

Protecting Access to Emergency Care

Submitted to the Governor's Select Task Force on Healthcare Professional Liability Insurance

By: The Florida College of Emergency Physicians
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As the Governor's Select Task Force on Healthcare Professional Liability undertakes its mission, it is important that the task force considers the critical and unique nature of emergency medicine and ensures that the "safety net" of emergency care remains available and accessible to Florida's citizens and visitors.

The "Right" to Emergency Care

Although neither the state nor federal government has yet determined that the public has a "right" to health care in general, both state and federal governments have deemed that, relative to emergency care, the public does have a right to receive pre-hospital ambulance services (i.e. 911) and to receive medical evaluation, treatment and care in a hospital if emergency care is requested. Emergency care in a hospital, in accordance with government mandates, must be provided to the extent of the service capability of the hospital, including physicians who provide specialty medical services. The government has dictated its policy that emergency care be provided regardless of diagnosis (e.g. labor, AIDS), ability to pay, or payer status (i.e. uninsured, Medicaid), national origin (Hispanic or Native American surnames). In spite of its policy mandating that emergency providers, whether such providers are public, private, not-for-profit or other types of entities or individuals, the government has not established policies ensuring that such providers will receive appropriate payment for emergency services provided.

While the policy of ensuring that individuals are able to obtain emergency medical care may be laudable, one might present an analogy of such a policy if such policy was imposed on other entities that provide services to the public, for example, restaurants. If such a policy was applicable to a restaurant, the restaurant would be required to serve every person who entered with whatever meal the patron chose. The restaurant could not turn away patrons who were unruly, who had not been adequately fed prior to entering the restaurant, who were intoxicated or under the influence of illegal drugs, who had eaten bad food prior to coming in the restaurant, or who were not going to pay for the meal provided to them. The policy would apply whether or not the restaurant would indeed lose money on the cost of the food and labor to provide the meals. The policy would also have the consequence that, if the person was unhappy with the meal or became ill, the restaurant could be held liable, as the restaurant had provided the meal and the services to the patron. This policy clearly would be unacceptable in today's society or business environment.

The government has determined that emergency services be provided to every person by or for whom such services are requested. The government has not ensured appropriate payment for such services. Nor has the government provided adequate legal protections for persons and entities providing such services.

What Makes Emergency Medicine Different

Providers of emergency care, as discussed above, are compelled by state and federal laws to treat every patient who presents himself or herself at an emergency department for treatment. Additionally, emergency care providers are subject to laws, such as the “Baker Act” (Florida Mental Health Act) and the “Marchman Act” (Hal S. Marchman Alcohol and Other Drug Services Act of 1993).

Providers of emergency care have no ability to choose their patients. Even if a provider knows that a patient has a history that might not be conducive to an optimal medical outcome, knows that a patient has not followed previous medical advice, or knows that a patient has been extremely litigious, the emergency care provider may not deny services to this patient.

While providers of emergency care are required to treat all patients, the government does not ensure that provision of such services are appropriately compensated. Providers of emergency care are subject to a high percentage of uncompensated or under-compensated care. Studies have been conducted documenting the low rate of compensation for emergency providers. It is our understanding that the task force has opted not to undertake the independently complex issue of provider payment. Should the task force desire documentation of this matter, it will be provided upon request. However, emergency care providers must pay for malpractice insurance and other associated costs for every single uncompensated or under-compensated patient seen by such provider. For a significant percentage of patients, emergency care providers actually lose money every time care is provided, regardless of whether the patient has an emergent condition or is strictly using the emergency department because the patient has no other access to care provided by the State.

Providers of emergency care must be available and ready to provide care around the clock, even when there are no patients. This is referred to as stand-by time. There is no remuneration for emergency care providers being available to the citizens and visitors to the State of Florida 24 hours/day, 365 days/year.

In every community statewide, emergency care providers represent the only universal access to health care for low-income and indigent patients. Typically, one out of every three patients seen by an emergency physician is indigent.

Even though there is no guarantee for appropriate payment for emergency services delivered in good faith, patients have unlimited access to the courts. Emergency physicians and other hospital-based physicians who provide emergency care may be required to carry a minimum of one million dollars in medical malpractice insurance.

Due to escalating premiums and the current medical malpractice situation facing on-call specialist colleagues who may also be needed to treat emergency patients, many specialists are understandably opting to carry no insurance or minimal coverage amounts, frequently leaving the hospital-based physician, and sometimes the hospital, as the “deep pocket.”

Emergency care providers operate in a high-complexity, high-risk environment, using rushed procedures, often late at night. Hundreds of independent judgments must be made without benefit of the patient’s prior medical history. This places the emergency care providers at greater risk, since adverse outcomes are more likely to occur

Florida’s emergency departments remain on the first line of response to a terrorist attack, especially if it involves a biological, chemical or nuclear release.

Fewer and fewer specialists, especially those in high-risk areas such as obstetrics and neurosurgery are willing to be on call for emergency departments. This means more transfers and diversions to facilities that may have specialists on call. This significantly threatens patient care.

