Approved: February 1, 2005
Date

MINUTES OF THE HOUSE HEALTH AND HUMAN SERVICES COMMITTEE

The meeting was called to order by Chairman Jim Morrison at 1:30 P.M. on January 27, 2005 in Room 526-S of the Capitol.

Committee members absent:
Representative Eber Phelps- excused

Committee staff present:
Melissa Calderwood, Kansas Legislative Research Department
Mary Galligan, Kansas Legislative Research Department
Renae Jefferies, Revisor of Statutes' Office
Gary Deeter, Committee Secretary

Conferees appearing before the committee:
Larry Buening, Executive Director, Kansas Board of Healing Arts

Others attending:
See attached list.

The minutes for the January 26, 2005, meeting were approved.

Representative Don Hill requested the committee sponsor two bills from the Kansas Board of Pharmacy. He said the first bill deletes obsolete language regarding renal dialysis, and the second bill puts in place a statute resembling one by the Board of Healing Arts that requires a licensee, if he loses an action against him/her, must pay the cost of the action. A motion was made, seconded, and passed to accept both bills as committee bills.

Larry Buening, Executive Director, Kansas Board of Healing Arts, continued testimony begun by Mark Stafford on January 20. (Attachment 1) Noting that he had been with the Board for over 20 years as disciplinary counsel, general counsel, and, since 1992, executive director, Mr. Buening said that no two states have identical laws governing the disciplining of doctors. The Board uses the Federation of State Medical Boards' *Guide to the Essentials of a Modern Medical Practice Act,* a guide which lists 41 grounds for disciplinary action; he further noted that Kansas statutes (**K.S.A. 65-2836** and **K.S.A. 65-2837)**, when including issues of incompetency, give more than 41 grounds for disciplinary action. He reiterated what Mr. Stafford said: that the Board does not regulate hospitals, institutions, or surgical centers, noting that the Board accepts the "captain of the ship" dictum regarding doctors so that an investigator's primary responsibility is to evaluate a doctor's competence, but not the doctor's office. However, he said, if there are sanitation issues, these are noted and included in an investigator's report.

Regarding office procedure and standard of care, Mr. Buening stated that the Board has adopted the KMS' (Kansas Medical Society's) *Guidelines for Office-based Surgery and Special Procedures* as the standard by which investigators evaluate physicians who do office surgical procedures, noting that the *Guidelines* would be posted on the Board's website by the end of the week. He said that in response to the Board's request, the

Governor's budget adds additional investigators, and the agency's Information Technology upgrade should improve the Board's efficiency in tracking the licensing information.

Members commended the KMS guidelines, suggested that the Board employ an expert rather than volunteers to help investigators develop their cases, and had numerous questions for Mr. Buening, most of which centered around the perception of the Board's failure to address complaints about a physician in a timely manner, the quality of the investigations, and the failure of investigators to follow the standard-of-care guidelines the Board has adopted. Mr. Buening answered these questions as follows:

- The Board received a grade D from *Public Citizen* magazine because the magazine allows some other states to gain higher rankings by the use of subterfuge in reporting statistics, a tactic which the Board does not do.
- Standard of care is a moving target because the practice of medicine changes so rapidly. The Board does not want to become too specific regarding these standards and have them become quickly obsolete. Even without written guidelines, the Board knows what a standard of care is when applied to specific cases.
- The Board has the authority to go into any doctor's office at any time, even without a complaint, to conduct an investigation.
- Sometimes the Board advises a physician about an investigation ahead of time, sometimes not, depending on the situation.
- With the number of complaints registered each year, the Board needs more investigators to respond in a timely manner; at present, investigative resources are stretched. The Governor's budget allocates two more investigators for FY 2006, but none for FY 2007.
- The Board is 100% fee-funded and by statute shifts 20% of these funds to the State General Fund each year; however, in recent years additional monies have been swept into the State General Fund to make up for deficits elsewhere, reducing the Board's funds significantly.
- A council considers complaints and decides if a given complaint is worthy of investigation. If the council deems it not to be, the Board does not hear about the complaint.
- All investigators have law-enforcement training. The average investigations takes between 9 months and a year.
- Because of the code of confidentiality, the Board must wait until the investigation is complete before reporting back to the originator of the complaint.
- If an investigation results in a fine, the money goes to the State General Fund.
- Reciprocity does not automatically result in granting a license to a physician coming into Kansas from another state. The Board checks national databases to guard against unfit physicians; if a physician's license is limited in anther state, the Kansas license will likewise reflect that restriction.
- Last year (2004) 10 licenses were revoked and 3-4 were suspended.
- Under the captain-of-the-ship philosophy, a physician can delegate any health-care activity to anyone he or she chooses; thus physicians' employees are neither monitored nor regulated by the Board.

