

Approved: 4/2/09
Date

MINUTES OF THE SENATE PUBLIC HEALTH AND WELFARE COMMITTEE

The meeting was called to order by Chairman Jim Barnett at 1:30 p.m. on March 16, 2009, in Room 136-N of the Capitol.

All members were present except Senator Haley, Senator Colyer, and Senator Brungardt who were absent.

Committee staff present:

Nobuko Folmsbee, Office of the Revisor of Statutes
Doug Taylor, Office of the Revisor of Statutes
Kelly Navinsky-Wenzl, Kansas Legislative Research Department
Terri Weber, Kansas Legislative Research Department
Jan Lunn, Committee Assistant

Conferees appearing before the Committee:

Jack Confer, executive director, Kansas Board of Healing Arts
Jerry Slaughter, executive director, Kansas Medical Society

Others attending:

See attached list.

Due to the substantive nature of Senate Resolution 1851, urging review, modification, and reorganization of laws pertaining to the maintenance and availability of health information, Senator Barnett returned it to the committee for final consideration. Following review of the resolution (now containing a number) and upon a motion by Senator Kelsey and a second by Senator Schmidt to favorably pass out Resolution 1851 to the full Senate, the motion carried.

Doug Taylor, office of the revisor of statutes, briefed those attending on **HB 2010 - Board of healing arts; storage, maintenance and transfer of medical record; medical record maintenance trust fund.** The bill establishes a medical records maintenance trust fund and grants authority to the Kansas State Board of Healing Arts to store, maintain and transfer abandoned medical records or medical records when no custodian has been appointed. The board is required to adopt rules and regulations necessary for the bill.

HB 2010 - Board of healing arts; storage, maintenance and transfer of medical record; medical record maintenance trust fund. Jack Confer, executive director of Board of Healing Arts, was recognized who explained the bill will provide the agency authority to maintain patients' medical records if the healing arts professional is no longer able to do so. In addition, the legislation provides for expeditious judicial process to ensure patients' medical records can be available. Mr. Confer cited two examples substantiating the proposed legislation (Attachment 1).

Following questions from senators relative to the current process, jurisdiction, clarification regarding the fees trust fund, and expediting the judicial process, Chairman Barnett recognized Jerry Slaughter, executive director of the Kansas Medical Society.

Mr. Slaughter indicated the Kansas Medical Society supports (Attachment 2) the legislation currently being considered, and he indicated he would like to offer an amendment that would address an issue regarding the ability of physicians to delegate certain acts to registered nurse anesthetists (RNAs) and others. Mr. Slaughter further explained that in recent months questions have been raised whether RNAs can order pre- and post-operative medications and diagnostic tests without an order from a physician, and also whether registered nurses and licensed practical nurses can carry out orders issued by a registered nurse anesthetist. The Attorney General issued an opinion (Attachment 3) based on a request from the Board of Nursing. Mr. Slaughter indicated subsequent meetings were held with representatives from the Kansas Association of Nurse Anesthetists, Kansas Society of Anesthesiologists, Kansas Hospital Association, and the Board of Nursing. As a result of meetings with the groups listed, an amendment was proposed that will remove any ambiguity and will clarify that physicians can delegate to nurse anesthetists the ability to order pre- and post-operative medications and diagnostic tests pursuant to that physician's order, and further, the amendment clarifies that registered nurses and licensed practical nurses can carry out orders issued by a registered nurse anesthetist pursuant to the physician's order. The amendment was included in Mr. Slaughter's testimony.

CONTINUATION SHEET

Minutes of the Senate Public Health and Welfare Committee at 1:30 p.m. on March 16, 2009, in Room 136-N of the Capitol.

Senator Barnett called committee members' attention to written testimony submitted by John Breth, Kansas Society of Anesthesiologists, (Attachment 4) and requested members consider his testimony during deliberations.

Senator Schmidt moved to adopt the amendment discussed and the technical amendments required and to pass out **HB 2010** favorably; Senator Kelly seconded the motion. The motion passed.

Senator Barnett called committee attention to **HB 2297 - Geriatric medicine; approved postgraduate training program for KU medical school and doctor of osteopathy loan programs** which was heard on March 4, 2009. An amendment to the base bill had been proposed that would include the Kansas National Guard in the list of programs participating in the Medical Student Loan Program or Osteopathic Medical Service Scholarship Program. Senator Kelly explained that she supported the inclusion of geriatricians to the program list so that they could practice in rural and/or underserved areas and to add the National Guard to the list of programs could possibly dilute the numbers of practitioners who might elect to practice in these rural, frontier or underserved areas. She encouraged Colonel Callahan to bring back legislation specific to the Kansas National Guard during the next session. Senator Barnett and other committee members offered their support and assistance to Colonel Callahan relative to submitting stand-alone legislation.

