

N.D.A.G. Letter to Rolfson (Nov. 16, 1990)

November 16, 1990

Mr. Calvin N. Rolfson
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North Dakota Board of Nursing
P.O. Box 2196
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Dear Mr. Rolfson:

Thank you for your August 7, 1990, letter in which you request my opinion on the question of whether the Board of Nursing (hereafter the Board) currently has the authority to promulgate administrative rules authorizing limited autonomous prescription practices for certain registered nurse licensees of the Board.

The Board administers and enforces statutes concerning the practice of nursing as a registered nurse or licensed practical nurse in North Dakota pursuant to N.D.C.C. ch. 43-12.1. The Legislature has charged the Board to "[a]dopt such rules under chapter 28-32 as are necessary to carry out the provisions of [N.D.C.C. ch. 43-12.1]" N.D.C.C. § 43-12.1-08(18).

N.D.C.C. ch. 43-12.1 authorizes the Board to delineate requirements to qualify to practice as a registered nurse or licensed practical nurse in the state and to establish standards with respect to such practice. The Board's authority in this respect was recognized in Trinity Med. Center v. N.D. Bd. of Nursing, 399 N.W.2d 835 (N.D. 1987) (upheld Board's authority to require by rule associate and baccalaureate degrees to become eligible to be a licensed practical nurse and a registered nurse respectively).

The Board now proposes to promulgate rules to authorize registered nurses, upon completion of additional specialized preparation, to write prescriptions for certain unspecified drugs, including certain unspecified controlled substances. You specifically inquire whether the Board has authority to promulgate these rules.

The North Dakota Supreme Court has held that it is proper to delegate rulemaking authority in very general terms if there are adequate standards and procedural safeguards.

N.D. Council of School Adm'rs v. Sinner, 458 N.W.2d 280, 285 (N.D. 1990); Trinity at 844. Most recently the North Dakota Supreme Court explained:

[W]e now follow the modern view which recognizes that, in a complex area, it may be necessary and appropriate to delegate in broad and general terms, as long as there are adequate standards and procedural safeguards.

. . . In Trinity Medical Center v. North Dakota Board of Nursing . . . [w]e concluded that a more relaxed application of the nondelegation doctrine was "necessitated by the complexities of the society in which we live."

458 N.W.2D 280, 285 (N.D. 1990).

It is my opinion the Legislature has articulated the applicable standards for prescribing medication in the definition of the practice of registered nursing found in N.D.C.C. § 43-12.1-02 and the definition of the practice of medicine found in N.D.C.C. § 43-17-01(2). These two sections establish a boundary between the nursing profession and the medical profession. This boundary may not be crossed without specific legislative action.

N.D.C.C. § 43-12.1-02(5) defines the practice of nursing as a registered nurse to include:

the performance of acts requiring the specialized knowledge, judgment, and skill based on principles of the biological, physical, and behavioral, and social sciences in:

. . . .

- f. The performance of such additional acts which are recognized by the nursing profession as proper to be performed by registered nurses who have had additional specialized preparation and are authorized by the board through its rules to perform such acts.

(emphasis supplied). Thus, the North Dakota Legislature has described a two-step process for determining additional acts which may be performed by the nursing profession. The first step is the consideration of whether the additional acts "are recognized by the nursing profession as proper to be performed by registered nurses who have additional specialized preparation." The second step of the process is the Board's authorization to perform the additional acts through its rules. The standard applied by the Legislature to determine the matters for which the Board may adopt rules, is the acts which are recognized by the nursing profession. The question then becomes whether the prescription of drugs by registered nurses who have additional specialized preparation is recognized as proper by the nursing profession.

At present only four states authorize nurses to independently prescribe medication in limited situations. Alaska Stat. § 8.68.410(1) and (8) (authorizing the Board of Nursing to adopt regulations permitting prescriptive practices by registered nurses); Minn. Stat. § 148.171(3)(b) (authorizing nurse midwives to prescribe medication when practicing nurse midwifery); Or. Rev. Stat. § 678.375 (authorizing the Board of Nursing to grant prescriptive privileges); and Wash. Rev. Code § 18.88.280(16) (prohibiting only the prescription of schedule I through IV controlled substances). Of these four states, only Washington does not expressly authorize nurses to prescribe medication by statute.

However, Washington's statutory scheme impliedly authorizes this practice by specifically prohibiting the prescription of schedule I through IV controlled substances, while not prohibiting the prescription of schedule V substances. Additionally, Wash. Rev. Code § 18.64.355(2) authorizes registered nurses to obtain drugs in emergency situations without a doctor's written order. Thus, the regulations promulgated by the Board of Nursing permit prescription of medications only "pursuant to applicable state and federal laws." Wash. Admin. Code § 308-120-400.

In each of the other instances where a state has authorized nurses to independently prescribe medication, the authority to prescribe medication is either provided specifically by statute or by a statute specifically authorizing the regulatory board to promulgate rules concerning the practice of prescribing medication.

The enactment of statutes authorizing prescriptive privileges to nurses in other states does not meet the threshold requirement under North Dakota law that the acts be "recognized by the nursing profession as proper to be performed by registered nurses who have had additional specialized preparation." To the contrary, the fact that in 23 of the 27 states whose statutes address prescription of medication by nurses the prescriptive privilege is limited to situations where a physician is involved in one manner or another, indicates that the practice of prescribing medication is not recognized as the practice of nursing.

Furthermore, that the prescription of medication is the practice of medicine and is recognized as such, may be concluded from the definition of the practice of medicine found in N.D.C.C. § 43-15-01(2)(b) and the commonly understood meaning of the word "prescribed." In medical parlance, the term "prescribed" means "(t)o order or recommend the use of (a drug or treatment)." American Heritage Dictionary, p. 979 (2nd Ed. 1982). Thus, the practice of medicine as defined in North Dakota law would include the prescription of medication.

The Board of Nursing may not circumvent the proscription on the unlicensed practice of medicine by enacting a rule purporting to bring a portion of the practice of medicine, the independent prescription of medication, within the scope of the practice of nursing. It is therefore my opinion that the practice of nursing as a registered nurse who has had additional specialized preparation does not include the independent prescription of medication.

In rendering this opinion I recognize the national trend to grant administrative agencies broad authority to promulgate rules. However, even that broad authority must be tempered by the application of specific standards. I also recognize that the nursing profession and the other health professions are constantly changing and consequently flexibility in legislation is necessary to keep up with those changes. Nonetheless, the North Dakota Legislature has demonstrated its ability to specifically authorize health care professionals to prescribe drugs when that authority is deemed necessary by the Legislature. See N.D.C.C. §§ 43-28-01(1) (Dentists); 43-29-12 (Veterinarians); 43-13-01(3) and (Optometrists). Therefore, it is my recommendation that if the Board

chooses to pursue prescriptive powers for the professionals it regulates the Board should seek specific legislative authority to authorize registered nurses with advanced training to prescribe medication.

Sincerely,

Nicholas J. Spaeth

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