Legal Briefs
The overlap between the practice of medicine and the practice of nursing

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It is surprising, at this late date, to find so many anesthesiologists asserting that "anesthesia is the practice of medicine." One of the irritants in Denton Regional Medical Center v LaCroix (947 SW2d 941 (1997)) was to have a court repeat this slogan as if it had meaning. How do nurse anesthetists participate in 65% of all anesthetics if "anesthesia is the practice of medicine?" The mistaken belief that nonphysicians are practicing medicine is not, unfortunately, limited to anesthesiologists. In 1996, the Texas Board of Medicine essentially asked the Texas Attorney General to tell the Texas Board of Podiatric Medicine that because hyperbaric oxygen therapy was the practice of medicine, it had to be regulated by the Board of Medicine. State legislatures, through licensing laws, determine what is and what is not the practice of medicine. However, licensing laws do not create monopolies for professions (In Re Carpenter's Estate, 196 Mich. 561 (1917)). Many professions are authorized to practice in the same, related, or similar fields and as a result have overlapping practice areas. Courts, attorneys general, and, on occasion, even organized medicine have acknowledged that practice areas overlap and are not exclusive. Anesthesia is an area which is both the practice of medicine and the practice of nursing.

Sermchief v Gonzales
The leading case, Sermchief v Gonzales, 600 S.W.2d 683 (Missouri 1983) has, for almost 15 years, been brilliantly illuminating. In 1975, the Missouri legislature enacted a new Nursing Practice Act, redefining professional nursing to expand the scope of nursing practices. Among other things, the requirement that a physician directly supervise nursing functions was eliminated. Moreover, in defining "professional nursing," the legislature used the phrase "including, but not limited to" making the definition of nursing open-ended and encouraging nursing to develop into new areas. Following the amendment to the Missouri nursing law, an agency began providing medical services to the general public in fields of family planning, obstetrics, and gynecology. The services were provided by nurses who took histories, conducted breast and pelvic examinations, took pap smears, gonorrhea cultures, and blood serology. They also dispensed certain medications and provided counseling services and community education. The acts by the nurses were done pursuant to written standing orders and protocols signed by physicians who were also employees of the agency. The Missouri State Board of Registration for the Healing Arts threatened to order the nurses and physicians to show cause why the nurses should not be found guilty of the unauthorized practice of medicine and the physicians guilty of aiding and abetting the unauthorized practice of medicine.

The Missouri Supreme Court, in a very clear and well-reasoned decision, pointed out that the provisions of the Medical Practice Act which prohibited the unauthorized practice of medicine did not apply to nurses licensed and lawfully practicing their profession. The court determined that the acts of the nurses questioned by the medical board were "precisely the types of acts the legislature contemplated when it granted nurses the right to make assessments and nursing diagnosis" (660 S.W.2d 689). "Having found that the nurses' acts were authorized by [the Nursing Practice Act], it follows that such acts do not constitute the unlawful practice of medicine for the reason that [the Medical Practice Act is] inapplicable to nurses licensed and lawfully practicing their profession within the provisions of [the Nursing Practice Act]." (660 S.W.2d 689).

Sermchief v Gonzales was so widely quoted and so well thought out that it seemed to have resolved once and for all the conflict of: Where does the practice of nursing end and the practice of medicine begin? The answer, as so clearly stated by the Missouri Supreme Court, is that there is no defining line between the professions. There are numerous overlapping areas and activities which constitute the practice of nursing when performed by nurses and the practice of medicine when performed by physicians. Nor has Sermchief v Gonzales been the only authoritative decision in this area.

Professional Health Care, Inc v Bigsby
In Professional Health Care, Inc. v Bigsby, 709 P.2d 86 (Colorado, 1985), Dr. Bigsby attempted to avoid his obligations to purchase a clinic which employed a nurse practitioner. Dr. Bigsby claimed that the nurse practitioner...
was engaged in the illegal practice of medicine which would have made his contract unenforceable. The clinic had been established to provide rural nursing services, home healthcare, and professional nursing services for doctors, clinics, and hospitals in extreme rural areas of Colorado. The nurse practitioner was supervised in professional aspects by a physician even though a nonphysician, one of the owners of the clinic, managed the clinic. The nonphysician set the amounts of the nurse practitioner's fees, controlled her work hours, and maintained the right to fire her. The court found that the nurse practitioner was indirectly supervised by a physician and followed protocols and directions that he established. The court ruled that the actions of the nurse practitioner "constituted only the practice of professional nursing and could not be construed to be the illegal practice of medicine" (709 P.2d 88).

