

**Consideration of Adoption of Proposed Amendments to 22 Tex. Admin. Code
§221.12, relating to *Scope of Practice***

Background: Proposed amendments to §221.12 were approved by the Board at its July Board meeting for submission to the *Texas Register* for public comment. The proposed amendments were recommended by the Advanced Practice Nursing Advisory Committee (APNAC). The proposal was published in the *Texas Register* on August 19, 2022, and the comment period ended on September 19, 2022. The Board received two written comments on the proposal. The Board did not receive any requests for a public hearing. A copy of the written comments received are attached hereto as Attachment "A".

Pursuant to 1 Tex. Admin. Code §91.36, a rule must be adopted within six months of its publication date or it must be re-proposed. Since the proposal of this rule was published on August 19, 2022, the deadline to adopt the rule will be in February 2023. Staff has referred the public written comments to the APNAC for review and further recommendations and will bring those recommendations to the Board at its January 2023 meeting for deliberation and vote on the proposal.



Sept. 19, 2022

James W. Johnston, General Counsel
Texas Board of Nursing
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Via email to Dusty.Johnston@bon.texas.gov

Re: Comments on Proposed Rule 22 Tex. Admin. Code § 221.12, Scope of Practice
(47 Tex. Reg. 33, Pages 4891-5036, Aug. 19, 2022)

Dear Mr. Johnston:

On behalf of Texas Medical Association (TMA), and our over 56,000 physician and medical student members, we submit the following comments on the Texas Board of Nursing's (BON's or board's) proposed amendments to 22 Tex. Admin. Code § 221.12, as published in the Aug. 19, 2022 Texas Register.

In the preamble, it states that the BON is acting in response to “an increased number of questions and complaints from the public regarding certain procedures and patient care activities being performed by APRNs.”¹ While we understand the impetus for the rule proposal and appreciate the desire to provide more clarity regarding the scope of practice of APRNs in Texas, we have strong concerns about the proposal's drafting. Therefore, we are opposed to the proposal in its current form. Our concerns focus on potentially conflicting provisions in the rules and preamble that may allow inappropriate scope expansion. We have included our specific concerns below, and we respectfully reserve the right to amend our comments as the rulemaking process continues. Thank you in advance for your consideration and attention to our comments.

COMMENTS

I. Comments on Preamble.

Again, TMA understands BON's stated desire to act on “an increased number of questions and complaints from the public regarding certain procedures and patient care activities being performed by APRNs” by attempting to address these issues through rulemaking. We also understand BON's stated intent to “remind[] licensees of the importance of ensuring that all

¹ See Preamble, Proposed Rules 221.12.

patient care activities are performed in conformity with their respective scopes of practice.”² However, we are concerned that some of the language in the preamble and proposed rules appears inconsistent with this intent and may inappropriately expand scope and/or increase confusion in this area. We are particularly concerned about these issues unless BON provides further clarification in the proposed rules that the Nursing Practice Act (the Act) is the basic framework for the scope of practice for APRNs. Training, education, experience, professional specialty guidance, and hospital credentialing may be important to determine if an APRN is qualified to perform a service, but only in the context of whether the Act first provides that the service is part of their licensure at all. *See, e.g.*, Tex. Occ. Code 301.002(2) defining “professional nursing”; and 301.004 (prohibition on practicing medicine). This is why we suggest further clarification, recommended herein.

II. Comments on Proposed Section 221.12.

A. Subsection (b).

In our first comment on the proposed rule itself, we ask BON to add “applicable” between “other” and “laws” in subsection (b). At first glance, our request may appear to be a distinction without a difference, but we hope our subsequent explanation adequately articulates why this edit is very important.

The existing, unedited rule includes additional limitations that were not included in this proposed language—“other laws and regulations of the State of Texas”. The “of the State of Texas” language added an important guardrail on the scope rule to avoid confusion with federal laws that may not be applicable to the APRN where state scope of licensure laws control. However, we also recognize there are some federal laws that do apply to parts of certain APRNs’ practices in Texas without interfering with scope of licensure. If BON’s intent is to capture those applicable federal laws, we understand and would like to provide our suggestion to avoid a potential misapplication of the proposed rules in a manner that violates Texas’ scope of licensure laws.

We recommend making the following **bolded** change to the proposed rule in subsection (b) to account for the state and federal laws that apply to an APRN’s practice:

(b) APRNs may only perform those functions that are within their Board authorized scope of practice for their role and population focus area and that are consistent with the Nursing Practice Act, Board rules, and other **applicable** laws and regulations affecting their practice in Texas.

