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MEMORANDUM

DATE: October 13, 2014

TO: Ruby Jason, Executive Director
Oregon State Board of Nursing

FROM: Thomas W. Cowan, Senior Assistant Attorney General
Business Activities Section

SUBJECT: Interstate Practice of Nursing

This memo is in response to recent inquiry from the Board's staff pertaining to the practice of nursing in an interstate environment. With an understanding that these issues will be discussed more thoroughly below, the specific questions with short answers are set forth as follows: (Note: Statutes referenced below are included in Attachment A.)

1. Do the definitions of the "practice of nursing" and "treating" in ORS 678.010(8), (9), (10), and (11) include nursing care through methods other than face-to-face, hands-on application of therapeutic measures such as telephonic consultation, video-conferencing methods (*e.g.* Skype®), or other electronic applications (*e.g.* e-mail dialogues)? Short answer: Yes.

2. Does the statement in ORS 678.021 — "in this state" link to the state where the nurse is physically located or to the state where the nursing practice is applied (where the patient is located)? In the case of a telephonic consultation by a nurse in an office in Oregon with a patient calling in from Arizona, does the nurse carry out nursing practice in Arizona or Oregon? Short answer: Generally, the practice of nursing occurs where the patient is located. However, if the "nurse" is licensed in Oregon, that fact would create an additional element of jurisdiction that may provide for jurisdiction in both Arizona and Oregon.

3. Could an exception linked to provision of nursing care through means such as telephonic or other electronic methods be added to the list of exemptions for nonresident nurses licensed and in good standing in another state as found in ORS 678.031(7)? Short answer: Yes, if the legislature determined that such an exception was appropriate.

Introduction

The proper foundation for an analysis of the above-referenced questions is Board jurisdiction. The Oregon Board of Nursing (Board) has two avenues of jurisdiction to enforce the Nurse Practice Act referenced in ORS 678.010 *et. seq*. The first avenue is the prohibition to

practice nursing in the state of Oregon without being properly licensed contained in ORS 678.021, which reads "It shall be unlawful for any person to practice nursing or offer to practice nursing in this state or to use any title or abbreviation, sign, card or device to indicate the person is practicing either practical or registered nursing unless the person is licensed under ORS 678.010 to 678.410 at the level for which the indication of practice is made and the license is valid and in effect." The second avenue of jurisdiction is that of "licensure", or in other words the Board's broad authority over its licensees and their conduct in a wide variety of settings and circumstances. It is important to maintain the intellectual distinction between these two lines of authority as the questions addressed in this memo are to be most clearly understood when applying the jurisdictional provisions of ORS 678.021.

The foundation for professional licensing, particularly in the medical fields is to "protect the public from consequences resulting from attempts to engage in such profession and occupations by persons that are not properly trained and qualified to do so." *Oregon State Bar v. Wright*, 280 Or 693, 698, 573 P2d 283 (1977). The prohibition for unlicensed practice articulated in ORS 678.021 is predicated upon the Oregon legislature's prerogative to protect Oregonians from unskilled, negligent or incompetent individuals attempting to provide nursing care as defined by the legislature. Two conclusions can be drawn from this premise. First, the Oregon legislature insists that those practicing nursing, or offering to practice nursing on individuals residing in Oregon must be properly licensed by the Board. Secondly, other states have comparable prohibitions on unlicensed practice with an eye toward protecting the public living within those states. By way of simple illustration, an unlicensed individual residing in Idaho but offering to provide nursing services in Oregon would be in violation of ORS 678.021. Conversely, an unlicensed individual residing in Oregon offering to provide nursing services in Idaho would be in violation of Idaho law.[1]

Figure 1. Jurisdictional Authority over Nursing Practice:

	Non-Licensee In-State	Non-Licensee Out-of-State
Patient InState	Yes	Yes
Patient Out-of-State	No	No

The relevant variables are illustrated above accounting for an analysis of non-licensee practice in settings pertinent to this discussion. While simple, it helps provide a paradigm for understanding not just ORS 678.021, but the exceptions contained in ORS 678.031 as well.

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[1] Is it important to remember that any nursing licensure held by an individual would likely create additional lines of jurisdiction and would need to be analyzed independently pursuant to "licensing" jurisdiction.

Questions Presented

Question 1: Do the definitions of the "practice of nursing" and "treating" in ORS 678.010(8), (9), (10), and (11) include nursing care through methods other than face-to-face, hands-on application of the therapeutic measures such as telephonic consultations, video-conferencing methods (*e.g.* Skype®), or other electronic applications (*e.g.* e-mail dialogs)?