Senator Kelsey moved to report **HB 2297** favorable for passage; Senator Kelly seconded the motion. The motion carried.

Senator Barnett adjourned 2:00pm.

The next meeting is scheduled for March 18, 2009.

SENATE PUBLIC HEALTH AND WELFARE COMMITTEE GUEST LIST

DATE: March 16, 2009

NAME	REPRESENTING
Jerry Gaultner	KAS
Chad Austin	KHA
Kevin Robertson	Ks Dental Assn
Dodie Wellshear	KAFP
John Kiephaber	Ks. Chiropractic Assn.
Patrick Vozekberg	Kearney and Assoc.
Col Daryl Callahan	Kansas National Guard
Bon Williams	Ks Assoc. Osteopathic Med.
Justin Moyer	KHPA
Barb Langner	KHPA
Gary Robbins	Ks CPT Assn
Jack Confer	KS BHA
Julia Mowers	"
Kristi Pankratz	"
Michelle Butler	Capital Strategies
J. Desmore	D. Schmidt
Robert Stiles	KDHE
Bob Bethell	House
Scott Heidner	Graces Braden
Wign Klock	Hein Law firm
David Rowe	KU Medical Center

MEMORANDUM

TO: Senate Public Health and Welfare Committee

FROM: Kansas State Board of Healing Arts – Executive Director Jack Confer

DATE: March 16, 2009

RE: House Bill 2010

The Kansas State Board of Healing Arts supports House Bill 2010.

This bill will give the agency the authority to retain patients' medical records after a professional in the healing arts' license has been revoked or the professional becomes incapacitated. The agency will have authority only if the professional does not have or does not follow his or her written protocol for transfer of records to another custodian in place.

The purpose of HB 2010 is to protect patients' medical records and ensure proper handling.

BACKGROUND

The Board has brought two cases under the current statutory scheme to obtain abandoned records. In both cases the statute has proven inadequate to protect patients. In the first instance, the Board temporarily suspended Dr. Stephen Schneider's privilege to practice medicine after he was charged with violating federal law. The United States District Court ordered Dr. Schneider to find a records custodian. When the Board learned that a young patient of Dr. Schneider was not allowed into school because his mother was not allowed access to his inoculation records, on August 22, 2008 the Board brought suit under Kansas law. Finally, on February 27, 2009 (seven months later) the district court placed Dr. Schneider's records with a records custodian.¹

In the case of Peter Lee, D.O., the Board permanently revoked his license in August, 2008. The next day a dumpster diver found 25 boxes of Dr. Lee's records. The information included names, social security numbers and insurance records of Dr. Lee's patients. The citizen notified the local police and Sheriff's Department. Quick action by local law enforcement saved numerous people from identity theft. The Board brought suit to obtain a records custodian on August 29, 2008. However, under the current statutory scheme the Board has been unable to get a court order for a records custodian to protect the interests of Dr. Lee's patients.

(continued on back)

¹ "It is unfortunate that the Kansas Statutes apparently do not provide an expedited procedure for appointment of a records custodian or at least provide for some type of interlocutory order of appointment pending a full hearing on the State Board's petition." *United States of America v. Schneider*, Case No. 07-10234-01-MLB (January 15, 2009).

STATUTORY AMENDMENTS

Medical Records Maintenance Trust Fund

New Section 1 creates a medical records maintenance trust fund. The purpose of this fund will be to pay for the storage, maintenance, and transfer of medical records that have been abandoned. It will be funded through assessed fees to the Healing Arts licensees.

This fund is essential to necessary to ensure patients' medical records are properly stored and maintained if the healing arts professional is no longer able to do so. Through this fund, the Kansas Board of Healing Arts will be able to ensure that patients have access to their records, and that the records are maintained by a qualified custodian.

Expedite Judicial Process

Section 2 amends K.S.A. 65-28,128 so that the district court must expedite any request by the agency to declare a licensee's records abandoned through review of documentation and affidavits.

