



Physicians Caring for Texans

September 14, 2020

The Honorable Ken Paxton
Attorney General of Texas
Attn: Opinions Committee
P.O. Box 12548
Austin, Texas 78711-2548

Via Email: Opinion.committee@texasattorneygeneral.gov

Re: Texas Medical Board's request for opinion on Chapter 157 of the Occupation Code regarding supervision and delegation of a certified registered nurse anesthetist (RQ-0371-KP)

Dear Attorney General Paxton,

The Texas Medical Association (TMA) appreciates the opportunity to comment on the Texas Medical Board's (TMB) request for an Attorney General Opinion on the following two issues:

1. Does the Texas Occupation Code, Chapter 157 *et. seq.* require any level of physician supervision of a Certified Registered Nurse Anesthetists (CRNA)?
2. Is the liability of the delegating physician limited solely to the determination of competency to initially delegate to CRNA under Section 157.060, or does it include liability for all delegated medical acts under Section 157.001?

TMA agrees, generally, with TMB's assertion and authorities evidencing that some level of supervision is required for the medical acts delegated to a CRNA under the Texas Medical Practice Act (TMPA), Section 157.001(a). This supervision does not have to be direct, meaning the physician is not required to directly supervise the CRNA's performance of the delegated medical acts. Instead, it is flexible, and the level of physician involvement, as the Office of the Attorney General has previously opined, is based on the "physician's professional judgment in light of other relevant federal and state laws, facility policies, medical staff bylaws, and ethical standards."¹

Further, a physician may be found liable for the delegated medical acts to a CRNA under Section 157.001(b). This liability depends, generally, on whether the physician was negligent in delegation or supervision or vicariously liable for the negligence of his or her delegate. However,

¹ Tex. Att'y Gen. Op. No. JC-0117, pp. 6-9 (1999).

a physician's liability in Section 157.060 for certain delegated acts to a CRNA is limited—he or she cannot be held liable for delegated acts based solely on the delegated order unless he or she had reason to believe the CRNA lacked competency to perform the act.

To summarize, under the TMPA, delegation to a CRNA also requires some level of supervision, *albeit* flexible, based on the physician's professional judgment, other laws, and other relevant, authoritative guidance. Delegation without supervision is not permitted.

Also, a physician may be held liable for delegated medical acts to a CRNA. Generally, a physician may be found liable for negligent delegation, negligent supervision, or held liable based on principles of agency law. However, liability based on delegation to a CRNA is limited by Section 157.060.

This application of the TMPA strikes the best balance between the interests of the physician, CRNA, and the patient: (1) it protects the physician's right to exercise his or her professional medical judgment over the delegated medical acts and to reduce his or her risk of liability by determining the appropriate level of oversight; (2) it allows the CRNA enough flexibility to perform his or her delegated acts within the latitude permitted by the TMPA and other governing laws and guidance; and (3) it supports a patient's receipt of, and access to, quality care.

ARGUMENTS AND AUTHORITIES

A. Chapter 157 of the TMPA requires some level of physician supervision over the medical acts delegated to the CRNA.

TMA agrees with TMB's assertion that the TMPA requires some level of physician supervision over the medical acts delegated to a CRNA. To that end, TMA incorporates TMB's statutory construction arguments herein by reference,² except for the statement "*The MPA expressly states the delegating physician is liable for the acts delegated under Section 157.001,*" which TMA expands on and clarifies in Section B of this letter.³ TMA also adds the following arguments:

1. Section 157.001 applies to all "persons," which broadly applies to all individuals, without exception.

The plain language of Section 157.001 shows the Legislature's "intent" for some level of physician supervision over a CRNA for delegated medical acts regardless of the practice setting.⁴ "Where text is clear, text is determinative of [legislative] intent. This general rule applies unless enforcing the plain language of the statute as written would produce absurd results Therefore...the words the Legislature chooses should be the surest guide to legislative intent."⁵

² TMB Att'y Gen. Request for Op., No. RQ-0371-KP, Aug. 12, 2020, pp. 2-6 (hereinafter referred to as TMB Request for AGO).

