STATE OF TENNESSEE
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Opinion No. 10-22

Rules Implementing the Tamper-Resistant Prescription Act

QUESTIONS

Administrative rules and regulations have been promulgated recently by several of the Health Related Boards in implementation of 2008 Acts, Public Chapter 1035, relating to tamper-resistant prescriptions. These rules have prompted several questions:

1. Is there any explicit statutory authority for a nurse anesthetist, nurse midwife, or clinical nurse specialist to prescribe prescription medications?

2. Does Tennessee Code Annotated § 63-7-126 give prescribing privileges to all categories of advanced practice nurse?

3. Does Tenn. Code Ann. § 63-7-123, which allows qualified nurses in the category of advanced practice nurse known as "nurse practitioner" to be issued a certificate of fitness to prescribe, also authorize the Board of Nursing to issue a certificate of fitness to prescribe to the other three categories of advanced practice nurse?

OPINION

1-3. Based upon our examination of the provisions of the relevant law, as it existed on and before May 22, 2002 and as it exists today, we conclude that, since 1980, there has existed statutory authority for issuance of a certificate of fitness to prescribe to an advanced practice nurse anesthetist, nurse midwife, or clinical nurse specialist, as well as to an advanced practice nurse practitioner, so long as that individual has met all of the qualifications prescribed by the Board of Nursing for issuance of such certificate.

ANALYSIS

1-3. 2008 Acts, Public Chapter 1035 (hereafter "the Act"), was passed by the Legislature in order to comply with the requirements of federal law.[1] The Act requires that all prescriptions written or printed in this state be written on tamper-resistant prescription paper that meets federal requirements. Tenn. Code Ann. § 53-10-401(a). It applies to "practitioners authorized to write prescriptions in this state." Id.

[1] The federal law is Section 7002(b) of the United States Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act of 2007, P.L. 110-28.

The health related boards that regulate Tennessee prescribers recently have adopted identical rules that provide additional detail with respect to the required characteristics of tamper-resistant prescription paper. *See, e.g.*, Tenn. Comp. R. & Regs. 0880-02-.23 (Tennessee Board of Medical Examiners). The rules define the "prescriber[s]" to whom they apply; a prescriber is "an individual licensed in Tennessee as a medical doctor, podiatrist, *advanced practice nurse with a certificate of fitness to prescribe*, dentist, optometrist, osteopathic physician, or physician's assistant." *See, e.g.*, Tenn. Comp. R. & Regs. 0880-02-.23(2)(b), 1000-04-.10(2)(b) (Tennessee Board of Nursing) (emphasis added).

The above regulatory definition of "prescriber" has prompted your request for an opinion from us. Citing Tenn. Code Ann. §§ 63-7-123 and 63-7-126, you question whether advanced practice nurses who are not "nurse practitioners" - but are "nurse anesthetists," "nurse midwives," or "clinical nurse specialists" - are authorized by Tennessee law to obtain from the Board of Nursing a certificate of fitness to prescribe medications.

Tenn. Code Ann. § 63-7-123, titled "Certified nurse practitioners – Drug prescriptions – Temporary certificate – Rules and regulations" and amended a number of times since its 1980 enactment, contains much of the statutory law that is applicable to those nurses who are authorized to write and sign prescriptions and/or issue drugs. Most of its provisions refer to such persons as "nurse practitioners" or "nurse practitioners who hold a certificate of fitness." However, as will be discussed further below, nothing in Tenn. Code Ann. § 63-7-123 or in any other provision of the Tennessee Code establishes a legislatively-imposed definition of these terms. Tenn. Code Ann. § 63-7-126, titled "Advanced practice nurses" and enacted in 2002, established the certification category of "advanced practice nurse" in Tennessee. It defines "advanced practice nurse" as a "registered nurse with a master's degree or higher in a nursing specialty and national specialty certification as a nurse practitioner, nurse anesthetist, nurse midwife, or clinical nurse specialist." Tenn. Code Ann. § 63-7-126(a). Paragraph (e) of Tenn. Code Ann. § 63-7-126 states:

> Nothing in this section shall be interpreted to alter or change the current law as it existed on May 22, 2002, regarding prescriptive rights, supervision, or scope of practice for nurse anesthetists regulated under this title, nurse midwives as described in § 56-7-2407, clinical nurse specialists, or certified nurse practitioners as defined in § 63-7-123. Nor shall anything in this section be interpreted to allow any board or other entity to promulgate rules that would alter or change the law as it existed on May 22, 2002, regarding such prescriptive rights, supervision, or scope of practice.

Based upon the above statutory provisions, we have determined that an examination of the provisions of the law as it existed on and before May 22, 2002, as well as today, is necessary to answer your questions.

