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Legislation with Greatest Potential Impact to Physicians and their Patients from the 2017 Arkansas General Assembly

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Where's My Doctor?

DAVID WROTEN
EXECUTIVE VICE PRESIDENT

We get that question a lot. It happens often when a physician leaves a practice, usually as an employee. Under most employment contracts the practice – either under hospital or physician ownership – retains ownership of the medical records when a physician leaves. However, the departing physician has a relationship with patients that they've treated and retains some responsibility for those patients. The physician has a responsibility to ensure his/her patients are taken care of and that patients currently under treatment are not abandoned.

It is not unusual for AMS to get a call from patients who want to continue their relationship with that physician but cannot find out where they went. Or, the physician wants to notify his/her patients where they've relocated but the previous employer will not provide a mailing list or will not notify patients on their own. This seems to be more frequent in hospital-based clinics where the hospital claims that the patients belong "to them." Courts clearly disagree. In countless cases, courts routinely agree that the records may belong to the hospital but the legal doctor-patient relationship stays with the treating physician. It's one thing when a physician leaves town or moves out of state, but often, the physician will leave to open their own practice or join another practice in the same community. It's not uncommon to hear stories that the hospital says they don't know where the physician went or patients are simply told their physician is gone and would they like to set an appointment with a new doctor.

So it's nice when an opportunity presents itself for AMS to help rectify problems that get in the way of professional relationships with patients. That opportunity came in the form of HB 1718, now Act 754. HB 1718, The Patient Right to Know Act, was introduced by Rep. Deborah Ferguson at our request. In a nutshell, it attempts to ensure that patients are able to find their physician or that physicians are able to notify their patients when they leave a practice.

Under Act 754, if a physician makes the new practice location or contact information available to the entity they are leaving, that entity is now prohibited from misleading the patient about the whereabouts of the physician or failing to provide the patient with the new contact information. If requested by the departing physician, within 21 days the entity must either provide the physician a mailing list of his/her existing patients, or send a notice to the physician's existing patients with the new contact information.

What happens when a physician leaves and they still have patients scheduled? Within two days of the request mentioned above, the entity must provide the physician with the names and contact information of patients who have upcoming appointments with that physician.

AMS believes these simple measures will go a long way to prevent disruptions in patient care and avoid many of the problems and even lawsuits that currently occur because departing physicians are unable to fulfill their legal and ethical obligations for continuity of care.

Act 754 is but one of the many legislative issues highlighted in this issue of *The Journal.*

AMS

It's not uncommon to hear stories that the hospital says they don't know where the physician went or patients are simply told their physician is gone and would they like to set an appointment with a new doctor.

Legislation with Greatest Potential Impact to Physicians and their Patients from the 2017 Arkansas General Assembly

H. SCOTT SMITH, JD *DIRECTOR OF GOVERNMENTAL AFFAIRS*

Regular Session: January 9 to May 1

Each legislative session takes on a life and personality of its own, and this session seemed to be more fussy and conflict-laden than any other recent sessions. While the number of bills filed in the 2017 session (2069) was slightly higher than the 2015 session (2062), the percentage of those passing this last session (54%) was noticeably lower than in 2015 (63%) and a far cry from twelve years earlier, when the 2005 legislature filed 3176 bills and passed 73% of those filed.

The stage for a session of conflict was quickly set with the AMS-supported tort reform resolution and the more than 50 medical marijuana bills filed to address passage of Issue 6 amending the Arkansas Constitution (which passed 53% to 47%).

AMS ended up actively tracking and working 342 of the 2069 bills filed, and of those bills, the following represent some of more high-profile issues AMS successfully fought for, amended and/or monitored closely that we anticipate will have more of an impact on you, your patients and your practice:

Tort Reform (SJR 8): This passed resolution proposes to amend the Arkansas Constitution and will now be sent directly to the 2018 ballot. SJR 8 would cap attorneys' contingency fees at 33 1/3%, cap non-economic damages at $500,000, cap punitive damages at $500,000 or 3x compensatory damages for each claimant and allows the legislature to amend, repeal or adopt rules of civil practice and procedure.

