



ALAN WILSON  
ATTORNEY GENERAL

May 21, 2013

The Honorable Bill Herbkersman  
Member, House of Representatives  
434-B Blatt Building  
Columbia, South Carolina 29211

Dear Representative Herbkersman:

You note in your letter to this Office that "I have been approached by an Advanced Practice Registered Nurse (Nurse Practitioner) who is concerned about her ability to practice her profession in this state as the law permits." Thus, you seek an opinion as to "whether South Carolina law permits a nurse practitioner to dispense certain scheduled prescription drugs to their patients after diagnosing and prescribing scheduled drugs for treatment."

By way of background, you note that "[t]he question arises because the nurse practitioner has learned that at least one of the South Carolina professional licensing boards has an 'unwritten' policy that prohibits nurse practitioners from dispensing prescription drugs for their patients following a diagnosis and prescription." You further state that "the statute that regulates the dispensing of scheduled drugs, the Pharmacy Practice Act, contains language that, by a plain reading, appears to expressly permit such activity by nurse practitioners."

You further urge the following:

[t]he Pharmacy Practice Act at S.C. Code § 40-43-30(14) defines the term "Dispense" as meaning "the transfer of possession of one or more doses of a drug or device by a licensed pharmacist or *person permitted by law*, to the ultimate consumer or his agent pursuant to a lawful order of a practitioner in a suitable container appropriately labeled for subsequent administration to, or use by, a patient." (emphasis added) The dispenser must also, before the actual physical transfer, interpret and assess the prescription order for potential adverse reactions or side effects, interactions, allergies, dosage, and the regimen the dispenser considers appropriate in the exercise of his professional judgment, and the dispenser shall determine that the drug or device called for by the prescription is

ready for dispensing. The dispenser shall also provide counseling on proper drug usage, either orally or in writing.

As I understand the matter, South Carolina law does not require a permit for or otherwise prevent a "licensed practitioner", as defined in the Pharmacy Practice Act, from dispensing drugs or devices that are the lawful property of the practitioner or a partnership or corporate entity which is fully owned by licensed practitioners. S.C. Code § 40-43-60(I). The Pharmacy Practice Act, S.C. Code § 40-43-30(45), defines a "Practitioner" as a physician, dentist, optometrist, podiatrist, veterinarian, *or other health care provider authorized by law to diagnose and prescribe drugs and devices,*" (emphasis added)

The Nurse Practice Act, S.C. Code § 40-43-10 et seq., states that a nurse practitioner is authorized to perform delegated medical acts to include making a *medical diagnosis* and initiating, continuing, and modifying therapies, including *prescribing drugs*, under approved written protocols.

Therefore, based on a reading of the plain language of the law, because nurse practitioners are permitted to both diagnose and prescribe drugs, they are permitted to dispense drugs, as long as the drugs are the lawful property of the practitioner or a partnership or corporate entity which is fully owned by licensed practitioners, such as physicians.

This interpretation is consistent with other related laws. For example, nothing in the Medical Practice Act appears to expressly grant physicians the authority to dispense drugs; however, the Pharmacy Practice Act does permit such activity by physicians. Thus, nurse practitioners must, just as physicians do, look to the Pharmacy Practice Act to determine if they can dispense drugs.

Lastly, the nurse practitioner who approached me about this subject indicated that she is permitted by law to request, receive, and sign for professional drug samples, except for those categorized as Schedule II drugs (the most habit forming such as oxycodone), and may lawfully distribute those samples to patients as listed in the approved written protocols. It seem counterintuitive to me that a nurse practitioner can "distribute" professional drug samples to a patient, Schedule III to V, but cannot dispense a Schedule III to V to a patient for whom he or she has diagnosed a medical condition and prescribed a drug to remedy that condition.

### Law/Analysis

A number of principles of statutory interpretation are applicable in resolving your question. First and foremost, is the cardinal rule of construction, which is to ascertain and effectuate the legislative intent, whenever possible. State v. Morgan, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and such language must be construed in light of the statute's intended purpose. State v. Hudson, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999). Moreover, a statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. Hay v. S.C. Tax Comm., 273 S.C. 269, 255 S.E.2d 837 (1979). In construing statutes, the words used must be given their plain and ordinary meaning without resort to a subtle or forced construction for the purpose of limiting or expanding their operation. Walton v. Walton, 282 S.C. 165, 318 S.E.2d 14 (1984). The best evidence of the Legislature's intent is found in the plain language of the statute. State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007). Further, as the South Carolina Supreme Court stated in Greenville Baseball, Inc. v. Bearden, 200 S.C. 363, 20 S.E.2d 813, 816 (1942), "it is a familiar canon of construction that a thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter. It is an old and well established rule that the words ought to be subservient to the intent and not the intent to the words." In addition, in construing statutory language, a statute must be read as a whole, not provisions thereof in isolation. All sections must be construed together with one another and each section given effect. Higgins v. State, 307 S.C. 446, 415 S.E.2d 799 (1992). As our Supreme Court has recognized, "[i]n ascertaining the intent of this Legislature, a court should not focus on a single section or provision but should consider the language of the statute as a whole." Croft v. Old Republic Ins. Co., 365 S.C. 402, 618 S.E.2d 909, 914 (2005).

