

OFFICIAL OPINION NO. 72-42, Instructional training of licensed practical nurses. Licensed practical nurses may not be directed by appropriate medical authority to act as an assistant instructor in an approved program of practical nursing training. Ch. 2M,

STATE OF SOUTH DAKOTA
OFFICE OF
THE ATTORNEY GENERAL

August 21, 1972

The Honorable Tom Mills
South Dakota State Senator
Sioux Falls, South Dakota 57105

OFFICIAL OPINION NO. 72-42

Instructional training of licensed practical nurses. Licensed practical nurses may not be directed by appropriate medical authority to act as an assistant instructor in an approved program of practical nursing training. Ch. 2M, Laws of 1972

Dear Honorable Mills:

You have requested my official opinion to answer the following submitted questions;

1. Under the "expanded role" enacted by Chapter 204 of the 1972 Session Laws, may a licensed practical nurse act as an assistant instructor in an approved program of practical nurses training education in a classroom setting under the direction of appropriate medical authority?
2. Under the "expanded role" enacted by Chapter 204 of the 1972 Session Laws, may a licensed practical nurse act as an assistant instructor in an approved program of practical nurses training education in a clinical setting under the direction of appropriate medical authority?

The material portions of Ch. 204 of the Session Laws of 1972 affecting the questions submitted are as follows:

Section 1. That SDCL 36-9-3(1) be amended to read as follows: (1). The "practice of professional nursing" means the performance for compensation of any act in the observation, care, evaluation, and counsel of the ill, injured or infirm, Or in the maintenance of health or prevention of illness of others or in the supervision and teaching of other personnel, or the administration of medications and treatments as prescribed by a licensed physician or licensed dentist; requiring substantial specialized judgment and skill and based on knowledge and application of principles of biological, physical and social science. The professional nurse may perform in addition to the foregoing, such special acts, with appropriate training, delegated by a physician licensed under the medical practice act: of South Dakota or by the medical staff of an employing medical facility licensed by the state of South Dakota. The foregoing shall not be deemed to include the practice of medicine, dentistry, or pharmacy.

Section 2. That SDCL 36-9-4(1) be repealed and reenacted to read as follows:

(1). The "practice of practical nursing" means the performance for compensation of any acts in the care, treatment or observation of the ill, injured or infirm and for the maintenance of the health of others and the promotion of health care, including the administration of medications and treatments, consistent with the practical nurse's education and preparation, under the direction of a licensed physician, dentist, or registered nurse. The licensed practical nurse may perform any of the foregoing duties, and with appropriate training may perform additional specialized nursing functions when directed to do so by the licensed physician, dentist or registered nurse.

Section 4. That SDCL 36-9 be amended by adding thereto a new section reading as follows:

The board of nursing shall require appropriate training and continuing education, when deemed necessary, for the performance of the special acts authorized in sections 1 and 2 hereof, and may also require continuing education for renewal of license.

Before a consideration of your question, certain basic matters should be discussed in order to set forth my consideration of the present problems.

In my opinion dated August 6, 1970, addressed to Miss Mary Ochs, the Executive Secretary of the South Dakota Board of Nursing, which is denominated Opinion No. 70-38, I ruled that

the determination of what is "an approved program for professional nursing," and who would be qualified to instruct in such program, was to be determined by the South Dakota Board of Nursing. It is my opinion that this ruling was correct.

I appreciate that this opinion dealt only with the field of licensed professional nursing, and the present question involves licensed practical nursing. However, because of the similarity in language used in SDCL 36-9-30(2) (dealing with the education of professional nurses, and SDCL 36-9-37 (2)), dealing with the education of practical nurses, my position remains unchanged. SDCL 36-9-37(2) requires a licensed practical nurse to have "completed the approved program for practical nursing and hold a diploma or certificate therefrom." Unless otherwise prohibited, the determination of what is an approved program of practical nursing and who may be qualified to instruct in such a program lies exclusively within the determination of the South Dakota Board of Nursing.

