

SC BOARD OF MEDICAL EXAMINERS  
10/4/2017 ADVISORY OPINION:  
THE SUPERVISION OF UNLICENSED  
PERSONNEL AND THE CORPORATE  
PRACTICE OF MEDICINE

NEXT CHALLENGE. NEXT LEVEL.

**NEXSEN | PRUET**

ANNUAL JOINT CONFERENCE

SC ASHRM / SC ONL / SC AHQ

1 DECEMBER 2017

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# Framing the Issue: Delegating “tasks” to Unlicensed Personnel

- ▶ More and more physicians are being employed by hospital systems including nonprofits, for-profits and governmental entities.
- ▶ More and more CMAs and RMAs are employed by hospital systems in these physician practices and in private practices.
- ▶ Why? Reimbursement for medical services continues to be subject to massive financial risks: How can we provide more care with less \$\$?
- ▶ Our challenge: How do we address these realities AND provide medical services efficiently and safely, ensuring the quality of services and constantly improving outcomes AND manage compliance risks?

# Framing the Issue: Delegating “tasks” to Unlicensed Personnel

- ▶ Physicians and their employers are asking: What tasks can be safely delegated to trained unlicensed staff?
  - ▶ Review lab results and notify patients of results?
  - ▶ Call in prescription refills into the pharmacy as the physician’s agent?
  - ▶ Apply splints and casts as ordered by the physician?
  - ▶ Perform dressing changes, suture or staple removal, wound care or foot care?
  - ▶ Administer eye examinations/administer eye drops to prep for exam?
  - ▶ Perform tasks cosmetic in nature such as botulism derivative injections or fillers, use laser therapy for hair or tattoo removal?
  - ▶ Apply topical applications of skin resurfacing agents (chemical/physical)?

# Framing the Issue: Delegating “tasks” to Unlicensed Personnel

- ▶ Administration of Medications?

- ▶ Oral medications? Prescription? OTC?

- ▶ “Routine” Injections?

- ▶ Immunizations/ “flu shot”;

- ▶ Birth control injections;

- ▶ Vitamin B shots;

- ▶ Allergy shots.

- ▶ Intravenous fluids/Intravenous medications?

- ▶ Setting up the IV;

- ▶ Venipuncture;

- ▶ Reconstituting medications;

- ▶ Administering the IV medication.

- ▶ Education: Provide instruction on medications as directed by a physician?

# Framing the Issue: Delegating “tasks” to Unlicensed Personnel

- ▶ American Association of Medical Assistants and the American Medical Technologists hold CMAs/RMAs out as having training to perform the following:
  - ▶ Taking medical histories;
  - ▶ Explaining treatment procedures to patients;
  - ▶ Preparing patients for examination;
  - ▶ Assisting the physician during the exam;
  - ▶ Collecting and preparing laboratory specimens;
  - ▶ Performing basic laboratory tests;
  - ▶ Instructing patients about medication and special diets;
  - ▶ Preparing and administering medications as directed by a physician;
  - ▶ Authorizing prescription refills as directed; Drawing blood;
  - ▶ Taking electrocardiograms; and
  - ▶ Removing sutures and changing dressings.

# Framing the Issue: Delegating “tasks” to Unlicensed Personnel

- ▶ In SC, there are currently about 18 schools, including community colleges and for profit schools, that provide training programs for CMAs and RMAs.
- ▶ There are currently about five accrediting bodies for CMAs/RMAs:
  - ▶ Commission on Accreditation of Allied Health Education Programs;
  - ▶ Accrediting Bureau of Health Education Schools;
  - ▶ Accrediting Council for Independent Colleges and Schools;
  - ▶ Accrediting Council for Continuing Education and Training;
  - ▶ Accrediting Commission of Career Schools and Colleges.
- ▶ **South Carolina law does not currently regulate CMAs/RMAs.**
- ▶ South Carolina law does, however, regulate physicians and statutory law addresses delegation to unlicensed personnel.

# What laws apply?

- ▶ SC Physician Practice Act: § 44-47-30(A): Nothing in Article 1 of the Physician Practice Act may be construed to . . .
  - ▶ “(5) prohibit a licensed physician from delegating tasks to unlicensed personnel in the physician's employ and on the premises if:
    - ▶ (a) the task is delegated directly to unlicensed personnel by the physician and not through another licensed practitioner;
    - ▶ (b) the task is of a routine nature involving neither the special skill of a licensed person nor significant risk to the patient if improperly done;
    - ▶ (c) the task is performed while the physician is present on the premises and in such close proximity as to be immediately available to the unlicensed person if needed;
    - ▶ (d) the task does not involve the verbal transmission of a physician's order or prescription to a licensed person if the licensed person requires the order or prescription to be in writing; and
    - ▶ (e) the unlicensed person wears an appropriate badge denoting to a patient the person's status. The unlicensed person shall wear a clearly legible identification badge or other adornment at least one inch by three inches in size bearing the person's first name at a minimum and staff position. The identification badge must be worn in a manner so that it is clearly visible to patients at all times;” (emphasis added).