³ *Id.* at p. 3.

⁴ *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009) (When determining the meaning of a statute, the ultimate goal is to "ascertain and give effect to the Legislature's intent.").

⁵ *Id.* (internal citations omitted).

The text of Section 157.001 unambiguously sets the general rules for delegation of medical acts to a CRNA in any practice setting, and these general rules expressly require supervision. Section 157.001(a) states, in relevant part:

Sec. 157.001. GENERAL AUTHORITY OF PHYSICIAN TO DELEGATE. (a)
A physician may delegate to a qualified and properly trained *person* acting under the physician's supervision any medical act that a reasonable and prudent physician would find within the scope of sound medical judgment to delegate if, in the opinion of the delegating physician:

(1) the act:

(A) can be properly and safely performed by the person to whom the medical act is delegated;

(B) is performed in its customary manner; and

(C) is not in violation of any other statute; and

(2) the person to whom the delegation is made does not represent to the public that the person is authorized to practice medicine.

The Legislature chose the definition of “person” in the MPA: “‘Person’ means an individual, unless the term is expressly made applicable to a partnership, association, or corporation.”⁶ Without question, a CRNA is an individual.

Further, there is no limitation on supervision in Section 157.001(a) based on setting or type of licensure. Plus, Section 157.058 does not reject the supervision requirement. If the Legislature wanted to exempt or except CRNAs in a licensed hospital or ambulatory surgical center (ASC) from the supervision requirement, the Legislature had the drafting tools to do so. It did not.

Thus, consistent with Texas law, when the Legislature supplies its own definition to a word, the word “shall be construed accordingly.”⁷ Accordingly, Section 157.001(a)'s supervision requirement must apply to all “person[s]” subject to delegation, including any CRNA in any setting.

2. Sections 157.001(a) and 157.058 can be properly harmonized by treating Section 157.058 as an additional limitation on the general delegation authority to a CRNA.

It is well-settled law in Texas that, if a conflict is alleged between two provisions of a statute, the provisions should be “harmonize[d]...to effectuate both by assigning each a meaning that will permit both to stand.”⁸ Here, to the extent any conflict exists at all, the two provisions are easily harmonized.

⁶ Tex. Occ. Code § 151.002(a)(12).

⁷ See *Summers*, 282 S.W.3d at 478, n.83 (citing to *Tex. Dep't of Trans. v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002) and *Transp. Ins. Co. v. Faircloth*, 898 S.W.2d 269, 274 (Tex. 1995) (citing to Tex. Gov't Code § 311.011(b))).

⁸ *Tex. Dep't of Public Safety v. J.H.J.*, 274 S.W.3d 803, 808 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (citing *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001)).

First, before delegating the medical acts specified in Section 157.058, a physician must determine if delegation is proper based on the requirements in Section 157.001(a). Then, if the delegation occurs in a licensed hospital or ASC, the physician must tailor the delegation to the limitations on ordering drugs and devices as required in Section 157.058—Section 157.058 states that, in a licensed hospital or ASC, a physician “may delegate to a [CRNA] the ordering of drugs and devices...” Section 157.0511 limits the ordering of devices and drugs under Subchapter B to only three categories (nonprescription drugs, dangerous drugs, and certain controlled substances).⁹

Further, the supervision requirement in Section 157.001(a) can also be harmonized to effectuate the latitude to perform the delegated medical acts provided in Section 157.058(b)-(c) (as well as provided by other laws and guidance governing CRNA performance of delegated medical acts).¹⁰ Indeed, the Office of the Attorney General has already opined that supervision does not require direct supervision over the CRNA’s performance of the delegated medical acts.¹¹ There is nothing in the express language of Section 157.001(a) that limits supervision in this way. Instead, the level of supervision is flexible and is based on the “physician’s professional judgment in light of other relevant federal and state laws, facility policies, medical staff bylaws, and ethical standards.”¹²

