

CHAPTER 9

DECLARATORY STATEMENTS FROM THE BOARD OF NURSING

I. INTRODUCTION

Declaratory statements are opinions issued by a professional board or administrative agency, usually at the request of someone governed by that board or agency, on a matter within the legal authority of the board or agency. In our case, we are discussing the Board of Nursing.

Many nurses are under the mistaken impression that if they have a question regarding the practice of nursing, or whether a certain act may exceed the scope of their license, they may just call up the Board of Nursing and ask. This is not true.

First, almost none of the employees of the Board of Nursing are nurses themselves. They are administrative employees. Second, if they give incorrect information, and the nurse relies on it, the nurse may find herself in legal trouble; therefore, Board of Nursing employees will rarely provide any information that requires an opinion on the scope of practice or on interpretation of a particular rule (other than those pertaining to license applications and similar administrative matters). Third, for any such opinion to be valid, it must be a decision made by the entire Board of Nursing, and not just one employee or even one member of the Board of Nursing. Fourth, before any such decision can be made, the Florida Administrative Procedure Act (APA), Chapter 120, Florida Statutes, and the Government in the Sunshine Act, require that notice of it be published and that others in the public be given an opportunity to attend a hearing on it.

Therefore, there is a formal requirement that anyone desiring such an opinion or advice, must file a formal petition for a declaratory statement.

For example, if a nurse has a question regarding certain action that her employer is requiring her to take, for example, if she believes it may be outside of the scope of her nursing license, she may petition the Board of Nursing for a declaratory statement (formal opinion) regarding this matter. If a nurse desires to request clarification how an administrative rule adopted by the Board of Nursing should be interpreted in a given situation, she may petition the Board of Nursing for a declaratory statement (formal opinion) regarding this matter. Usually, it seems that those requesting declaratory statements are requesting opinions that authorize them to perform some act that may, at first blush, seem to violate an administrative rule or exceed the scope of practice. By obtaining a favorable decision, the nurse is protecting herself from later charges that she has violated a rule or exceeded the scope of her practice.

As in just about all other matters concerning administrative agencies (of which the Board of Nursing is one), the Florida Administrative Procedure Act (APA), Chapter 120, Florida Statutes, governs the authority to make declaratory statements and the procedures by which someone may apply for one.

II. PURPOSE OF A DECLARATORY STATEMENT

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the Board of Nursing has authority, pursuant to Rule 28-105.001, Florida Administrative Code. A petition for a declaratory statement may be used only to resolve questions or doubts as to how the statute, rule, or order may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person or for obtaining a policy of general applicability. A petition for a declaratory statement must describe the potential impact of the statute, rules, or orders upon the petitioner's interests.

Any "substantially affected person" may seek a declaratory statement from the Board of Nursing as to the applicability of a statutory provision, or of any rule or order of the Board of Nursing as it applies to the licensee's particular set of circumstances, pursuant to Section 120.565, Florida Statutes. The term "substantially affected person" means just that. You must be able to show that the rule, opinion, decision or act affects you, not someone else. The petition seeking a declaratory statement must state with particularity the licensee's set of circumstances and must specify the statutory provision, rule, or order that the licensee believes may apply to the set of circumstances.

Usually the professional licensing boards attempt to limit the number of declaratory statements that they give. Each petition for a declaratory statement must be meticulously researched, analyzed, reviewed and discussed. Often a declaratory statement will later be found to have effects which were not considered at the time. They take a great deal of time and work on the part of the Board of Nursing and its attorneys, so they are not usually embraced with a great deal of joy.

The Board of Nursing, like all administrative agencies, will attempt to limit who may apply for a declaratory statement, as a result. Usually, anyone licensed by the Board will be found to have standing or be a "substantially affected person," as long as they can show that the decision has some direct effect on them. Therefore, a registered nurse, licensed practical nurse, certified nursing assistant, or advanced registered nurse practitioner will be found to be a "substantially affected person" and will be determined to have standing to obtain a declaratory statement. Others may be turned away. However, even if they are initially denied, if that person (even if he, she or it is not licensed by the Board of Nursing) is shown that they are substantially affected by a rule, decision, opinion or statute, may nevertheless have standing. There are many appellate cases that have found this to be the case.

Therefore, an employer of a nurse may, for example, have standing under certain circumstances to request a declaratory statement. A professional association (for example, the Florida Nurse's Association), which represents those who are substantially affected may have standing under certain circumstances to request a declaratory statement. A company such as a nurse registry or temporary agency may have standing under certain circumstances to request a declaratory statement. A physician desiring to employ a nurse practitioner to perform certain acts may have standing under certain circumstances to request a declaratory statement.

If you file a petition for a declaratory statement, and it is rejected on the basis that you do not have standing, our recommendation is to file an amended petition that sets forth in great detail (supported by affidavits and other documents attached to it) how the petitioner is affected or will be affected by the

decision, rule, opinion, or statute.

