

January 10, 2022

**Written and Oral Neutral Testimony in the Senate Public Health and Welfare Committee
regarding Certified Anesthesiologist Assistants in Kansas**

Dear Chair and Honorable Committee Members,

I am Susan Gile, Interim Executive Director of the Kansas State Board of Healing Arts (“Board”). Courtney Cyzman, General Counsel of the Board, will be presenting oral testimony. The Board is the executive body tasked with licensing and regulating 15 healthcare professions in Kansas, including physicians. *See* K.S.A. 65-2801. The Board is composed of 15 members, 12 of whom are licensed healthcare professionals from various professions, including eight licensed physicians. The statutory mission of the Board is patient protection. *See* K.S.A. 65-2801.

The Board submits this neutral testimony to assist legislators in evaluating current Kansas law and urges further legislative attention to the issue of whether the legislature should provide a more detailed, specific, and tailored statutory structure for the practice of Certified Anesthesiologists Assistants (“CAA”) practice in Kansas.

The function of the Board is executive in nature. We are bound to enforce and abide by Kansas law. Nothing in this testimony should be construed as a clinical or professional recommendation (or lack thereof) or an expression of preference for or against the professional services of CAAs or any other healthcare profession. **This testimony is limited to an expression of the Board’s understanding of the requirements of the law that the Board has a duty to recognize and enforce.**

On May 18, 2021, the Board received a formal letter from Dr. Jeremy Cook, M.D., President – Elect of the Kansas Society of Anesthesiologists. (Attachment 1). This letter requested the Board confirm the understanding of the authority of a physician anesthesiologist licensed by the Board to delegate the provision of anesthesia services to CAAs acting under physician anesthesiologist supervision consistent with the delegation and supervision requirements specified in Kansas law. Most specifically, the following question was posed to the Board:

Does the Healing Arts Act or any other statute administered by the Kansas State Board of Healing Arts prohibit Certified Anesthesiologist Assistants from performing professional anesthesia services in Kansas within the scope of their certified education and training under the supervision of a physician anesthesiologist who is licensed in Kansas and who complies with the requirements of K.S.A. 65-28,127 in regard to the physician’s delegation and supervision of professional services performed by the Certified Anesthesiologist Assistant?

At the June 11, 2021, Board meeting, which is an open meeting subject to the Kansas Open Meetings Act (“KOMA”), K.S.A. 75-4317 *et seq.*, the Board considered and answered the question it was posed in a written formal response. (Attachment 2). **To be clear, the Board did not license a new profession, and would not do so unless and until the Kansas legislature authorizes us to do so.** In response to the specific question posed, the Board concluded Kansas law allows CAAs to perform anesthesia services in Kansas within the scope of their education and training under the supervision of a physician anesthesiologist who is licensed in Kansas and who complies with the requirements of K.S.A. 65-28,127, K.S.A. 65-2837(b)(26), and K.S.A. 65-2837(b)(30) in regard to the physician’s delegation and supervision of professional services performed by the CAA. This conclusion was based on the plain language of the statutes and augmented by legislative history and relevant Attorney General (“AG”) opinions.

Although the Healing Arts Act generally prohibits unlicensed practice of any of the professions licensed and regulated by the Board, K.S.A. 65-2872(g) exempts “persons whose professional services are performed under the supervision or by order of or referral from a practitioner who is licensed under this act.” K.S.A. 65-28,127 outlines more specific and detailed requirements applicable of physicians who delegate or supervise acts which constitute the practice of the healing arts to other persons. For the sake of brevity, see Attachment 2 for the complete thorough legal analysis, including review of legislative history.

A secondary factor the Board considered when reviewing this issue is the general value in avoiding actions that could be construed as having an unlawfully chilling effect on professional competition. Consistent with the Board’s mission to protect the public, the board seeks to take a position that is less restrictive on market competition than other available options.

