

**LETTER OPINION
2005-L-41**

November 9, 2005

Ms. Karen Wojahn
President
North Dakota State Board of Massage
PO Box 218
Beach, ND 58621-0218

Dear Ms. Wojahn:

Thank you for requesting my opinion whether a nurse licensed in North Dakota may practice massage in the bona fide practice of nursing while working at a massage establishment or day spa. It is my opinion that a nurse may not practice massage at a massage establishment, day spa, or similar business.

ANALYSIS

A person may not practice massage for a fee, gratuity, or as a free demonstration, without a license issued by the North Dakota Board of Massage.¹ There are several exceptions from this requirement, including an exception for:

Any individual who is engaged in a profession or occupation for which the individual is licensed by this state, so long as the individual's activities are performed in the course of the bona fide practice of the individual's profession or occupation and as long as the individual does not represent to the public that the individual is a massage therapist or is engaged in the practice of massage.²

Nurses are licensed to practice by the state, and may therefore fit into this exception.³ When doing so, however, the nurse's activities must be performed in the bona fide practice of nursing. Further, the nurse may not represent to the public that the nurse is a massage therapist, nor may the nurse represent to the public that he or she is engaged in the practice of massage.⁴

¹ N.D.C.C. § 43-25-03(1).

² N.D.C.C. § 43-25-04(3).

³ N.D.C.C. ch. 43-12.1.

⁴ N.D.C.C. § 43-25-04(3).

There are “overlapping functions within the practice of nursing and other providers of health care.”⁵ Massage is defined to mean “the scientific and systematic manipulation of the soft tissues of the human body through any manual or mechanical means.”⁶ Massage may be appropriately performed by a nurse when caring for a patient.⁷ It, therefore, appears reasonable to assume that a bona fide nursing practice may include massage when it is appropriate for a patient’s care.

Although massage may be appropriate nursing care, the circumstances when it will be appropriate must be interpreted consistently with the statutory definition of nursing and the prohibitions against representing that the nurse is a massage therapist or representing that the nurse is engaged in the practice of massage. Statutes on related topics should be harmonized, if possible.⁸ This includes statutes concerning the overlap between different professions.⁹ Further, the statutory exception from massage licensing must be reasonably construed; it exists only so far as the statutory language warrants.¹⁰ “[A]ll doubts are to be resolved in favor of the general provisions rather than the exception.”

Nursing relates to providing health care for a person who has been diagnosed with an illness or injury.¹¹ Nursing includes maintenance of health and prevention of illness, providing supportive and restorative care, and nursing treatment.¹² Nursing also includes referring individuals to other health care professionals, collaboration with other health care professionals when implementing a health care regimen, and the execution of a health care regimen prescribed by a health care practitioner.¹³ A nurse performing ordinary, “non-medical,” relaxation massage in a massage establishment is not engaged in “activities [that] are performed in the course of the bona fide practice of the individual’s profession [nursing].”

⁵ N.D.C.C. § 43-12.1-01.

⁶ N.D.C.C. § 43-25-02.

⁷ Larson v. Russell, 176 N.W. 998, 1000 (N.D.1919) (nurse, under direction of a physician, massaged paralyzed patient); Regency Services Corp. v. Board of County Comm. of Adams County, 819 P.2d 1049, 1054 (Colo. 1991) (nurse aids gave various types of massages to nursing home patients); Mercil v. Mathers, 1994 W.L. 1114 (Mn. App. 1994) (nurse gave uterine massage following birth); Parson v. Interfaith Medical Center, 700 N.Y.S.2d 224, 226 (Sup. Ct. App. Div., 2d Dept. N.Y. 1999) (nurse gave massage to hospital patient).

⁸ Public Service Commission v. Wimbledon Grain Co., 663 N.W.2d 186, 193 (N.D. 2003).

⁹ N.D.A.G. 1997-L-196.

¹⁰ Id.

¹¹ N.D.C.C. § 43-12.1-02(5) (nursing includes maintenance of health and prevention of illness, providing supportive and restorative care, and nursing treatment).

¹² N.D.C.C. § 43-12.1-02(5)(a), (c).

¹³ N.D.C.C. § 43-12.1-02(5)(c), (e).

While nursing may be performed “in a variety of settings,”¹⁴ a nurse working in a massage establishment¹⁵ implies to the public that the nurse is engaged in the practice of massage, which violates the exception from massage licensure.¹⁶ This implication becomes conclusive if the nurse simply takes massage customers by appointment or as they walk through the door, and is not using massage for specific supportive and restorative care pursuant to a health care regimen prescribed for that customer by a health care practitioner. Further, a nurse may not take advantage of this exception from massage licensure if the nurse does not specifically inform the customer that he or she is a nurse and not a massage therapist.¹⁷

Therefore, it is my opinion that a nurse may only engage in massage if the massage is performed in the bona fide practice of nursing, which would require the nurse to make an evaluation of the client’s health needs and be performed in connection with a health care regimen prescribed by a health care practitioner. It is my further opinion that when a nurse is working at a massage establishment, spa, or similar business rather than a medical or healthcare setting, the nurse represents to the public that he or she is engaged in the practice of massage. In that situation, a nurse may not take advantage of the exception from massage licensure, and must be a licensed massage therapist or the nurse will have violated N.D.C.C. ch. 43-25.¹⁸

Sincerely,

Wayne Stenehjem
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).

¹⁴ N.D.C.C. § 43-12.1-02(5). The context for this statement is the definition of nursing, which implies that the setting must be related to an individual’s health care, i.e., generally a hospital, clinic, nursing home or other health care facility.

¹⁵ Defined at N.D.C.C. § 43-25-02(3).

¹⁶ N.D.C.C. § 43-25-04(3).

¹⁷ Id.

¹⁸ The penalty for violating N.D.C.C. ch. 43-25 is a class B misdemeanor. N.D.C.C. § 43-25-19.