B. Subsection (c).

We are also concerned the proposed factors in standalone subsection (c) may create ambiguity for APRNs about whether these factors provide an alternative measure for what is considered

² *Id.*

within their scope of practice in Texas outside of the Act. This misapplication would violate state licensure laws where inconsistent with the Act.

For example, subsection (c)(2) states:

(2) Whether the action falls within generally acceptable standards of care appropriate for the APRN's role and population focus area, *as determined by a professional specialty organization*

By allowing this factor to be solely defined by a professional specialty organization, it creates ambiguity about what exactly is controlling the APRN's scope of practice.

As another example, (c)(4) states:

(4) Whether the APRN has been *credentialed by a health care facility's credentialing body and/or holds a privilege to perform the action* at a health care facility;

Again, it does not matter if a hospital credentials and/or provides privileges to an APRN to perform an act that falls outside of the APRN's legal scope of practice in Texas—if the APRN performs such act in Texas, the APRN has violated the laws governing the APRN's state licensure.

Our concerns are increased by some parts of the preamble, which may be misconstrued, including this statement:

“If an APRN is unsure if a particular action falls within his/her scope of practice, the proposed amendments are intended to provide additional clarity as to the factors that should be reviewed and considered before performing the activity or action.”

To avoid potential negative and dangerous consequence—including a misinterpretation that violates scope of licensure laws—we recommend combining (b) and (c) to better set the parameters for how scope is defined:

(b) APRNs may only perform those functions that are within their Board authorized scope of practice for their role and population focus area and that are consistent with the Nursing Practice Act, Board rules, and other **applicable** laws and regulations affecting their practice in Texas.

[~~(c)~~] In determining whether a particular action falls within an APRN's authorized scope of practice, **the Board will first determine if the action is allowed under the applicable laws and regulations affecting the APRN's practice in Texas, including the Nursing Practice Act. If so, the Board will then consider the following factors [will be considered]:**

(1) Whether the APRN received training regarding the performance of the particular action in his/her advanced educational program;

(2) Whether the action falls within generally acceptable standards of care appropriate for the APRN's role and population focus area, as determined by a professional specialty organization;

- (3) Whether the APRN has demonstrable clinical competence and/or clinical experience in performing the action in the role of an APRN, obtained through supervision and/or training by a qualified practitioner;
- (4) Whether the APRN has been credentialed by a health care facility's credentialing body and/or holds a privilege to perform the action at a health care facility;
- (5) Whether the APRN has completed additional training for the specific action being performed. Additional training means education obtained by the APRN post-APRN licensure in ~~his/her~~ the APRN's role and population focus area that is adequate for the action being performed by the APRN.
- (A) To determine whether the additional training obtained by an APRN is adequate for the action being performed by the APRN, the following factors will be considered:
- (i) the type of instruction provided, by way of example, and not limitation, online instruction; in-person instruction; didactic instruction; or clinical instruction;
 - (ii) the learning objectives, content, materials, and methods for evaluating participation contained in the training curriculum;
 - (iii) the length and/or quantity of the training;
 - (iv) the qualifications of the person/entity providing the training;
 - (v) whether the training has been certified or recognized by a professional specialty organization for the APRN's role and population focus area;
 - (vi) whether the training is consistent with evidence-based practice;
 - (vii) whether the training is sponsored by an educational institution, such as a formal fellowship or precepted experience; and
 - (viii) whether the training is provided by an entity in conjunction with the use of the entity's product, drug, or medical apparatus/equipment.
- (B) All training must include a method of objective, verifiable participant competency following completion of the training.

C. Subsection (g).

We also object to the “may” disciplinary language in proposed subsection (g). This proposed subsection states:

(g) An action that is determined to have been committed outside an APRN's authorized scope of practice *may* subject the APRN to discipline.

This is a bad public policy precedent to set. If an APRN is acting outside the professional's scope of licensure, there should be disciplinary consequences, albeit the level of discipline may vary based on the factors underlying the infraction.

Further, this proposed language is inconsistent with the board's existing Rule 221.17. Rule 221.17, Enforcement for APRNs, states:

“Any nurse who violates the rules set forth in this chapter shall be subject to disciplinary action and/or termination of the authorization by the board....”

Proposed subsection (g) should align with Rule 221.17; and we therefore ask BON to change “may” to “shall”.