Physician Dispensing (SB 162/Act 284): Adds contraceptives and Naloxone as prescriptions that a physician can dispense without obtaining a dispensing permit from the Arkansas State Medical Board. Effective July 31, 2017.

Telemedicine (SB 146 and HB 1437/Act 203): Updates the 2015 Telemedicine Act by expanding the "originating site" definition to a patient's location, expands the definition of "telemedicine" to include all types of "electronic information and communication technology," adds "remote patient monitoring" to "telemedicine" definition, clarifies that the use of any type of telemedicine device can be used once the professional relationship is properly established and provides insurance coverage and reimbursement parity not just for physician services, but all services provided via telemedicine as long as the service is comparable to the in-person service. Effective July 31, 2017.

Peer Review (SB 611/Act 975): Amends the 2013 Peer Review Fairness Act by clarifying that not all peer review is covered by the Act (just true adversarial proceedings), explains when an "investigation" begins, addresses the role of attorneys, requires **external reviewers** be chosen by medical staff physicians, requires that the physician under review be included in or copied on any communications with an external reviewer, requires the **hearing panel** members be chosen in accordance with the medical staff bylaws and not just by the hospital administration, and finally, prohibits those hearing panel members from having a conflict of interest. Remedy section allowing a physician to petition the circuit court where action occurred or circuit court of adjoining county within 60 days of a final peer review decision adverse to the physician is effective April 7, 2017. Other parts are effective July 31, 2017.

Prior Authorization (SB 665/Act 815): Unifies the PA process to include determination of medical necessity, determination of whether an individual is covered by the health plan and whether a particular service is covered under the plan for that individual. It also guarantees payment of claims for services that were prior authorized unless: the service is never provided, the claim for service is not submitted in a timely fashion, the patient has exhausted a benefit limitation in his or her plan or the utilization review entity has evidence of misrepresentation, fraud, or abuse by the provider or subscriber.

It also prohibits rescission of authorizations for lack of medical necessity unless the utilization review entity notifies the physician three business days prior to the scheduled service that authorization is being rescinded. There is an exception if the individual is no longer covered on the date of service and the insurer has provided means for the physician to check the patient's status up to the day of service.

The bill mandates a procedure for benefit inquiries ("voluntary" prior authorization) whereby a physician can know whether a service will be paid for a particular patient before providing the service even if the insurer does not require prior authorization. Finally, it prohibits insurers from requiring patients to switch to a different drug under a "step therapy" requirement if the patient has already gone through step therapy for the same drug even if the insurer changes the drug formulary or PBM. Effective August 1, 2017.

Private Right of Action in Alternative Payment (SB 498/Act 724): Prohibits insurers or other payors from requiring physicians to contract away statutory protection by waiver in

a provider agreement or other contract, provides explicit insurance department authority to develop rules and allows physicians to bring direct legal action against an insurer in lieu of an enforcement action by the insurance department. Effective July 31, 2017.

Patient Right to Know (HB 1718/Act 754): When a physician changes practice location, this will prohibit a former employer or practice group of the physician from withholding information from or giving misleading information to the physician's patients regarding that physician's new practice location. If requested within 21 days of leaving, the former employer or practice group must either: send notice to the physician's existing patients regarding the new practice location; post the new location on it's website for one year; or give a list of existing patient names and addresses to the departing physician. Effective March 30, 2017.

Physician Ordered Life Sustaining Treatment (POLST) (SB 356/Act 504): This legislation is intended to work with the nationwide POLST "paradigm" which is designed to simplify and honor patient treatment wishes in end-of-life planning. It focuses on: advance care planning conversations between patients, loved ones and physicians; shared decision-making between a patient and his or her physician about end-of-life treatment options; and honoring those patient wishes on a POLST form. The form is intended to simply communicate shared decisions into actionable medical orders and clarify which end-of-life treatments a patient desires and those they do not want. Effective July 31, 2017.

