

The Misaligned APRN: Grandfathered or Something Else?

Carolyn Buppert, JD, MSN

Attorney, Law Office of Carolyn Buppert, P.C.

www.buppert.com

buppertcarolyn@gmail.com

410-570-0058

851 7th St., Boulder, CO 80302

Copyright 2017 Carolyn Buppert

Disclosures

Speaker has no financial relationship with any company alluded to in this talk, other than her own law office

Objectives

1. Highlight the concerns when APRNs accept employment outside of their education in a specific role or population
2. Lead discussion of the legal implications of misaligned practice for an APRN
3. Describe the most common legal challenges to APRN practice

Misalignment can be a problem when

- Payer has specific requirements about the qualifications of the provider who can bill a service
 - Example: Medicare, mental health services
- Clinician/practice/facility is sued
- Credentialing is done by medical staff office and they don't understand APRN credentials

Misalignment can be a problem when

- Providers refer for specialty consultations expecting response board-certified specialists
- Patients are misled about the qualifications of their provider, who is an APRN
- APRNs don't know which jobs they safely can take

I have heard from

- WHCNP providing medication management for a psychiatrist's patients
- PNP working alone at a satellite office of a pediatric endocrinology practice
- FNP working in critical care
- ANP practicing in dermatology
- WHCNP providing primary care for women in a sexually transmitted disease clinic

And...

- ANP asked by urgent care clinic owner to see children when they present to clinic
- Gerontological NP asked to see adults under 50
- PNP asked to see 23 year old who has aged out of heme-onc specialty clinic
- New grad FNP asked to see acute stroke patients in a hospital

Grandfathering or something else?

- FNP hired by hospital 25 years ago to follow post-op patients for cardio-thoracic surgeons, and is still doing that
- FNP, fresh out of school, being recruited today to supervise cardiac stress tests in hospital

Questions

- Is there consensus on what education, certification and precepting is needed for APNs practicing in medical specialties?
- Whose place is it to determine the correct preparation for any given specialty or any given job?
- Who currently provides guidance on the correct education and certification for any given job description?

What does the Consensus Model say?

Licensing of NPs should be in these 6 areas

- Adult-Gerontology (acute or primary care)
- Pediatrics (acute or primary care)
- Family
- Neonatal
- Women's health
- Psych/mental health

What does the Consensus Model say about specialties?

“Education and assessment strategies for specialty areas will be developed by the nursing profession, i.e., nursing organizations and special interest groups.... Competence at the specialty level will not be assessed or regulated by boards of nursing but rather by the professional organizations.”

– Page 6

“APRN specialty education and practice build upon and are in addition to the education and practice of the APRN role and population focus. For example, a family CNP could specialize in elder care or nephrology; an Adult-Gerontology CNS could specialize in palliative care; a CRNA could specialize in pain management; or a CNM could specialize in care of the post-menopausal woman. State licensing boards will not regulate the APRN at the level of specialties in this APRN Regulatory Model. Professional certification in the specialty area of practice is strongly recommended.”

“Competency in the specialty areas could be acquired either by educational preparation or experience and assessed in a variety of ways through professional credentialing mechanisms (e.g., portfolios, examinations, etc.).”

– Page 12

“Certification for specialty may include exam, portfolio, peer review, etc.”

– Page 14, Diagram 2

Criteria for evaluating certification programs include having “procedures for ensuring match between education and clinical experience, and APRN specialty being certified”

- APRN Joint Dialogue Group Report, July 7, 2008, Appendix A, NCSBN Criteria for Evaluating Certification Programs, page 25

Summary

- Competence in a specialty may come through education or experience
- Licensing boards will not regulate the specialties
- Professional organizations will set the standards
- Certification in the specialty is strongly recommended

Summary

- Competency can be assessed through exams, portfolios or peer review
- There should be a match between education and clinical experience and the APRN specialty

Certifications available to APRNs in these specialties

- PNCB Pediatric psych/mental health
- CAPC Palliative care
- ONCB Orthopedics
- NNCC Nephrology
- ONCC Oncology
- ABCM Cardiovascular
- CBUNA Urology
- AIPM Pain management

Specialties without certification available to APNs but with many APN providers

- Neurology
- Neurosurgery
- Cardiovascular surgery
- Gastroenterology
- Endocrinology
- Sleep
- Rheumatology

Current situation

- In general, it is left to the APN and employer to work out, addressing
 - Does the APN have certification in the specialty?
 - Is the certification a valid measure of competency?
 - If APN not certified, what are risks?
 - How can the employer assess competency?

