

January 13, 1993

Ms. Leola Daniels, M.S., R.N.
Executive Director
Idaho State Board of Nursing
280 N. Eighth, Suite 210
STATEHOUSE MAIL
Boise, ID 83720

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Ms. Daniels:

On October 11, 1991, you requested an opinion from this office interpreting the Idaho Nursing Practice Act, concerning non-licensed personnel administering prescribed medications to patients in medical offices. The issue presented was whether Idaho Code §§ 54-1402(b)(1)(f) and (2)(d) of the Nursing Practice Act mandates that only licensed nurses be authorized to perform such nursing functions as administration of medications and treatments prescribed by physicians (except as specifically exempted by the Nursing Practice Act or rules of the Board of Nursing).

This office responded by letter dated January 24, 1992, stating that the law in Idaho governing the practice of medicine and the administration of prescribed medication does not exclusively reserve to licensed nurses the ability to administer prescribed medication. This opinion was based in part upon Idaho Code § 54-1402 which grants licensed nurses the power to administer medication, but lacks any express language exclusively granting this power to licensed nurses. We noted that this section must be read in conjunction with the Medical Practice Act, Idaho Code § 54-1804, which provides the penalties and remedies relating to the unlicensed practice of medicine. Idaho Code § 54-1804(1) states exceptions to the rule:

Under the circumstances described and subject in each to limitations stated, the following persons, though not holding a license to practice medicine in this state, may engage in activities included in the practice of medicine:

(g) A person administering a remedy, diagnostic procedure or advice as specifically directed by a physician

We concluded that, although the extent to which a physician may delegate duties to unlicensed personnel pursuant to Idaho Code § 54-1804(1)(g) is unclear, it is

inappropriate to define the limits through the duties enumerated to licensed nurses in Idaho Code § 54-1402.

On May 1, 1992, Mr. Meuleman and yourself met with Attorney General EchoHawk to urge reconsideration of the conclusion stated in the opinion letter of January 24, 1992. Mr. Meuleman provided this office his legal analysis of the relevant statutes in a letter dated June 2, 1992.

After reviewing Mr. Meuleman's analysis, and further researching and considering this issue, we conclude that our original reasoning was correct.

The regulation of duties non-licensed medical personnel are allowed to perform under the control and supervision of a physician is not governed by the state regulations governing the practice of nursing. The Nursing Practice Act regulates the profession of nursing, not the entire field of health care providers. The regulation of duties non-licensed medical personnel may perform is governed by Idaho Code § 54-1804, which provides the penalties and remedies relating to the unlicensed practice of medicine.

As Mr. Meuleman pointed out in his legal analysis, the initial step in interpreting statutory language is the plain meaning rule. "[U]nless the result is palpably absurd, we must assume that the legislature means what it clearly stated in the statute." Sherwood v. Carter, 119 Idaho 246, 254, 805 P.2d 452, 460 (1991). Nowhere in the Nursing Practice Act is there any indication that the duties enumerated therein are to be exclusively reserved to registered nurses. In addition, the plain language of Idaho Code § 54-1804(1)(g) states that any person may administer "a remedy, diagnostic procedure or advice specifically directed by a physician." There is no language limiting the duties that a physician may delegate to those for whom licensure is not otherwise required.

Read together, nurses may perform all functions enumerated in Idaho Code § 54-1402, and physicians may direct a non-licensed person to administer a remedy, diagnostic procedure or advice, pursuant to Idaho Code § 54-1804(1)(g). To conclude that the extent to which a physician may direct a non-licensed assistant is governed by the duties enumerated to licensed nurses is to go beyond the plain language of these two statutes.

This conclusion is supported by the construction of Idaho Code § 54-1803(1), which defines physicians' assistants. This section excludes physicians' assistants from performing those functions and duties specifically delegated by law to those persons licensed as pharmacists, dentists, dental hygienists and optometrists. If the legislature had intended to restrict the activities of non-licensed persons under Idaho Code § 54-1804(1)(g), in relation to traditional nursing functions, it could easily have done so in this

subsection just as it did in § 54-1803 (1) with regard to physicians' assistants and several other potentially overlapping health care professions.