Provisions for the regulation of the practice of nursing in South Carolina are found at S.C. Code Ann. Section 40-33-10 *et seq.* Section 40-33-20(5) defines an "Advanced Practice Registered Nurse" or "APRN" as

... a registered nurse who is prepared for an advanced practice registered nursing role by virtue of additional knowledge and skills gained through an advanced formal education program of nursing in a specialty area approved by the board. The categories of APRN are *nurse practitioner*, certified nurse mid-wife, clinical nurse specialist, and certified registered nurse anesthetist. An advanced practice registered nurse shall hold a doctorate, a post-nursing master's certificate, or a minimum of a master's degree that includes advanced education composed of didactic and supervised clinical practice in a specific area of advanced practice registered nursing. In addition to those activities considered the practice of registered nursing an APRN may perform delegated medical acts.

(emphasis added). Further, pursuant to § 40-33-20(41) a "nurse practitioner" or "NP" is defined as a

registered nurse who has completed an advanced formal education program at the master's level acceptable to the board, and who demonstrates advanced knowledge and skill in assessment and management of physical and psychosocial health, illness status of persons, families, and groups. Nurse practitioners who perform delegated medical acts must have a supervising physician or dentist who is readily available for consultation and shall operate within the approved written protocols.

Section § 40-33-20(23), defines the term "delegated medical acts" to mean:

... additional acts delegated by a physician or dentist to the NP, CNM, or CNS and may include formulating a medical diagnosis and initiating, continuing, and modifying therapies including drug therapy, under written protocols as provided in Section 40-33-34. Delegated medical acts must be agreed to jointly by both the Board of Nursing and the Board of Medical Examiners. Delegated medical acts must be performed under the general supervision of a physician or dentist who must be readily available for consultation.

Moreover, Section 40-33-20(10) defines "Approved written protocols" as "specific statements developed collaboratively by a physician or the medical staff and a NP, CNM, or CNS that establishes physician delegation for medical aspects of care, *including the prescription of medications.*" (emphasis added).

Likewise, in § 40-47-20 (14) the Medical Practice Act states that the term "Delegated medical acts to the APRN"

means additional acts delegated by a physician or dentist to the Advanced Practice Registered Nurse (NP, CNM, or CNS) which may include formulating a medical diagnosis and initiating, continuing, and modifying therapies, including prescribing drug therapy, under approved written protocols as provided in Section 40-33-34 and section 40-47-195. Delegated medical acts to the APRN (NP, CNM, or CNS) must be agreed to jointly by both the Board of Nursing and the Board of Medical Examiners. Delegated medical acts to the APRN (NP, CNM, or CNS) must be performed under the general supervision of a physician or dentist who must be readily available for consultation.

Section 40-33-34(F)(1) enumerates the requirements for authorized prescriptions by a nurse practitioner, certified nurse-midwife or clinical nurse with prescriptive authority. Such requirements are as follows:

- (a) must comply with all applicable state and federal laws;
  - (b) is limited to drugs and devices utilized to treat common well-defined medical problems within the specialty field of the nurse practitioner or clinical nurse specialist, as authorized by the physician and listed in the approved written protocols. The Board of Nursing, Board of Medical Examiners, and Board of Pharmacy jointly shall establish a listing of classification of drugs that may be authorized by physicians and listed in approved written protocols.
  - (c) do not include prescriptions for Schedule II controlled substances; however, Schedules III through V controlled substances may be prescribed if listed in the approved written protocol and as authorized by Section 44-53-300;
  - (d) must be signed by the NP, CNM, or CNS with the prescriber's identification number assigned by the board and all prescribing numbers required by law. The prescription form must include the name, address and phone number of the NP, CNM, or CNS and physician and must comply with the provisions of Section 39-24-40. A prescription must designate a specific number of refills and may not include a nonspecific refill indication.
  - (e) must be documented in the patient record of the practice and must be available for review and audit purposes.
- (2) A NP, CNM, or CNS who holds prescriptive authority may request, receive and sign for professional samples, except for controlled substances in Schedule II, *and may distribute professional samples to patients as listed in the approved written protocol, subject to federal and state regulations.*

(emphasis added).