Importantly, note that this application of the two provisions gives full effect to the Legislature’s chosen definition of “person” in the TMPA. If Section 157.058 were treated as a separate and independent basis for delegation authority for CRNAs in licensed hospitals and ASCs, it would rob meaning from the TMPA’s broad definition of “person” as it is used in Section 157.001(a). This goes against clear Texas precedent that requires avoiding harmonizing statutes in a manner that would treat any language as “mere surplusage.”¹³

Finally, as stated above, if the Legislature intended to carve out Section 157.058 as an independent and separate basis for delegation authority without reference to the supervision requirement in Section 157.001(a), it could have done so by including applicable “notwithstanding” language into Section 157.058 or other limiting language, as it did in Section 157.060 (“Unless the physician has reason to believe....”) relating to limiting a physician’s

⁹ See Tex. Occ. Code § 157.0511(a).

¹⁰ These subsections of Section 157.058 state:

- (b) The physician’s order for anesthesia or anesthesia-related services is not required to specify a drug, dose, or administration technique.
- (c) Pursuant to the physician’s order and in accordance with facility policies or medical staff bylaws, the nurse anesthetist may select, obtain, and administer those drugs and apply the medical devices appropriate to accomplish the order and maintain the patient within a sound physiological status.
- (d) This section shall be liberally construed to permit the full use of safe and effective medication orders to use the skills and services of certified registered nurse anesthetists.

¹¹ Tex. Att’y Gen. Op. No. JC-0117, pp. 6-9 (1999).

¹² *Id.*

¹³ See *In re Caballero*, 272 S.W.3d 595, 599 (Tex. 2008).

liability for certain delegated medical acts.¹⁴ But it did not. Therefore, both provisions apply in full effect, as explained herein, in accordance with Texas law.

B. A Physician May Be Held Liable, Generally, for any Delegated Medical Acts to a CRNA Under Section 157.001(b); However, Liability is Limited in Certain Circumstances.

TMB asks whether the liability of the delegating physician is limited solely to the determination of competency to initially delegate to a CRNA under Section 157.060, or does it include liability for all delegated medical acts under Section 157.001(b). The answer is a physician may be held liable for delegated medical acts to a CRNA under Section 157.001(b), but that liability is limited depending on the acts delegated under Section 157.060.

To the extent any conflict exists between TMPA Sections 157.001(b) and Section 157.060, again, the sections must be harmonized to give effect to each one and avoid rendering any language “mere surplusage.”¹⁵ Section 157.001(b) expressly states a physician “remains responsible” for all delegated medical acts. The physician’s liability for any medical acts delegated to a CRNA depends, generally, on whether the alleged violation is based on the physician’s direct negligence (for delegation or appropriate supervision),¹⁶ the negligence of his or her employee delegate,¹⁷ or the negligence of a delegate employed by a third party.¹⁸ As already shown above, “person” in Section 157.001 broadly applies to all individuals, including CRNAs.

Section 157.060 limits the physician’s general liability for a delegated medical act of a CRNA (or other advanced practice registered nurse or physician’s assistant) in certain circumstances to a “reason to believe” standard, which is less burdensome on the physician than a medical professional liability negligence standard¹⁹:

Unless the physician has *reason to believe* the physician assistant or advanced practice registered nurse lacked the competency to perform the act, a physician is not liable for an act of a physician assistant or advanced practice registered nurse solely because the physician signed a standing medical order, a standing delegation order, or another order or protocol, or entered into a prescriptive authority agreement, authorizing the physician assistant or advanced practice registered nurse to administer, provide, prescribe, or order a drug or device.

¹⁴ *Mena v. Lenz*, 349 S.W.3d 650, 655 (Tex. App.—Corpus Christi 2011, no pet.).

¹⁵ *See In re Caballero*, 272 S.W.3d at 599.

¹⁶ *See, e.g., Windrum v. Kareh*, 581 S.W.3d 761, 768 (Tex. 2019) (“In a medical malpractice negligence case, the standard of care is what a doctor of ordinary prudence in that particular field would or would not have done under the circumstances.”).

