

Withdrawal of Proposed Amendments to Rule 221.12, relating to Advanced Practice Nurses' Scope of Practice and Consideration of Comments and Responses to Comments

Summary of Request: Consider withdrawal of proposed amendments to Rule 221.12, relating to the advanced practice nurse's scope of practice, and responses to comments.

Historical Perspective: Rule 221.12, relating to Scope of Practice for advanced practice nurses, states that the advanced practice nurse's scope of practice is based upon educational preparation, continued advanced practice experience and the accepted scope of professional practice of the particular specialty area. The rule further indicates that the scope of practice of particular specialty areas is defined by national professional specialty organizations or advanced practice nursing organizations recognized by the Board.

At the October 2005 meeting, the Board considered the Advanced Practice Nursing Advisory Committee's (APNAC's) recommendation to amend Rule 221.12(1). The proposed amendment eliminated the requirement that the Board review and approve every scope of practice statement developed by advanced practice nursing professional organizations for use by advanced practice nurses. The committee members elected to recommend that the Board not recognize specific scope of practice statements and revise Rule 221.12(1) accordingly. The Board accepted the committee's recommendation and voted to propose the rule amendment (published in the November 11, 2005 issue of the *Texas Register*).

Three comments were received in response to the proposed rule (Attachment A). Comments were submitted by State Representative Vicki Truitt, the Texas Medical Association (TMA), and the Texas Society of Anesthesiologists (TSA). Each of the commentors expresses concern that, by eliminating the requirement that the Board review and approve each individual scope of practice statement, the Board is granting private entities the authority to establish scope of practice for nurses in Texas. Additionally, TSA has requested a public hearing in connection with the proposed rule change.

Staff believes the comments raise concerns that should be further evaluated prior to final rule adoption. Staff recommends that the proposed rule be withdrawn at this time to allow for further discussion and analysis by staff. A proposed summary of the comments received and the responses to those comments are included for the Board's consideration as Attachment B.

Pros and Cons:

Pros: Withdrawal of the proposed rule will allow additional time for discussion and analysis by staff. It will not negatively affect the scope of practice for advanced practice nurses and eliminate the requirement for a public hearing at this time.

Cons: None noted.

Staff Recommendation: Move to withdraw the proposed revisions to Rule 221.12 as published in the *Texas Register*. Staff is authorized to publish the summary and response to comments as indicated in Attachment B.

HOUSE OF REPRESENTATIVES



VICKI TRUITT
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December 13, 2005

Katherine A. Thomas MN, RN
Executive Director
Board of Nurse Examiners
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Re: Proposed amendment to 22 TAC Section 221.12 as published in the Texas Register on November 11, 2005 at 30 TexReg 7354 to 7356. Advanced Practice Nurses.

Dear Ms. Thomas:

As the chairman of Budget and Oversight of the House Committee on Public Health, I would like to express my concern with the above referenced rule, as it appears to inappropriately delegate the regulation of the practice of nursing to entities that are beyond the control of the State of Texas. From the preamble to the rule, it is obvious that the Board of Nurse Examiners will not approve "scope of practice statements" but will refer "interested parties" to the documents concerning scope of practice prepared by national professional specialty organizations or advanced practice nursing organizations. In effect, the board will permit, without prior approval, those private entities to establish the scope of practice of professional nursing within this state. This is unacceptable.

The Texas Constitution in Article II, section 1 and Article III section 1, provides for the Texas Legislature and its regulatory agencies, to govern and police the professions of this state. The legislature has given the Board of Nurse Examiners the authority to regulate the practice of nursing. Chapter 301 of the Texas Occupations Code provides the legislative authority for the regulation of nursing by the Board of Nurse Examiners.

I hope the Board of Nurse Examiners reconsiders the proposed rules, which I fear weaken the role of the board to ensure that patients of this state are protected, and that nursing care provided to them is of the highest quality.