Staff provided a briefing on **HB 2086,** commenting that the bill addresses the length of time between surveys of long-term care facilities, extending the time from 15 months to 36 months.

The meeting was adjourned at 2:58 p.m.

HOUSE HEALTH AND HUMAN SERVICES COMMITTEE
GUEST LIST

DATE: JANUARY 27 2005

NAME	REPRESENTING
Amy Salisbury	DOB
Larry Buening	BD OF HEALING ARTS
ROGER WARREN MD	" " " "
Chip Wheelen	Asn of Osteopathic Med.
Judy Smith	CWA of KS
Virginia Stam	Federico Consulting
Rebecca Bailey	KMS
Sara Holden	Intern to Rep. Miller, F
Gayle Moore	KDHE
Rebecca [illegible] (RICE)	KCA & KANA
Rob Mealy	Hein Law Firm
Kevin Barone	KTLA
Joe Tuttle	Family Values Alliance
John Marshall	THORNE MEDIA GROUP
Amy Campbell	KS State Ophthalmological Society

KANSAS BOARD OF HEALING ARTS

LAWRENCE T. BUENING, JR.
EXECUTIVE DIRECTOR

KATHLEEN SEBELIUS, GOVERNOR

MEMO

TO: House Committee on Health and Human Services

FROM: Lawrence T. Buening, Jr.
Executive Director

DATE: January 26, 2005

RE: Overview of the Board

Thank you for the opportunity for the Board to again appear before you and provide information on the Board's operations, particularly in the area of investigation and disciplinary actions. I am sorry I was unable to attend the meeting on January 20.

I have been employed by the Board for just over 20 years. In 1984, I was hired as the Board's first disciplinary counsel, a position that was created by the 1984 Legislature to investigate or cause to be investigated all matters involving professional incompetency, unprofessional conduct or any other matter which may result in disciplinary action. In 1986, the Board hired me as General Counsel and in 1992, I was named the Executive Director.

I have reviewed the minutes of the January 20 meeting at which time Mark Stafford, the Board's General Counsel provided an overview and answered a number of questions. I will not repeat Mr. Stafford's written testimony that was provided to you then. However, I would like to clarify and expand upon some of the comments made by Mr. Stafford during the question and answer period.

It is my understanding that a question was asked whether the laws for the disciplining of doctors are the same or similar in all states. The short answer is that no two states have identical laws in this area. The Federation of State Medical Boards has published *A Guide to the Essentials of a Modern Medical Practice Act* in 1956. The 2000 edition of this book suggests 41 grounds for disciplinary action. Many of these grounds were originally taken from the Kansas Healing Arts Act. K.S.A. 65-2836 lists 29 separate grounds for discipline. Among these are subsection (b) which makes it a ground for discipline if a "licensee has committed an act of unprofessional conduct or professional incompetency". K.S.A. 65-2837 then provides three definitions for "professional incompetency" as follows:

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HHS Attachment 1
1-27-05

"(a) "Professional incompetency" means:

(1) One or more instances involving failure to adhere to the applicable standard of care to a degree which constitutes gross negligence, as determined by the board.

(2) Repeated instances involving failure to adhere to the applicable standard of care to a degree which constitutes ordinary negligence, as determined by the board.