Turning now to the statutes governing the regulation of pharmacists, we note that § 40-43-30(14) defines the word "dispense" as meaning

The transfer of possession of one or more doses of a drug or device by a licensed pharmacist or person permitted by law, to the ultimate consumer or his agent pursuant to a lawful order of a practitioner in a suitable container appropriately labeled for subsequent administration to, or use by, a patient.

Pursuant to § 40-43-60(I), there is provided an exception for a "licensed practitioner as defined under Section 40-43-30(45) from possessing or administering drugs or devices, or compounding



drugs used for administration in the regular course of professional practice." A "practitioner" is defined by § 40-43-30(45) as "a physician, dentist, optometrist, podiatrist, veterinarian, or other health care provider authorized by law to diagnose and prescribe drugs and devices."

Based upon the foregoing statutes, it is clear that a nurse practitioner possesses certain prescriptive authority pursuant to the "approved written protocols" and "delegated medical acts" authorized by § 40-33-10 *et seq.* However, your question concerns the statutory authority to "compound" and "dispense" these medications for which a nurse practitioner may write prescriptions. Nowhere in the definitions of the terms "delegated medical acts" or "approved written protocols" or elsewhere in § 40-33-20 is there given express dispensing authority to a nurse practitioner or other "advanced practice registered nurse." Authorities from other jurisdictions have concluded that where such power is not expressly provided by statute, it was not intended to be provided. See, *Op. Alaska Atty. Gen.*, No. 663-92-0381 (July 31, 1992) ["under existing statutes and regulations an ANP is not authorized to compound and dispense drugs ...."]; *Op. Ky. Atty. Gen.*, No. 11-004 (June 10, 2011) ["physician assistants have not been given the statutory authority to 'dispense' medications"]; *Op. Ark. Atty. Gen.*, No. 2009-094 (September 9, 2009) ["neither A.C.A. § 17-92-102(a) or any other provision permits advanced practice nurses with prescriptive authority to distribute pre-packaged pharmaceuticals for a profit, i.e. engage in point-of-care medication dispensing"].

Our situation appears to be distinguishable, however. As noted above, § 40-33-34(F)(2) provides that

[a] NP, CNM or CNS who holds prescriptive authority may request, receive and sign for professional samples, except for controlled substances in Schedule II, *and may distribute professional samples to patients as listed in the approved written protocol*, subject to federal and state regulations.

Thus, in contrast to the statutes referenced above from other jurisdictions, § 40-33-34(F)(2) recognizes that a nurse practitioner may dispense medications in the form of professional samples (except for controlled substances in Schedule II), consistent with the approved written protocol.

Moreover, the Pharmacy Practice Act provides additional authority to nurse practitioners. Subsections (H) and (I) of § 40-43-60 provides as follows:

(H) Nothing in this chapter shall be construed to require a permit of or to prevent a licensed practitioner as defined under Section 40-43-30(45) from possessing or administering drugs or devices, or compounding drugs used for administration in the regular course of professional practice.

(I) This chapter does not require a permit of or prevent a licensed practitioner, as defined under Section 40-43-30(45), from dispensing drugs that are the lawful property of the practitioner or a partnership or corporate entity which is fully owned by licensed practitioners or from dispensing a free complimentary trial supply of drugs owned by a person or institution authorized to possess medication under state or federal law for indigent patients with guidelines equal to or equivalent to Section 340B of the Public Health Service Act. Drugs or medicine dispensed must comply with the labeling requirements of state and federal laws and regulations.

As stated, § 40-43-30(45) defines a "practitioner" as "a physician, dentist, optometrist, podiatrist, veterinarian, *or other health care provider* authorized by law to diagnose and prescribe drugs and devices." (emphasis added). A "health care provider" is defined by § 40-43-30(23) to "include a pharmacist who provides health care services within the pharmacist's scope of practice pursuant to state law and regulation," but obviously is not limited to pharmacists alone. Other health care providers, including advanced practice registered nurses, are, as we have seen, "authorized by law to diagnose and prescribe drugs and devices." Thus, the statutes in other states, referenced above, may be distinguished from South Carolina's statutes (i.e., §§ 40-43-60 (H) and (I) and 40-43-30(45)). Nurse practitioners, as well as other advanced practice registered nurses, are exempt from the requirement of a pharmacist's permit, provided these practitioners dispense medications (except for Controlled Substances in Schedule II) in accordance with the "approved written protocol" and provided the terms of §§ 40-43-60(H) and (I) are met.