Sincerely,

Vicki Truitt

VT/ml

CHAIRMAN:
BUDGET AND OVERSIGHT, HOUSE COMMITTEE ON PUBLIC HEALTH
VICE CHAIRMAN:
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MEMBER:
HOUSE COMMITTEE ON APPROPRIATIONS



December 9, 2005

Katherine A. Thomas MN, RN
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333 Guadalupe, Suite 3-460
Austin, Texas 78701

Re: Proposed amendment to 22 TAC Section 221.12 as published in the Texas Register on November 11, 2005 at 30 TexReg 7354 to 7356. Advanced Practice Nurses.

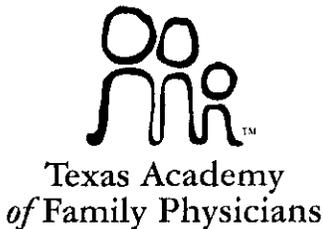
Dear Ms. Thomas,

On behalf of our Associations, we are pleased to take the opportunity to comment upon the above referenced proposed rule amendment.

The Board of Nurse Examiners ("Board") proposes to amend Section 221.12 (1) by removing the requirement for the Board to have previously "recognized" a national professional organization or advanced practice nursing organization prior to a change in scope of practice as defined by such organization. In effect, the Board indicates that those organizations, without any review by the board, will establish the scope of practice for Advance Practice Nurses ("APN"s) in this state.

The commentary to the proposed rule amendment indicates that the Board appointed an Ad hoc committee which included two interested individuals that are directors of advanced educational programs. This committee, the Advanced Practice Nursing Advisory Committee ("APNAC") questioned whether the Board would be required to review and vote to recognize each scope of practice statement each time it was amended or revised. The committee also expressed concern that the recognition of specific statements could be limiting both for the Board as well as for advanced practice nurses. The committee elected to recommend that the Board not recognize specific scope of practice statements and the rule was revised (the proposed amendment) accordingly.

The mandate of any professional licensing agency is to protect the public and not to act as a facilitator for the expansion of the scope of practice of the profession it is established to regulate. The question is not whether it is difficult to develop criteria and hence regulate, but rather whether the regulation is appropriate and necessary to protect the public. The fact that "recognition of specific statements" might be limiting to the Board and to



APNs is precisely the nature of the regulation of the scope of practice of a profession. It is the duty of the Board to set boundaries for scope of practice, not abdicate its role as a regulator to any "national" private organization.

The APNAC is a committee created by the Board and not by the Legislature. As such it has no rulemaking authority. Similarly, neither national professional specialty organizations nor advanced practice nursing organizations have any legislatively delegated rule making authority. For the Board to acquiesce in such sub delegation of rule making contravenes the Texas Constitution. The constitutional provision at issue, article III, section 1, states as follows: "The Legislative power of this State shall be vested in a Senate and House of Representatives." Legislative delegations of authority are also subject to article II, section 1, the separation of powers provision. Courts have construed article II, section 1 and article III, section 1 to permit the legislature to delegate rule-making authority to an administrative agency if the legislature "establishes 'reasonable standards to guide the entity to which the powers are delegated.'" See *Edgewood Indep.Sch. Dist. v. Meno*, 893 S.W. 2nd 450, 474 (Tex 1995). Legislative authority may even be delegated to private entities if the legislative purpose is discernible and there is protection against the arbitrary exercise of power. See *Office of Pub. Ins. Counsel v. Texas Auto. Ins. Plan*, 860 S.W. 231, 237 (Tex. App. – Austin 1993, writ denied).

In reviewing the use of advisory committees, the Government Code is instructive. Section 2001.031 of the Government Code, a provision of the Administrative Procedure Act ("APA"), addresses the use of advisory committees by state agencies. It provides as follows:

- § 2001.031. INFORMAL CONFERENCES AND ADVISORY COMMITTEES. (a) A state agency may use an informal conference or consultation to obtain the opinions and advice of interested persons about contemplated rulemaking.
- (b) A state agency may appoint committees of experts or interested persons or representatives of the public to advise the agency about contemplated rulemaking.
- (c) The power of a committee appointed under this section is advisory only.