Again, the Board did not license a new profession, and would not do so unless and until the Kansas legislature authorizes us to do so. The Board simply formally answered the specific question it was posed based on current Kansas law. The Board urges further legislative attention to the issue of whether the legislature should provide a more detailed, specific, and tailored statutory structure for the practice of CAAs practice in Kansas.

Thank you for considering this testimony. I welcome any comments, questions, or further dialogue with members of the committee. Please feel free to contact me at (785) 296-3680 or at any time via email at susan.gile@ks.gov.

Sincerely,



Susan Gile
Interim Executive Director

BOARD MEMBERS: TOM ESTEP, M.D., PRESIDENT, WICHITA • RONALD M. VARNER, DO, VICE PRESIDENT, AUGUSTA • ABEBE ABEBE, MD, SHAWNEE
MARK BALDERSTON, DC, SHAWNEE • MOLLY BLACK, MD, SHAWNEE • RICHARD BRADBURY, DPM, SALINA • R. JERRY DEGRADO, DC, WICHITA
ROBIN D. DURRETT, DO, GREAT BEND • STEVEN J. GOULD, DC, CHENEY • CAMILLE HEEB, MD, TOPEKA • STEVE KELLY, PHD, PUBLIC MEMBER, NEWTON
JENNIFER KOONTZ, MD, NEWTON • JOHN F. SETTICH, PH.D., PUBLIC MEMBER, ATCHISON • STEPHANIE SUBER, DO, LAWRENCE • SHERRI WATTENBARGER, PUBLIC MEMBER, LENEXA

May 28, 2021

Mr. John Settich, PhD
President
Kansas State Board of Healing Arts
800 SW Jackson St., Lower Level-Suite A
Topeka, KS 66612

Subject: Physician delegation of authority

Dear Dr. Settich:

On behalf of the Kansas Society of Anesthesiologists, I am writing to request the Kansas Board of Healing Arts (BoHA) confirm the authority of physician anesthesiologists to delegate the provision of anesthesia services to certified anesthesiologist assistants (CAA) acting under physician supervision and the terms and conditions specified in Kansas law. Kansas does not currently license CAA's but licensure has been discussed in the Legislature and has been recommended by the Kansas Department of Health & Environment. Many states either license CAA's or allow them to practice under the delegatory authority of physicians. Three of the four states surrounding Kansas allow CAA's to practice.

With hospital systems operating in Kansas and neighboring states (where CAA's are allowed to practice) combined with the shortage of anesthesia providers in Kansas, our Society members are considering options to fill the immediate and future needs of Kansas hospitals, their anesthesiology practices and patients. Utilizing the highly trained and proven skills of CAA's under the supervision of Kansas physician anesthesiologists appears to be a promising option. Our legal research indicates state law provides physician anesthesiologists the authority to delegate to CAA's in Kansas. However, we believe it would be helpful for the BoHA to issue definitive guidance to physicians, hospitals and the public on this important matter. Hence, we respectfully ask the BoHA to respond to the following:

“Does the Healing Arts Act or any other statute administered by the Kansas State Board of Healing Arts prohibit Certified Anesthesiologist Assistants from performing professional anesthesia services in Kansas within the scope of their certified education and training under the supervision of a physician anesthesiologist who is licensed in Kansas and who complies with the requirements of K.S.A. 65-28,127 in regard to the physician's delegation and supervision of professional services performed by the Certified Anesthesiologist Assistant?”

Thank you for your consideration of this request and please feel free to contact me if you or the Board has any questions or concerns.