This will speed up the judicial process to ensure that situations like what happened to the little boy in Wichita who was unable to start kindergarten on time do not happen again.



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To: Senate Public Health and Welfare Committee

From: Jerry Slaughter
Executive Director

Date: March 16, 2009

Subject: HB 2010; Concerning abandoned medical records; physician delegation orders

The Kansas Medical Society appreciates the opportunity to appear today as you consider HB 2010, concerning the handling and disposition abandoned medical records of licensees of the Healing Arts Board. As amended by House Committee, we support HB 2010. Today we are also going to ask you to consider adding further amendments to the Healing Arts Act to address a recent Attorney General's opinion relating to provisions in the Act regarding the delegation of medical acts to others by physicians.

Abandoned Medical Records

HB 2010, as amended, would provide funding for the Board of Healing Arts for the storage, maintenance, and transfer of abandoned medical records. The Board felt, and we agree, that the existing statutes could be strengthened somewhat to assure the proper handling and protection of patients' medical records in those relatively rare situations that occur when a licensee of the Board is no longer practicing due to death, disability, bankruptcy, incarceration, loss of license or incapacity due to illness or injury, and when the orderly transfer of medical records to a designated custodian does not take place. The bill would create the Medical Records Maintenance Trust Fund from licensure fees to be used to pay for storage, maintenance and transfer of abandoned medical records of licensees who do not, or are not able to, make arrangements for a custodian of their records upon becoming an inactive licensee. The bill also would give the Board the power to order a licensee to reimburse the Board for expenses incurred for the storage, maintenance, and transfer of medical records when a licensee fails to provide for the safekeeping of medical records when the licensee becomes inactive. The bill would require a district court to expedite an action brought by the Board pursuant to KSA 65-28,128 relating to the appointment of a custodian of abandoned medical records.

Current regulations of the Board, K.A.R. 100-24-2, require licensees to maintain patient records for a minimum of 10 years from the date of professional services rendered. In addition, K.A.R. 100-24-3 requires licensees who terminate their practice to notify the Board of the location of their patient records, and the name of the agent or custodian of their records. As the bill was originally introduced, we had some concerns about several provisions, particularly the requirement that every licensee must submit a written record retention protocol *each year* prior to license renewal, and that failure to do so would have constituted unprofessional conduct.

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However, the House Committee amendments substantially improved the bill. It is now a reasonable approach to assure that the Board has the necessary funds and tools to meet its responsibilities relating to the orderly transfer, maintenance and storage of, or appointing a custodian for, abandoned medical records, without creating an unnecessary burden on the vast majority of licensees who carry out their obligations regarding accessibility, confidentiality and security of medical records upon becoming inactive for whatever reason.

Physician Delegation; Registered Nurse Anesthetists

We would also like to ask the Committee to consider amending HB 2010 to address a matter that has arisen regarding the ability of physicians to delegate certain acts to registered nurse anesthetists (RNAs) and others. In recent months questions have arisen over whether RNAs can order pre- and post-operative medications and diagnostic tests without an order from a physician, and also whether RNs and LPNs can carry out orders issued by RNAs. As the Committee is aware, the statutes governing RNAs are quite specific to their unique advanced nursing practice. In order to determine the answer to the questions posed above, the Board of Nursing sought an opinion from the Kansas Attorney General on these issues (see attached).

The AG ruled that RNAs are not authorized under current law to order pre- and post-operative medications and diagnostic tests, unless authorized to do so pursuant to a physician order, which is a requirement of their licensing statute. The RNA licensing law (KSA 65-1158) at subsection (a) requires that RNAs perform their duties and functions pursuant to the "*order of a physician or dentist requesting anesthesia or analgesia care...*"; and at subsection (c) that RNAs "*shall perform duties and functions in an interdependent role as a member of a physician or dentist directed health care team.*" Since neither of those provisions specifically authorizes a physician to delegate to an RNA the ability to order pre- and post-operative medications and tests relating to anesthesia care, the AG properly noted that the physician delegation provisions in the Healing Arts Act must be reviewed in conjunction with the RNA statutes.

The delegation provisions in the Healing Arts Act are found at two places: KSA 65-2872(g), and for the purposes of this issue, more specifically subsection (a)(3) of KSA 65-28,127. That subsection requires physicians who delegate medical acts to others to "*...delegate to such persons only those acts and functions which the responsible licensee knows or has reason to believe such person is competent and authorized by law to perform.*" The AG goes on to note that the phrase "*and authorized by law to perform*" has been the source of at least two conflicting earlier AG opinions, which has created uncertainty about its application.