III. THE PETITION

Because of the strict procedures and formality required of a petition for a declaratory statement, as well as the research that must go into it, and the hearing requirements, we do not recommend that you attempt to file one yourself. We recommend that you retain the services of an experienced health care attorney who has filed these before.

Pursuant to Rule 28-105.002, Florida Administrative Code, a petition seeking a declaratory statement shall be filed with the Department of Health's Agency Clerk. These should be filed with or sent to the following:

Agency Clerk
Department of Health
4052 Bald Cypress Way, Bin #A02
Tallahassee, Florida 32399-1703.

The petition must contain the following information:

1. The caption shall read: "Petition for Declaratory Statement Before the Florida Board of Nursing";
2. The name, address, telephone number, and facsimile number of the petitioner (licensee);
3. The name, address, telephone number, and facsimile number of the petitioner's attorney or qualified representative (if any);
4. The specific statutory provision(s), agency rule(s), or order(s) on which the declaratory statement is sought;
5. A description of how the statutes, rules, or orders substantially affect the petitioner in the petitioner's particular set of circumstances;
6. The signature of the petitioner or of the petitioner's attorney of qualified representative; and
7. The date.

It is our recommendation that, in addition to the foregoing, that you attach any and all applicable rules, statutes, opinions, interpretations, documents, journal articles, opinions from other agencies, chapters from text books, affidavits or other information or documentation that may help the Board of Nursing decide your case. For example, there may be an article from a nursing journal that supports the decision you are requesting. There may be a similar opinion or declaratory statement from a board of nursing in

a different state. There may be a court case on point. You may have expert opinions from nursing professors that support the statement that you are requesting. Attach anything that may help the Board decide your question.

IV. DISPOSITION OF PETITION BY THE BOARD OF NURSING

Pursuant to Rule 28-105.003, Florida Administrative Code, The Board of Nursing may hold a hearing to consider the petition for a declaratory statement. If a hearing is held, it shall be in accordance with sections 120.569 and 120.57, Florida Statutes. Within 90 days of the filing of the petition with the Department of Health, the Board of Nursing shall render a final order denying the petition or granting the declaratory statement.

V. EFFECT OF DECLARATORY STATEMENTS

Although a declaratory statement is technically applicable only to the person who requests it, such statements provide a good indication of how the Board of Nursing views particular practice issue. Many people refer to them for guidance on various issues. A copy of a declaratory statement may be obtained from the Board of Nursing by calling (850) 245-4175 and requesting it.

Practical Tips:

1. Hire an experienced health care attorney who has filed a petition for a declaratory statement before.
2. Do not attempt to do it yourself. It is far more complex than it sounds.
3. In addition to what is required, as set forth above, you should also include:
 - a. A comprehensive yet concise, well organized and clear statement of all relevant facts and circumstances;
 - b. A statement as to how and why the petitioner is "substantially affected" in as many different ways as apply; and
 - c. A copy of all relevant background documents and materials, attached as exhibits, including any applicable:
 1. Contracts, forms, policies, procedures or similar documents;
 2. Legal opinions, government opinions, agency opinions or similar documents;

3. Letters or instructions received from employers, contractors, etc.;
 4. Affidavits of others;
 5. Any relevant nursing journal articles, medical journal articles, chapters out of books and treaties or other medical or nursing literature;
 6. Relevant legal cases;
 7. Relevant nursing board opinions from other states/jurisdictions;
 8. Applicable nursing codes of ethics;
 9. Clinical guidelines, algorithms, decision trees or similar documents;
 10. Affidavits or opinions of experts with a copy of their CV or resume attached; and
 11. Any other relevant documents that might be of assistance to the Board of Nursing in making a decision.
4. Serve the original on the Department of Health(DOH) Agency Clerk but also serve a copy on the Executive Director of the Board of Nursing at the main Board of Nursing office in Tallahassee.
 5. Send your original and your copy by U.S. express mail (so there is tracking of it), and request a return receipt for it, so you have a receipt showing when it was received and who received it. Be sure to keep a complete copy of the petition and all of its attachments, of course.
 6. Place a certificate of service on your petition showing the above.
 7. Be sure to attend the meeting when your petition is discussed. Be prepared. Bring any relevant witnesses. Be prepared to discuss with authority the need for your declaratory statement and the reasons it is important. If you fail to attend, this will be seen as an indication that you do not consider it important. The Board of Nursing may also consider that you have abandoned your petition under these circumstances and may dismiss it for that reason alone.

VI. EXAMPLES OF DECLARATORY STATEMENTS BY THE BOARD OF NURSING

Below are a few examples of declaratory statements released by the Florida Board of Nursing.

A full list of the declaratory statements issued by the Board is included in Appendix I of this Manual along with copies of many of the most relevant declaratory statements.

To obtain copies of other declaratory statements released by the Board of Nursing you can either contact the Board to have the Board mail copies to you or go to the following website and print out copies of them:

http://www.doh.state.fl.us/mqa/nursing/nur_declareFO.html.