Questions for the individual APRN and employer to answer

- Does the APRN have the knowledge to differentially diagnose and manage the conditions likely to be encountered?
- What are the clinical competencies and skills require to treat these conditions?
- How has the APRN achieved and demonstrated competence?

– Adapted from: Missouri Board of Nursing Scope of Practice Decision-making Tool

- What is the standard for a practitioner in this field?
- Does the APRN meet those standards?
- Has the APRN completed a specialty preceptorship or fellowship?

– Adapted from: Missouri Board of Nursing Scope of Practice Decision-making Tool

- What are the consequences of accepting treatment responsibility for these patients?
- Does the APRN a formal relationship with a provider who is adequately trained and immediately available?
 - Adapted from: Missouri Board of Nursing Scope of Practice Decision-making Tool

- Is the safety of the patient at risk?
 - Adapted from: Missouri Board of Nursing Scope of Practice Decision-making Tool

I ask the APRN:

Do the APRN and employer understand that, if sued, the first thing the plaintiff's attorney will ask is "What are your qualifications to provide this service?"

Let's look at federal laws for any requirements

- Qualifications of APRN
- Scope of practice of APRN
- Conditions of participation
- Criteria for reimbursement

Qualifications of APRN under federal law

Found in regulations on Medicare reimbursement

Requires:

Certification by a recognized national certifying body that has established standards for ARNPs

Master's degree in nursing or a Doctor of Nursing Practice (DNP) doctoral degree

- Source: 42 CFR 410.75

Scope of practice of nurse practitioner under federal law

- Defers to each state's law
 - Source: 42 CFR 410.75 (regulations on what Medicare will pay for)

Conditions of participation

482.22 Condition of participation: Medical staff.

(a) Standard: Eligibility and process for appointment to medical staff.
The medical staff must include doctors of medicine or osteopathy. In accordance with State law, including scope-of practice laws, the medical staff may also include other categories of nonphysician practitioners determined as eligible for appointment by the governing body.

(2) The medical staff must examine the credentials of all eligible candidates for medical staff membership and make recommendations to the governing body on the appointment of these candidates in accordance with State law, including scope-of-practice laws, and the medical staff bylaws, rules, and regulations.

Criteria for reimbursement: Medicare transmittal

Qualification Requirements for Mental Health Providers

“Providers of mental health services must be qualified to perform the specific mental health services that are billed to Medicare. In order for services to be covered, mental health professionals must be working within their State Scope of Practice Act and licensed or certified to perform mental health services by the State in which the services are performed.” Transmittal AB-03-037 (2003)

Let's look at state law

OH APRN decision making model

- Is the procedure/activity prohibited by any Section of the Ohio Revised Code or the Ohio Administrative Code?
- Is the procedure/activity consistent with the Ohio Nurse Practice Act, rules regulating the practice of nursing, Interpretive Guidelines of the Board, and for CTP Holders, the Formulary?

- Do practice guidelines of a national specialty or advanced practice organization support inclusion of this procedure/activity in your particular practice?
- Do you possess the depth and breadth of knowledge to perform this procedure/activity safely? AND Do you possess the depth and breadth of knowledge to respond appropriately to complications or untoward effects of the procedure/activity?
 - http://www.nursing.ohio.gov/PDFS/AdvPractice/APRN_Decision_Model_March_2015.pdf
 - And see NCSBN Scope of Nursing Practice Decision-Making Framework

“You must be able to provide documentation, upon request of the Board, to show evidence of your knowledge to perform the procedure/activity. Such knowledge is generally obtained through education emanating from a recognized body of knowledge relative to the care to be provided. Documentation could include:

- APRN educational programs;
- Preceptorship, fellowship, or internship; and/or
- Other formally organized educational experience”

http://www.nursing.ohio.gov/PDFS/AdvPractice/APRN_Decision_Model_March_2015.pdf

Another board of nursing approach

“What can I do to determine if a nursing task which includes procedures/treatments is within my scope of practice?”

Nurses have the option of filing a “Petition for Declaratory Statement”....
Declaratory statements are an agency’s opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner’s particular set of circumstances”

Source: Florida Board of Nursing at <http://floridasnursing.gov/nursing-faqs/advanced-registered-nurse-practitioner-arnp/>

What is lacking in some states

Clear scope of practice for APRN:

- CA -- No scope of practice stated in state law
- Tennessee and Michigan -- APRN may prescribe, but no other scope of practice specified in state law
 - Can an APRN in Tennessee or Michigan diagnose?