Hoffson v Orentreich
In *Hoffson v Orentreich* (168 A.D.2d 243, 562 NYS 2d 479, 1990), the Supreme Court of New York determined that a jury was justified in finding that a nurse who incised and drained three acne cysts and removed blackheads was acting in accordance with proper nursing standards and was not engaged in the unauthorized practice of medicine.

Prentice Medical Corporation v Todd
In *Prentice Medical Corporation v Todd* (145 Ill.App.3rd 692, 495 N.E.2d 1044, 99 Ill. Dec. 309, 1986), the court would not enjoin a nurse from performing gynecological services. It was disputed as to whether the nurse had agreed not to compete with the medical corporation which formerly employed her. She ceased seeing patients for the plaintiffs on June 30, 1985 and the next day opened two facilities to personally see patients. She also sent a letter to many of her former patients stating that she would "continue to offer the same personal attention, quality medical care, and confidential services you have come to expect." She prescribed birth control pills under standing orders of a physician.

Her former employer sued for an injunction to prohibit the nurse from seeing patients, but the court refused to grant the injunction for several reasons. First, there was a dispute as to whether the nurse was subject to a covenant not to compete. Second, the nurse was a licensed professional and in Illinois and other states, courts are reluctant to grant injunctions to prevent people from practicing their trade or profession. (The patient/practitioner relationship means that if an injunction is granted, not only does it affect the practitioner but it also restricts patients from receiving care from a practitioner of the patient's choice.) And, finally, although the defendant referred to her "practice," the court ruled that the nurse was not holding herself out as practicing medicine. The nurse practiced under standing orders, cooperating with supervising physicians in her new position just as she had when employed by the plaintiffs.

Michigan v Beno
Lest anyone believe that only nurses can be accused of illegally practicing medicine, there is the case of *Michigan v Beno* (422 Mich. 293, 373 NW2d 544, 1985). An investigator for the Michigan Department of Licensing and Regulation visited a licensed chiropractor on several occasions. Over the course of these visits, the chiropractor took x-rays of the investigator's spine and elbow; gave the inspector a general physical examination including an analysis of hair and urine samples; signed the investigator's employee health record; used galvanic current, ultrasound and diathermy techniques; and dispensed vitamins to the investigator.

The Board of Chiropractic conducted a hearing and determined that some of the activities engaged in exceeded the scope for the practice of chiropractic. The chiropractor challenged the Board's findings in court and the trial court's findings were appealed to the Michigan Court of Appeals and, finally, to the Supreme Court of Michigan. The issue at each level was whether the practices complained of were included in the practice of chiropractic. The Michigan Supreme Court's ultimate analysis was quite illuminating. The Court of Appeals had determined that the use of galvanic current, for example, was specifically included in the practice of physical therapy and that, therefore, the chiropractor could not use galvanic current technique unless licensed or authorized by the Physical Therapist Act. The Michigan Supreme Court disagreed:

"This analysis only partially resolves this issue since appellant is arguing that chiropractors are otherwise authorized by law to engage in these practices. We must decide whether these techniques are allowed under the chiropractic act, not under the statutory provisions dealing with physical therapy. Merely because these activities may constitute the practice of physical therapy, or for that matter the practice of medicine, nursing, etc., does not thereby inevitably mean that they are not within the scope of chiropractic. An examination of the licensing jurisdiction of the various healthcare professions reveals considerable overlapping among them. It is possible that some of the activity which is included within the broad definition of the practice of medicine is also included within not only chiropractic but also, for example, physical therapy, podiatry and dentistry. Thus, when analyzing whether a particular activity is within an individual healthcare profession, the focus should be on the statutory definition of that profession, and not whether the activity is included with other professions." (422 Mich. at 332)
The court sent the case back for further proceeding. Some of the activities complained of were clearly outside the practice of chiropractic, some were included, and others, even though not included in the practice of chiropractic, were not necessarily illegal unless they were otherwise prohibited by Michigan law.

In Beno, the Michigan Supreme Court was not looking for boundaries between professions. It made no difference if the activity constituted the practice of physical therapy, medicine, or nursing. Scope of practices overlap. The question, and the only question, is whether the questioned activity was within the scope of chiropractic practice. If it is not within the scope of chiropractic and it is reserved by statutes to one of the other professions, then it is illegal for a chiropractor to engage in it. However, if it is within the scope of chiropractic, then it is not important whether other professions are also permitted to engage in it.