DOH-04-0039. In this declaratory statement, the Board addresses the issue of the scope of practice for a registered nurse who is trained as a Sexual Assault Nurse Examiner, hereinafter referred to as "SANE."

The nurse who petitioned the Board sought for the Board to issue a declaratory statement as to whether it was in the scope of practice for her to administer sexual battery exams as a SANE in a variety of circumstances for evidence/specimen collection purposes. The Board stated that it is within the scope of practice for a registered nurse trained in SANE to perform evidence/specimen collection under the direct supervision of a licensed physician in a hospital emergency room department, as well as in the community-based setting; a licensed physician must always be available for patient assistance when a nurse trained in SANE is conducting a sexual battery exam. The Board also stated that a registered nurse trained in SANE-A or SANE-P to perform sexual battery exams for those patients for evidence/specimen collection purposes. The Board went on to state that it was not within the scope of practice for a nurse who is trained in SANE to perform a sexual battery pelvic exam for diagnostic purposes.

DOH-03-1381. In this declaratory statement, the Board addresses the issue of the scope of practice for a registered nurse trained in Advanced Cardiac Life Support (ACLS).

The petitioner wanted to know if it was within the scope of practice for a registered nurse to defibrillate a patient, using a defibrillator, upon recognizing ventricular fibrillation or ventricular tachycardia in an inpatient or ambulatory procedure setting. The Board stated that it is within the scope of practice for a nurse to defibrillate a patient, using a defibrillator, upon recognizing ventricular fibrillation or ventricular tachycardia in an inpatient or ambulatory procedure setting if there are standing orders and protocols for the nurse to follow in that situation; however, it is not within the scope of practice to defibrillate a patient prior to ACLS code team arrival or physician verbal or written order.

DOH-03-0408. In this declaratory statement, the Board addresses the issue of the scope of practice for a registered nurse who is not a Certified Registered Nurse Anesthetists (CRNA) to administer Diprivan to an intubated patient who is monitored or monitor an intubated patient who has received Diprivan

pursuant to a verbal or written order given by a licensed independent practitioner.

The Board declared that it is within the scope of practice for a registered nurse trained and certified in ACLS, and is following the established policies and procedures of the facility where the nurse works to administer Diprivan to intubated patient and monitor intubated patients who have been administered Diprivan.

DOH-03-0407. In this declaratory statement, the Board addressed three separate issues: whether it was within the scope of practice for a registered nurse to administer intravenous Ketamine (Ketalar) pursuant to a written or verbal order by a surgeon in an ambulatory setting where the patient is not intubated; whether it is within the scope of nursing for a registered nurse to administer intravenous Ketamine (Ketalar) pursuant to a written or verbal order by the surgeon for the purposes of rendering the patient insensible to pain for the injection of local anesthetic and surgical procedures; and, whether it is within the scope of practice for a registered nurse to administer intravenous Ketamine (Ketalar) pursuant to a written or verbal order by a surgeon in an ambulatory setting where there is not an anesthesiologist on staff?

In answering these three questions the Board stated that all three questions posed to it were outside the scope of practice for a registered nurse.

DOH-03-0406. The Petitioner who brought this declaratory statement is a registered nurse who wanted the Board to issue a declaratory statement as to whether it was within the scope of nursing for a registered nurse to secure a peripherally inserted central catheter (PICC) with a skin suture.

The Petitioner stated that registered nurses who have received specialized can place PICC and to ensure patient safety and prevent accidental removal of the line, practitioners will often secure the PICC with a skin suture. In its Final Order the Board stated that there was insufficient information to issue a declaratory statement because the practice could be within the scope of practice for a registered nurse if an approved provider of nursing education or continuing education teaches suturing as part of PICC placement.

DOH-02-0364. The Petitioner who brought this declaratory statement was a registered nurse and petitioned the Board to find out whether it is within the scope of practice for a registered nurse to perform laser treatments for vascular lesions and hair removal with a Medilas D Skin Pulse Laser.

The Board stated that it was unable to answer the declaratory statement because enough information was not given to it; however, based on the information given a registered nurse may not perform hair removal procedures with a laser device unless the nurse is licensed pursuant to Chapter 478, Florida Statutes. The Board did state that the Medilas D Skin Pulse Laser is approved by the Board of Medicine; any person who uses laser devices for the purposes of removing hair must be licensed as an electrologist under Chapter 478, Florida Statutes, and must work under the protocols of the Board of Medicine.

VII. CONCLUSION

Because of the time, expense and technicalities of obtaining a declaratory statement, as well as the fact that if it is unfavorable, it will be published for everyone to see, there may be better alternatives. One of these is to obtain a legal opinion from a health lawyer who is familiar with nursing matters. Another is to ask the question of a nursing professor, if the matter is not likely to have detrimental legal consequences. Regardless, if you do need a declaratory statement, the procedure is there for it.

You should review and familiarize yourself with the declaratory decisions we have included in Appendix I of this Manual.

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