# What laws apply?

## ▶ Corporate Practice of Medicine (“CPOM”) Doctrine:

- ▶ In SC, CPOM has never been implemented by statute or adopted by a ruling of the SC Supreme Court where CPOM was the matter in controversy.
- ▶ The CPOM is a prohibition against a corporation practicing medicine and/or employing a physician to practice medicine.
- ▶ Four (4) SC Supreme Court cases can be cited in connection with the proposition that SC common law prohibits the CPOM:
  - ▶ Ezell et al. v. Ritholz et al, 188 S.C. 39, 198 S.E. 419 (1938);
  - ▶ Wadsworth v. McRae Drug Co., 203 S.C. 543, 28 S.E.2d 417 (1943);
  - ▶ McMillian v. Durant, M.D., 312 S.C. 200, 439 S.E.2d 829 (1993); and
  - ▶ Baird v. Charleston County, 333 S.C. 519, 537, 511 S.E.2d 69, 78 (1999).
- ▶ But see: Op. S.C. Atty. Gen., 1982 WL 189119 (Sept. 8, 1982); OrthAlliance, Inc. v. McConnell et al., No. 8:08-2591-RBH, 2010 WL 1344988 (D.S.C., Mar. 30, 2010).



# Factual framework for the legal analysis: Intersection between the Corporate Practice of Medicine and Delegation of Tasks to Unlicensed Personnel

- ▶ The Advisory Opinion: “The Supervision of Unlicensed Personnel and the Corporate Practice of Medicine.” Recall . . .
  - ▶ More and more physicians are being employed by hospital systems including nonprofits, for-profits and governmental entities.
  - ▶ More and more CMAs and RMA’s are employed by hospital systems in these physician practices.
- ▶ Hospital systems have job descriptions/protocols/policies and procedures that define/outline the duties of employees.
- ▶ How does this reality comport with CPOM?
  - ▶ Do the entity’s job descriptions/protocols/policies and procedures supplant/interfere with the physician’s independent judgment in delegating?
- ▶ What position does the SCBoME take?
- [http://www.llr.state.sc.us/pol/Medical/pdf/Laws/AO\\_Supervision%20of%20Unlicensed%20Personnel%20and%20the%20Corporate%20Practice%20of%20Medicine.pdf](http://www.llr.state.sc.us/pol/Medical/pdf/Laws/AO_Supervision%20of%20Unlicensed%20Personnel%20and%20the%20Corporate%20Practice%20of%20Medicine.pdf)

# What position does the SCBoME take?

- ▶ “The Board does not license or regulate corporations. However, the Board has well established expectations concerning the economic relationships within which its licensees may practice. While the economic relationship is not a direct regulatory concern of the Board, the licensee must control the exercise and practice of his or her clinical judgment at all times. The physician’s professional judgment must be independently exercised, regardless of the economic relationship or business form involved. Licensees are subject to all provisions of the Medical Practice Act regardless of the economic relationship or corporate form in which they practice. Licensees may not employ or permit unlicensed persons to practice medicine. It is unlawful and unprofessional conduct for a licensee who engages in the practice of medicine to permit an unlicensed person to direct, participate in or interfere with the licensee’s practice of medicine”

# What position does the SCBoME take?

- ▶ SC BoME: “Consequently, licensees should not enter into any agreement or associate themselves with a practice arrangement which permits a person other than a licensed physician to direct, participate in, or interfere with the licensee’s practice of medicine and exercise of their independent professional judgment. Licensees should ensure unlicensed personnel are appropriately trained and competent to perform delegated tasks and provide documentation of that to the Board upon request.”
- ▶ Take away: Be certain that each and every individual physician independently approves the job descriptions/protocols/policies and procedures as applied to each and every individual unlicensed person.

# What position does the SCBoME take?

- ▶ SC BoME: “To the extent the licensee’s economic relationship complies with the principles set forth herein and is otherwise authorized by applicable law, it is authorized by the licensing law of this State governing physicians. It is each physician’s individual responsibility to ensure that he or she practices only within the lawful scope of practice set forth in the Medical Practice Act and other State law. It is further the responsibility of non-licensees to refrain from any activities which constitute the practice of medicine.”

# Other Realities

- ▶ Financial pressures continue to grow: How do we efficiently and safely provide medical care with fewer resources?
- ▶ What position does/will the SC Board of Nursing take on whether some of the “tasks” delegated by the physician to unlicensed personnel amount to the “practice of nursing?”
  - ▶ See: <http://www.llr.state.sc.us/pol/nursing/PStatements/asstwithmeds.pdf>
  - ▶ <http://www.llr.state.sc.us/POL/Nursing/PStatements/DelegationPositionStatementApproved072910.pdf>
- ▶ What about other licensing boards?
- ▶ Multiple stakeholders have differing opinions as to what a physician can/should delegate to unlicensed personnel:
  - ▶ Physicians have strong opinions about what can be delegated.
  - ▶ Legal counsel have strong opinions about what tasks are likely “of a routine nature involving neither the special skill of a licensed person nor significant risk to the patient if improperly done.”

# Recommendations

- ▶ How should risk managers/nursing leaders/quality & safety officials balance these realities?
  - ▶ Work together: Include ALL stakeholders - Physicians, Risk Managers, Nursing Leaders, Quality and Safety Professionals, Hospital/Health System Administration;
  - ▶ Consult with legal counsel;
  - ▶ Consult with the SC BoME and stay tuned for additional guidance;
  - ▶ Review your job descriptions/protocols/policies and procedures that define/outline the duties of unlicensed personnel.
  - ▶ Be certain that each and every individual physician independently approves the job descriptions/protocols/policies and procedures as applied to each and every individual unlicensed person AND document / document / document the approval.

# Questions?

NEXT CHALLENGE. NEXT LEVEL.

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