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Advanced Practice Nurses

A New Skirmish in the Continuing Battle Over Scope of Practice

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In 1999, this column described the hotly contested efforts of advanced practice nurses (APNs) to define in federal regulations relationships between APNs and physicians that recognized the full scope of practice and quality of care of APNs.¹ With the new skirmish described here, the battle continues.

In June 2006, the deceptively titled Healthcare Truth and Transparency Act (HR 5688) was introduced by Congressman Sullivan, with co-sponsorship by Congressmen Green (Texas), and was referred to the Committee on Energy and Commerce. Eleven cosponsors, all Republicans, signed onto the legislation, including Representative Charles Bass (NH), Representative Michael Bilirakis (FL), Representative Michael C. Burgess (Texas), Representative Barbara Cubin (Wyoming), Representative John R. Randy Kuhl (New York), Representative Jim McDermott (Washington), Representative Joseph R. Pitts (PA), Representative Ted Poe (Texas), Representative John J. H. Joes Schwartz (Michigan), Representative Pete Sessions (Texas), Representative John E. Sweeney (NY), and Representative Gene Green (Texas), who withdrew his co-sponsorship on June 28, 2006.

This bill pits organized physician groups against APNs and other nonphysician providers. The bill, designed to limit selected scopes of practice, creates a federal cause of action against nonphysician healthcare professionals who “make any deceptive or misleading statement, or engage in any deceptive or misleading act, that deceives or misleads the

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public or a prospective or current patient that such person is a medical doctor, doctor of osteopathic medicine, doctor of dental surgery, or doctor of dental medicine or has the same or equivalent education, skills, or training.”² Penalties for misleading consumers about their licensure, scope of practice or expertise, or misrepresentation include treatment of the act as a violation of section 5 of the Federal Trade Commission Act (15 U.S.C. 45). The bill would compel the Federal Trade Commission to conduct studies of what are perceived unfair and deceptive acts and practices:

1. to identify specific acts and practices constituting a violation of such section;
2. to determine the frequency of such acts and practices;
3. to identify instances of harm or injury resulting from such acts and practices; and
4. to identify instances where any State public policy has permitted such acts and practices.

After conducting such studies, the Federal Trade Commission shall report its findings to Congress not later than 1 year after the date of the enactment of this Act.

Although most nurse lobbyists do not believe the bill will move this year, it represents a bold step by the medical community to inappropriately initiate federal action to address state-mandated scopes of practice.³ Historically, states regulate practice and determine whether the licensure process adequately protects the public [U.S. Const. amend. X; see also Timothy S. Jost, *Introduction—Regulation of the Healthcare Professions*, in *Regulation of the Healthcare Professions*, 7 (Timothy S. Jost, ed., 1997); See generally Benjamin Shimerberg & Doug Roederer, *Occupational Licensing: Questions A Legislator Should Ask*, p. 4 (Ralph Marcelli, ed., 1978); Ross D. Silverman, *The Changing Face of Law and Medicine in the New Millennium: Regulating Medical Practice in the CyberAge: Issues and Challenges for State Medical Boards*, 26 Am. J. L. and Med 255, 256 (2000) which notes that: “The right of states to regulate the practice of medicine is founded upon constitutional grounds and traditional interpretations of states’ rights. As the power

to regulate the health professions was not specifically entrusted to Congress, the Tenth Amendment reserves such power to the states and the people. Under the police power, states have the authority to pass regulations to protect the public health and safety of their citizens.”⁴ This legislation is premised upon expanding the authority of the federal government to override state constitutional authority and expand the authority of the Federal Trade Commission to address interpretation and regulation of individuals acting under state licensure and consumer protection statutes.³ “Under the guise of protecting patients, certain forces are trying to persuade the consumer public that non-MD health professionals are somehow less worthy to deliver healthcare services than are medical doctors,” said American Chiropractic Association President Richard G. Brassard, DC. “This misguided legislation suggests that non-MD health professionals are misrepresenting their education, skills, and training, and should, under certain circumstances, be penalized if they assert they are delivering services equivalent to those of a medical doctor.”⁶

The presumptions incorporated into the act include an inability of the public to discern and understand distinctions in expanded nonphysician practice. Interestingly, the presumption is that the public cannot discern the differences in physicians, nurses, and physician assistants. Likewise, physicians are attempting to undermine common language usage and terminology and undermine the current usage of the term “doctor” as an academic designation. Richard Cooper, MD, who has long researched and written about health policy and the healthcare workforce and recently became co-chair with Linda Aiken, PhD, RN, FAAN of the Council on Physician and Nurse Supply at the University of Pennsylvania,⁷ described in 2001 the impact of nonphysician clinicians in the 21st century.⁸ He noted that nonphysician clinicians have participated in patient care for many years, but over the past decade, their numbers, training, expanded practice prerogatives, and access to reimbursement have changed in ways that present opportunities and challenges for physicians. As traditional nonphysician clinicians, he included nurse practitioners, clinical nurse specialists (CNSs), certified nurse midwives, and physician assistants. Alternative nonphysician clinicians include chiropractors, acupuncturists, and naturopaths. According to Cooper, the healthcare system is changing and many elements of care that previously were provided by physicians are now being provided by these other clinicians cost-effectively and with a high degree of patient satisfaction.⁸ Also according to Cooper, these dynamics will profoundly affect the practice of medicine; physicians and nonphysician clinicians “will increasingly share what were previously considered physician services.”⁸ He concludes with the statement that the success of each discipline will be judged by its effective participation in a continuum of care that meets patient needs and the needs of the healthcare system overall. This evidence-based view of the healthcare workforce apparently does not inform the policy actions of the medical associations.