Sincerely,



Jeremy Cook, MD
President-Elect
Kansas Society of Anesthesiologists
Jdcook91@gmail.com
(813) 789-2576

Kansas State Board of Healing Arts
800 SW Jackson, Lower Level-Suite A
Topeka, KS 66612



phone: 785-296-7413
fax: 785-368-7102
Email: KSBHA_healingarts@ks.gov
www ksbha.org

Tucker Poling, Executive Director

Laura Kelly, Governor

June 11, 2021

Jeremy Cook, M.D.
President
Kansas Society of Anesthesiologists
11709 Roe Ave.
#103D
Leawood, KS, 66211

Dr. Cook,

I write in response to your letter, dated May 28, 2021, in which you request that the Kansas Board of Healing Arts (“Board”) confirm your organization’s understanding of the authority of a physician anesthesiologist licensed by the Board to delegate the provision of anesthesia services to certified anesthesiologist assistants (“CAA”) acting under physician anesthesiologist supervision consistent with the delegation and supervision requirements specified in Kansas law. You note that your organization’s legal research indicates Kansas law provides Kansas licensed physician anesthesiologists the authority to delegate to CAA's in Kansas.

You also express the belief that it would be helpful for the Board to issue definitive guidance to physicians, hospitals, and the public on this matter that directly relates to the statutes and regulations administered and enforced by the Board. Most specifically, you present the following question to the Board:

Does the Healing Arts Act or any other statute administered by the Kansas State Board of Healing Arts prohibit Certified Anesthesiologist Assistants from performing professional anesthesia services in Kansas within the scope of their certified education and training under the supervision of a physician anesthesiologist who is licensed in Kansas and who complies with the requirements of K.S.A. 65-28,127 in regard to the physician's delegation and supervision of professional services performed by the Certified Anesthesiologist Assistant?

The Board agrees that the interests of transparency and predictability in the Board’s regulatory enforcement would be served by providing guidance to our licensees and the public on this topic, which directly relates to the statutes and regulations administered and enforced by the Board. The Board is the executive body tasked with licensing and regulating 15 healthcare professions in Kansas, including physicians. See K.S.A. 65-2801, et seq. The Board is also tasked with enforcing the statutory prohibition against the unlicensed practice

BOARD MEMBERS: JOHN F. SETTICH, PH.D., PUBLIC MEMBER, PRESIDENT, ATCHISON • TOM ESTEP, MD, VICE PRESIDENT, WICHITA • MARK BALDERSTON, DC, SHAWNEE
MOLLY BLACK, MD, SHAWNEE • RICHARD BRADBURY, DPM, SALINA • R. JERRY DEGRADO, DC, WICHITA • ROBIN D. DURRETT, DO, GREAT BEND
STEVEN J. GOULD, DC, CHENEY • CAMILLE HEEB, MD, TOPEKA • STEVE KELLY, PH D., PUBLIC MEMBER, NEWTON • JENNIFER KOONTZ, MD, NEWTON
STEPHANIE SUBER, DO, LAWRENCE • KIMBERLY J. TEMPLETON, MD, LEAWOOD • RONALD M. VARNER, DO, EL DORADO • SHERRI WATTENBARGER, PUBLIC MEMBER, LENEXA

of the healing arts in Kansas. See, e.g., *State ex rel. State Bd. of Healing Arts v. Thomas*, 33 Kan. App. 2d 73, 77–78, 97 P.3d 512, 518 (2004).

The function of the Board is executive in nature. We are bound to enforce and abide by Kansas law without regard to whether the Board agrees with the underlying policy determinations made by the legislature. Nothing in this letter should be construed as a clinical or professional recommendation (or lack thereof) or an expression of preference for or against the professional services of CAAs or any other healthcare profession. This letter is limited to an expression of the Board’s understanding of the requirements of the law that the Board has a duty to recognize and enforce.

In response to your question, **Kansas law allows CAAs to perform anesthesia services in Kansas within the scope of their education and training under the supervision of a physician anesthesiologist who is licensed in Kansas and who complies with the requirements of K.S.A. 65-28,127, K.S.A. 65-2837(b)(26), and K.S.A. 65-2837(30) in regard to the physician's delegation and supervision of professional services performed by the Certified Anesthesiologist Assistant.** We base this conclusion on the plain language of the statutes cited above and below. The legislative history and relevant AG opinions cited below augment this conclusion.