Emergency care providers have no control over the amount of or lack of medical care previously received by the patient. Patients may present having had no prior medical care for what might be serious medical conditions, or may have knowingly engaged in activities known to exacerbate existing medical problems. This may place the patient at higher risk of an adverse outcome and the emergency care provider at higher risk of litigation.

Although patients can be referred to other health care providers for follow-up care, emergency care providers have little or no control over the patient’s willingness or ability to obtain such care or the payer’s willingness to cover such follow-up care.

Emergency care providers frequently face multiple co-existing emergencies. The need to ensure adequate coverage of emergency departments by emergency physicians, by emergency nurses and other personnel, and by specialist physicians is paramount.

Emergency care providers generally have no prior physician-patient relationship with their patients. Due to such lack of established professional relationships, encounters with patients in the emergency care setting may be perceived to be less personal, thereby stripping the emergency care provider and the patient of this important ongoing rapport.

Emergency care is different because the State has mandated that such care is available to all individuals who request such care. In light of such mandate, the state needs to ensure vital and critical services be available, including access to specialists. Without appropriate specialists, provision of timely, quality emergency care, may not be available in Florida.

Emergency Services are Affected

As the number of patients accessing hospital emergency departments for care has continued to rise, the number of board certified emergency physicians has fallen. In 1992, there were 4.57 million emergency department visits. At such time, there were 1,146 board certified emergency physicians. In 2001, emergency department visits had increased to approximately 6.4 million, while number of board certified emergency physicians had decreased to 901.

According to a recent *New York Times* article by Joseph Treaster (published August 25, 2002) at least half a dozen hospitals across the country have closed obstetrics wards, others are curtailing trauma services and rural clinics have been temporarily shuttered as a result of soaring costs for medical malpractice insurance.

A Largo hospital plans to stop delivering babies on December 1, while Las Vegas' only trauma center temporarily closed this summer after a massive exodus of doctors to other states. (Source, Orlando Sentinel: September 22, 2002)

More than 1,300 health care institutions nationwide have cut back on services, while 6 percent of the 5,000 member hospitals of the American Hospital Association have eliminated units (Source: AHA Survey, June, 2002) With each service deleted or unit eliminated in our hospitals, such service will not be available to emergency patients.

The Laws Underlying the Government Mandate to Provide Emergency Services

Federal EMTALA Law

The Emergency Medical Treatment and Active Labor Act (EMTALA) was signed into law on April 7, 1986. Certain amendments were made in 1989 and 1990. The federal government has developed rules and guidelines to implement EMTALA.

All persons who come into an emergency department are protected by the law, regardless of whether the person is insured or eligible for Medicare or Medicaid. All persons who present at the emergency department and who request examination and treatment for an emergency medical condition must be treated alike, regardless of payment status. The hospital must provide for an appropriate medical screening to determine whether an emergency medical condition (including labor, psychiatric conditions, substance abuse/intoxicated conditions) exists. The screening exam must be the same appropriate screening examination that the hospital would perform on any individual presenting to the hospital's emergency department with those signs and symptoms, regardless of the individual's ability to pay for medical care and must provide services within its capability. On-call physicians and ancillary services are considered to be within the parameters of "capability".

If the hospital determines that the individual has an emergency medical condition, the hospital must provide, within the capabilities of the staff and facilities available at the

hospital, further medical examination and treatment as required to stabilize the medical condition, or if the hospital does not have the capabilities, to transfer the individual to another medical facility in accordance with stringent transfer criteria and requirements.

Each hospital is required to maintain a list of physicians who are on-call for duty after the initial examination and to provide treatment necessary to stabilize the individual's emergency medical condition. If a hospital offers a service to the public, the service should be available through on-call coverage of the emergency department.

If a higher level hospital that has specialized capabilities (such as burn units, shock-trauma units, neonatal intensive care units, or (with respect to rural areas) regional referral centers are necessary to provide care to patients who might need to be transferred, such specialized hospitals may not refuse to accept the patient from a referring hospital if the hospital has the capacity to treat the individual.

Florida Access to Emergency Services and Care Law

The Florida Access to Emergency Services and Care Law was passed by the Florida Legislature in 1988. The law is similar, but not identical, to the federal EMTALA law.

Florida law provides that every general hospital which has an emergency department must provide emergency services and care for any emergency medical condition when services are requested by any person, ambulance provider, or other hospital seeking a medically necessary transfer.

Florida law provides a two-pronged concept to describe its requirement that hospitals provide emergency services and care. Emergency services and care includes: 1) a medical screening, examination and evaluation to determine if there is an emergency medical condition, and (2) the care, treatment or surgery necessary to *relieve or eliminate* the condition. Such services must be provided "within the service capability of the facility."

Florida law clearly states that provision of emergency services and care shall not be based upon, or affected by, the person's race, ethnicity, religion, national origin, citizenship, age, sex, preexisting medical condition, physical or mental handicap, insurance status, economic status, or ability to pay for medical services, except to the extent that a circumstance such as age, sex, preexisting medical condition or physical or mental handicap is medically significant to the provision of appropriate medical care to the patient.