The doctrine of *expressio unius est exclusio alterius* provides that if the statute specifies one exception to a general rule, other exceptions are excluded. Black's Law Dictionary, 521 (rev. 5th ed.), Kansas Attorney General Opinion No. 86-125. Given this rule of statutory construction, it follows that nonlicensed assistants as referred to in Idaho Code § 54-1804(1)(g) are not prohibited from administering medication because the legislature would have so stated if it had so intended.

To add to Idaho Code § 54-1804(1)(g) "for which licensure is not otherwise required," as Mr. Meuleman suggests, would not be giving the plain meaning to the statute, but imposing our own interpretation. Such action is inappropriate by this office, and must be left to the legislature to clarify.

Our statutory interpretation is consistent with that of other jurisdictions' interpretations of similar statutes. Tennessee Attorney General Opinion No. 88-09 addressed the issue of under what circumstances unlicensed staff members of private group homes may administer medication to residents. The opinion concluded that although administering medication was a function expressly granted to licensed nurses and physicians, non-licensed persons were also allowed to administer medication when under the supervision of a licensed physician or nurse.

Utah Attorney General Opinion No. 80-12 answered the question whether the use of psychological assistants by individuals licensed to practice psychology in the state of Utah was proper. Finding no law on point, that office analogized the use of non-licensed employees in a professional setting to the practice of medical doctors and dentists using non-licensed assistants to aid in the performance of their duties. The Utah opinion concluded:

[T]he law inherently recognizes that anyone practicing in the field of the learned professions . . . may employ assistants provided they serve under the direct control and supervision of the licensed practitioner and do not directly counsel with or advise the client or perform any other function specifically reserved to one who is so licensed.

Utah Attorney General Opinion No . 80-12, p. 2.

The common thread running through these opinions is the direct control and supervision provided by the physician. The authority for a non-licensed employee to assist the professional is not limited by the duties the state empowers to other licensed

personnel, absent express legislative intent to the contrary. Rather, it is governed by the plain meaning of the statutes the legislature has enacted.

In Kansas, the issue of whether physicians' assistants could issue prescription orders was raised during the 1978 session of the legislature. The special committee's report on the proposed bill states as follows:

The Committee has concluded that the scope of practice of a physicians' assistant in Kansas should be determined by the employing physician rather than by the Board of Healing Arts or by statutes. Experience in those states which have adopted a statutory "laundry list" of responsibilities which can be assumed by the physicians' assistant indicates that this approach needlessly limits the use of the physicians' assistant. In reaching the conclusion that the responsible physician should determine the scope of practice of the physicians' assistant, the Committee recognizes that the physician who employs a physicians' assistant remains legally and medically responsible for the actions of that assistant. Ultimately, only the employing physician can judge effectively how the physicians' assistant performs and the limits of his capabilities. The physician should be free to exercise judgment in such matters, fully realizing that if his judgment is faulty he retains liability for the practice acts of the physicians' assistant.

Kansas Attorney General Opinion No. 86-125.

The opinion concluded that, because physicians' assistants are expressly authorized by statute to practice medicine under the direction and supervision of a physician and that practice includes the prescribing of medicine, physicians' assistants were allowed to issue prescriptions under the direction and supervision of a physician. *See also* Michigan Attorney General Opinion No. 77-5220; Maryland Attorney General Opinion No. 86-008.

The issue of non-licensed assistants performing tasks which are also functions granted to licensed nurses is analogous to one of the issues addressed in Magit v. Board of Medical Examiners, 17 Cal. Rptr. 488, 366 P.2d 816, 820 (1961). There, the court noted:

It has generally been recognized that the functions of nurses and physicians overlap to some extent, and a licensed nurse, when acting under the direction and supervision of a licensed physician, is permitted to perform certain tasks which, without such direction and supervision, would constitute the illegal practice of medicine and surgery.

This issue in Magit, the status of a licensed nurse administering anesthetics, is analogous to the issue before us. Magit recognized the right of nurses under the supervision of physicians to perform functions they were not otherwise licensed to perform and that would otherwise constitute the illegal practice of medicine. Similarly, in this instance, non-licensed personnel may perform functions otherwise granted to licensed nurses, so long as they perform these functions under the supervision of a physician.

Although the extent to which a physician may delegate duties to office personnel pursuant to Idaho Code § 54-1402 is unclear, it is not defined by the duties enumerated to licensed nurses in Idaho Code § 54-1402. Further clarification is appropriate only by the legislature.

Very truly yours,

JOHN J. MCMAHON
Chief Deputy