Although the Healing Arts Act generally prohibits unlicensed practice of the healing arts, K.S.A. 65-2872(g) expresses a limited and conditional exemption for “persons whose professional services are performed under the supervision or by order of or referral from a practitioner who is licensed under this act.” *Id.* For example, in 1996, the Kansas Supreme Court held that an unlicensed lay¹ midwife’s practice of midwifery was lawful under K.S.A. 65-2872(g) based on a supervisory relationship with physicians. *State Bd. of Nursing v. Ruebke*, 259 Kan. 599, 624–25, 913 P.2d 142, 160–61 (1996). See also, *State ex rel. Londerholm v. Doolin*, 209 Kan. 244, 262, 497 P.2d 138, 152 (1972). Further, the *Ruebke* court interpreted the lack of legislative action specifically directed at the practice of midwifery in Kansas as an indication of legislative intent not to prohibit the practice of midwifery² in Kansas. See *Ruebke*, 259 Kan. at 617.

Two years after the *Ruebke* decision, the legislature passed K.S.A. 65-28,127, which created more specific and detailed requirements applicable to physicians who delegate or supervise acts that constitute the practice of the healing arts to other persons. In most relevant part, the current version of this statute states:

- (a) Every supervising or responsible licensee who directs, supervises, orders, refers, accepts responsibility for, enters into written agreements or practice

¹ Although the *Ruebke* case refers to “lay” midwifery, the currently preferred professional terminology is “direct entry midwifery.”

² Note that the continuing force and effect of this aspect of the legislative intent analysis in the *Ruebke* decision, *as specifically applied to the practice of midwifery*, is no longer clear due to the passage of the Independent Practice of Midwifery Act in 2017.

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 written agreements or practice protocols between the supervising or responsible licensee and such persons, as may be determined by the board;
- (3) direct, supervise, order, refer, enter into a written agreement or practice protocol with, or delegate to such persons only those acts and functions which the supervising or responsible licensee knows or has reason to believe can be competently performed by such person and is not in violation of any other statute or regulation;
- (4) direct, supervise, order, refer, enter into a written agreement or 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 supervising or responsible licensee;
- (5) provide for a qualified, substitute licensee who accepts responsibility for the direction, supervision, delegation and written agreements or practice protocols with such persons when the supervising or responsible licensee is temporarily absent; and
- (6) comply with all rules and regulations of the board establishing limits and conditions on the delegation and supervision of services constituting the practice of medicine and surgery.

(b) "Responsible licensee" means a person licensed by the state board of healing arts to practice medicine and surgery or chiropractic who has accepted responsibility for the actions of persons who perform acts pursuant to written agreements or practice protocols with, or at the order of, or referral, direction, supervision or delegation from such responsible licensee.

...

(g) The board may adopt rules and regulations establishing limits and conditions on the delegation and supervision of services constituting the practice of medicine and surgery.

...

K.S.A. 65-28,127.

In the same legislative session (1998), the disciplinary subsection of the Healing Arts Act, at K.S.A. 65-2837, was also amended to add the following grounds for a finding of "unprofessional conduct" by a licensee of the Board:

(b)(30) Failing to properly supervise, direct or delegate acts that constitute the healing arts to persons who perform professional services pursuant to such licensee's direction, supervision, order, referral, delegation or practice protocols.

Several Attorney General (“AG”) opinions dealing with delegated practice have been issued subsequent to the passage of and amendments to K.S.A. 65-28,127 and K.S.A. 65-2837. The most relevant is [Kan. Att’y Gen. Op. No. 2014-20](#) (Dec. 18, 2014).³ This opinion dealt with delegation to EMS attendants of tasks the attendants are not licensed to perform. The opinion reviewed the history of amendments to K.S.A. 65-28,127, noting that the legislature amended the statute in 2009 by deleting language limiting delegation by a physician to only tasks “such person is . . . authorized by law to perform” and replacing that phrase with a phrase permitting delegation of tasks that “can be competently performed by such person and is not in violation of any other statute or regulation.” Kan. Att’y Gen. Op. No. 2014-20 (Dec. 18, 2014). The opinion concluded:

The amendment clarified that under certain conditions a physician may delegate acts to a person who is not licensed to perform them as long as the performance of those acts is not specifically prohibited by some other statute or regulation. Given the 2009 amendment to K.S.A. 65-28,127, we conclude that a physician may delegate medical tasks to an EMS attendant beyond those tasks specified in the EMS Act provided the attendant is competent to perform the tasks, the delegation does not violate any other statute or regulation, and the other statutory criteria for delegation are met.