AMS Amended to Improve:

APRN and PA Expanded Signature Authority (HB 1180/Act 372): Will allow advanced practice registered nurses and physician assistants to sign: certification of disability for patients to receive disabled parking permits; sports physicals to authorize student athletes to participate in athletic activities; physicals for bus drivers; forms relating to do-not-resuscitate orders; forms excusing a potential jury member due to an illness; death certificates; workers' compensation forms; forms relating to absenteeism for employment or school purposes; and authorizations for durable medical equipment. Effective July 31, 2017.

The stage for a session of conflict was quickly set with the AMS-supported tort reform resolution and the more than 50 medical marijuana bills filed to address passage of Issue 6 amending the Arkansas Constitution (which passed 53% to 47%).

Mandatory Usage of Prescription Drug Monitoring Program (SB 339/Act 820): Requires checking the PDMP each time a prescription for Schedule II or III opioid is written and the first time for a benzodiazepine. Directs licensing boards to adopt rules. Boards will now have explicit power to adopt rules limiting Schedule II amounts prescribed. Current exemptions are provided for: a palliative care or hospice patient; residents in a licensed nursing home facil-

Medical Board Legal Issues?

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ity; PDMP inoperability due to technological or electrical failure and oncologists are to check the PDMP when prescribing to a patient on an "initial malignate (*sic*) episodic diagnosis" and every three months following diagnosis while in treatment.

AMS unsuccessfully fought to have stronger exemptions included specifically in the bill, but was successful in getting amendatory language in the bill granting authority to the Arkansas State Board of Health to promulgate additional exemptions other than those contained in the bill. Regulation exemption adoption will require a ¾ vote of the legislature's Legislative Council. In addition, the department of health is to provide quarterly reports on prescribing patterns. Effective July 31, 2017.

AMS Successfully Opposed (and bills failed after committee debate):

- APRN Independence and Allowed Prescribing of Schedule II (HB 1181 and HB 1186)
- APRN as Medicaid PCP (HB 1182)
- APRN Allowed Prescribing of Schedule II (HB 1228)
- CRNA Independence (SB 171)
- Gutting of Clean Indoor Air Act (SB 311)
- Healthcare "Conscience" Refusal (HB 1628): would have allowed a health insurance company to deny coverage for a procedure simply because the company had a conscientious objection.
- Occupational Safety Deregulation (HB 1551 and HB 2159): would have gutted state regulatory agencies' ability to protect the public.
- Local Control of Fluoride (HB 1515 and HB 1865): would have allowed local water systems serving fewer than 5,000 and 22,000, respectively, the ability to disregard the Arkansas Department of Health's minimum fluoride content level.
- Medicaid Conflicts of Interest (SB 175): would have required all Medicaid providers receiving more than $25,000 in a year to disclose all "conflicts" and report certain expenditures to the state the following year.

Other Issues Closely Monitored:

Medical Marijuana (numerous bills): Over 50 bills were filed and 23 became law. Following are a few points taken from the various bills most pertinent to physicians.

To legally purchase, a patient must have a written certification signed by a physician stating the patient has a "qualifying medical condition." Each certification is good for thirty days. The following conditions "qualify" a patient to receive a written certification: cancer; glaucoma; HIV positive or AIDS; hepatitis C; ALS; Tourette's syndrome; Crohn's disease; ulcerative colitis; PTSD; severe arthritis; fibromyalgia; or Alzheimer's disease.

Other qualifying conditions could be any chronic or debilitating disease or condition or its treatment that produces one or more of the following: cachexia or wasting disease; peripheral neuropathy; intractable pain (not responsive to ordinary treatment or surgery for more than 6 months); severe nausea; seizures, including those characteristic of epilepsy; or severe and persistent muscle spasms, including those characteristic of MS.