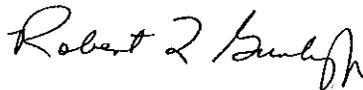
This APA provision generally authorizes state agencies to use advisory committees in rule-making on the condition that the power of any committee appointed under the provision is purely advisory.

In brief, the Legislature has not delegated rule-making authority to either the APNAC or to a national professional specialty organization or advanced practice nursing organization. To permit such sub delegation is not contemplated by the APA and would be in violation of article II, section 1 and article III, section 1 of the Texas Constitution. Contrary to the recommendation of the APNAC, the Board has a legislatively mandated duty to review, access, modify, amend or reject each and every change to a modification or amendment of a "scope of practice statement" prior to such new activity or scope of practice being permitted within this state.

The proposed rule should not be adopted and should be strengthened to establish a protocol by which the board will review each and every new "scope of practice statement" it plans to permit. Such review and acceptance or rejection is a form of rulemaking and should therefore also conform to the Government Code provisions concerning posting and public hearing.

Thank you for the opportunity to comment upon the proposed rule change.

Sincerely,



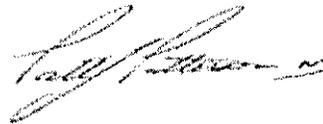
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Patty J. Patterson, M.D.
President, Texas Pediatric Society



Robert E. Jackson, M.D.
President, Texas Academy of Internal Medicine

Cc: The Honorable Rick Perry, Governor of Texas
The Honorable David Dewhurst, Lieutenant Governor of Texas
The Honorable Tom Craddick, Speaker of the Texas House of Representatives
The Honorable Jane Nelson – Chair, Senate Committee on Health and Human Services
The Honorable Diane Delisi – Chair, House Committee on Public Health
The Honorable Vicki Truitt – Vice Chair, Sunset Advisory Commission
The Honorable Byron Cook – Member, Sunset Advisory Commission
The Honorable Glenn Hegar – Member, Sunset Advisory Commission
The Honorable Carl Isett – Member, Sunset Advisory Commission
The Honorable Ruth Jones McClendon – Member, Sunset Advisory Commission
The Honorable Elliot Shapleigh – Member, Sunset Advisory Commission
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December 8, 2005

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333 Guadalupe, Suite 3-460
Austin TX 78701

Re: Proposed amendments to 22 TAC Section 221.12 as published at 30 Tex.
Reg. 7354-7356

Dear Ms. Thomas:

The Texas Society of Anesthesiologists ("TSA") offers its comments concerning the Board of Nurse Examiners proposed amendments to 22 Texas Administrative Code, Section 221.12, concerning the regulation of advanced practice nurses, as published 30 Tex. Reg. 7354-7356 (November 11, 2005).

In addition, pursuant to Tex. Govt. Code Section 2001.0029(B)(3), TSA hereby requests a public hearing in connection with the proposed rule changes.

The Texas Society of Anesthesiologists is a state-wide medical society with 2,486 position members. TSA's members evaluate patients, determine anesthesia plans, administer anesthetics, medically direct certified registered nurse anesthetists ("CRNAs"), anesthesiologists assistants ("AAs") monitor patients during surgical, obstetrical, and other diagnostic and therapeutic procedures, and provide post-anesthetic care in ambulatory surgical centers, hospitals, and office settings throughout Texas.

Texas law is clear that the selection and administration of anesthetic drugs is the practice of medicine. Medical acts associated with the provision of anesthesia services may be delegated by a physician to a qualified and properly trained person, but the delegating physician remains responsible for the medical acts of the person performing the delegated medical acts. Generally, a physician may delegate anesthesia-related medical acts to CRNAs or AAs. In addition, certain other healthcare providers, such as dentists, oral surgeons, and podiatrists may be qualified, trained, and authorized to independently perform some medical acts associated with the administration of anesthesia.