We (KMS) proposed the language in 1997 which eventually became KSA 65-28,127 in order to provide clarification about when and under what circumstances physicians could appropriately delegate certain acts to others, including unlicensed individuals working under their direction and supervision. We did not intend, nor do we believe the legislature intended, to have this delegation section become an impediment to the appropriate transmission of physician orders to individuals who perform acts pursuant to physician delegation. Nonetheless, that phrase has had the unintended result of creating ambiguity in situations such as that involving nurse anesthetists.

At the request of Rep. Brenda Landwehr, Chair of the House Health and Human Services Committee, KMS has been meeting with several groups, including the Kansas Association of

Nurse Anesthetists, the Kansas Society of Anesthesiologists, the Kansas Hospital Association, and the Board of Nursing in an attempt to address concerns about the impact of the AG's opinion. We recognize that some in the nurse anesthetist community would like to have a broader discussion about changing their practice act to give them the ability to perform their functions without a physician order or delegation. However, we believe that the specific issue identified by the AG can be addressed by a simple amendment to the physician delegation statutes referenced above, and that a broader discussion about changing their practice act would merit a more lengthy deliberative process involving all of the interested parties.

Consequently, as a result of our meetings with the groups noted above, we proposed an amendment to KSA 65-28,127 which we believe will remove any ambiguity and make it clear that physicians can delegate to nurse anesthetists the ability to order pre- and post-operative medications and diagnostic tests pursuant to that physician's order. In our opinion, the proposed language to the delegation statute would also remove any doubt that RNs and LPNs can carry out orders issued by RNAs pursuant to that same physician's order. Last week the Board of Nursing voted to support the proposed language, as has the Kansas Association of Nurse Anesthetists. The proposed amendment which we would urge you to amend into HB 2010 is as follows:

KSA 65-28,127. Licensees who direct, supervise, order, refer, accept responsibility for, enter into practice protocols with or delegate acts which constitute practice of healing arts to others; requirements and limitations; construction of section. (a) Every responsible licensee who directs, supervises, orders, refers, accepts responsibility for, enters into practice protocols with, or who delegates acts which constitute the practice of the healing arts to other persons shall:

- (1) Be actively engaged in the practice of the healing arts in Kansas;
- (2) review and keep current any required practice protocols between the responsible licensee and such persons, as may be determined by the board;
- (3) direct, supervise, order, refer, enter into a practice protocol with, or delegate to such persons only those acts and functions which the responsible licensee knows or has reason to believe ~~such person is competent and authorized by law to perform~~ can be competently performed by such person and is not in violation of any other statute or regulation ;

We believe this amendment removes the ambiguity in the physician delegation statute in a manner that is consistent with the balance of that statute, and is also consistent with the RNA practice act. In order to avoid any misinterpretation, we would also request that the Committee place in the minutes a statement that the amendment to KSA 65-28,127 is intended to remove any uncertainty about whether physicians can delegate to nurse anesthetists the ability to order pre- and post-op medications and diagnostic tests pursuant to that physician's order; and further that the amendment also clarifies that RNs and LPNs can carry out orders issued by RNAs pursuant to the physician's order.

We would like to express our thanks to the groups that have been working to resolve this issue, and in particular the Kansas Association of Nurse Anesthetists, the Board of Nursing and the Kansas Hospital Association. Thank you for the opportunity to offer these comments.



STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

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January 26, 2009

ATTORNEY GENERAL OPINION NO. 2009- 4

Mary Blubaugh, MSN, RN
Executive Administrator
Kansas State Board of Nursing
Landon State Office Building
900 W Jackson St., Ste. 1051
Topeka, KS 66612-1230

Re: Public Health--Regulation of Nursing--Registered Nurse Anesthetists--Duties of Registered Nurse Anesthetists; Authority of Registered Nurse Anesthetists to Give Orders for Medications and Diagnostic Tests Related to Anesthesia or Analgesia Care Pursuant to a Physician's Order

Public Health--Kansas Healing Arts Act--Persons Not Engaged in the Practice of the Healing Arts; Licensees Who Direct, Supervise, Order, Refer, Accept Responsibility for, Enter into Practice Protocols with or Delegate Acts Which Constitute Practice of Healing Arts to Others; Authority of Physicians to Delegate Orders to Registered Nurse Anesthetists for Medications and Diagnostic Tests Related to Anesthesia or Analgesia Care