**Tatro v Texas State Board of Education**
The federal courts in Texas have also had occasion to carefully consider the overlap of practice areas. Mr. and Mrs. Tatro sued the Texas State Board of Education to require that their daughter, Amber, be permitted to attend public schools. Amber, who was five years old, suffered from spina bifida. As a result of her disease, she had to be catheterized several times a day by a method known as "clean intermittent catheterization" or "CIC." The School District, which was trying to exclude her from the public schools, claimed that under the Texas Medical Practice Act, school employees could provide CIC only if they were under the control and supervision of a licensed physician. Without such control, argued the School District, to perform CIC would be to engage in the unlawful practice of medicine. Amber's physician had prescribed CIC and on various occasions, she had been catheterized by her parents, her babysitter, her teachers and teacher's aide at the nursery school which she attended, and by her teenage brother.

The United States District Court for the Southern District of Texas ruled that once CIC was prescribed by a physician, the treatment did not constitute the unlawful practice of medicine nor was the physician obligated to supervise the treatment he had prescribed. His duty was merely to ascertain that the person or institution providing the treatment in conformity with his prescription was qualified. The court ruled that the professional nurses employed by the school district were more than capable of providing CIC (516 F.Supp. 968 (1984)).

During the case, the court became concerned that if physicians thought they were obligated to control and supervise the prescribed treatment they might very well not prescribe it. The court worried that if it ordered Amber to be accepted by the Texas school system and doctors refused to prescribe CIC to be administered by school nurses, Amber would, despite the court's order, still be unable to attend public schools. To satisfy its concern, the District Court invited the Texas Medical Association and the Dallas County Medical Society to participate as amicus curiae. Because of the importance of the attitude of organized medicine in the court's decision, the District Court published the entire amicus curiae brief as an appendix to its decision. By its amicus brief, the Texas Medical Association tried to answer the question whether furnishing CIC without a physician's supervision would be engaging in the unlawful practice of medicine. The Texas Medical Association first stated that CIC should not be administered unless ordered by a physician, but then, noted the Texas Medical Association, "the definitions of the practice of medicine, nursing, and the other licensed health professions overlap to some extent. This overlapping creates the result that the same act when performed by a nurse under the direction of a physician is considered to be part of the practice of nursing and when performed by a physician is considered to be the practice of medicine" (516 F.Supp. at page 989). The Texas Medical Association pointed out that under Texas law the practice of nursing includes the administration of treatments as prescribed by a licensed physician.

"Thus, nurses can lawfully perform medical functions delegated to them by physicians. When nurses do perform delegated medical tasks, they do so with the knowledge that administering these delegated treatments is part of the practice of nursing and recognized as such in the state's statutes defining nursing practice. When performing CIC as ordered by a physician for a particular patient, the nurse is practicing nursing as it is contemplated in the statutes" (516 F. Supp. at 989).

The Texas Medical Association went further and pointed out that in addition to procedures which a nurse performs only when ordered by a physician, which it called "dependent nursing functions," there are also recognized "independent nursing functions, which are "performed by virtue of the nurse's education, training and experience, and which properly reflect the nurse's independent judgment" (516 F. Supp at 991).

The position of the Texas Medical Association in its amicus brief for the Tatro case in 1981, that is, recognizing the overlap in duties performed by professions, is quite reasonable. The United States District Court approved it and relied on it in ordering Amber to be accepted into the Texas public schools. How odd then that the very same
organization would begin its argument in an amicus brief filed in *Denton Regional Medical Center v LaCroix*, with the statement "The administration of anesthesia is the practice of medicine."

**Texas attorney general's office**

The attorney general's office in Texas has, through a series of opinions, shown its understanding of the nature of licensing laws. Governmental agencies sometimes request the attorney general's guidance as to their jurisdiction relative to other state agencies. In 1990, a chiropractor who was not a licensed physical therapist had asked if he could advertise that he performs "physical therapy." The Texas Physical Therapy Act prohibited anyone from representing himself or herself as being a physical therapist unless he or she was licensed pursuant to the Physical Therapy Act. However, the Physical Therapy Act exempted licensees of other state agencies. Therefore, concluded the attorney general, if physical therapy was within the scope of practice of chiropractors, the Physical Therapy Act did not apply, and the chiropractor could advertise that he provided physical therapy. (Office of the Attorney General, State of Texas, Opinion Number JM1211).

