right to make contracts of any kind, so long as no fraud or deception is practiced and the contracts are legal in all respects, is an element of civil liberty possessed by all persons.[3]

Considered chief among contracts is that of personal employment – should the right be stricken down or arbitrarily interfered with, the courts have found that such activity is an unconstitutional impairment of liberty.[4] While it is true that this freedom is not absolute and may be subject to reasonable restrictions in the interest of public welfare[5], it is the general rule that "parties are masters of their own contract, and then servants to its ultimate terms."[6]

It is well within the realms of possibility that a court could find that physicians have the right and ability to negotiate their employment contracts with hospitals or other organized practice models. Although the reason behind such a law could not be described "arbitrary", because there is an understandable grievance, it still would likely not rise to the level of a legislative necessity to protect the public's general welfare. Ultimately, the inference with the freedom to contract claim will be this proposed legislation's

[2] U.S. Const. amend. XIV, § 1.
[3] State, e*x rel*. v. Ives, 167 So. 394 (Fla. 1936).
[4] Coppage v. Kansas, 236 U.S. 1 (1915).
[5] Schmidinger v. Chicago, 226 U.S. 578 (1913).
[6] Fla. Dept. of Fin. Servs. v. Freeman, 921 So. 2d 598, 607 (Fla. 2006) (Cantero, J., concurring).

greatest obstacle at all stages of the process.

Legislative Impact

There are several legislative consequences to consider before pursuing a bill of this kind. As discussed in the Legal Study section of this report, the freedom to contract is one of the most valued and valuable rights recognized by the law. Currently, the Florida Legislature has Republican majority and the freedom to contract is a liberty this body will not invade lightly save for a great public concern. This hurdle alone places this legislative initiative at a severe disadvantage for passage.

Another factor that should be evaluated before pursuing controversial legislation is the impact it will have on the FMA's relationships with certain organizations. If we introduce legislation that restricts hospital employment contracts, that action will engage the entire hospital lobbying team. Not only does this negatively affect the working relationship the FMA has with hospitals during session but may have an impact for working together on fundraising and other joint political efforts in the future. There may also be unintended consequences to legislatively interfering with hospital employment contracts, including salary reductions for those physicians that opt out of supervisory positions.

Finally, the FMA has long defended the physician's role as head of the medical team. Part of that vigorous defense includes lobbying and educating members that mid-level clinicians such as ARNPs and PAs can only practice under physician supervision. The incoming Speaker of the House of Representatives, Jose Olivia, has clearly expressed his intent to expand scope of practice for mid-level clinicians. While there is merit behind the frustration physicians have with supervising individuals that are unknown, this legislation will appear to the House that physicians do not wish to supervise mid-level practitioners and that loose thread may be pulled to uncover a bill that allows independent practice.

The goal of Resolution 17-410 would have to be accomplished legislatively because there is currently no statutory authority for it to be accomplished through regulations. Should the BOG decide this is legislation worth pursuing, the following is potential draft legislative language:

458.xxx – Prohibited physician employment arrangements.

(1) A person may not employ an allopathic physician licensed under this chapter or engage an allopathic physician licensed under this chapter as an independent contractor to provide services that allopathic physicians are authorized to offer under this chapter if the terms of employment or the independent contractor agreement authorizes the employer or contractor to direct, control or interfere with the allopathic physician's clinical judgement regarding the supervision of non-physician clinicians, including the decision not to supervise such non-physician clinicians based on patient safety issues or quality of care concerns.

(2) Any person who violates this section commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(3) Any contract or arrangement entered into or undertaken in violation of this section is void as contrary to public policy.

Conclusion

In summary, legislation intended on prohibiting hospitals from requiring non-physician supervision as a term of employment would likely fail to pass through the Florida Legislature, create animosity with the hospital lobbying core, and have unintended consequences both personally for individual physicians and ultimately on the FMA's stance on scope expansion. Since no other state has similar legislation, it is difficult to predict the type of legal or other challenges that may arise. It may be more beneficial and productive for physicians to consider less extreme measures of resolution such as engaging more in the contract negotiation stage, exploring avenues for getting involved in the mid-level clinician hiring process, and working with hospital administration at the ground level in an attempt to find a reasonable solution.

*** Resolution 17-410**

Physician Right to Decline Supervision of Non-Physician Clinicians

Collier County Medical Society

House Action: Referred to the Board of Governors for Study and report back

RESOLVED, that the FMA affirm the rights of physicians to decline to supervise non-physician clinicians based on patient safety issues such as inadequate supervision time, lack of cooperation from non-physician clinicians, or quality of care concerns.

RESOLVED, that the FMA conduct research to propose legislation or regulatory changes that prohibit non-physician clinician supervision as a term of employment and protect physicians' right to decline supervision of non-physicians.