Synopsis: A certified registered nurse anesthetist (CRNA) is not authorized under K.S.A. 65-1158 to issue preoperative and postoperative orders for medications and diagnostic tests related to anesthesia or analgesia care. We decline to opine on the issue of whether a physician can delegate such activity in light of the ambiguity in the physician delegation statute, K.S.A. 2007 Supp. 65-28,127, and because the health care professions are better suited to address this issue through appropriate legislation. Due to the conflict in the interpretation of K.S.A. 2007 Supp. 65-28,127, the conclusions in Attorney General Opinions No. 2000-26 and 2008-6 are withdrawn. Cited herein: K.S.A. 65-1130; 65-1152; 65-1158; K.S.A. 2007 Supp. 65-2802; K.S.A. 65-2803; K.S.A. 2007 Supp. 65-2872; 65-28,127; K.A.R. 60-11-102.

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Dear Ms. Blubaugh:

As Executive Director for the Kansas State Board of Nursing (Nursing Board), you request an opinion concerning K.S.A. 65-1158, the statute governing certified registered nurse anesthetists (CRNA). A CRNA is a registered professional nurse (RPN) who has also been certified by the Nursing Board as an advanced registered nurse practitioner (ARNP) in the nurse anesthetist category.¹

Your first inquiry is whether a CRNA, pursuant to K.S.A. 65-1158, can issue orders, written and verbal, for medications and diagnostic tests related to the anesthesia/analgesia care of patients if the physician's orders for such care add the phrase "to include pre- and post-op orders." If the answer is yes, you also ask whether the Nurse Practice Act authorizes an RPN and a licensed practical nurse (LPN) to accept or follow orders given by the CRNA.

In response to our request for input, representatives for the Kansas State Nurses Association (KSNA) and the Kansas Association of Nurse Anesthetists (KANA) offered their opinion that K.S.A. 65-1158 authorizes a CRNA to issue orders for all aspects of anesthesia/analgesia care, including pre- and post-operative orders for medication and testing, without an order from a physician. Based upon their response, the first determination is the scope of practice for a CRNA as set forth in K.S.A. 65-1158.

1. Can a CRNA, pursuant to K.S.A. 65-1158, issue orders for preoperative and postoperative medications and diagnostic tests related to anesthesia or analgesia care?

K.S.A. 65-1158 provides as follows:

"(a) Upon the order of a physician or dentist requesting anesthesia or analgesia care, each registered nurse anesthetist shall:

"(1) Conduct a pre- and post-anesthesia visit and assessment with appropriate documentation;

"(2) develop a general plan of anesthesia care with the physician or dentist;

"(3) be authorized to select the method for administration of anesthesia or analgesia;

"(4) be authorized to select appropriate medications and anesthetic agents;

"(5) induce and maintain anesthesia or analgesia at the required levels;

¹See K.S.A. 65-1130, 65-1152, and K.A.R. 60-11-102(b).

"(6) support life functions during the peri-operative period;

"(7) recognize and take appropriate action with respect to patient responses during anesthesia;

"(8) provide professional observation and management of the patient's emergence from anesthesia; and

"(9) participate in the life support of the patient.

"(b) Each registered nurse anesthetist may participate in periodic and joint evaluation of services rendered, including but not limited to, chart reviews, case reviews, patient evaluation and outcome of case statistics.

"(c) A registered nurse anesthetist shall perform duties and functions in an interdependent role as a member of a physician or dentist directed health care team."

The italicized phrase in subsection (a) was added to the statute in 1996.² K.S.A. 65-1158 is very clear that a CRNA cannot perform any of the activities listed in subsection (a)(1) through (9) absent an order by a physician or dentist - much less order medications or testing in a preoperative or postoperative environment independent of authority from a physician. Thus, K.S.A. 65-1158 does not authorize a CRNA to issue preoperative and postoperative orders for medications and diagnostic tests related to anesthesia or analgesia care of a patient. The legislative history of this statute supports this conclusion.

