

Opinion No. 81-07

May 11, 1981

OPINION OF: Jeff Bingaman, Attorney General

BY: Andrea B. McCarty, Assistant Attorney General

TO: New Mexico Nursing Board, 2340 Menaul Blvd., N.E., Suite 112, Albuquerque, New Mexico 87107

LICENSES AND LICENSING, HEALTH AND SAFETY

A certified nurse practitioner licensed by the Nursing Board to perform midwifery need not be licensed by the Health Services Division of the Health and Environment Department to perform services constituting midwifery as defined by the Department's midwifery regulations.

QUESTIONS

Must a "certified nurse practitioner" be licensed by the Health Services Division of the Health and Environment Department to perform services constituting midwifery as defined by the Department's midwifery regulations?

CONCLUSIONS

No, if licensed by the Nursing Board to provide such services.

ANALYSIS

The regulations of the Health Services Division of the Health and Environment Department governing the practice of midwifery provide for two types of midwives, the lay midwife and the certified nurse-midwife. Lay midwifery is defined as, "the provision of health care services in pregnancy and child birth by a person not a licensed physician or a certified nurse-midwife." Certified nurse-midwifery is defined as the "management of pre-natal, delivery, post-partum, or interconceptional period of the child-bearing woman and the care of her newborn by a registered professional nurse who has qualified as a certified nurse-midwife under Section 200."

OPINION

Historically, the practice of midwifery has been an area of the practice of medicine and of nursing exempted from the licensing authority of both the Board of Medical Examiners and the Board of Nursing. Laws 1923, Chapter 44, Section 7, in defining the practice of medicine, stated that nothing in the Act would be construed to prohibit "women from practicing midwifery." Laws 1953, Chapter 15, Section 31, provided as an

exemption to the Nursing Practice Act, "any person certified or licensed in this state to practice midwifery." Laws 1968, Chapter 44 repealed prior laws governing the practice of nursing and enacted the present version of the exemption which provides that:

"The Nursing Practice Act [61-3-1 to 61-3-30 NMSA 1978] shall not apply to or affect:

"F. The practice of midwifery by any person other than a registered nurse, who is certified or licensed in this state to practice midwifery;"

{*218} The Medicine and Surgery Act at Section 61-6-16 NMSA 1978 provides, in part, that the Act shall not apply to or affect:

". . .

C. The practice of midwifery as regulated by the Health and Social Services Department [Health Services Division of the Health and Environment Department];"

Since 1921, the practice of midwifery has been subject to the permissive and mandatory regulatory authority of the Health and Environment Department and its predecessor agencies. Laws 1921, Chapter 145, Section 3; Laws 1937, Chapter 39, Section 4; Laws 1973, Chapter 359, Section 3. The purpose of the statutory scheme providing for both the exemptions and the regulatory authority in the appropriate public health department, both past and present, appears to be that individuals desiring to practice midwifery may do so without obtaining a medical or nursing license, but they must comply with any licensure criteria established by the Health Services Divisions.

Clearly, the statutes do not contemplate that the Health Services Division would have regulatory authority over licensed medical doctors who provide services which fall within the regulatory definition of midwifery. Similarly, the Health Services Division would not have regulatory authority over nurses who are licensed to provide services which fall within the definition of midwifery.

Under the Nursing Practice Act, a registered nurse is licensed to practice "professional nursing." Section 61-3-3(C), NMSA 1978. Professional nursing, as such, does not encompass the authority to deliver babies. Thus, a registered nurse (not a certified nurse practitioner) who desires to practice midwifery, which includes delivering babies, must obtain an additional license to do so. As the occupations of a registered nurse and a midwife are distinct, each must be licensed. See, e.g., 51 Am.Jur. **Licenses and Permits**, Section 44.

A certified nurse practitioner, on the other hand, may be authorized to deliver babies. The Nursing Practice Act provides at Section 61-3-3(H) that a

"'Certified nurse practitioner' means a registered nurse, as described in subsection C of this section, licensed to practice in this state, who must have satisfactorily completed a post graduate program designed for the education and preparation of nurse

practitioners. A certified nurse practitioner shall be endorsed by the board upon recommendation of the certification committee for nurse practitioners. For acts beyond those described in subsection A of this section, a certified nurse practitioner shall act only under the supervision of a physician or surgeon licensed to practice in New Mexico. The name of and pertinent information concerning each nurse practitioner certified by the board shall be entered on the list of nurse practitioners maintained by the board."

The Nursing Board regulations, in defining the practice and functions of a certified nurse practitioner, state, in part:

"The nurse practitioner practices under the supervision of a physician according to a mutual protocol based on the nurse practitioner's knowledge and skills provided by his/her educational program. Some examples, but not limited to, are:

{*219} h. managing the care of healthy women during pregnancy including family planning, and common gyn problems. May deliver uncomplicated normal deliveries if trained to do so."

The certified nurse practitioner practicing under this regulation is designated a family nurse practitioner. Although the regulations may be ambiguous with respect to whether a family nurse practitioner is authorized to deliver babies and, accordingly, should be clarified, there is no indication that the legislature intended to vest regulatory authority in the Health Services Division over any part of the practice of nursing regulated by the Nursing Board.

The present authority in Health Services Division to regulate the practice of midwifery, Section 24-1-3(R) NMSA 1978, derived from a 1921 law enacted prior to the 1975 amendment to the Nursing Practice Act creating certified nurse practitioners. The legislature could not, in 1921 or in 1973, when Section 24-1-3, was re-enacted, have contemplated the expanded practice of nursing by a certified nurse practitioner. Therefore, the grant of authority in Health Services Division to regulate midwifery did not envision the Division's regulating a certified nurse practitioner properly authorized by Nursing Board regulations to deliver babies.

Where a person is licensed by one authority to perform a function which may also be licensed by another authority, there is no need for that person to obtain two licenses. In **Smith v. American Packing and Provision Co.**, 130 P.2d 951 (Utah 1942), the appellate court reversed the dismissal of a licensed engineer's complaint for payment of engineering services. The lower court was of the opinion that the alleged engineering services set forth in the complaint actually constituted the unlicensed practice of architecture. In reversing, the court stated:

"The mere fact that a licensed profession extends in some degree into the field of some other licensed occupation does not require the licensee to have a license in each of the

fields into which his profession may overlap, unless the statutes impose such requirement. . . .

The real criterion for determining if a licensed professional engineer must also have a license as an architect is not whether some service he performs might be performed lawfully by an architect, but whether such functions are necessarily embraced within the scope of engineering covered by his license. The issuance of a license in one field is not to be employed as a stepping stone to practice in some other field or even in a part of such other field, unless the functions of such other field performed by the licensee are necessarily embraced within the scope of the activities authorized by the license."

Similarly, a family nurse practitioner authorized by the Board of Nursing to perform services constituting midwifery need not, as well, have a midwife license from the Health Services Division. The regulatory authority of the Health Services Division with respect to the practice of midwifery must be confined to the delivery of midwifery services by individuals who do not possess either a nursing, medical, or osteopathic license authorizing the licensee to perform services which might fall within the definition of "midwifery."

ATTORNEY GENERAL

Jeff Bingaman, Attorney General