

March 31, 2005

John Brion, Executive Director
Ohio Board of Nursing
17 South High Street, Suite 400
Columbus, Ohio 43215-3413

SYLLABUS:

2005-012

1. The administration by a nurse of a drug that is prescribed or administered for the purpose of terminating a pregnancy with a living fetus or embryo, with an intention other than to produce a live birth and with the result of terminating the pregnancy, constitutes “performing or inducing an abortion” as referred to in R.C. 4723.28(B)(30).
2. R.C. 4723.151(A) prohibits a nurse from administering a drug that is prescribed or administered for the purpose of terminating a pregnancy with a living fetus or embryo, with an intention other than to produce a live birth and with the result of terminating the pregnancy.



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OPINION NO. 2005-012

John Brion, Executive Director
Ohio Board of Nursing
17 South High Street, Suite 400
Columbus, Ohio 43215-3413

Dear Executive Director Brion:

We have received your request for an opinion concerning the authority of a nurse to administer drugs with the intent and effect of terminating a pregnancy. This opinion addresses the following questions:

1. Does the administration of a drug by a nurse intending to and causing the termination of a live pregnancy constitute “performing or inducing an abortion” as referred to in R.C. 4723.28(B)(30)?
2. Does R.C. 4723.151(A) prohibit a nurse from administering a drug with the intent and effect of terminating a live pregnancy?

We understand the words “live pregnancy” to refer to a pregnancy with a living fetus or embryo, whether the fetus or embryo is viable or nonviable.

These questions have arisen in connection with a request from a hospital for advice concerning a nurse’s scope of practice.¹ For the reasons below, we conclude that the administration by a nurse of a drug that is prescribed or administered for the purpose of

¹ We have been informed that the request received by the Ohio Board of Nursing concerned the administration of a particular drug. This opinion does not address particular drugs and does not determine whether any particular drug may be prescribed or administered for the purpose of terminating a pregnancy with a living fetus or embryo, with an intention other than to produce a live birth and with the result of terminating the pregnancy. Rather, this opinion addresses only the issues of law presented in the questions set forth in this opinion.

terminating a pregnancy with a living fetus or embryo, with an intention other than to produce a live birth and with the result of terminating the pregnancy, constitutes “performing or inducing an abortion” as referred to in R.C. 4723.28(B)(30). We conclude, further, that R.C. 4723.151(A) prohibits a nurse from administering a drug that is prescribed or administered for the purpose of terminating a pregnancy with a living fetus or embryo, with an intention other than to produce a live birth and with the result of terminating the pregnancy.

Authority to perform or induce an abortion under Ohio law

As used throughout the Revised Code, “abortion” is defined to mean “the purposeful termination of a human pregnancy by any person, including the pregnant woman herself, with an intention other than to produce a live birth or to remove a dead fetus or embryo.” R.C. 2919.11. Abortion is further defined as the practice of medicine or surgery for purposes of R.C. 4731.41. *Id.*

R.C. 4731.41 states that no person shall practice medicine and surgery without the appropriate certificate from the State Medical Board to engage in the practice. The State Medical Board grants certificates for the practice of medicine and surgery, osteopathic medicine and surgery, podiatric medicine and surgery, and limited branches of medicine. *See, e.g.*, R.C. 4731.14; R.C. 4731.15; R.C. 4731.20; R.C. 4731.56.² Nurses are prohibited from engaging in the practice of medicine or surgery or any of its branches, and also from medical diagnosis and prescription of medical measures. R.C. 4723.151(A).

Consistent with the general prohibition against nurses practicing medicine or surgery, the Revised Code expressly prohibits nurses from performing or inducing abortions. In particular, R.C. 4723.28(B) authorizes the Board of Nursing to impose disciplinary sanctions upon a nurse for “[p]rescribing any drug or device to perform or induce an abortion, or otherwise performing or inducing an abortion.” Similarly, R.C. 4723.151(C) states that nothing in R.C. Chapter 4723 “shall be construed as authorizing any nurse to prescribe any drug or device to perform or induce an abortion, or to otherwise perform or induce an abortion.”

