Texas Hospital Association

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December 5, 2019

Via electronic submission to: rules.development@tmb.state.tx.us

PUBLIC COMMENT LETTER

Ms. Rita Chapin
Texas Medical Board
P.O. Box 2018
Austin, Texas 78768-2018

Re: Proposed Amendments to Rule 193.5, as published in the November 8, 2019 *Texas Register*.

Dear Ms. Chapin:

On behalf of our more than 465 member hospitals and health systems, including rural, urban, children's, teaching and specialty hospitals, the Texas Hospital Association appreciates the opportunity to provide comments on the Texas Medical Board's above-referenced proposed amendments to the rule entitled "Physician Liability for Delegated Acts and Enforcement." THA appreciates TMB's collaborative approach to rulemaking and offers the following comments.

After reviewing the proposed rule, our overriding concern is that new subsection (c) would have a substantial and detrimental impact on the operations, workflow, and ultimately patient care rendered in Texas hospitals. Moreover, the rule is ambiguous as written and it is unclear to whom the rule applies. We urge the Board to consider revisions to the proposed rule and to continue its collaboration with interested stakeholders before finalizing the rule.

The purpose of the proposed amendments, as stated in the November 8, 2019 Texas Register, is to add new subsections (c) and (d) in order to clarify that the physician and the delegate relationship applies for providers other than PAs and APRNs. The proposed amended rule reads in its entirety as follows:

§193.5. Physician Liability for Delegated Acts and Enforcement.

(a) A physician shall not be liable for the act or acts of a physician assistant or advanced practice registered nurse solely on the basis of having signed an order, a standing medical order, a standing delegation order, a prescriptive authority agreement, or other order or protocol, authorizing a physician assistant or advanced practice registered nurse to administer, provide, prescribe or order a drug or device, unless the physician has reason to believe the physician assistant or advanced practice registered nurse lacked the competency to perform the act or acts.

(b) Notwithstanding subsection (a) of this section, delegating physicians remain responsible to the Board and to their patients for acts performed under the physician's delegated authority.

(c) This subsection applies to individuals other than a physician assistant or advanced practice registered nurse who have a standing medical order, a standing delegation order, a prescriptive authority agreement, or other order or protocol with the delegating physician. A physician who delegates to individuals is responsible for ensuring and documenting:

(1) it is within reasonable, sound medical judgment after consideration of the patient's history, status, and procedures to be undertaken to proceed with delegation;
(2) the delegated acts can be properly and safely performed in its customary manner;
(3) the identity of the physician responsible for the delegation and supervision of the delegated act or acts; and
(4) the identity credentials and title of the individual who will perform the delegated act or acts.

~~[(c) Any physician authorizing standing delegation orders or standing medical orders which authorize the exercise of independent medical judgment or treatment shall be subject to having his or her license to practice medicine in the State of Texas revoked or suspended under §§164.001, 164.052, and 164.053 of the Act.~~]

(d) Any physician authorizing delegation, orders, standing delegation orders or standing medical orders which authorize or allow the exercise of independent medical judgment or treatment shall be subject to having his or her license to practice medicine in the State of Texas revoked or suspended under §§164.001, 164.052, and 164.053 of the Act.

Our concerns with subsection (c) are twofold, each discussed in greater detail below: (1) subsection (c) could be read to require that any delegation to a non-physician assistant or a non-advance practice nurse occurring under a standing medical order, a standing delegation order, or other order or protocol meet the requirements of subparts (1)-(4) on a per patient basis; and (2) even if subsection (c) is not intended to apply as described in (1), the process described in subparts (1)–(4) of the rule go much farther than is required to accomplish the stated purpose of the amendment. In either case, the application of the rule would have a substantial and detrimental impact on the operations, workflow, and ultimately patient care rendered in Texas hospitals.

(1) Applicability of subparts (1)–(4) to a delegation to a non-physician assistant or a non-advance practice nurse occurring under a standing medical order, a standing delegation order, or other order or protocol.

We should preface this discussion by acknowledging that we are not certain that the intent of the proposed rule is to be applied as broadly as described herein. However, the plain language of subsection (c) is that it "applies to individuals other than a physician assistant or advanced practice registered nurse who have a standing medical order, a standing delegation order, a prescriptive authority agreement, or other order or protocol with the delegating physician." It is not clear whether the phrase "who have a standing medical order, a standing delegation order, a prescriptive authority agreement, or other order or protocol with the delegating physician" modifies "individuals" or "physician assistant or advance practice nurse". The use of the word "have" suggests that the

phrase modifies the plural "individuals" rather than the singular "physician assistant or advance practice nurse". That being the case, subsection (c) appears to apply to all individuals (other than a PA or APRN) who have:

- a standing medical order
- a standing delegation order
- a prescriptive authority agreement[1], or
- other order or protocol

with the delegating physician. However, even if the phrase only applies to APRNs and PAs, then the term "individuals" is unmodified, making it even broader as applicable to all circumstances of delegation, *i.e.*, whether under a standing process or otherwise. The rule then goes on to describe the steps that must be taken when that delegation is exercised (the particular steps are discussed below).