The original bill authorized a CRNA to "develop an anesthesia care plan with a physician or dentist . . . *which includes ordering appropriate medications and anesthetics for pre-operative, intra-operative and post-operative administration.*"³ The italicized language was deleted after a year-long collaboration between the Nursing Board, the Board of Healing Arts, and several professional organizations representing nurses and physicians.⁴

Mr. Joseph Conroy, the representative from the Kansas Association of Nurse Anesthetists, testified that the introductory phrase, "[u]pon the order of a physician or dentist requesting anesthesia or analgesia care," meant CRNAs "cannot provide anesthesia services without a physician order and therefore are not 'independent practitioners', nor do [CRNAs] wish to practice medicine."⁵ He also testified that the provision authorizing a CRNA to "develop a general plan of anesthesia care with the physician or dentist" governed instances where

²L. 1996, Ch. 179, § 5.

³*Minutes*, Senate Committee on Public Health and Welfare, February 14, 1995, Attachment 3-2.

⁴See *Minutes*, Senate Committee on Public Health and Welfare, February 22, 1995; February 8, 1996; and March 11, 1996.

⁵*Minutes*, Senate Committee on Public Health and Welfare, February 8, 1996, Attachment 3.

a physician may not have sufficient training to develop a specific anesthesia plan, but the physician's medical expertise and judgment was needed for patient care.⁶

Dr. James Kindscher from the Kansas State Society of Anesthesiologists and Mr. Jerry Slaughter from the Kansas Medical Society also testified. They stated the 1996 amendments authorized physicians to order anesthetic care for their patients and to participate in the plan of anesthetic care but CRNAs could select the appropriate anesthetic agents and the method of administration within the context of a physician-directed health care team.⁷

The conclusion that CRNAs cannot order medication and diagnostic testing related to anesthesia or analgesia care is also supported by the advanced registered nurse practitioner statute, K.S.A. 65-1130. This statute authorizes ARNPs to prescribe drugs under certain conditions but disallows such activity for CRNAs.⁸

2. Can a physician delegate to a CRNA the authority to order preoperative and postoperative medications and diagnostic tests related to anesthesia or analgesia care?

Pursuant to subsection (a) of K.S.A. 65-1158, CRNAs are authorized to provide certain anesthesia or analgesia care only upon the order of physician, and under subsection (c), CRNAs "shall perform duties and functions in an interdependent role as a member of *physician or dentist directed* health care team."⁹ Neither provision specifically authorizes a physician to delegate to a CRNA the ability to order preoperative and postoperative medications and diagnostic tests related to anesthesia or analgesia care. Accordingly, the statutes governing physicians, the Healing Arts Act, K.S.A. 65-2801 *et seq.* must be reviewed.

Prescribing medications and ordering diagnostic tests constitutes the practice of the healing arts.¹⁰ It is unlawful to practice the healing arts unless one is licensed to do so.¹¹ However, the practice of the healing arts does not include the following persons:

"(g) Persons whose professional services are performed under the supervision or by order of or referral from a [physician];

⁶*Id.*

⁷*Id.*, at Attachments 4 and 5. Additionally, the Nursing Board's representative also testified the 1996 amendments required the physician and CRNA to communicate about the anesthetic care plan prior to the surgical procedure and such communication must be recorded in case of disciplinary proceedings. *Id.*, at Attachment 1.

⁸K.S.A. 65-1130(d) requires CRNAs to abide by the strictures in K.S.A. 65-1158.

⁹Emphasis added.

¹⁰K.S.A. 2007 Supp. 65-2802(a).

¹¹K.S.A. 65-2803(a).

.....
"(m) Nurses practicing their profession when licensed and practicing under and in accordance with the provisions of article 11 of chapter 65 of the Kansas Statutes Annotated, or amendments thereto, and any interpretation thereof by the supreme court of this state."¹²

Subsection (m), recognizes that the practice of nursing can encompass acts that constitute the practice of the healing arts. However, as discussed above, K.S.A. 65-1130 and K.S.A. 65-1158 do not authorize a CRNA to issue orders for medication or diagnostic testing. Accordingly, subsection (m) does not allow a CRNA to issue such orders.

As subsection (m) does not apply, the next determination is whether subsection (g) applies. Subsection (g) appears to allow a person to practice the healing arts if acting pursuant to a physician's order or if the physician delegates the activity to the person. However, K.S.A. 2007 Supp. 65-28,127 places certain strictures on a physician ordering others to engage in activities constituting the practice of the healing arts.