The language “otherwise perform or induce an abortion” is broad and general. The word “otherwise” means “in another manner; differently,” and encompasses any means of performing or inducing an abortion except the means expressly mentioned in the statute (that is, prescribing a drug or device to perform or induce an abortion). *Random House Dictionary of the English Language* 1372 (2d ed. unabridged 1987). The statutory provisions quoted above thus plainly prohibit a nurse from prescribing a drug or device to perform or induce an abortion, and also from performing or inducing an abortion in any other manner, including through the administration of a drug intended to induce an abortion. If the General Assembly had intended

² For purposes of this opinion, we use the term “physician” to refer to an individual authorized under R.C. Chapter 4731 to practice medicine and surgery or osteopathic medicine and surgery. *See* R.C. 4723.01(K).

to exclude any particular means of performing or inducing an abortion from this general prohibition, it could easily have done so. *See, e.g., Wachendorf v. Shaver*, 149 Ohio St. 231, 236-37, 78 N.E.2d 370 (1948) (“the Legislature must be assumed or presumed to know the meaning of words, to have used the words of a statute advisedly and to have expressed legislative intent by the use of the words found in the statute”); *Lake Shore Elec. Ry. Co. v. Pub. Utils. Comm’n*, 115 Ohio St. 311, 319, 154 N.E. 239 (1926) (if the legislature intended a particular meaning, “it would not have been difficult to find language which would express that purpose”); *In re Application of Hesse*, 93 Ohio St. 230, 235, 112 N.E. 511 (1915) (the General Assembly is assumed to have knowledge of the law and, in expressing its intent, “it would have been easy, in unequivocal language, to make that provision plain”). Use of the general word “otherwise” indicates that no exclusions were intended. *See generally Women’s Med. Prof’l Corp. v. Baird*, 277 F. Supp. 2d 862, 873 (S.D. Ohio 2003) (the United States Supreme Court has held that “a state may require that only licensed physicians perform abortions”).

Authority to administer drugs

The administration of drugs is considered to be part of the practice of medicine. *See* R.C. 4731.34(A) (“[a] person shall be regarded as practicing medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery ... who ... [p]rescribes, advises, recommends, administers, or dispenses for compensation of any kind ... a drug or medicine, appliance, mold or cast, application, operation, or treatment, of whatever nature, for the cure or relief of a wound, fracture or bodily injury, infirmity, or disease”). Hence, physicians are authorized to administer drugs in the course of their professional practice.

Pursuant to R.C. Chapter 4723, the Ohio Board of Nursing grants various types of licenses and certificates for the practice of nursing, defining the scope of practice of nurses with specified qualifications. *See* R.C. 4723.01(B), (F), (G), (H), (I), (J); *see also, e.g.,* R.C. 4723.06; R.C. 4723.07; R.C. 4723.09; R.C. 4723.17; R.C. 4723.41; R.C. 4723.43. In general, a registered nurse is permitted to administer medications “authorized by an individual who is authorized to practice in this state and is acting within the course of the individual’s professional practice.” R.C. 4723.01(B)(5). A licensed practical nurse must complete a course in medication administration in order to administer medications, and may then administer medications authorized by an individual who is authorized to practice in this state and is acting within the course of the individual’s professional practice. A licensed practical nurse remains subject to special requirements regarding the administration of intravenous therapy. R.C. 4723.01(F)(3). In general, then, a nurse may administer medications within the scope of practice for which the nurse has been licensed or otherwise qualified, and as authorized by a physician or other authorized practitioner.

Certain nurses, however, have been granted limited authority to prescribe drugs and therapeutic devices. Am. Sub. H.B. 241, effective May 17, 2000, granted clinical nurse specialists, certified nurse-midwives, and certified nurse practitioners authority to prescribe certain drugs and therapeutic devices pursuant to defined relationships with licensed physicians.

1999-2000 Ohio Laws, Part I, 1731 (Am. Sub. H.B. 241, eff. May 17, 2000); *see* R.C. 3719.06; R.C. 4723.151(B); R.C. 4723.43; R.C. 4723.431; R.C. 4723.48; R.C. 4723.481; R.C. 4723.50.