Kan. Att’y Gen. Op. No. 2014-20 (Dec. 18, 2014).

It appears that the legislature responded to AG opinions⁴ in the mid 2000s (which discussed delegation of acts to individuals not licensed to perform those acts) by amending the statute to *broaden* physician delegatory authority after the issue of delegation to unlicensed individual was publicly raised and questioned in the context of those opinions. A review of the statutory authorities and the related legislative history described above demonstrates that the legislature intentionally refrained from limiting physician delegatory authority to only licensed practitioners and instead chose to implement the substantive delegatory and supervisory requirements of K.S.A. 65-28,127, K.S.A. 65-2837(b)(26), and K.S.A. 65-2837(b)(30) in cases where no other Kansas statute or regulation prohibits performance of the delegated and supervised professional services by appropriately trained and educated unlicensed professionals.

A secondary factor relevant to this issue is the general value in avoiding any actions that could be construed as having an unlawfully chilling effect on professional competition. Absent statutory or regulatory authority to justify anti-competitive professional restrictions, and to the extent consistent with the Board’s statutory duty of public protection, the Board generally seeks to take a position that is less restrictive on market competition than other available options. This general approach is calculated to avoid unlawful restriction of competition in the professional marketplace. Cf., generally, *North Carolina State Bd. Of Dental Examiners v. FTC*, 574 U.S. 494 (2015).

³ See also, generally, [Kan. Op. Atty. Gen. No. 2020-2](#) (Feb. 4, 2020).

⁴ The most significant legislative history is discussed in the full [Kan. Att’y Gen. Op. No. 2014-20](#) opinion.

Although current law allows delegated supervised practice by CAAs, the Board also believes that a CAA licensure statute is ultimately preferable from a regulatory perspective to maximize the Board's ability to meet its broader statutory mandate of protecting the public. See K.S.A. 65-2801. A licensure statute would give the Board and its licensees more regulatory clarity and provide the Board tools to directly regulate these practitioners. The Board believes a profession-specific statutory approach would allow for more effective, efficient, equitable, and predictable regulation to protect the public and promote high quality care. We note that 3 of the 4 states that border Kansas currently have licensure statutes that guide CAA practice. We also note the 2019 findings of the KDHE Technical Committee and the Secretary of the KDHE, including the following:

- “The scope of practice of the Anesthesiologist Assistants is identifiable.”
- “Nationally recognized standards of education and training exist for the practice of Anesthesiologist Assistants and are identifiable.”
- “[T]he level of credentialing of the Anesthesiologist Assistants should be licensure . . . [by] the Kansas State Board of Healing Arts” to best protect the public.

Therefore, we urge further legislative attention to the issue of whether the legislature should provide a more detailed, specific, and tailored statutory structure for the practice of CAAs in Kansas in the form of a licensure act.

While K.S.A. 65-28,127(g) and K.S.A. 65-2865 authorize the Board to promulgate rules or regulations limiting and conditioning the performance of delegated practice by CAAs, the Board believes the better approach would be for the legislature to statutorily express its policy intent (if any) regarding the scope and contours of CAA practice in Kansas. However, the Board will continue to evaluate issues relating to CAA practice to determine whether either regulations under K.S.A. 65-28,127(g)/K.S.A. 65-2865 and/or formal practice guidance by the Board pursuant to K.S.A. 77-438 is appropriate to best protect the public in the absence of statutory guidance specifically addressing CAA practice in Kansas.

Sincerely,



Tucker L. Poling
Executive Director