K.S.A. 2007 Supp. 65-28,127, in part:

"(a) Every responsible [physician] who directs, supervises, orders, refers, accepts responsibility for, enters into practice protocols with, or who delegates acts which constitute the practice of the healing arts to other persons shall:

.....
"(3) direct, supervise, order, refer, enter into a practice protocol with, or delegate to such persons only those acts and functions which the responsible [physician] knows or has reason to believe such person is competent *and authorized by law to perform*;

"(4) direct, supervise, order, refer, enter into a practice protocol with, or delegate to other persons only those acts and functions which are within the normal and customary specialty, competence and lawful practice of the responsible [physician];
.....

¹²K.S.A. 2007 Supp. 65-2872.

"(d) Nothing in subsection (a)(4) shall be construed to prohibit a [physician] from ordering, authorizing or directing anesthesia care by a registered nurse anesthetist pursuant to K.S.A. 65-1158 and amendments thereto."¹³

Subsection (a)(3) appears to require that a physician delegate only activities which the physician believes the person is competent to perform *and* is authorized by law to perform. If "and" is interpreted in the conjunctive rather than the disjunctive "or", a physician cannot delegate to a CRNA the authority to order preoperative and postoperative medications and diagnostic tests because the CRNA is not authorized by law to do so.

The legislative history of this statute demonstrates that the legislation, introduced by the Kansas Medical Society, was centered on physicians delegating medical activities to unlicensed individuals.¹⁴ The only reference to CRNAs was an amendment to the bill (codified at subsection [d]) which was designed to address their concerns because neither the Kansas Medical Society nor the Kansas Association of Nurse Anesthetists wanted the bill "to complicate the unique practice arrangement which is governed by K.S.A. 65-1158."¹⁵

In short, the legislative history does not illuminate why the phrase "and authorized by law to perform" was included when the bill was intended to allow physicians to delegate activities constituting the healing arts to individuals who are not authorized by law to do so. To further complicate matters, there are two Attorney General opinions offering conflicting interpretations of subsection (a)(3).¹⁶

In Attorney General Opinion No. 2000-26, Attorney General Carla J. Stovall considered whether a physician could delegate to a person other than a CRNA the administration of an anesthetic medication. Concerning the delegation provision in K.S.A. 2007 Supp. 65-28,127(a)(3), General Stovall reasoned:

"A narrow reading of the phrase 'authorized by law to perform' would preclude any delegation of any task that falls under the professional responsibility of a physician, except to another licensed professional when the task is within the professional responsibility of that other professional. A narrow reading would, therefore, preclude most delegation to unlicensed individuals, and many acts which are currently delegated to licensed or registered individuals. Most probably, that phrase refers back to the phrase 'enter into a practice protocol with,' to prohibit a physician from entering into a practice protocol with an advanced registered nurse practitioner that would exceed that practitioner's normal scope of practice. If the Legislature meant

¹³Emphasis added.

¹⁴*Minutes*, Senate Committee on Public Health & Welfare, February 19, 1997.

¹⁵*Id.* Attachment 4.

¹⁶Attorney General Opinion No. 2008-6 and 2000-26. See also Attorney General Opinion No. 1995-84.

to prohibit delegation of all tasks except when delegated to licensed or registered individuals in whose scopes of practice such duties are a part, it could have said it much more simply."

However, this office disagreed with General Stovall's opinion that "authorized by law" was limited to protocols. In Attorney General Opinion No. 2008-6, the issue was whether a physician could delegate to a first responder the performance of medical procedures that extended the statutorily authorized activities for that attendant level. The opinion concluded that "authorized by law" precluded a physician from delegating or ordering an act constituting the healing arts to a person whom the law did not authorize:

"Pursuant to [AG Opinion No. 2000-26], at the minimum it would be improper for a physician to enter a protocol authorizing attendants to perform procedures that fall outside the attendants' statutorily authorized activities. However, there does not appear to be any reason to limit the phrase 'authorized by law to perform' only to practice protocols. The phrase 'authorized by law to perform' refers back to 'direct, supervise, order, refer, 'accept responsibility for, enter into a practice protocol with, or delegate,' thus limiting a physician from directing, supervising, ordering, referring, accepting responsibility for entering into a practice protocol with, or delegating activities that would exceed an attendant's authorized scope of practice, *i.e.*, the activities an attendant is authorized by law to perform."

If the conclusion in this recent Attorney General opinion were followed, a physician cannot delegate to a CRNA the authority to issue preoperative and postoperative orders for medications and diagnostic tests related to anesthesia or analgesia care because such activity exceeds the CRNA's statutory authority.