¹⁷ *See, e.g., Sparger v. Worley Hosp., Inc.*, 547 S.W.2d 582, 585 (Tex. 1977) and *Hernandez v. Kanlic*, 583 S.W.3d 878 (Tex. App.—El Paso, pet. denied) (discussing generally the principles of agency law for employers, employees, and “borrowed servants”).

¹⁸ *Sparger*, 547 S.W.2d at 586.

¹⁹ *See, e.g. Jackson v. Axelrad*, 221 S.W.3d 650, 655 (Tex. 2007); *Hood v. Phillips*, 554 S.W.2d 160 (Tex. 1977) (describing negligence in a medical malpractice case as what “a reasonable and prudent member of the medical profession would [do] under the same or similar circumstances”).

Therefore, these provisions can be harmonized so the specific language in Section 157.060 does not “eliminate” the general rule of Section 157.001(b).²⁰ Instead, it only limits a physician’s liability for the delegated medical acts to a CRNA in certain circumstances.²¹

So, as the Austin Court of Appeals has opined, construing both Section 157.001(b) and 157.060, a physician may not be held responsible “solely” because of his or her supervisory relationship with an advanced practice registered nurse (e.g., CRNA) unless he or she has reason to believe the nurse lacked competence to perform the act—but the physician can be held liable for other reasons, such as failure to provide appropriate supervision.²² This is an appropriate limitation based on an advanced practice registered nurse and physician assistant’s specialized training and credentials, and the flexibility given to the CRNA to perform the delegated acts under Section 157.058.

As an aside, TMB references the “captain of the ship” doctrine in its briefing on liability.²³ Though referenced for the purpose of demonstrating liability only and not for the *standard* of liability,²⁴ in an abundance of caution, we clarify that the Texas Supreme Court has expressly rejected the “captain of the ship” doctrine as a standard of liability for a physician.

This doctrine was applied against a physician as a form of strict liability for a delegate’s actions.²⁵ The discussion in *Franklin v. Gupta* provides a helpful explanation of the old doctrine:

Under this doctrine, a surgeon is likened to the captain of a ship, in that it is his duty to control everything going on in the operating room. Thus, liability is imposed by virtue of the surgeon's status and without any showing of actual control by the surgeon.

Again, Texas has rejected this. Instead, Texas law holds that, generally, the principles of agency law apply to liability for an agent, including the relationship between a physician and his or her delegate.²⁶ In a hospital or other setting where the delegate is employed by a third party, those principles recognize that a physician’s liability for the actions of a delegate depends, in part, on the physician’s right to control the “assisting nurse in the details of the specific act raising the issue of liability.”²⁷ Of course, this liability is limited further by Section 157.060 for certain delegated acts to CRNAs (or other advanced practice nurses and physician assistants).

It is important to note the applicable standard of liability, because recently TMB’s final orders have been challenged asserting that TMB improperly applied a strict-liability standard to violations involving delegated medical acts. In both cases, the court of appeals never directly addressed whether

²⁰ *Cotropia v. Texas Med. Bd.*, 2018 WL 4087408 (Tex. App.—Austin, no pet.).

²¹ *Id.*

²² *Davis v. Tex. Med. Bd.*, 2018 WL 1802509 *4 (Tex. App.—Austin 2018, no pet.) (unreported).

²³ Where TMB cites to the “captain of the ship doctrine” in its briefing, it notes the case as *Webb v. Jornes*, 488 S.W.2d 407 (Tex. 1973). However, this appears to be an inadvertent mistake. The language TMB quotes is from *Sparger*. And of course there, the Court rejected the doctrine.

²⁴ TMB Request for AGO, at p. 8.

²⁵ *Id.*

²⁶ See footnote 17, herein.

²⁷ *Sparger*, 547 S.W.2d at 583.

strict liability was used by TMB to hold the physicians liable or whether a strict liability standard is improper under Chapter 157. Instead, the court affirmed the order based on other findings.