The provisions enacted by Am. Sub. H.B. 241 bear a significant relationship to the matter here under consideration. In addition to using Am. Sub. H.B. 241 to grant limited authority for certain nurses to prescribe drugs and therapeutic devices, the General Assembly used Am. Sub. H.B. 241 to enact the language of R.C. 4723.151(C) stating expressly that, notwithstanding the limited grant of authority to prescribe drugs and therapeutic devices, “nothing in [R.C. Chapter 4723] shall be construed as authorizing any nurse to prescribe any drug or device to perform or induce an abortion, or to otherwise perform or induce an abortion.” The General Assembly also used Am. Sub. H.B. 241 to enact the corresponding language of R.C. 4723.28(B)(30) authorizing the imposition of sanctions against a nurse who prescribes any drug or device to perform or induce an abortion, or otherwise performs or induces an abortion. Further, the General Assembly used Am. Sub. H.B. 241 to amend various other statutes to prohibit nurses from prescribing any drug or device to perform or induce an abortion, or otherwise performing or inducing an abortion. *See, e.g.*, R.C. 4723.44(C)(7) (prohibiting a certified registered nurse anesthetist, clinical nurse specialist, certified nurse-midwife, or certified nurse practitioner from prescribing any drug or device to perform or induce an abortion, or otherwise performing or inducing an abortion); R.C. 4723.50(B)(1) (the formulary listing the types of drugs and therapeutic devices that may be prescribed by a clinical nurse specialist, certified nurse-midwife, or certified nurse practitioner “shall not permit the prescribing of any drug or device to perform or induce an abortion”).

The language of the restrictions governing the prescription of any drug or device to perform or induce an abortion clearly applies to the nurses who are granted authority to prescribe drugs and therapeutic devices, and defines the limits of their authority. The more general language that prohibits “otherwise” performing or inducing an abortion is not restricted to those nurses or to the prescription of drugs or therapeutic devices. By its terms it applies to all nurses and includes any and all means of performing or inducing an abortion. By the enactment of this language in several sections of R.C. Chapter 4723, the General Assembly expressed a clear legislative intent to prohibit nurses from performing or inducing abortions by any means.

The General Assembly thus made clear its intent that a nurse is not permitted to prescribe any drug or device to perform an abortion, or to perform or induce an abortion in any other manner. As noted above, “abortion” means “the purposeful termination of a human pregnancy by any person ... with an intention other than to produce a live birth or to remove a dead fetus or embryo.” R.C. 2919.11. Thus, abortion includes the termination of a pregnancy with a living fetus or embryo by means of a drug administered for the purpose of causing the termination of the pregnancy other than by a live birth.

Hence, R.C. 4723.151(A) prohibits a nurse from administering a drug that is prescribed or administered for the purpose of terminating a pregnancy with a living fetus or embryo, with an intention other than to produce a live birth and with the result of terminating the pregnancy. Further, the administration by a nurse of a drug that is prescribed or administered for the purpose

of terminating a pregnancy with a living fetus or embryo, with an intention other than to produce a live birth and with the result of terminating the pregnancy, constitutes “performing or inducing an abortion” as referred to in R.C. 4723.28(B)(30), and may be the basis for disciplinary sanctions under that provision.

There remains the question whether a nurse may be permitted to administer a drug that is prescribed or administered for the purpose of performing or inducing an abortion, if the nurse is acting pursuant to a physician’s order. This question must be answered in the negative. Physicians are authorized to practice medicine and surgery and, thus, to perform or induce abortions. *See* R.C. 2919.11; R.C. 4731.41; *see also, e.g.*, R.C. 2901.01(B)(2)(a); R.C. 2903.09(C)(1); R.C. 2919.17. As discussed above, physicians acting within the course of their professional practice may authorize nurses to administer medications. R.C. 4723.01(B)(5) and (F)(3); *see also* R.C. 4723.03. However, a physician or other practitioner may authorize a nurse to administer medications only to the extent that the nurse is permitted to administer medications by statute and by the license, certificate, or other authorization held by that nurse. The specific prohibition against a nurse performing or inducing an abortion must prevail over the general authority of a nurse to administer medications pursuant to an order from an authorized practitioner. *See* R.C. 1.51. *See generally Mazurek v. Armstrong*, 520 U.S. 968, 976 n.5 (1997).

