
Legal Briefs



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State Regulation of Health Care Professions

State regulation of health care differs significantly from state regulation of other industries, such as banking. If one were to analyze whether two highly regulated commercial services compete, such as banking and securities brokerage, one might begin with an analysis of the statutory authority. Banking legislation tends to clearly and specifically set forth powers, duties and procedures. However, in medical and nursing regulation, there is a large degree of deference to the health care community by both legislatures and courts.

You can find this deference in *Chalmers-Francis V. Nelson*:

"There was much testimony as to the recognized practice of permitting nurses to administer anesthetics and hypodermics. One of the plaintiff's witnesses testified to what seems to be the established and uniformly accepted practice and procedure followed by surgeons and nurses, and that is that it is not diagnosing or prescribing the nurses within the meaning of the Medical Practice Act."

Note that the Court relies on expert factual testimony to determine the meaning of the California Medical Practice Act. More to the point, this deference is also expressed in the California Nursing Act:

"In amending this Section at the 1973-74 session, the legislature recognizes that nursing is a dynamic field, the practice of which is continually evolving to include more sophisticated patient care activities. It is the intent of the legislature in

amending this section at the 1973-74 session to provide clear legal authority for functions and procedures which have common acceptance and usage."

History of licensure laws for health care professions

Modern anesthesia practice dates from the first part of the nineteenth century. In the latter part of the nineteenth century, nursing programs, such as the one at the Mayo Clinic, were turning out nurse anesthetists. When licensure laws came into existence, they were designed to establish quality standards within each profession and provide some legislative recognition of what professions did. But, they were not designed to establish monopolies. (See *Frank v. South*, 175 Ky. 416, 194 S.W. 375 and *State v. Borah*, 51 Ariz. 318, 76 P. 2d 757). Thus, many people were allowed to give anesthesia: surgeons, ophthalmologists, anesthesiologists, dentists and nurse anesthetists.

The fact that state licensing laws do not provide a clear distinction between the practice of medicine and the practice of nursing is also understandable in this historical context. The legislature was not trying to establish monopolies; it was merely trying to recognize the pre-existing appropriate areas of practice for each profession.

The historical background clearly suggests that first there was the practice of anesthesia; then came the Medical and Nursing Practice Acts. When

laws were enacted, legislatures tried, in general, to describe existing practice. Unlike banking or securities regulations, in the health field, practice defines the statute; the statute rarely defines the practice.

Legal latitude for health professionals

Why does the law permit health professionals so much latitude in defining their respective areas? The health field is very technical and complex. Moreover, people have a great deal of confidence in the system. Courts and legislatures are reluctant to interfere with a system that they do not totally understand, and are even more reluctant when they perceive that it is operating well. The fields of medicine and nursing are given the status of professions.

Members of the general public are required to act in a manner in which a reasonably prudent person would act. A member of a profession, however, is required to exercise that degree of care and to use that degree of skill which an average member of the profession would have used. Thus, negligence of a member of the community is determined by a jury of peers based on their own experience. The negligence of a professional is determined by a jury based on expert testimony regarding the standard of care of that profession.

Sometimes nurse anesthetists ask whether a court would determine that certain action constituted negligence. They may seek to ask a lawyer what a court would hold. The answer in these cases lies not within the expertise of a lawyer, but within the expertise of the nurse anesthetists. What will be the expert testimony which will be given to the court? Will nurse anesthetists testify that the conduct in this case was negligent, or that it was within the accepted guidelines for an average nurse anesthetist? A lawyer may be helpful in defining the issue; a lawyer may be helpful in repeating what other expert testimony has been and what other courts have decided. But only a nurse anesthetist can advise as to whether the conduct was negligent.

In giving deference to the health care community, sometimes the courts go far beyond what they would do in other circumstances. Law school students learn very early that during a trial, *law* is determined by the judge, while *facts* are determined by the jury, if there is one, or by the judge if there is none. Evidence is offered by the parties to help determine what the facts are. Expert evidence is also offered to convince the trier of fact, whether judge or jury, what the facts are. In some cases involving the health care field, judges appear

to be relying on expert testimony for much more than mere facts. In the passage from *Chalmers-Francis v. Nelson* quoted earlier, the court is saying literally that there was expert testimony on the meaning of the Medical Practice Act. Interpretation of statutes is usually the province of the judge. Lawyers representing the parties can make arguments to the judge as to what they believe the interpretation of the statute is, but it is the court which makes the final determination. In the *Chalmers-Francis* case, the court was convinced by expert testimony from witnesses as to the meaning of the Medical Practice Act.

In the case of *Bentley v. Langley* (249 S.E. 2d 481, N.C. 1978) a deposition was introduced in which an anesthesiologist was permitted to testify that a doctor who undertook to supervise a nurse anesthetist was responsible for the anesthesia services administered. This is a *legal* question! Again, it would be very unusual for a court to accept expert testimony from an anesthesiologist as to matters of law. It should be noted that the parties did object to the affidavit and that the case did not discuss whether this portion of the anesthesiologist's testimony could be relied upon.

Of course, there is a limit to the deference of the law to the health care field, and one example can be seen in the area of nursing. Sometimes, the health care professions may be reluctant to make changes which the legislature believes are desirable. In these circumstances, a legislature will act.

An example can be seen in the case of *Sermchief v. Gonzales*, wherein the Missouri legislature expanded the roles of nursing. When the Medical Practice Board threatened to charge nurses with the unauthorized practice of medicine, nurses sought the protection of the Supreme Court of Missouri. The Supreme Court of Missouri avoided defining the practice of medicine and nursing. Instead it pointed out that the nurses were doing what the legislature had authorized them to do.

What I find interesting is the very respectful attitude, perhaps too respectful, that the health care and law professions harbor toward each other. Nurse anesthetists are often curious as to how a court would view certain types of conduct. The answer, as we have seen, lies not with the legal profession but with the profession of nurse anesthesia. On a similar note, the legal profession seeks opinions from the health care community on matters of law when it would never dream of asking for a similar opinion from another profession. Is it conceivable that a banker would be permitted to testify as to whether a bank was legally responsible for the actions of its officers?