This power of the nursing board is not without limitation. Initially, the exclusive prerogative of determining whether or not to license practitioners of nursing, and to determine the training and qualifications of licensed nurses lies with the Legislature. Without legislative enactment the nursing board would not exist. While such board may be granted authority to provide rules and regulations within the nursing law, as our nursing board has been authorized, all of its rules and regulations must be within the framework of the nursing act. Any attempt on the part of such board to make requirements not authorized by the Legislature is an arrogation upon itself of legislative powers. Such an action by an administrative board is condemned by our Court. Recent cases illustrating this rule are *Livestock State Bank v. State Banking Commission*, 80 S.D. 491, 127 N.W. 2d 139 and *Affiliated Distillers Brand Corp. v. Gillis*, 81 S.D. 44, 130 N.W. 2d 597.

With these basic principles in mind, we must examine Chapter 204, Laws of 1972 to determine its effect upon the authority of the Nursing Board to determine what is an approved program of nursing, and who are qualified to instruct therein.

It appears that there are three alternatives that must be considered:

1. Does such 1972 Act provide that licensed practical nurses may instruct, as assistant instructors, in an approved practical nursing course? If it does, this positive legislative Act would require the Nursing Board to adopt rules and regulations permitting licensed practical nurses to be assistant instructors.

2. Does the 1972 enactment prohibit licensed practical nurses from being assistant instructors in such program? If this be true, the Nursing Board could not authorize such licensed practical nurses to be assistant instructors.

3. Is the 1972 Act such that the Legislature had no intent to either authorize or prohibit licensed practical nurses from acting as Assistant Instructors in an approved program of practical nursing? In this case, it would appear that the determination of whether or not a licensed practical nurse can act as an assistant instructor lies within the sound discretion of the Board of Nursing.

Basically, the purpose of all nursing is to care for and attend to the sick. This basic purpose is so well known that I must assume that such was not ignored in the 1972 enactment. There is no question that Section 1 of Chapter 204 has expanded the areas in which a licensed professional nurse may lawfully act. This area is "such special acts delegated by a physician licensed under the Medical Practice Act of South Dakota, or by the medical staff of an employing medical facility licensed by the State of South Dakota," so long as this professional nurse has appropriate training to perform such special acts.

There can be no question that the areas in which a licensed practical nurse may lawfully act were expanded by Section 2 of the 1972 Act. These additional functions are "specialized nursing functions" when directed to do so by the licensed physician, dentist, or registered nurse so long as such practical nurse has appropriate training to so perform.

Section 4 of Chapter 204, Laws of 1972, has as its intent a method to provide for these special acts. It provides that the Board of Nursing shall require appropriate training and continuing education, when deemed necessary, for the performance of such special acts authorized in Section 1 and 2 of the Act.

Broadly speaking, it appears that this broadening of functions permits a licensed professional nurse to embark on procedures which may be classified as in the field of medicine. As far as the licensed practical nurse is concerned, it permits such licensee to embark in the field that might be only within the ambit of professional nursing. Before any such licensee can embark into such "special acts," he must have appropriate training so to act, and the licensee must be directed to embark therein, in the case of a professional nurse, by a physician licensed under the Medical Practice Act, or by the medical staff of an employing medical facility licensed by the State of South Dakota, and in the case of a practical nurse, by a licensed physician, dentist or registered nurse.

The 1972 Act has nothing to do with the education needed or those persons qualified to instruct in an approved program of practical nursing. Such approval remains with the State Board of Nursing. Persons licensed under the Medical Practice Act, are licensed under an entirely different law enacted for an entirely different purpose than the regulation of the field of nursing. These medical practice licensees have traditionally been given special instructions in the care of patients by registered nurses. This is the extent of their function in nursing. While I appreciate that some physicians are instructors in schools of nursing, professional and practical, it is not because of licensure by the Medical Practice Act that they so operate, but it is because of the approval of the state nursing board that such professionals are authorized to instruct.

Your specific questions each, as worded, must be answered, NO. Permission to act as an instructor, head or assistant, in an approved program of practical nursing training, does not come from the medical profession, or as you have designated "appropriate medical authority." Approval or permission for a licensed practical nurse to act in the field of instruction in an approved program of practical nursing training can lawfully come only from the Board of Nursing under the statutes as they exist at this time.

Respectfully submitted,

Gordon Mydland
Attorney General