Chapter 301 of the Texas Occupations Code provides the legislative authority for the regulation of nursing by the Board of Nurse Examiners. Section 301.151 enumerates the general rule making authority of the Board and states:

The Board may adopt and enforce rules consistent with this Chapter and necessary to:

1. Perform its duties and conduct proceedings before the Board;
2. Regulate the practice of professional nursing and vocational nursing;
3. Establish standards of professional conduct for license holders under this Chapter; and
4. Determine whether an act constitutes the practice of professional nursing or vocational nursing.

Section 301.152 of the Occupations Code provides the legislative directive to the Board concerning rules regarding advanced practice nurses. Section 301.152(b) states:

(a) the Board shall adopt rules to:

(2) approve a registered nurse as an advanced practice nurse;

(Emphasis added).

Section 301.154 of the Occupations Code includes the legislative directive to the Board pertaining to rules regarding delegation of certain medical acts as follows:

Section 301.154. Rules Regarding Delegation of Certain Medical Acts.

- (a) The Board may recommend to the Texas State Board of Medical Examiners the adoption of rules relating to the delegation by physicians of medical acts to registered nurses and vocational nurses licensed by the Board. In making a recommendation, the Board may distinguish between nurses on the basis of special training and education.
- (b) A recommendation under subsection (a) shall be treated in the same manner as a petition for the adoption of a rule by an interested party under Chapter 2001, Government Code.

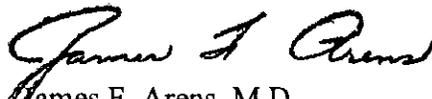
Finally, Section 301.002(2) of the Occupations Code defines "professional nursing." According to the Occupations Code, "the term does not include acts of medical diagnosis or prescription of therapeutic or corrective measures." However, professional nursing does include the administration of a medication or treatment as ordered by a physician, podiatrist, or dentist (Tex. Occ. Code Section 301.002(2)(c)).

Katherine A. Thomas, MN, RN
December 8, 2005
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The Legislature of Texas has both empowered and charged the Board of Nurse Examiners with the authority and the obligation to regulate the practice of nursing in the State of Texas. At best, the proposed rule delegates the Board's rule making authority to "national professional specialty organizations or advanced practice nursing organizations," with no independent scrutiny by the Board and no consideration of whether the unnamed organizations may have the best interest of Texas patients in mind when they adopt their own scope of practice standards. At worst, the proposed Rule represents an absolute violation of the Texas Legislature's directive to the Board of Nurse Examiners to regulate those individuals whom it is charged with providing standards for professional licensing.

The TSA appreciates the opportunity to comment on the proposed Rule, and looks forward to the chance to exchange ideas at a later public hearing.

Sincerely,


James F. Arens, M.D.
President

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Proposed Summary of Comments and Responses to Comments on Proposed Rule 221.12

Summary: Three comments were received in response to the proposed rule (Attachment A). Comments were submitted by State Representative Vicki Truitt, the Texas Medical Association (TMA), and the Texas Society of Anesthesiologists (TSA). Each of the commentors expresses concern that, by eliminating the requirement that the Board review and approve each individual scope of practice statement, the Board is granting private entities the authority to establish scope of practice for nurses in Texas.

Responses: The revisions to the rule that were proposed by the Board are consistent with practices employed by other state agencies. For example, in its rules relating to Office Based Anesthesia (22 Tex. Admin. Code, § 192), the Texas Medical Board refers to standards set forth by the American Society of Anesthesiologists. Relying on scope of practice statements from professional organizations allows regulatory agencies to rely on evidence-based standards that have gone through rigorous review and evaluation at the national level. Although the proposed rule continued to only permit practice that is consistent with state laws and regulations, the Board has elected to withdraw the proposed rule at this time to allow for further analysis.