Written certification may only be made by a MD or DO with an unrestricted Arkansas license and DEA registration to prescribe controlled substances and may NOT be issued based on a telemedicine assessment. Each certification must identify the qualifying condition. The Arkansas Department of Health will be providing the certification form to be used by physicians.

A certifying physician must provide documentation for those qualifying patients who are physically disabled and require a designated caregiver and qualifying patients under age 18. For patients under age 18, the physician must also explain the potential benefits and risks to a parent or guardian.

Generally, physician remuneration from or to a dispensary or cultivation facility is prohibited unless the physician is a qualifying patient. Additionally, physicians who write qualifying medical condition certifications for patients are prohibited from investing in a dispensary or cultivation facility.

According to their website, the Arkansas Department of Health has already created the standardized certification form (which must be used and is available on their website), and anticipates starting to issue medical marijuana registry cards approximately one month prior to medical marijuana being available at dispensaries. The department will communicate to the public when the application process is available.

Special Session: May 1 to May 3

While the regular legislative session activities wrapped-up the first week of April, official *sine die* was not until one month later, on May 1 (for a veto-override session if needed). After officially finishing the regular session, the legislature went back into special session the same day and finished the special session a few days later.

Bills of Interest:

Arkansas Works Re-worked (SB 3/Act 6 & HB 1003/Act 3): These bills lower eligibility caps in Arkansas Works from 138% to 100% of the federal poverty level and allow work requirements be put in place for certain enrollees. Effective May 4, 2017.

Consolidating Medical Marijuana Legislation from Regular Session (SB 2/Act 8): This bill consolidates the codification and makes technical corrections to deal with conflicts in the twenty-three (23) bills that were passed during the regular session. Effective the same date when most of the individual bills are effective, July 31, 2017.

If interested in learning more about some of these issues, AMS will be hosting seven "Wednesday Webinars" throughout the summer on the following Wednesdays from noon to 12:30 pm. The dates and subject matter will be:

July 12-Prescription Drug Monitoring Program Mandatory Use

July 19-Prior Authorization

July 26-Medical Marijuana

August 2-Patient's Right to Know & APRN Expanded Signature Authority

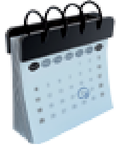
August 9-Physician Dispensing

August 16-Physician Order for Life-Sustaining Treatment

August 30-Telemedicine

Contact the AMS office if you would like more information. AMS

MARK YOUR CALENDAR



SAVE THE DATE

The Arkansas Urologic Society's annual meeting will be held September 8-9 at the 21C Museum Hotel in Bentonville.

Educational programs will be specific to urology. Located on the northeast corner of the Bentonville town square and a short walk to Crystal Bridges Museum of American Art, 21c Museum Hotel Bentonville is a 104-room boutique hotel, contemporary art museum and cultural center. Contact Kay Waldo at 501-224-8967 for more information.

It's Update Time Again!

The AMS has sent out your member update record. You can fill out the form and return it or log on to the website (www.arkmed.org) to update your information. This is the information we use to keep your office information updated for the website and to get important information to you throughout the year.

During the 2017 Arkansas General Assembly, AMS fought and won some important battles for you and your patients. This series of webinars will provide important information on bills that were passed and what steps need to be taken to comply with the laws and regulations. Physicians, office managers, APRN's and other medical staff will benefit from these webinars.

Each webinar is 30 minutes, beginning at noon.

July 12th
Prescription Drug Monitoring
Program Mandatory Use (SB 339/Act 820)

July 19th
Prior Authorization (SB 665/Act 815)

July 26th
Arkansas Medical Marijuana

August 2nd
Patient's Right to Know (HB 1718/Act 754) &
APRN Expanded Signature Authority (HB 1718/Act 754)

August 9th
Physician Dispensing (SB 162/Act 284)

August 16th
Physician Order Life-Sustaining Treatment (SB 356/Act 504)

August 30th
Telemedicine (SB 146 and HB 1437/Act 203)