Florida Emergency Medical Services (EMS/Ambulance) Law

Chapter 401, Florida Statutes, governs the regulation of emergency medical technicians, paramedics, and ambulances. The law requires and provides certain duties for EMS medical directors (licensed physicians) who oversee the medical care provided in ambulances. Ambulances are classified as either "advanced life support" or "basic life

support,” depending on the complexity of medical services provided. Ambulances are generally licensed as either ground ambulances or air ambulances. However, due to Florida’s unique environment, the development of watercraft and quick-response-vehicles, such as bicycles or golf-cart-type vehicles, are enhancing the emergency medical services system’s ability to provide rapid response to patients in need of immediate care.

Section 401.45, F.S., provides that a person may not be denied needed prehospital treatment or transport from any licensee (i.e. ambulance) for an emergency medical condition.

Section 395.1041, the Florida Access to Emergency Services and Care Law, specifies that emergency medical services providers (ambulance providers) may not condition either prehospital transport of any person nor transfer of patients in need of treatment for an emergency medical condition on the ability to pay.

Florida’s Trauma Care Law

Florida’s trauma law is found as “Part II” of Chapter 395, the hospital regulatory statute. Trauma centers are regulated by the Department of Health.

Trauma is generally an injury due to blunt or penetrating means, or burns. Examples might include automobile crashes; bicycle, motorcycle, or pedestrian incidents, significant falls, and knife or gun shot wounds.

One of the central premises of trauma care is development of an inclusive trauma system that will ensure that trauma patients receive definitive medical care within the “golden hour” – a period of time that is significant in determining mortality and morbidity relative to trauma patients. The trauma system includes coordination of components from the initial 911 contact; to ambulance/paramedic assessment, response, and transport; to non-trauma center hospitals initial assessment and care; to activation of the trauma team at the trauma center. The entire system is critical to ensuring that life-saving care is provided to the trauma patient within the “golden hour.”

A critical component of trauma care is the trauma center. There are three general types of trauma centers in Florida: Level I Trauma Centers; Level II Trauma Centers, and Pediatric Trauma Referral Centers.

Becoming a trauma center is not a mandate of the state. Whether or not a hospital chooses to become a trauma center is purely voluntary, and depends on many things, including a commitment to serve the community and the ability to ensure in-house or prompt availability of a number of required physician specialties. Once a hospital has applied to become a state-approved trauma center, there are a number of stringent requirements and government mandates that apply. The trauma center must accept all trauma victims. The hospital applying to become or operating as a trauma center must commit to certain capital expenditures and costs to meet operating requirements. There

must be a commitment of specialist physicians who are willing to provide specialist response. For Level I trauma centers, “in-hospital” coverage is often required. For Level II trauma centers, the specialists must be “promptly available,” as defined by the state.

The state requires that hospitals that operate as approved trauma centers maintain a number of required specialist physicians. In addition to addition to emergency physicians and trauma surgeons, a number of surgical and other specialists must be part of the trauma program. Required surgical specialists include: general, OB-GYN, neurosurgery, ophthalmology, oral/maxillofacial, hand, cardiac, orthopedic, pediatric, plastic, thoracic, urology, otorhinolaryngologic. Other required specialists include: cardiology, gastroenterology, hematology, infectious disease, internal medicine, nephrology, pathology, pediatrics, psychiatry, pulmonary medicine. Without having the complement of required specialists, the hospital cannot operate as an approved trauma center in Florida.

Florida’s trauma system has a need for trauma centers. According Department of Health figures, there were 33 trauma centers in Florida in 1986. In 2002, there were 20 trauma centers. In a 1990 State Trauma Report, the ideal number of trauma centers, based on population, demographic and other factors at that time, was 44-60. According to the 1999 Trauma System Report on Timely Access to Trauma Care, submitted to the Legislature by the Department of Health, there has been a lack of timely access to trauma care due to the state’s fragmented trauma system.

Some of the reported issues facing the trauma system include the ability to maintain specialists, extreme medical liability, the underlying cost of operating a trauma center and overcrowded trauma centers. Many of these issues are similar to the issues facing hospitals and physicians in non-trauma center hospitals.

Benefits to the Public and Florida’s Emergency Care System

Possible areas of benefit of the current proposal relative to emergency services include, but are not limited to:

- Encouraging specialists to maintain hospital privileges or to provide needed services in a hospital environment, thus making such services available for emergency department patients
- Enhancing recruitment of physicians to hospitals in Florida, thereby enhancing the availability of such emergency and specialist physicians to serve in Florida’s emergency departments
- Enabling smoother operation of Florida’s EMS system through availability and stabilization of emergency physicians and specialists available to hospital emergency departments
- Enhancing the trauma system by encouraging physicians who serve at trauma centers to remain available to the system and by encouraging other physicians to agree to serve at trauma centers.
- Reducing wait-time for patients needing emergency or specialist physician care through improving the availability of physicians at hospitals. Such improved

availability of physicians will also reduce the number of medically necessary transfers between hospitals and will reduce diversion of ambulances due to lack of specialty availability. This increased availability of prompt medical care will benefit patient care.

- Ensuring that our first responders (i.e. emergency medicine professionals in and out of the hospital setting) are available in the event of a weapons of mass destruction event..