We have similarly applied these Pharmacy statutes in other closely related contexts. In *Op. S.C. Atty. Gen.*, January 24, 2006, 2006 WL 269607, we referenced §§ 40-43-60(H) and (I), in responding to the question of whether physicians have the legal authority to dispense drugs to patients of health centers. We noted that the State Board of Pharmacy interpreted § 40-43-60 as prohibiting "physicians working in a federally funded health center from dispensing medication to their patients – because they do not 'own' the medication." Referencing § 40-43-30(45), we explained that a physician "is included in the definition of 'licensed practitioner' under the Act" and thus the physician "may administer or dispense drugs." Further, we cited § 40-43-60(I), and concluded that, pursuant thereto, "a physician may dispense drugs (1) in which he or she owns or (2) drugs constituting 'a free trial supply' and are owned by the physician or an institution serving indigent patients." With respect to the issue of "ownership," we stated as follows:

... if the physicians working in the centers are the physicians receiving the drugs under these programs, presumably these physicians are the owners of the drugs for purposes of section 40-43-60(I). However, we must note that the determinations of ownership of the drugs is a factual determination. Therefore, this determination is not appropriate in an opinion of this Office.

Reasoning similar to that contained in our 2006 Opinion would be applicable here, to nurse practitioners dispensing medication within the scope of their practice. For the Legislature to have authorized nurse practitioners and other advanced practice registered nurses (as "other health care providers") to dispense medications pursuant to an exception in the Pharmacy Practice Act is, in our view, no different from permitting other practitioners, who are authorized to prescribe medicine, to do so. Such exception within the Pharmacy Act is entirely consistent with the authority of nurse practitioners to prescribe medications in certain circumstances. Indeed, the statutes regulating nurse practitioners and other advanced practice registered nurses, which expressly authorize the dispensing of "professional samples," pursuant to § 40-33-34, is a clear indication of the Legislature's intent to allow nurse practitioners to dispense medications within their authorized scope of practice. Thus, in our opinion, the Pharmacy Practice Act expressly contains (in the form of § 40-43-60(I) (and (H)) and § 40-43-30(45)) an exemption from the permit requirements of that Act, thereby allowing a nurse practitioner (and other advanced practice registered nurses) to dispense "drugs or devices that are the lawful property of the practitioner or a partnership or corporate entity which is fully owned practitioners ...." This is conceptually no different from the situation governing physicians, as recognized by our 2006 Opinion, quoted above.<sup>1</sup>

### Conclusion

The Pharmacy Practice Act exempts from the requirement of a permit any "practitioner," defined to include a "physician, dentist, optometrist, podiatrist, veterinarian or other health care provider *authorized by law to diagnose and prescribe drugs and devices.*" (emphasis added). It is thus our opinion that, because a nurse practitioner is permitted, pursuant to the Nurse Practice Act, to both diagnose and prescribe drugs under the conditions specified in that Act, the nurse practitioner is likewise permitted, pursuant to the Pharmacy Practice Act, to dispense medications, so long as these drugs are the lawful property of the practitioner or a partnership or corporate entity which is fully owned by licensed practitioners, such as physicians. Such question of ownership is a factual issue, which must be determined on a case-by-case basis, and which we cannot address in an opinion of this Office. *Op. S.C. Atty. Gen.*, December 12, 1983; *Op. S.C. Atty. Gen.*, January 24, 2006, *supra*.

Our opinion of January 24, 2006 is particularly instructive in reaching this conclusion. There, we construed the Pharmacy Practice Act to authorize physicians who, of course, are authorized to diagnose and prescribe drugs, to dispense medications to patients of health centers, provided the physician owned the drugs or the drugs were owned by the institution serving the indigent patients. With respect to the issue of ownership, we concluded that such was a factual

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<sup>1</sup> A previous opinion of this Office, *Op. Atty. Gen.*, Op. No 84-6 (January 20, 1984, 1984 WL 159815) is not controlling here. That opinion was issued long before the change in the law allowing nurse practitioners to prescribe certain medications. Moreover, the 2009 Opinion, discussed above provides a discussion of the law more in keeping with present statutory enactments.

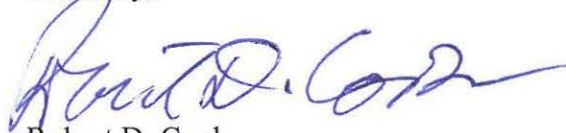


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question beyond the scope of the opinion. That same reasoning would govern with respect to nurse practitioners.

Moreover, our opinion herein that nurse practitioners are authorized to dispense drugs as specified herein is further supported by the fact that the Nurse Practice Act expressly authorizes nurse practitioners to "distribute professional samples to patients as listed in the approved written protocol, subject to federal and state regulations." Such express authorization indicates a legislative intent to allow nurse practitioners to dispense medications in accordance with their clear authority to diagnose and prescribe.

Sincerely,

A handwritten signature in blue ink, appearing to read "Robert D. Cook", with a stylized flourish extending to the right.

Robert D. Cook  
Deputy Attorney General

RDC/an