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Mansfield Rule Certified 2022-2023

The Evolution of the Standard Of Care for Autonomous Nurse Practitioners, by Abbye E. Alexander, Esq., and Christopher J. Tellner, Esq., published in Reuters Legal News, 10-4-2023

Reuters - The evolution of the standard of care for autonomous nurse practitioners - Tellner - Alexander - Oct 2023

According to the American Association of Nurse Practitioners (AANP), nurse practitioners deliver "high quality health care in more than 1 billion patient visits each year," and as of April 2022, there were more than 350,000 licensed nurse practitioners in the United States. Enlarging the health care role of nurse practitioners even further, many states have recently passed laws permitting nurse practitioners to practice autonomously, with more than half of the nation adopting such allowances.

This trending shift in health care brings benefits and concerns alike and magnifies a need for legal clarity on the implications of such a shift where there is still a lot of grey matter.

Permitting nurse practitioners to practice independent of physicians has created questions about what standard of care is applicable to autonomous nurse practitioners.

Nurse practitioners who can practice autonomously can legally perform the professional activities traditionally reserved for physicians, including assessment of a patient's condition, ordering diagnostic tests, interpreting results and making diagnoses, prescribing medication and ordering treatments independent of a supervising physician.

The benefit of these laws is the increased availability of providers, particularly in the areas of primary care and family medicine, which in turn can lead to more affordable options and fewer delays in treatment. However, a concern with these laws is that in broadening the scope of practice for nurse practitioners, some states are effectively removing the "safety net" of a supervising physician, which may lead to increased malpractice actions, specifically actions based on failures to diagnose or misdiagnosis.

As many states only recently passed autonomous nurse practitioner laws within the last few years, there is not enough empirical data to determine whether these laws have been correlated with any increase in malpractice actions. It should be noted that even prior to these autonomous practice laws going into effect, nurse practitioners have been exposed to malpractice liability. However, permitting nurse practitioners to practice independent of physicians has created questions about what standard of care is applicable to autonomous nurse practitioners. Specifically:

- ***Is the standard of care higher or otherwise different for an autonomous nurse practitioner compared to a traditional nurse practitioner "supervised" by a physician?***
- ***If so, is the standard of care for an autonomous nurse practitioner equivalent to that of a physician practicing in the same field or specialty?***
- ***Can physicians still testify to establish the applicable standard of care for an autonomous nurse practitioner?***

The exact standard of care in a specific malpractice action depends on a multitude of factors. An analysis of malpractice actions against nurse practitioners in two states that passed autonomous nurse practitioner legislation (Florida and New York) suggests that the autonomous status of a nurse practitioner may not be a factor in establishing the applicable standard of care.

Florida

In 2020, the Florida Legislature passed legislation to allow eligible Advanced Practice Registered Nurses (APRNs) to hold the status of independent practitioner. Under this law, APRNs who meet certain criteria to practice primary care or midwifery without physician supervision or a protocol are given the status of independent practitioner. In 2021, the Florida Board of Nursing established a preliminary definition of "standards of practice" for autonomous nurse practitioners, which states:

Advanced practice registered nurses who are registered pursuant to Section 464.0123, F.S., shall engage in autonomous practice only in a manner that meets the General Standard of Practice. The General Standard of Practice shall be that standard of practice, care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similarly situated health care providers. (Emphasis added.)

However, this new definition of "standard of care" was unaccompanied by any new legislation to establish who may provide expert testimony concerning the applicable standard of care for an autonomous nurse practitioner. Fla. Stat.§ 766.102(6) (2023) provides, "a physician … may give expert testimony in a medical negligence action with respect to the standard of care of such medical support staff," including "nurse practitioners" if the physician is licensed, qualifies as an expert under subsection (5), and, "by reason of active clinical practice or instruction of students, has knowledge of the applicable standard of care for … nurse practitioners."

As Florida's autonomous practice act is new, there is limited case law differentiating the standard of care for a supervised nurse practitioner as opposed to an autonomous nurse practitioner. However, at least one Florida court permitted a physician to provide expert testimony about the standard of care for an autonomous nurse practitioner pursuant to the existing requirements of § 766.102(6) (Univ. of Fla. Bd. of Trustees v. Carmody, Florida Supreme Court, July 2023). Presently, it appears that a Florida nurse practitioner's autonomous status does not inherently disqualify a physician from testifying about the applicable standard of care.

New York

In 2022, New York enacted legislation allowing for autonomous nurse practitioners. With full practice authority, nurse practitioners in New York can evaluate, test, diagnose, manage treatment and prescribe medications for patients without having to sign a contract agreement with a supervising physician.

N.Y. Comp. Codes R. & Regs. tit. 8 § 64.5(b) provides:

A nurse practitioner who has more than three thousand six hundred hours of experience practicing as a licensed or certified nurse practitioner pursuant to the laws of New York or any other state or as a nurse practitioner while employed by the United States Veterans Administration, the United States Armed Forces or the United States Public Health Service shall not be required to practice in collaboration with a physician qualified in the specialty involved and in accordance with a written practice agreement and written practice protocols as set forth in subdivision (a) of this section.

However, unlike Florida, New York's Board of Nursing has not explicitly issued a revised definition of "standard of care" or "standard of practice" for autonomous nurse practitioners.

N.Y. Comp. Codes R. & Regs. tit. 10 § 85.43(b) simply states that "[n]urse practitioners shall be authorized to provide health care services to eligible medical assistance recipients which fall within the scope of practice for certified nurse practitioners as determined by the Department of Education (see section 6902 of the Education Law and 8 NYCRR sections 52.12, 64.5 and 64.6)."

Like Florida, New York has traditionally allowed physicians to provide expert testimony concerning the applicable standard of

care for nurse practitioners, although, nurse practitioners are not generally allowed to testify about a physician's standard of care. New York courts, such as that in *Michalko v. DeLuccia, have held that "[a] medical expert does not have to be a specialist in the same field as a defendant doctor" to render an opinion about proper treatment (New York Appellate Division, Third Department, 2020).*

Also in Mills v. Moriarty, the court held that "[t]he nurse-practitioner, who was not a medical doctor, lacked the qualifications to render a medical opinion as to the relevant standard of care and whether the defendants had deviated from that standard," (New York Appellate Division, Second Department, 2003).

It appears state courts have not yet clearly differentiated the applicable standards of practice for an autonomous nurse practitioner as opposed to a nurse practitioner supervised by a physician.

Because New York only recently permitted autonomous nurse practitioners, there is a scarcity of case law regarding malpractice actions against them. However, in reviewing recent decisions issued after the expansion of a New York nurse practitioner's scope of practice, it appears that New York courts still permit physicians to serve as expert witnesses to establish the standard of care for malpractice actions against nurse practitioners. One example is in the June 2023 case, Heinrich v. Serens, New York Appellate Division, Fourth Department.

Conclusion

The possibility of legislatively creating autonomous nurse practitioners remains a topic of debate for many states. However, despite the national trend of expanding the scope of practice for nurse practitioners, it appears state courts have not yet clearly differentiated the applicable standards of practice for an autonomous nurse practitioner as opposed to a nurse practitioner supervised by a physician.

Furthermore, both Florida and New York still permit, and give great weight to, the expert testimony of a physician even when no physician was involved in the underlying malpractice action against a nurse practitioner. Therefore, while autonomous nurse practitioners in many states can now "step out of the shadow" of physician supervision, the applicable standard of care for nurse practitioners is still very much "supervised" by the expert testimony of physicians.

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