



STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

STEPHEN N. SIX
ATTORNEY GENERAL

January 26, 2009

120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.KSAG.ORG

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interpretation of K.S.A. 2007 Supp. 65-28,127, the conclusions in Attorney General Opinions No. 2000-26 and 2008-6 are withdrawn.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.

*

*

*

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.

³Minutes, 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.

⁵Minutes, 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
Page 8

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 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", with a stylized, cursive script.

Janet L. Arndt
Assistant Attorney General

SS:MF:JLA:jm