As the Board is no doubt aware, use of standing medical orders, standing delegation orders, and protocols is well-established in hospitals and contributes substantially to the efficiency of the delivery of care in those facilities, as well as the quality and safety of that care through the standardization of evidenced-based processes. As written, the rule arguably would require a delegating physician to document elements in any care setting and on a per patient basis at the point that a delegation under these standing processes is exercised, which is operationally impossible and would completely defeat the purposes of physician extenders and having a standing process in the first place. The efficiencies and enhancement to patient care and patient safety gained by having these standing delegation processes would be lost. If the Board is going to move forward with revisions to rule 193.5, we believe the first part of subsection (c) should be rewritten to clear up any ambiguity as to its applicability and address these operational and patient care concerns. The rule should clearly state that it does not apply to a delegation to an APRN or PA or to a delegation to any individual acting on a delegation in a hospital embodied in a standing medical order, a standing delegation order, a prescriptive authority agreement, or other standing order or protocol. THA suggests the following language replace the first sentence of the proposed rule:

> (c) This subsection applies to ~~individualsa~~ delegation to any individual other than (1) a delegation to a physician assistant or advanced practice registered nurse ~~who have~~or (2) a delegation occurring in a hospital under a standing medical order, a standing delegation order, a prescriptive authority agreement, or other order or protocol ~~with the delegating physician~~.
>
> ***(2) The process required in subparts (1)-(4) are unnecessary and will negatively impact operations, workflow, and patient care in Texas hospitals.***

Subparts (1)-(4) of subsection (c) require a delegating physician to ensure and document certain required elements when a delegated task is performed. The requirements of the subpart seem unnecessary and go much farther than is needed to accomplish the stated purpose of the revisions, which is to "clarify that the physician and the delegate relationship applies for providers other than PA and APRN's." The first and most significant problem with the subparts is the onerous documentation requirement. As written, the rule would require each physician to not only ensure but to document four discrete elements. This requirement will be a tremendous burden on physicians

[1] We are aware and note that a prescriptive authority agreement may only be held by a PA or an APRN under Occupations Code sec. 157.0152. We do not believe this fact resolves the ambiguity in the proposed rule.

practicing on a busy medical facility. The physician will have to stop and document, on a per-patient basis and in each instance of delegating a task, each of the elements described in the subparts. (This burden is even more pronounced when considered in the context of acts carried out under standing processes as described above.) This will be extremely disruptive and will impede the efficient delivery of care. Instead of a documentation requirement, the rule could simply clarify what a delegation entails in terms of what the delegating physician is responsible for. As for what those elements are, we believe the elements embodied in subparts (1) and (2), with some modification, should be the focus of the Board's rule. As the Board is aware, hospitals are very structured and often fast-paced care environments. The care delivered is carefully documented and generally there is no doubt from the documentation available about who carried out an act, what their credentials are, and that is was carried out under delegation. THA suggests the following language replace the second sentence of the proposed rule:

> A physician who delegates to individuals is responsible for ensuring ~~and documenting~~:
>
> (1) it is within reasonable, sound medical judgment ~~after consideration of~~in light of the patient's history, status, and procedures to be undertaken to proceed with delegation; and
> (2) the delegated act~~s~~ can be properly and safely performed in its customary manner by the individual to whom the act is delegated~~;~~
> ~~(3) the identity of the physician responsible for the delegation and supervision of the delegated act or acts; and~~
> ~~(4) the identity credentials and title of the individual who will perform the delegated act or acts~~.

This language removes the documentation requirement, and the unnecessary elements that were required to be documented in the proposed version, but preserves the purpose of the revisions. It replaces "after consideration of" with "in light of" to remove any suggestion that these considerations must be specific documented.

Taking these revisions together, THA suggests that subsection (c) read:

> (c) This subsection applies to a delegation to any individual other than (1) a delegation to a physician assistant or advanced practice registered nurse or (2) a delegation occurring in a hospital under a standing medical order, a standing delegation order, a prescriptive authority agreement, or other standing order or protocol. A physician who delegates to individuals is responsible for ensuring:
>
> > (1) it is within reasonable, sound medical judgment in light of the patient's history, status, and procedures to be undertaken to proceed with delegation; and
> > (2) the delegated act can be properly and safely performed in its customary manner by the individual to whom the act is delegated.

Thank you for your consideration of these comments. We anticipate that we may receive additional and more specific feedback from our members on the impact of the rule as proposed and will provide that information to the Board as it becomes available. We look forward to continuing our collaboration with the Board on these issues. Should you have any questions, please do not hesitate to contact me at swohleb@tha.org or 512/465-1000.

Respectfully submitted,

Stephen G. Wohleb
Senior Vice President and General Counsel
Texas Hospital Association