Davis v. Texas Medical Board, 2018 WL 1802509 (Tex. App.—Austin, no pet.) (unreported): Physician appealed TMB’s final order revoking his license alleging, *inter alia*, he should not have been held “strictly liable” for delegated acts performed by advanced nurse practitioner. The court of appeals did not address whether TMB had applied strict liability or whether strict liability applied at all—instead the court found that “even if [the physician] is correct that he may not be held strictly liable for the APN’s actions, he may still be liable for his failure to supervision [the performance of the delegated acts].”

Cotropia v. Texas Medical Board, 2018 WL 4087408 (Tex. App.—Austin, no pet.) (unreported): The court of appeals, relying on *Davis*, found that, because TMB’s decision to discipline the physician did “not rest solely on his supervisory relationship with APNs,” TMB’s disciplinary order would not be overturned.

The application of a strict liability standard in any regard would directly conflict with the TMPA and case law, as described above. Therefore, while a physician, in general, may be liable for any delegated medical acts to a CRNA based on direct negligence—including supervision of such acts—or a form of vicarious liability for the negligence of his or her delegate, for certain delegated acts, a physician cannot be held liable for the CRNA’s acts based solely on the delegated order unless he or she had reason to believe the CRNA lacked competency to perform the act.

C. This Application of the TMPA Strikes the Best Balance, Benefitting the Physician, the CRNA, and the Patient.

By harmonizing Sections 157.001(a)-(b), 157.058, and 157.060 as provided for above, it reaches the best balance between the interests of the physician, CRNA, and patient. For the physician, it preserves the physician’s right to exercise his or her professional judgment to determine if delegation is proper, and to determine the level of oversight needed to monitor the delegated medical acts for the safety of the patient and to reduce the physician’s risk of liability for the CRNA’s possible negligent performance of the delegated acts. For the CRNA, it provides a method for guidance and oversight without interfering with the CRNA’s latitude to perform the delegated acts in accordance with the TMPA, other laws, and guidance. And for the patient, it supports the receipt of quality care. It also increases access to care. Because the TMPA does not require direct supervision, it frees up a physician to provide his or her services to another patient, if appropriate based on the physician’s professional judgment, other laws, and the individual circumstances.

CONCLUSION

TMA asks that the Attorney General opine that Chapter 157 of the TMPA requires some level of supervision over the delegated ordering and administering of anesthesia and anesthesia-related services performed by a CRNA in accordance with Section 157.058. This supervision does not have to be direct, meaning the physician is not required to directly supervise the CRNA’s performance of the medical acts. Instead, it is flexible, and the level of physician involvement is

based on the physician's professional judgment in light of other relevant federal and state laws, facility policies, medical staff bylaws, and ethical standards.

Further, we ask the Attorney General to opine that, under Chapter 157, a physician may be held liable, generally, for any delegated medical act to a CRNA under Section 157.001(b) based on negligence or a principle of agency law, including providing an appropriate level of supervision for such acts; however, for certain delegated acts, Section 157.060 limits a physician's liability for the delegated acts when a violation is based solely on the delegation order unless he or she had reason to believe the CRNA lacked competency to perform the act.

Again, we thank you for the opportunity to provide comments on this request for opinion. If you have any questions, please do not hesitate to contact any of the following TMA staff at TMA's main number 512-370-1300 or by email: Donald P. "Rocky" Wilcox, JD, Vice President and General Counsel, rocky.wilcox@texmed.org; Kelly Walla, JD, LLM, Associate Vice President and Deputy General Counsel, kelly.walla@texmed.org; or Laura J. Thetford, JD, Assistant General Counsel, laura.thetford@texmed.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Donald P. Wilcox". The signature is fluid and cursive, with a large, stylized initial "D".

Donald P. "Rocky" Wilcox, JD
Vice President and General Counsel

Cc: Kelly Walla, JD, LLM
Associate Vice President and Deputy General Counsel

Laura J. Thetford, JD
Assistant General Counsel