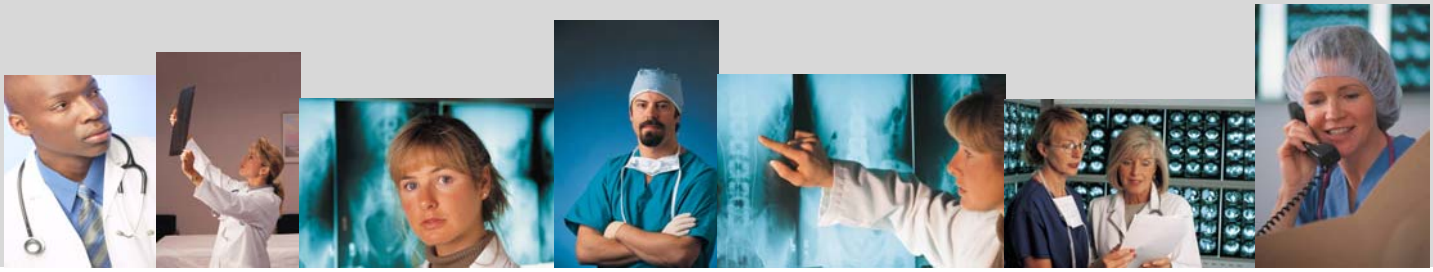
Florida Nurse Practitioner SCOPE

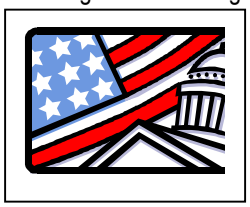


Volume I Issue 2 A Publication of the Florida Nurses Association June 2005

Legislative Update 2005

Barbara Lumpkin, RN
FNA Associate Executive Director

After taking some time to gather thoughts and do a valid assessment of



the 2005 Legislative Session I realize that we actually came out passing three bills that grant new authority to Nurse Practitioners and a slam dunk victory on stopping bills that would have put new restrictions on NPs. Of the three bills passed the Governor has signed two, the one giving NPs authority to order/prescribe home health services and the one authorizing NPs to do employment physicals on firefighters and security personnel. The bill granting statewide authority for NPs to authorize Disabled Parking Permits just reached the Governor on June 6 so he has until the 21st of this month to sign the bill.

Post session letters thanking legislators who filed or supported our bills as well as those legislative leaders who in general support the issues on the Florida Nurses Association Legislative Agenda were written. I also wrote asking for discussions with the sponsors of the Family Practice Bill that would have required physicians to provide "on site general supervision" at least 30% of "open for business hours" in any practice setting staffed predominantly by NPs or PAs. I wrote to Senator Mike Haridopolos from Melbourne and Representative Holly Benson from Pensacola to let them know that the Florida Nurses Association is ready and willing to meet with them and representatives of the medical associations to see if it is possible to develop a definition of general supervision that all parties can live with.

As I write this nearly a month after sending the letters I have not heard from either legislator but the Executive VP of the Academy of Family Practice Physicians did respond and set a date for a meeting on June 30th in Tallahassee. The invitation was accepted and I invited FNPN and FANA to also participate in the discussions. This year we were able, very early, to meet with Senate leadership and the health care advisors to Governor Bush to educate them regarding the impediments the bill would place on NPs' ability to practice as they do now and the reduction in access to good health care for many citizens. It was difficult to make a real difference through meetings with House members who often are very supportive because Representative Benson is the Chair of the Health and Families Council in the House, a key leadership position. This means that we are concerned that similar legislation will be filed for consideration during the 2006 session unless a mutually acceptable definition of general supervision is worked out. It is beginning to seem like both nurses and physicians are abandoning advocacy for all people who need health care as we sustain our "civil war" while HMOs, Insurers, and others assume control of our fledgling health care system. I know that many of you have concerns in addition to the authority to prescribe controlled substances such as fair compensation for services rendered, the ability to be credentialed for clinical staff privileges and on provider panels, the fact that you as an NP with one million in professional liability insurance are the "deep pocket" in your practice, and being able to meet the health care needs of those who need it in your communities. It seems like little barriers are always before us such as the one Vicky Stone-Gale, President of the Southeast Florida NP Group is fighting with drug companies who now want physicians to sign a statement that it is appropriate for drug reps to give samples to NPs. Even though we passed the prescription labeling bill during the 2004 session many, if not most, pharmacies continue to put the name of the NP's supervising physician on labels of prescriptions written by the NP.

Anyway, this article is my way of letting you know that FNA's advocacy for NPs goes on at all times before, during, and after legislative sessions. We look forward to the meeting with the Florida Academy of Family Practice Physicians and FMA on June 30th and we will let you know the results of this first meeting.