One guide used for policy action regarding medical practice acts is the *Essentials of a Modern Medical Practice Act*, first published in 1956 and now updated every 3 years by the Federation of State Medical Boards.⁹

Its purpose is (1) to serve as an informational guide to states as they adopt new medical practice acts or amend

existing laws, and (2) to encourage the development and use of consistent standards, language, definitions, and tools by boards responsible for physician regulation. *Essentials of a Modern Medical Practice Act* applies equally to practice acts that govern physicians who have acquired the MD or DO degree in the same statute or in separate statutes. Initially drafted to provide legislative support for patient safety and quality of care issues when making decisions about scope of practice changes, the publication has morphed into a policy platform for protecting the medical scope of practice. When read with the complementary position paper, *Assessing Scope of Practice in Health Care Delivery: Critical Questions in Assuring Public Access and Safety*, the documents provide a roadmap for limiting nonphysician providers to supervised practice.¹⁰

Organizations that support legislation such as H.R. 5688 may not be obvious by their names. One of the organizations that lobbied for introduction of this legislation is the Coalition for Healthcare Accountability and Transparency (CHART). “The AMA [American Medical Association] is one of the 10 organizations that comprise CHART, and one of six organizations to have an official relationship with both CHART and the Scope of Practice Partnership,” explained Dr Rebecca Patchin, a member of the American Medical Association’s board of trustees.¹¹ Often leading the charge for the medical association against expanded scope of practice for APNs, Rebecca Patchin uses her remote history as a former critical care nurse to criticize efforts by APNs and speak negatively about nurses.¹²⁻¹⁴

On the very same day that H.R. 5688 was introduced, CHART released the results of a survey claiming the majority of Americans are unaware of the differences in the training and education between medical doctors and other licensed providers of healthcare services. The survey was conducted as part of the development of a database on nonphysician providers that the Scope of Practice Partnership is developing for use in state legislative battles over scope of practice. CHART members include the American Medical Association, American Academy of Ophthalmology, American Academy of Otolaryngology—Head and Neck Surgery, American Psychiatric Association, American Society of Anesthesiologists, American Osteopathic Association, American College of Surgeons, and American Society of Cataract and Refractive Surgeons. The American Dental Association also supports HR 5688. In a move that appears to be aimed at stopping the growth of essentially all healthcare practitioners, except for medical doctors and doctors of osteopathy, last spring, the AMA House of Delegates (like the American Nurses Association, the AMA has a House of Delegates. Unlike ANA, they are a direct member organization.) adopted a resolution to support the creation of the Scope of Practice Partnership (SOPP), a new organization, to study the qualifications, education, and academic requirements of “limited licensure healthcare providers and limited independent practitioners” such as doctors of chiropractic, acupuncturists, naturopathic physicians, and APNs.¹¹ The SOPP is a conglomeration of state medical associations and specialty groups created, according to one association newsletter, “to marshal the medical community’s resources against the growing threat of expanding scope of practice for allied health professionals.”¹¹ The resolution called for the association (AMA) to allocate more than \$170,000 to

help fund and publish the study, and to provide a report of its findings, as yet unpublished, when the House of Delegates convenes at AMA's 2006 annual meeting in Chicago. Members of SOPP contribute \$25,000 annually to underwrite the efforts of the partnership.

This issue of assault on APN's scope of practice is building and needs an appropriate response from the nursing community, one that befits a battle. The SOPP and CHART have identified state legislative efforts for lobbying campaigns. Legislation such as H.R. 5688 represents another approach. H.R. 5688 has been pulled for hearings until after the November elections. But the skirmish and certainly the battle are not over. NACNS is working with other nursing organizations to monitor and track moves on the battlefield. Expect and anticipate more.

WHAT NOW?

Battle Plan for Our Scope of Practice

We urge you, as CNSs, to take the following actions:

1. Track the activities of both CHART and the Scope of Practice Partnership;
2. Monitor the activities of State Boards of Medicine (BOM). When the BOM wants to address issues and knows it cannot do so through the BON, they try to impose regulations to limit how physicians interact with nurses. This approach is likely to occur in proposed state regulations about prescriptive authority and other scope of practice expansions.
3. Identify and track any legislative changes, especially at the state level, that limit scopes of practice for APNs. Write to the editor of this journal about what you identify.

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