(3) A pattern of practice or other behavior which demonstrates a manifest incapacity or incompetence to practice medicine."

K.S.A. 65-2837(b) further provides for 31 definitions of the term "unprofessional conduct". Subsection (b)(24) provides as follows:

"(24) Repeated failure to practice healing arts with that level of care, skill and treatment which is recognized by a reasonably prudent similar practitioner as being acceptable under similar conditions and circumstances."

It is accurate the Board's jurisdiction is limited to the individuals it regulates. It does not issue licenses to facilities as does the Kansas Department of Health and Environment. Hospitals and ambulatory surgical centers licensed by KDHE are not regulated by the Board. However, clinics at which the healing arts is practiced, if not otherwise regulated by another state agency, are subject to the jurisdiction and direct oversight of the Board. The doctor licensed by the Board is held responsible for all activities within the clinic or office, including the cleanliness and sanitation of the facilities. No specific written criteria have been adopted to establish the minimum standards that must be met in the areas of cleanliness and infection control procedures in a doctor's office. Rather, each matter brought to the Board's attention is considered on a case-by-case basis to determine whether the facilities for which the doctor is responsible meet the appropriate standard of care as determined by the Board.

On October 12, 2002, the Board approved the *Guidelines for Office-Based Surgery and Special Procedures* that had been approved by the House of Delegates of the Kansas Medical Society. The stated purpose of the guidelines is to provide guidance to physicians who perform surgery and other special procedures which require anesthesia, analgesia or sedation, primarily related to those cases in which there is a loss of consciousness by the patient. The guidelines are not applicable to minor surgery. The guidelines do provide that locations where office-based surgery is to be performed comply with applicable health and safety laws and that sterilization of operating materials should be adequate. Also included in the guidelines are recommendations for qualifications of physicians and staff, equipment, facilities, quality assurance, and policies and procedures for patient assessment and monitoring. The guidelines were not intended to establish a standard of care and they are not employed by the Board's investigators. The Board has always been reluctant to enact rules and regulations establishing a standard of care and to, in essence, legislate the practice of the healing arts. The primary reason for this has been that what constitutes an appropriate standard of care today may be entirely contraindicated in just a few years.

On May 3, 2004, Senate President Dave Kerr wrote to me and indicated that there had been concern expressed among legislators about the conditions at a clinic. Senator Kerr inquired whether the Board had sufficient staff and authority to deal aggressively and effectively with situations like the one he mentioned. In my response on May 4, 2004, I stated as follows:

"I believe the Board has sufficient authority to handle cases similar to the one above described. There is no prohibition, statutory or otherwise, against the Board conducting investigations or inspections absent a complaint or receipt of some information expressing a concern. In fact, the courts have supported a state regulatory agency's ability to conduct an inspection or investigation in the absence of a complaint."

This position has not changed. Over the years, the Legislature has done an excellent job of enacting laws providing for additional grounds for discipline. On the other hand, I did advise Senator Kerr that the Board does not now have, and has not for a number of years, adequate staffing to meet all of its responsibilities and obligations. When the Board's budget request was submitted September 14, 1994, the Board had 26 total FTE positions, four of which were special investigators to investigate the 12,945 professionals then regulated. Today, the Board has 29 FTE positions and 5 FTE investigators, but now regulates more than 18,3000 professionals. Starting July 1, 2005, the Board will commence the regulation of what is expected to be more than 3000 radiologic technologists. On July 1, 1995, there were 236 open investigative cases. 302 additional cases were opened during FY1995. In contrast, 523 cases were opened in FY2004 and, as of July 1, 2004, there were 719 open investigative cases.

The Board has requested additional personnel for FY2006 and FY2007 and the Governor has recommended two additional FTE positions—one investigator and one legal assistant–be added for FY2006. The Board is currently in the midst of an information technology enhancement project which will streamline the complaint and investigative processes and improve productivity and efficiency. It is hoped that these measures will reduce both the number of open cases and the length of time involved in the investigative process.

Thank you for the opportunity to appear before you. I would be happy to respond to any questions.