In addition to their general authority to direct nurses to administer medications, physicians are permitted, pursuant to rules adopted by the State Medical Board, to delegate the authority to administer medications to individuals who are not licensed to perform that task, in certain circumstances and subject to certain restrictions. *See* R.C. 4731.053(B) and (D)(3) (requiring the State Medical Board to adopt rules “that establish standards to be met and procedures to be followed by a physician with respect to the physician’s delegation of the performance of a medical task to a person who is not licensed or otherwise specifically authorized by the Revised Code to perform the task” and, with certain exceptions, prohibiting rules that “authorize a physician to delegate the administration of anesthesia, controlled substances, drugs administered intravenously, or any other drug or category of drug the board considers to be inappropriate for delegation”); 11A Ohio Admin. Code Chapter 4731-23 (“Delegation of Medical Tasks”); *see also* R.C. 4731.36(D). *See generally* 2000 Op. Att’y Gen. No. 2000-023 (predating the enactment of R.C. 4731.053, R.C. 4731.36(D), and 11A Ohio Admin. Code Chapter 4731-23). This authority, however, does not permit a physician to delegate to a nurse the authority to administer medications that a nurse is statutorily prohibited from administering. *See* 11A Ohio Admin. Code 4731-23-02(B)(4) (a physician shall not delegate the performance of a medical task unless the physician has determined that no law prohibits the delegation).

Ohio statutes clearly prohibit a nurse from administering a drug that is prescribed or administered for the purpose of terminating a pregnancy with a living fetus or embryo, with an intention other than to produce a live birth and with the result of terminating the pregnancy. Therefore, neither the physician’s general authority to authorize a nurse to administer medications nor the physician’s power to delegate a medical task pursuant to R.C. 4731.053 and 11A Ohio Admin. Code Chapter 4731-23 may be construed to permit the physician to grant a

nurse responsibility for administering a drug intended to cause the termination of a pregnancy with a living fetus or embryo other than by a live birth.

It might be argued, in the case of a nurse acting pursuant to a physician's order with regard to a pregnancy with a living fetus or embryo, that the intent to cause the termination of the pregnancy other than by a live birth is that of the doctor, and the nurse is merely carrying out an order. We reject the premise that this argument permits a nurse to administer a drug that causes the termination of a pregnancy with a living fetus or embryo other than by a live birth, because Ohio statutes establish clear prohibitions against nurses performing or inducing abortions by any means, and also because Ohio statutes expressly make abortion the practice of medicine or surgery, which is outside the scope of nursing practice. *See* R.C. 2919.11; R.C. 4723.151; R.C. 4723.28(B)(30).

The conclusion that a nurse is not permitted to administer the medication that actually induces an abortion does not prevent the nurse from providing other services in connection with an abortion procedure. Although nurses are expressly prohibited from performing or inducing abortions, they are permitted to participate in medical procedures within the scope of practice for which they are licensed, certified, or otherwise authorized, and to provide nursing services that do not constitute the performance or inducement of an abortion.³ *See* R.C. 4723.01(B), (F), (G), (H), (I), (J); R.C. 4723.151(B); R.C. 4723.43. *See generally* 1998 Op. Att'y Gen. No. 98-035 at 2-208 to 2-209 (it is appropriate for the Board of Nursing to promulgate rules specifying the manner and conditions under which a registered nurse or a licensed practical nurse may administer medications); *cf.* R.C. 4731.91(D) (“[n]o person is required to perform or participate in medical procedures which result in abortion, and refusal to perform or participate in the medical procedures is not grounds for civil liability nor a basis for disciplinary or other recriminatory action”).

Conclusions

For the reasons discussed above, it is my opinion, and you are advised, as follows:

1. The administration by a nurse of a drug that is prescribed or administered for the purpose of terminating a pregnancy with a living fetus or embryo, with an intention other than to produce a live birth and with the result of terminating the pregnancy, constitutes “performing or inducing an abortion” as referred to in R.C. 4723.28(B)(30).
2. R.C. 4723.151(A) prohibits a nurse from administering a drug that is prescribed or administered for the purpose of terminating a pregnancy

³ Clearly, a determination of precisely which functions constitute the performance or inducement of an abortion requires medical knowledge and involves questions of fact that exceed the scope of this opinion. *See* note 1, *supra*.

with a living fetus or embryo, with an intention other than to produce a live birth and with the result of terminating the pregnancy.

Respectfully,

A handwritten signature in black ink, appearing to read "Jim Petro". The signature is fluid and cursive, with a large initial "J" and a long horizontal stroke extending to the right.

JIM PETRO
Attorney General