On November 6, 1996, the office of the attorney general was asked by the Board of Medical Examiners if it could regulate hyperbaric oxygen therapy. The attorney general's office agreed with the Board of Medicine that hyperbaric oxygen therapy was the practice of medicine which could be regulated by the Board of Medicine. However, the attorney general ruled that the State Board of Podiatric Medical Examiners could also determine that hyperbaric oxygen therapy was within the scope of practice of podiatrists. If it was, then the State Board of Podiatric Medical Examiners could also regulate it. The Board of Medical Examiners would regulate its practice by physicians, and the Board of Podiatric Medical Examiners would regulate its practice by podiatrists (Opinion Number DM423, November 6, 1996).

Finally, in 1997, the question arose as to whether a physical therapist could perform needle electromyography testing. The attorney general noted that the State Board of Medical Examiners had determined that needle electromyography testing constituted the practice of medicine and agreed that the Board's determination was a reasonable one. However, the Board of Physical Therapy Examiners had also determined that needle electromyography testing was within the scope of practice of a licensed physical therapist. The attorney general agreed that the decision of the Board of Physical Therapy Examiners was also reasonable. The Board of Medical Examiners had asked the attorney general which state agency had the authority to regulate needle electromyography testing. The attorney general's office answered that the Board of Medical Examiners could regulate electromyography as it constituted the practice of medicine (that is, when it was performed by physicians), and the Board of Physical Therapy Examiners would have the authority to regulate electromyography when it was the practice of a licensed physical therapist.

As can be clearly seen from the attorney general's decisions, licensing boards regulate professions, not activities. The Board of Medicine regulates anesthesiologists, not anesthesia. When physicians administer anesthesia, they are practicing medicine and are regulated by Boards of Medicine. When nurse anesthetists administer anesthesia, they are practicing nursing and are regulated by Boards of Nursing.

**Lindon v Middletown Regional Hospital**

In *Lindon v Middletown Regional Hospital* (1995 WL 669931, Ohio App. This is an *unpublished* opinion. It cannot be relied on as authority but is referred to in this column merely for illustrative purposes), the plaintiff experienced episodes of fainting. She was seen by a physician and follow-up appointments were scheduled which the plaintiff cancelled. She told a nurse who served as clinic manager of Planned Parenthood of her fainting episodes. The nurse advised her to stop taking oral contraceptives and arranged for her to be examined by yet another physician. Finally she was seen by a third physician who counseled her that she was at great risk for stroke if she continued to both smoke and use oral contraceptives. Having advised her of the risk, he authorized a 30-day supply of oral contraceptives and at the end of the 30-day period he authorized another 6 months' supply which she obtained from Planned Parenthood.

After the plaintiff suffered a stroke, she brought suit against Planned Parenthood, claiming that Planned Parenthood had engaged in the unauthorized practice of medicine by permitting its nursing staff to diagnose and prescribe medication. When the jury awarded a verdict in favor of Planned Parenthood, the plaintiff appealed. The Appellate Court upheld the jury verdict pointing out that the nurses at Planned Parenthood had only dispensed oral contraceptives pursuant to a physician's order and that "standing orders" were sufficient to remove the nurses' activity from the unauthorized practice of medicine.

**Sledziewski v Cioffi**

The cases we have looked at so far reflect expansions of the scope of practice of nurses or other professions. But
case law reveals that nurses can also be criticized if they try to avoid activities that might be the practice of medicine. In *Sledziewski v Cioffi* (528 NYS 2d 913, New York, 1988), the plaintiff supposedly was injured during an operation by a physician at Ellis Hospital. The patient sued the physician and Ellis Hospital claiming that Ellis Hospital was liable for the acts of the physician. The physician was an independent contractor whose negligence could not be imputed to the hospital. The plaintiff also claimed that the hospital was liable because the nursing staff failed to react to her symptoms and order appropriate diagnostic testing. The Appellate Court ruled that the trial court should have granted summary judgment in favor of the hospital. The hospital's nursing staff had no responsibility to diagnose plaintiffs condition.

**Overlapping activities and areas of expertise**

In these days, when every publication by an anesthesiologist seems to begin with the phrase "anesthesia is the practice of medicine," even the most confident nurse anesthetist must wonder if we are missing something. Did someone award physicians a monopoly while nurse anesthetists were busy administering anesthesia? It is sometimes helpful and reassuring to learn that courts are aware that medicine, nursing, podiatry, chiropractic, physical therapy, and other healthcare professions share overlapping activities and areas of expertise. This fact is understood not only by the legal system, but, as can be seen by their brief in the *Tatro* case, even, on occasion, by organized medicine.

*This article is not intended as legal advice nor is it advice on the law of any state. If legal advice or other expert assistance is required, the services of a competent professional person should be sought.*