D. Additional Comments:

We are confused on what BON means by “population focus area” and “new roles”. We note that BON uses “specialty area” and “population focus area” with some inconsistency in its rules and informational resources. We suggest using consistent, well-defined terms to provide clear communication to licensees.

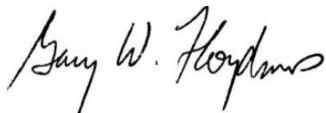
We also suggest referencing Rule 221.13 in this proposed rule as one of the factors for whether the board determines an APRN was acting within appropriate scope of licensure. Rule 221.13 sets out the “Core Standards for Advanced Practice” and provides additional factors likely important to the board’s determination of whether an APRN is acting within the APRN’s scope of practice.

Finally, the board refers to “a professional specialty organization” and “an educational institution” in its proposed rules for the purpose of considering standards of care and training; however, there are no reasonable limitations on what type of professional specialty organization (e.g., nationally recognized) or educational institution (e.g., accredited, board-approved) that standard of care or training may come from. We suggest including additional qualifications on these terms to prevent a licensee from using a sham specialty organization or educational institution to verify the licensee’s actions/training/education.

CONCLUSION

Thank you for considering the above comments. We appreciate BON’s role in this process and the board’s attempt to clarify scope of licensure for APRN’s in its rules. If you have any questions, please contact any of the following TMA staff by email: Kelly M. Walla, JD, LL.M., vice president and deputy general counsel, at kelly.walla@texmed.org; Laura J. Thetford, JD, associate general counsel, at laura.thetford@texmed.org; or Michelle Romero, associate vice president of advocacy, at michelle.romero@texmed.org; by phone at 512-370-1300; or at our mailing address: 401 West 15th Street, Austin, Texas 78701.

Sincerely,

A handwritten signature in black ink that reads "Gary W. Floyd". The signature is written in a cursive, flowing style.

Gary W. Floyd, MD
President



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September 19, 2022

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Re: Comments on Proposed Rule 22 Tex. Admin. Code § 221.12, Scope of Practice (47 Tex. Reg. 33, Pages 4891-5036, Aug. 19, 2022)

Dear Mr. Johnston:

This firm acts as General Counsel to the Texas Pain Society (TPS), a trade association comprised of Texas physicians practicing pain management. This letter serves as our comments to the Board of Nurses' proposed amendments relating to Scope of Practice of Advanced Practice of Registered Nurses.

We are concerned with the dearth of clear standards by which a supervising physician can measure an APRN's competency within their self-designated specialty.

The proposed changes arose from public questions and complaints regarding certain procedures and patient care activities being performed by APRNs. While we appreciate the Board's efforts in this regard to clarify Scope of Practice, the new rules do not go far enough to alleviate the public's concern (as well as physician employers) that APRN's may self-designate their own specialties without proven training or measurable competency.

TPS objects to the Board of Nursing's proposed amendments relating to Scope of Practice of Advanced Practice Registered Nurses, 22 TAC sec. 221.12, and in particular section (c), which is intended to clarify how the Board will determine if a particular patient care activity falls within an APRN's scope of practice. We propose the language highlighted in yellow, below, to ensure that the APRN has been supervised by someone in that field of specialty. As it is currently proposed, the word "qualified" is too vague to be enforceable.



- 3) Whether the APRN has demonstrable clinical competence and/or clinical experience in performing the action in the role of an APRN, obtained through supervision and/or training by a qualified practitioner in his/her advanced educational program;

Further, proposed sec. 221.12(c)(5)(A) is a list of factors to determine the adequacy of the APRN's training. We believe that training should be required by a qualified practitioner in his/her educational program rather than by a supervising physician, and that that training should be for no less than one year. Thus, we would suggest adding to the proposed language:

- (i) the type of instruction provided, by way of example, and not limitation; online instruction, in-person instruction; didactic instruction; or clinical instruction in his/her advanced educational program;
- (iii) the length, one year being the minimum length of training required, and/or quantity of the training in his/her advanced educational program;

Finally, we suggest that the Board put more teeth into these rules, by changing the "may" to "will" in section (g), so that it the proposed rule reads:

- (g) An action that is determined to have been committed outside an APRN's authorized scope of practice may will subject the APRN to discipline.

TPS' members are committed to quality of care and need assurances that the APRNs it hires are fully competent in the field of pain management. While we agree that the new language is a step in the right direction, the above additional language and qualifications provide concrete requirements that will prove helpful to physicians and the public in determining an APRN's competency within their scope of practice.

Sincerely,

Robbyn P. Wysocki
General Counsel, Texas Pain Society