In 1980, the Tennessee Legislature first granted prescriptive rights to certain nurses. It did so by means of Public Chapter 851. This legislation included a provision directing the Board of Nursing to:

> [e]stablish and examine the qualifications, competencies, training, education, and experience required of a registered nurse applying for a certificate of fitness as a nurse practitioner, as defined by the board of nursing, and of such nurse practitioner who has met such additional requirements, sufficient to prepare such person to write and sign prescriptions and/or issue drugs in accordance with the limitations and provisions of Section 7 of this act.[2]

1980 Acts, Public Chapter 851, § 3 (codified at former Tenn. Code Ann. § 63-736(m), subsequently renumbered as former Tenn. Code Ann. § 63-7-207(13)). Public Chapter 851 further directed that if the Board of Nursing found an applicant "defined" in Section 3 of the chapter to be "worthy and competent," it was to:

> recommend to the licensing board for the healing arts that a certificate of fitness be issued to such person, designating such person to be a certified nurse practitioner, and . . . recommend such nurse practitioner who [has met] such additional qualifications, competencies, training, education, and experience, pursuant to such section, sufficient to prepare such person to write and sign prescriptions and/or issue drugs within the limitations and provisions of Section 7 of this act.

1980 Acts, Public Chapter 851, § 4 (codified at former Tenn. Code Ann. § 63-103, subsequently renumbered with minor changes in language as former Tenn. Code Ann. § 63-1-104(b)).

In 1985, the Legislature abolished the state licensing board for the healing arts and transferred to the Board of Nursing the healing arts board's previous authority to issue certificates of fitness to nurse practitioners upon the recommendation of the Board of Nursing. 1985 Acts, Pub. Chap. 120, § 9.[3] Following passage of these amendments, the Board of Nursing's statutory authority to authorize nurse prescribers lay in Tenn. Code Ann. §§ 63-7-207(13) and 63-7-123. Tenn. Code Ann. § 63-7-207(13) gave the Board the power and duty to:

> [e]stablish and examine the qualifications, competencies, training, education, and experience required of a registered nurse applying for a certificate of fitness as a nurse practitioner, as defined by the board of nursing, sufficient to prepare such person to write and sign prescriptions and/or issue drugs in

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[2] Section 7 of Public Chapter 851 restricted such authorized nurse practitioner to writing and signing prescriptions and/or issuing drugs while practicing in site-specific areas and primary health care centers and facilities that were approved by the licensing board for the healing arts, upon the recommendation of the primary care advisory board. These provisions were codified at former Tenn. Code Ann. § 63-129, subsequently renumbered as former Tenn. Code Ann. § 63-1-129(b)(2). Any prescription written and signed and/or any drug issued by such nurse practitioner was deemed to be that of the physician under whose supervision and control the nurse practitioner was practicing. 1980 Acts, Pub. Chap. 851, § 7 (codified at former Tenn. Code Ann. § 63-129, subsequently renumbered as former Tenn. Code Ann. § 63-1-129(b)(3)).

[3] This section was codified at former Tenn. Code Ann. § 63-7-123(a) and (b).

accordance with the limitations and provisions of § 68-1-602.[4]

Tenn. Code Ann. § 63-7-123 provided that:

> (a) The Board shall issue a certificate of fitness to nurse practitioners who meet the qualifications, competencies, training, education, and experience, pursuant to Section 63-7-207(13), sufficient to prepare such persons to write and sign prescriptions and/or issue drugs within the limitations and provisions of Section 68-1-602, Tennessee Code Annotated.
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> (b) A nurse who has been issued a certificate of fitness as a nurse practitioner pursuant to Sections 63-7-207 and 63-7-123, Tennessee Code Annotated, has not been automatically given the right to write and sign prescriptions and/or issue drugs but such person shall be given such privileges as provided for by Sections 63-7-207 and 63-7-123, Tennessee Code Annotated, only when the certificate of fitness of the nurse practitioner, and the recommendation of the Primary Care Board for the site at which the nurse practitioner is practicing has been recorded and filed in accordance with Section 68-1-602, Tennessee Code Annotated.

We have been informed that pursuant to this 1985 statutory authority, the Board of Nursing issued approximately 150 certificates of fitness in December 1985 to nurses whom it had established as qualified to prescribe and had defined as nurse practitioners. These early holders of certificates of fitness as nurse practitioners included nurse midwives and other categories of what are now referred to as advanced practice nurses.

Over the next several years, the Legislature made a number of changes to the statutes pertinent to nurse prescribers. In 1992, it enacted provisions for the issuance of a temporary certificate of fitness. 1992 Acts, Pub. Chap. 822. The Legislature specified that such temporary certificate could be issued to persons who are licensed to practice in Tennessee, have a "master's degree in a nursing clinical specialty area with preparation in specialized practitioner skills which includes three (3) quarter hours of pharmacology instruction or its equivalent," and who have "applied for examination and/or [are] awaiting examination results for national certification as a first-time examinee in an appropriate nursing specialty area." *Id.* (presently codified at Tenn. Code Ann. § 63-7-123(c)). Other changes included abolishing the "site-specific" restrictions upon nurse practitioners' prescribing and replacing such restrictions with notice-filing, formulary and protocol requirements (*see* 1994 Acts, Pub. Chap. 569; 1996 Acts, Pub. Chap. 659)[5]; and authorizing nurse practitioners who hold a certificate of fitness to prescribe

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[4] Former Tenn. Code Ann. § 68-1-602, as amended in 1985, included requirements that the Director of the Division of Health Related Boards record and file the Primary Care Advisory Board's site specific recommendations as to the areas where each nurse practitioner was approved and permitted to write and sign prescriptions and/or issue drugs, together with the name of the supervising physician under whom such nurse was rendering service.