The answer to this question is yes in so far as the nursing care or offer of nursing care is directed to a client in Oregon. To the extent that the telephonic consultation, video conferencing, or e-mail dialogs constitute the practice of nursing as contemplated in ORS 678.010(8), then the practice or offer to practice would be deemed to have occurred "in this state" and would require an Oregon nursing license. The language of the statutory definition of "Practice of Nursing" includes diagnosing, treating[2], teaching and counseling, none of which limit interaction to face-to-face experience. *See* ORS 678.010(8). Further, the application of knowledge leading to, among other things, assessing, planning and teaching are hallmarks of R.N. practice and not necessarily restricted to face-to-face engagement. *See* ORS 678.010(10). The original definitions in the Nurse Practice Act are well suited to accommodate new practice models.

Question 2: Does the statement in ORS 678.021- "in this state" link to the state where the nurse is physically located or to the state where the nursing practice is applied (where the patient is located)? In the case of a telephonic consultation by a nurse in an office in Oregon with a patient calling in from Arizona, does the nurse carry out nursing practice in Arizona or Oregon?

The prohibition for unlicensed practice contained in ORS 678.021 is oriented to the patient. Generally speaking to "practice nursing" or "offer to practice" requires a recipient, patient or client. The Oregon legislature has prohibited the practice or offer to practice to recipients, patients, or clients in Oregon without a proper license to do so.

As to the hypothetical contained in question two, it presents a blended question of both "licensing" and "practice" jurisdiction. If the "nurse" in the hypothetical is not licensed in Arizona, he or she may very well have practiced nursing on a client in Arizona without proper Arizona licensure. Additionally, if the nurse referred to was an Oregon licensee, the Oregon Board would have licensing jurisdiction regarding the quality of the care provided notwithstanding the location of the patient. To carry the hypothetical further, an Oregon-licensed nurse who provided poor nursing care to a patient calling from Arizona may be subject to discipline by the Board for improper nursing care via the Board's licensing jurisdiction and possibly disciplinary action by Arizona for the unlicensed practice provided telephonically.

Question 3: Could an exception linked to provisions of nursing care through means such as telephonic or other electronic methods be added to the list of exemptions for non-resident nurses licensed and in good standing in another state as found in ORS 678.031(7)?

The answer to question three is clearly yes in so far as the Oregon State Legislature determined that an exception of the type contemplated for non-resident nurses were in the best interests of the public. The only caveat would be that while rulemaking in some instances provides the Board with the ability to supplement, augment and clarify statutory prerogatives, rulemaking would not provide sufficient justification to create exceptions of the type contemplated in question three without direct statutory authorization.

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[2] Treating by definition contemplates direct care, but may allow for a broader interpretation of treatment to include electronic delivery methods.

Conclusion

While practice methods have changed with the advance in technology it has not done so beyond the ability of the nurse practice act to provide clarity and parameters around the practice of nursing in Oregon. An analysis of the variety in practice settings is best undertaken with an understanding of both "licensing" jurisdiction and "practice" jurisdiction as the Board attempts to regulate both the practice and practitioners engaged in nursing in Oregon.

Attachment A

ORS 678.010

(8) "Practice of nursing" means diagnosing and treating human responses to actual or potential health problems through such services as identification thereof, health teaching, health counseling and providing care supportive to or restorative of life and well-being and including the performance of such additional services requiring education and training which are recognized by the nursing profession as proper to be performed by nurses licensed under ORS 678.010 to 678.410 and which are recognized by rules of the board. "Practice of nursing" includes executing medical orders as prescribed by a physician or dentist but does not include such execution by a member of the immediate family for another member or execution by a person designated by or on behalf of a person requiring care as provided by board rule where the person executing the care is not licensed under ORS 678.010 to 678.410. The practice of nursing includes providing supervision of nursing assistants.

(9) "Practice of practical nursing" means the application of knowledge drawn from basic education in the social and physical sciences in planning and giving nursing care and in assisting persons toward achieving of health and well-being.

(10) "Practice of registered nursing" means the application of knowledge drawn from broad in-depth education in the social and physical sciences in assessing, planning, ordering, giving, delegating, teaching and supervising care which promotes the person's optimum health and independence.

(11) "Treating" means selection and performance of those therapeutic measures essential to the effective execution and management of the nursing care and execution of the prescribed medical orders.

ORS 678.021

License required to practice nursing. It shall be unlawful for any person to practice nursing or offer to practice nursing in this state or to use any title or abbreviation, sign, card or device to indicate the person is practicing either practical or registered nursing unless the person is licensed under ORS 678.010 to 678.410 at the level for which the indication of practice is made and the license is valid and in effect.

ORS 678.031

(7) Nonresident nurses licensed and in good standing in another state if they are practicing in Oregon on a single, temporary assignment of not to exceed 30 days, renewable for not to exceed 30 days, for assignments that are for the general public benefit limited to the following:

(a) Transport teams;

(b) Red Cross Blood Services personnel;

(c) Presentation of educational programs;

(d) Disaster teams;

(e) Staffing a coronary care unit, intensive care unit or emergency department in a hospital that is responding to a temporary staffing shortage and would be otherwise unable to meet its critical care staffing requirements; or

(f) Staffing a long term care facility that is responding to a temporary staffing shortage and would be otherwise unable to meet its staffing requirements.