Deficiencies in state law often are remedied through delegation (MI), standardized procedures (CA) or collaboration agreements (TN)

Implications for litigation: Perils of “grandfathering”

- NP had a diploma in nursing from a hospital and was certified by the hospital as a pediatric nurse practitioner in 1977
- NP was grandfathered as a nurse practitioner without having to obtain the current requirement of Baccalaureate and Masters of Science in Nursing
- Opened a solo practice and entered a collaborative agreement with a physician

- NP never collaborated with collaborating physician
- NP treated plaintiff's baby during the first 14 months of life; saw the baby 32 times during the first year
- When the mother asked to have a physician see the baby, the NP told her she only needed to see a physician for a hospital admission

- Finally mother took baby a hospital, where baby was seen by the NP's collaborating physician
- Baby diagnosed with neuroblastoma
- NP's records documented signature symptoms of neuroblastoma in the baby at 6 months

- Neuroblastoma, if diagnosed within the first year of life is treatable, with 90% chance of event-free survival
- Here, baby suffered permanent injuries
- Jury decided in favor of the plaintiffs and awarded \$6,000,000 in general damages; \$629,728 in past medical expenses; \$3,358,828 in future medical expenses; \$33,000 to the father and \$200,000 to the mother for loss of consortium

Oliver v. Magnolia Clinic, 2010-2785 (La. 3/25/11), 57 So. 3d 308

Malpractice insurer position

“The nurse practitioner’s specified scope of practice is critical with respect to any theory of liability or potential allegations that may be asserted in malpractice litigation. It also forms the context within which a court will determine whether negligent conduct occurred and whether the nurse practitioner acted within the scope of practice.”

“This framework enables a jury to decide whether the nurse practitioner adhered to, or breached, the standard of a reasonable and prudent nurse practitioner in the same or similar circumstance in a specific liability claim. The scope of practice for nurse practitioners typically encompasses educational background, clinical experience, and collaborative activities with other healthcare professionals.”

From HPSO nurse practitioner claims study 1994-2004 at <http://www.hpso.com/Documents/Risk%20Education/individuals/NursePractitionerClaimsStudy.pdf>

- In NSO survey 76% of those who had had claims against them said they refuse to perform procedures outside their scope of practice, those who did said they performed outside their SOP because trained by their physician collaborator

Most common legal challenges

- Refusal of hospitals to give admitting privileges to FNP (want ACNPs)
- Refusal of Board of Nursing to approve collaborative agreement based on mismatch
- Denial of reimbursement, based on lack of qualifications of provider
- Not common but serious: Plaintiff in malpractice claims APRN not qualified

Discussion questions

- Is it acceptable that competency decisions are being made solely between employer and individual ANP?
- If there is no certification available in a specialty, is on-the-job training from a specialist sufficient to protect patient safety?

Discussion questions

- Are NPs who get on-the-job training rather than formal education and certification exposed to an unacceptable level of liability if there are malpractice lawsuits?
- How to best document on-the-job training?

Discussion questions

- If there is an educational track and certification available to NPs, should an NP be required to have that education and certification to practice in that area?

Questions

- Does it make sense that NPs working for specialists can, in some situations, perform and be reimbursed for procedures that 3rd-year specialty resident cannot?

Questions

- Whose responsibility is it to answer these questions?
 - Individual APNs and their employers?
 - State boards?
 - Nursing associations?
 - Specialty medical societies?
 - State medical boards?
 - New specialty-based certification organizations?

Articles I wrote on this subject

- As an adult NP can I take a job with acute care responsibilities?
 - <http://www.medscape.com/viewarticle/845895>
- Is it legal for family nurse practitioners to practice in specialty areas?
 - <http://www.medscape.com/viewarticle/478180>
- At what age is a patient an adult?
 - <http://www.medscape.com/viewarticle/740929>
- Can a family nurse practitioner work in the ED or ICU?
 - <http://www.medscape.com/viewarticle/832164>

Resources

- NCSBN, Guidelines for Grandfathering APRNs by Endorsement [https://www.ncsbn.org/Grandfathering_Guidelines_\(3\).pdf](https://www.ncsbn.org/Grandfathering_Guidelines_(3).pdf)
- NCSBN, Scope of Practice Decision-Making Framework <https://www.ncsbn.org/decision-making-framework.htm>

Thank you for coming!

2017 NCSBN APRN Roundtable

April 4, 2017