[5] These provisions are codified presently at Tenn. Code Ann. § 63-1-132(c) and within Tenn. Code Ann. § 63-7-123.

and/or issue controlled substances, in compliance with physician supervisory rules jointly adopted by the Board of Medical Examiners and the Board of Nursing (*see* 1997 Acts, Pub. Chap. 507).[6] As it did with other prescribing practitioners, the Legislature also imposed upon nurse practitioners requirements with respect to such matters as legibility of prescriptions. *See, e.g.*, 2004 Acts, Pub. Chap. 678.[7]

As noted above, when the Legislature adopted the "advanced practice nurse" statute in 2002, it stated that nothing in the new statute should be interpreted to alter or change the current law as it existed on May 22, 2002, regarding prescriptive rights, supervision, or scope of practice for nurse anesthetists, nurse midwives, clinical nurse specialists, or certified nurse practitioners. Tenn. Code Ann. § 63-7-126(e). As of May 22, 2002, the Board of Nursing's "Qualifications" rule governing qualifications for issuance of a certificate of fitness as a nurse practitioner with privileges to write and sign prescriptions and/or issue legend drugs required in paragraph (1) that an applicant meet all of the following requirements:

(a) Current licensure as a registered nurse under T.C.A. Title 63, Chapter 7;
(b) Graduation from a program conferring a master's or doctoral degree in nursing;
(c) Preparation in specialized practitioner skills at the master's, post-master's, doctoral, or post-doctoral level. Said specialized practitioner skills education shall include, but not be limited to, at least three (3) quarter hours of pharmacology instruction or its equivalent; and
(d) Current national certification in the appropriate nursing specialty area.

Tenn. Comp. R. & Regs. 1000-04-.03(1) (effective June 8, 1999). This paragraph is still in effect today, although it has been renumbered as paragraph (2) of rule 1000-04-.04 (titled "Certificate of Fitness"). Tenn. Comp. R. & Regs. 1000-04-.04(2) (effective August 11, 2004).

Examination of the language of this rule demonstrates that it does not limit issuance of certificates of fitness as a nurse practitioner with privileges to write and sign prescriptions and/or issue legend drugs to only those nurses with an advanced degree in, and national certification as, a "nurse practitioner." Rather, the rule allows, in accordance with the Board of Nursing's practice in issuing such certificates of fitness since 1985, issuance of certificates of fitness to nurse anesthetists, nurse midwives, and clinical nurse specialists, as well as to nurse practitioners, so long as any such advanced practice nurse meets the qualifications set out in the rule.

Based upon the above examination of legal authority, we conclude that, since 1980, there has existed statutory authority for issuance of a certificate of fitness to prescribe to an advanced practice nurse anesthetist, nurse midwife, or clinical nurse specialist, as well as to an advanced

[6] These provisions are codified presently within Tenn. Code Ann. § 63-7-123.

[7] Pertinent to nurse practitioners who are authorized to prescribe drugs, these requirements are codified presently at Tenn. Code Ann. § 63-7-123(b)(3).

practice nurse practitioner, so long as that individual has met all of the qualifications prescribed by the Board of Nursing for issuance of such certificate. Mindful that the primary object in applying and construing statutes is to determine the legislative intent, we take particular note of the fact that from 1980 until the present, the Legislature has not itself defined the term "nurse practitioner." Rather, from the beginning it has specifically given this authority to the Board of Nursing. 1980 Acts, Public Chapter 851, § 3 (codified at former Tenn. Code Ann. § 63-736(m), subsequently renumbered as former Tenn. Code Ann. § 63-7-207(13)). Today, this provision is found at Tenn. Code Ann. § 63-7-207(14) and reads remarkably similarly to the language originally enacted in 1980 (the Board of Nursing has the power and duty to "[e]stablish and examine the qualifications, competencies, training, education and experience required of a registered nurse applying for a certificate of fitness as a nurse practitioner, *as defined by the board*, sufficient to prepare such person to write and sign prescriptions and/or issue drugs in accordance with the limitations and provisions of § 63-1-132" (emphasis added)). Since 1980, the Legislature has not altered this broad conveyance of definitional authority to the Board of Nursing. Furthermore, it expressed the specific intention in 2002 that its enactment of the "advanced practice nurse" statute would not alter or change current law as it existed on May 22, 2002, regarding prescriptive rights, supervisions, or scope of practice for nurse anesthetists, nurse midwives, clinical nurse specialists, or certified nurse practitioners. In defining the category of "nurse practitioners" who were and are qualified to receive a certificate of fitness to prescribe to include other advanced practice nurses, it is our opinion that the Board of Nursing has acted within the scope of its legislatively-conveyed authority.

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