Included in this newsletter is an article by John R. Shipman, a Financial Planner. John has done workshops for health care providers to educate them as individuals or businesses on how to protect assets in case you are sued for malpractice. John is willing to travel to various parts of the state to do a one and a half hour presentation on how to protect you assets in case of a suit against you. His address is H&R Block Financial Advisors, Inc. 4922-B 38th Avenue North, St. Petersburg, FL 33710 and he can be reached by phone at **Office**: (727) 528-2870, **Toll Free**: (866) 670-6940 and **Fax**: (727) 528-2837. Those of you who arrange programs for meetings and events please feel free to contact John to arrange for him to come to one of your meetings.

The feature article of this newsletter written by our Practice Counsel, Cynthia Mikos, RN, Esq. was actually written during the session when we were fighting HB 629, the bill supported by all medical groups but proposed by the Florida Society of Anesthesiologists. We are very pleased that Cynthia will be joining us at the meeting with the medical groups on June 30th. Rest assured we will do a full report to all FNA ARNP members after that meeting.

We hope you have a very good summer and always feel free to contact us for information or assistance in finding answers to your questions or concerns.

Asset Protection Strategies

John Shipman, BA

There has been a great deal of press lately – especially in relation to the medical field – regarding asset protection "strategies" from quite a number of different sources. I must say first that if you are considering any of them in your financial lives, seek competent legal or tax counsel ***prior to*** making any decisions. Some decisions, if made too quickly and without thorough research, can prove to be costly, and some are irrevocable. It may just be worth paying for a visit to your legal or tax professional, making sure that the person you visit has expertise in this very specific area and nothing to sell. Last, you should always consider taxes and costs that may result – the end may not justify the means.

On the other hand, some strategies may work for you, but nothing is either fool proof, or good for everyone or in every case. So, do your homework.

Another word to the wise: a good estate plan is not always a good asset protection strategy. You may have to make a choice – which is more important to you and your family today: avoiding potential estate taxes should you (if you're single, or you and your spouse, if you're married) die unexpectedly, or protecting from potential creditors? The current federal estate tax exemption can be as much as $1.5 million per person today (twice that to a married couple if you take advantage of that wording). And that number will continue to rise over the next several years until it reaches a peak in 2010. With that said, most Florida residents, while probate and other problems may be a concern, do not have to worry about federal estate taxes today. A common misconception is that owning assets in joint tenancy names with a spouse, in a revocable living trust, or owning property out of state makes those assets exempt from creditors. This is not necessarily the case. And putting assets jointly into childrens' names may open a whole new can of worms. Very big worms.

Go back to your lawyer who drew up your will or trust and go over the wording, ensuring it is still current, and taking into consideration asset protection strategies this time – it may be that a word here, or a word missing there may make all the difference. And make sure he knows about the rules regarding out-of-state property, if you have any – avoiding probate and asset protection sometimes are not interchangeable. And on the subject of property, while your homestead may be an exempt asset, it may be only if it meets certain criteria, including the size of the land – again, check with your legal counsel. If you do not have a current will or trust, go now!

Last, some types of insurance products sold in Florida to Florida residents may be exempt from some creditors, if they are not purchased with the knowledge of a pending lawsuit or specifically to avoid a creditor. While there are additional fees and costs inherent in annuities and they are a long-term investment not suitable for everyone, they can, in some cases, be creditor proof in addition to other potential benefits. Consider them carefully prior to investing in one. If you have or are considering purchasing a 529 Plan (a college funding vehicle for your children or grandchildren), some are said to be harder to reach by creditors than others, though none have been fully battle tested to date. Ask your insurance agent for a full review of all your investments with all these thoughts in mind and consider all the positives and negatives of any insurance or investment product.

IN summary, while nothing in this area can be guaranteed, as it is often a vague and contentious area of law and moving target, I would urge anyone who is concerned about losing their property or investments due to one mishap to immediately take steps to ensure that you have done everything possible to protect them. And there is no time like the present to get started.

ADVANCED PRACTICE WITHIN THE LAW

Physician Supervision, Delegation and Competence

Cynthia A. Mikos, Esq.

A proposed bill to be considered by the Florida Legislature this session may limit the ability of the supervising physician to supervise tasks performed by nurses, including advanced registered nurse practitioners ("ARNPs"), if the physician is not competent to perform the supervised task. How does supervision differ from delegation? The concept that the delegator should be competent to perform the delegated task is a principle recognized by the nursing profession in its own rules regarding delegation. However, when the delegator is a physician and the delegate is a nurse, each licensed in different professions, inherent inconsistencies arise. How can the physician be competent to perform basic or advanced nursing tasks when the physician is not educated or licensed as a nurse? Are physicians deemed to be competent to perform all nursing tasks? When supervising medical tasks, must the physician be in the same specialty as the ARNP to be deemed competent? These and other issues are likely to be discussed during this legislative session as House Bill 629 is debated.