In applying rules of statutory construction, Kansas appellate courts sometimes construe "and" to mean "or" and vice versa when necessary to reflect the intent of a statute.¹⁷ The prior Attorney General opinions did not consider this statutory rule of construction in their analyses. While it could be applied here, we decline to do so because of concern regarding unintended consequences that may affect the health care community.

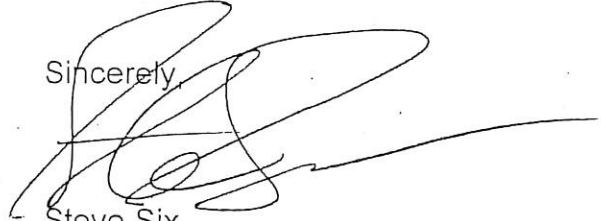
Whether or not a physician can delegate acts that fall within the province of the healing arts to a CRNA is best resolved by the legislature after consultation with health care providers. Accordingly, this office declines to answer your question whether a physician can delegate to a CRNA the authority to order preoperative and postoperative medications and diagnostic tests related to anesthesia or analgesia care. Because the answer to your final question - whether a CRNA can delegate to an RPN or LPN the administration of such orders - is predicated on an affirmative answer to the physician-delegation question, your final question cannot be answered. Moreover, due to the conflict in the interpretation of

¹⁷*State ex rel. Stephan v. Martin*, 230 Kan. 747, 752-53 (1982).

Mary Blubaugh
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the physician delegation statute, K.S.A. 2007 Supp. 65-28,127, the conclusions in Attorney General Opinions No. 2000-26 and 2008-6 are withdrawn.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read 'Steve Six', with a long horizontal flourish extending to the right.

Steve Six
Attorney General

A handwritten signature in black ink, appearing to read 'Janet L. Arndt', written in a cursive style.

Janet L. Arndt
Assistant Attorney General

SS:MF:JLA:jm

Kansas Society of Anesthesiologist
Remarks to the Senate Public Health and Welfare Committee
Supporting the Kansas Medical Society's
Proposed Amendment to House Bill No. 2010

March 16, 2009

Chairman Barnett and Members of the Senate Committee:

My name is John Breth and I am an Anesthesiologist licensed to practice the Healing Arts in Kansas. I graduated from the University of Kansas and the School of Medicine at the University of Kansas. I have practiced anesthesiology in Kansas for eight years. I am a member of Anesthesiology Chartered, at Providence Medical Center in Kansas City, Kansas . Currently, I serve as President of the Kansas Society of Anesthesiologists.

The Kansas Society of Anesthesiologists was organized to raise and maintain the standards of the medical practice of anesthesiology and improve the care of the patient in Kansas. We are a component Society of the American Society of Anesthesiologists (ASA). The ASA serves as an important voice in American Medicine and the foremost advocate for all patients who require anesthesia or relief from pain.

I appear today, by this written testimony, on behalf of the Kansas Society of Anesthesiologists in strong support of Kansas Medical Society's proposed amendment to KSA 65-28,127 (the physician delegation statute) to be inserted into House Bill No. 2010. The proposed language clarifies that physicians have the ability to delegate certain authority to Certified Registered Nurse Anesthetists (CRNAs). This amendment should resolve any question in the law about whether a licensed physician requesting anesthesia or analgesia care can issue a delegation order which authorizes a CRNA to order appropriate pre-operative and post-operative medications and tests pursuant to that licensed physician's order. It will also remove any doubt that a Registered Nurse (RN) or Licensed Professional Nurse (LPN) can follow the order of a CRNA who is working pursuant to a physician's order. A conflict in the delegation statute was identified in Attorney General's Opinion No. 2009-04 issued on January 26, 2009. The Attorney General's interpretation called into question a physician's ability to direct care and treatment of a patient through a delegated order. We believe that based on this recent interpretation the physician delegation statute needs clarification by this legislature to ward off any unintended results of the opinion.

I regret that because of my schedule I am unable to present these remarks in person but request that they be made a part of your Committee's record and that you consider them during your deliberations.

Should you require additional information please contact our Association's lobbyist in Topeka, Doug Smith. He may be reached at 785-235-6245.

Thank you for the opportunity to present this written testimony in favor of this amendment and request that you adopt the amendment you act favorably on House Bill No. 2010.

John Breth, MD
President
Kansas Society of Anesthesiologists

Public Health and Welfare

Date:

Attachment:

03/16/09

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