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NO.
STATE OF NEBRASKA
OFFICIAL
OCT 6 1994
DEPT. OF JUSTICE

DATE: October 3, 1994

SUBJECT: Scope of Practice of Dental Hygienists

REQUESTED BY: Senator Don Wesely

WRITTEN BY: Don Stenberg, Attorney General
Lynn A. Melson, Assistant Attorney General

You have asked whether legislation is needed to assure that the Department of Health has statutory authority to promulgate regulations allowing dental hygienists to administer local anesthetics. You have referred to two statutory provisions concerning dental hygienists. Neb. Rev. Stat. § 71-193.17 provides that a licensed dental hygienist may perform certain oral procedures including 1) scaling of teeth and 2) polishing all exposed tooth surfaces in the oral prophylaxis procedure. Neb. Rev. Stat. § 71-193.19 provides that the Department of Health may, by rule and regulation, prescribe additional services which may be performed by a licensed dental hygienist when such additional procedures are educational or related to the oral prophylaxis. In your letter, you have indicated that it is the procedure of planing roots below the gum line which generally requires the administration of local anesthetic by injection.

We have reviewed the Nebraska statutes concerning the practice of dentistry and the procedures authorized to be performed by licensed dental hygienists. As discussed below, we conclude that legislation would be needed to give the Department of Health sufficient authority to expand the scope of practice of dental hygienists to encompass the injection of local anesthetics.

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The scope of dentistry practice is defined at Neb. Rev. Stat. § 71-183 (1990). That statute provides at § 71-183(1) that a person shall be deemed to be practicing dentistry who performs "any dental operation or oral surgery or dental service of any kind . . . . " The statute also provides at § 71-183(12) that a person shall be deemed to be practicing dentistry who "administers an anesthetic of any nature in connection with a dental operation. . . ." In other words, the general rule is that only a dentist may administer anesthetics.

Neb. Rev. Stat. § 71-183.01 (Cum. Supp. 1992) lists certain practices and operations which are exceptions to the general rule that a person engaged in such practice must be a licensed dentist. Section 71-183.01(2) states that a qualified anesthetist or registered nurse is not practicing dentistry when giving an anesthetic for a dental operation under the direct supervision of a licensed dentist or physician. Section 71-183.01(7) states that a licensed dental hygienist, when performing certain procedures under the supervision of a licensed dentist, is not deemed to be practicing dentistry. This exception is limited to the performance of "the oral prophylaxis procedure, which will include the scaling and polishing of teeth and such additional procedures as are prescribed in accordance with rules and regulations adopted by the Department of Health." We also note that § 71-193.17(10) specifically provides that a licensed dental hygienist may apply topical desensitizing agents, but contains no specific provision regarding administration of anesthetics by injection. These statutes must be read along with §§ 71-193.17 and 71-193.19 to which you refer to in your letter. Statutes pertaining to the same subject should be construed together as if they were one law and effect should be given to every provision. ***Indian Hills Community Church v. County Bd. of Equalization***, 226 Neb. 510, 412 N.W.2d 459 (1987). Legislative intent deduced from the entire act prevails over that of a particular part considered separately. ***Grosvenor v. Grosvenor***, 206 Neb. 395, 293 N.W.2d 96 (1980). Finally, we note for your information that the current regulations adopted by the Department of Health expressly prohibit dental hygienists from administering local or general anesthetics. 172 NAC 53-002.02C.

You inquire whether the Department of Health has sufficient statutory authority to adopt regulations allowing dental hygienists to administer a local anesthetic. It is true that there is language in both §§ 71-183.01(7) and 71-193.19 which allows the Department of Health to prescribe "additional procedures" which may be performed by a licensed dental hygienist. However, these additional procedures must relate to the oral prophylaxis procedure

and it appears doubtful that the administration of a local anesthetic by injection is sufficiently related to the oral prophylaxis procedure. We find the Legislature has expressed its intent in §§ 71-183 and 71-183.01 that only licensed dentists, and qualified anesthetists and registered nurses under the direct supervision of a licensed dentist or physician, may give anesthetics. This lends support to our opinion that §§ 71-193.17 and 71-193.19 would be interpreted to mean that administering a local anesthetic is not one of the 'additional procedures" related to oral prophylaxis which may be prescribed by agency regulations. In the event the court would find the reference to "additional procedures" ambiguous and resort to legislative history for the purpose of determining legislative intent, we have reviewed the legislative history of Neb. Rev. Stat. §§ 71-193.17 and 71-193.19. LB 572 was intended to clarify statutory language concerning the practice of dentistry, to resolve a conflict with regard to who may take a dental x-ray, and to clarify the role of the licensed dental hygienist and make specific what is included in the oral prophylaxis procedure which hygienists are permitted to perform. As Chairman of the Committee on Public Health and Welfare, we note that you gave the following explanation during floor debate prior to passage of Laws 1986, LB 572. "Another thing, we make it clear is that you don't allow for local anesthesia to be administered by a dental hygienist. We do allow for monitoring of nitrous oxide. Once the dentist starts it, the dental hygienist is very qualified to make sure that everything functions according to plan, but as far as actual administration of anesthesia, they would not be allowed to do that." Floor Debate on LB 572, 89th Neb. Leg., 2nd Sess. 8418 (Feb. 6, 1986) (Statement of Sen. Wesely).

We also point out that, if the Department were to amend its regulations without a statutory change so as to allow dental hygienists to administer local anesthetics; Neb. Rev. Stat. §§ 71-183.01(7) and 71-193.19 may be subject to challenge as an unconstitutional delegation of legislative authority. Although the legislature may authorize an administrative agency to make rules and regulations to carry out an express legislative purpose or to enforce a law within designated limitations, these designated limitations and the standards by which the powers granted are to be administered must be clearly and definitely stated in the authorizing act. ***Bosselman, Inc. v. State***, 230 Neb. 471, 432 N.W.2d 226 (1988). Arguably, these references to additional procedures to be prescribed by the Department of Health might not be found sufficiently clear and definite to guide the agency in exercising the power conferred upon it.

For all of these reasons we conclude that, if a change in scope of practice is desired, a safer course would be to amend the statutes in question so as to expressly provide for the administration of local anesthetics by dental hygienists.

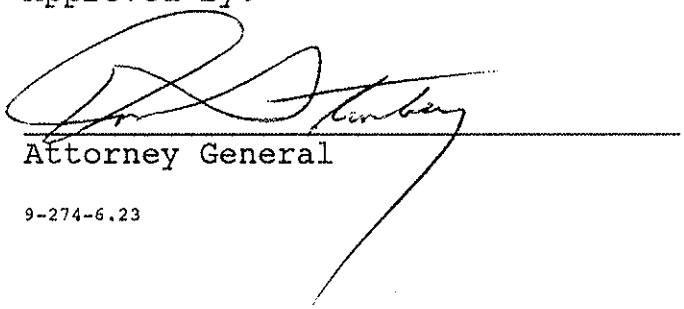
Sincerely,

DON STENBERG
Attorney General

Lynn A. Melson
Assistant Attorney General

cc: Patrick J. O'Donnell
Clerk of the Legislature

Approved By:



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