HB 629[i] is the Florida Medical Association's legislative response to the appellate court's decision in *Ortiz v. the Department of Health, Board of Medicine*, 882 So.2d 402, (4th DCA 2004), a case which was discussed in the last column of this newsletter. In *Ortiz*, the court invalidated the portion of the Board of Medicine's office surgery rule that required anesthesiologists, rather than surgeons, to supervise a CRNA's administration of anesthesia in a physician's office. The basis for the court's decision was a statutory provision in the Medical Practice Act[ii] which prohibited the Board of Medicine from interpreting the grounds for discipline in such a way that interfered in services rendered by a licensed nurse under the direct supervision of a physician. HB 629 deletes the statutory provision upon which the *Ortiz* court based its decision, thus setting the stage to introduce same specialty physician supervision of CRNAs and other ARNPs through rule making by the Board of Medicine. However, the bill goes even farther by inserting a requirement that the physician cannot accept or perform a professional responsibility, such as supervising a nurse, which the physician is not competent to perform.

Current Florida Law on ARNP Supervision

Presently, Florida law provides that ARNPs provide advanced nursing acts and delegated medical acts.[iii] Delegated medical acts must be performed pursuant to a written protocol with a licensed physician and under the general supervision of the physician.[iv] General supervision requires that the physician be available by communication device such as a telephone whenever delegated medical acts are rendered.

The level of physician supervision required for the performance of delegated medical acts is supposed to be set by the Joint Committee, a statutorily created entity consisting of three members selected by the Florida Board of Nursing, three members selected by the Florida Board of Medicine and a representative of the Secretary of the Florida Department of Health.[v] Regulations adopting

the recommendation of the Joint Committee are then promulgated by the Board of Nursing to govern the practice of ARNPs. The Joint Committee does not regularly meet. It last met approximately five years ago to consider whether the prescription of controlled substances by ARNPs was a delegated medical act authorized by the Joint Committee.

In the past few years, mechanisms outside the Joint Committee have arisen for addressing the physician supervision level of ARNPs. First, the Florida Board of Medicine instituted the office surgery rule at issue in the *Ortiz* case imposing direct and same specialty supervision on CRNAs. Second, the Medical Practice Act was amended through the legislative process to require direct physician supervision of ARNPs performing laser hair removal. [vi] In neither instance was the Joint Committee convened nor the Board of Nursing involved in the process. Similar attempts to restrict the practice of ARNPs through levels of physician supervision have been supported in recent legislative sessions by the Florida Society of Dermatology & Dermatologic Surgery and the Florida Academy of Family Physicians ("Academy"). The Academy currently supports an ARNP supervision bill requiring onsite physician supervision of ARNPs in an office setting at least 33% of the office hours or deems the location not a physician office practice setting. The bill then establishes a number of requirements for physicians who supervise ARNPs outside the physician office setting, including limiting to two the number of ARNPs or Physician Assistants to be supervised.[vii] In no instance was the Joint Committee consulted.

Current Florida Law on Delegation

Florida law prohibits all licensed health care professionals from delegating tasks to a person who is not qualified to perform them and also prohibits all licensed health care professionals from accepting tasks they are not competent to perform. More specifically, nurses and all other licensed health professionals are also governed by certain general provisions found in Chapter 456, Florida Statutes. Under the general provisions, any licensed health care professional who knowingly delegates a professional responsibility to a person who is not qualified to perform the task may be disciplined.[viii] Similarly, physicians are prohibited from delegating a task to a person who is not qualified to perform it not only by the general provisions cited above, but also by the Medical Practice Act. [ix] Moreover, any licensed health care professional who performs a task which they are not competent to perform is subject to licensure discipline for practicing outside the scope of their profession.[x]

Additionally, nursing regulations govern a nurse's delegation of tasks to unlicensed assistive personnel ("UAP") and a practical nurse's ability to delegate to UAPs and other practical nurses. In both instances, the nurse delegator must be qualified by licensure and experience to perform the delegated task.[xi] In this circumstance, the UAP is viewed as an assistant to the nurse and the nurse is ultimately responsible to ensure the assigned tasks are properly completed. Thus, the nurse cannot delegate a nursing task to a UAP if the nurse is not competent to perform the task.

On the other hand, Florida courts have long recognized that physician supervision of ARNPs does not necessarily subject the supervising physician to liability for the acts of the separately licensed advanced practice nurse due to the ARNP's specialized training and certification. The difference in the two situations is the level of direct control. The nurse who directs and controls the UAP is responsible for proper completion of the task and could be disciplined under the Nurse Practice Act for improper delegation. The physician who merely supervises the specialized services of another professional does not automatically assume liability for the performance of the supervised task. Delegation differs from supervision and the delegation principles have not historically been applied in the supervision arena.

Supervision v. Delegation

HB 629 muddles the lines between supervision and delegation. Current Florida law does not require that the physician be competent to actually perform all the tasks that the physician supervises or delegates. For instance, Florida law permits the operating surgeon to supervise the CRNA's administration of anesthesia, a task the surgeon may or may not be competent to perform, but has historically been deemed competent to supervise. Similarly, the physician is not measured for competence to perform the professional responsibilities furnished by physical therapists, speech therapists, nurses, or a number of other health care professions deemed to render health care services under the supervision of the physician. Certainly, nurses supervise other licensed health care professionals such as respiratory therapists, paramedics, etc. No Florida law requires the nurse to be competent to perform respiratory therapy before supervising the therapist. However, current Florida law already prohibits both the physician and the nurse from delegating a professional task to another person if the delegate is not qualified to perform the task and further prohibits the delegate from performing a professional task if the delegate lacks the competence to do so.

At first blush the concept that a physician should be competent to perform tasks which the physician supervises seems reasonable. However, implementation of the competent supervisor concept poses theoretical and practical difficulties, because in many circumstances the supervising professional is not licensed or trained as the supervised professional. Adoption of the competency in supervision concept dramatically alters the nature of health professional supervision as we know it today and affects a far-ranging number of situations outside the anesthesiologists' relationship with CRNAs.

Last year, the Illinois Supreme Court wrestled with the issue of whether a physician could testify in a malpractice case as to the standard of care for a nurse.[xii] For years, physicians have testified across the country, and continue to testify in Florida, as to when a nurse violates the standard of care for nursing. Ultimately, the Illinois court decided that only a nurse could testify as to the standard of care for nursing because only a nurse is trained and licensed as a nurse. The court noted that physicians often have no first-hand knowledge of nursing practice except for observations made in patient care settings, and that it is as illogical for physicians to testify on nursing standard of care as it would be for nurses to testify about medical malpractice.[xiii] The Illinois Supreme Court examined and rejected the proposition that there is nothing which a nurse can do which a doctor cannot do. These same issues are raised by HB 629 when it requires physician competence to supervise a nurse.

Conclusion

HB 629 adopts the outdated premise that the physician is automatically enabled to perform all nursing responsibilities, including advanced nursing responsibilities, without attending nursing school or becoming licensed as a nurse. It undermines the separate and distinct body of professional knowledge of nursing. It undercuts the authority of the Joint Committee and authorizes the Board of Medicine to control certain aspects of the practice of nursing without collaboration with the Board of Nursing. The consequences of its adoption as Florida law reach far beyond the *Ortiz* case.

HB 629 also forces us to consider the relationship between supervision and delegation not only between physicians and nurses but among the myriad of licensed health care professionals. This is a far-reaching discussion which is much broader than the ability of CRNAs to give anesthesia in the office setting under the supervision of the surgeon. Nurses must become informed about the current law on supervision and delegation and be able to defend their separate body of professional knowledge. All health care professionals and facilities should monitor changes in the law which may limit supervision to like-licensed or same specialty professionals, a new and perhaps illogical outcome in this complex health care environment

---

[i] The full text of the bill is available online at www.myfloridahouse.gov.
[ii] Chapter 458, Florida Statutes (2004)
[iii] Section 464.003(3)(c), Florida Statutes
[iv] Rule 64 B9-4.001(14), Florida Administrative Code
[v] Section 464.003(3)(c), Florida Statutes
[vi] Section 458.348(3), Florida Statutes
[vii] See House Bill 1009
[viii] Section 456.072(1)(p), Florida Statutes
[ix] Section 458.331(1)(w), Florida Statutes
[x] Section 456.072(1)(o), Florida Statutes
[xi] Rules 64 B9-14.001 and 64 B9-16.004, Florida Administrative Code
[xii] *Sullivan v. Edward Hospital*, 806 NE2d 645 (Ill. 2004).
[xiii] *Sullivan* at 658-659.

Cynthia A. Mikos, is a nurse attorney certified in health law by The Florida Bar who represents nurse practitioners, certified registered nurse anesthetists ("CRNA") and nurse midwives in her legal practice in Tampa, Florida. The information shared in this column is for the purpose of general education and is not legal advice. Readers are encouraged to engage a lawyer familiar with the subject of their question to answer any specific inquiry they may have.

Florida Nurse Practitioner Week
November 6-12, 2005