



STATE OF KANSAS

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August 1, 1985

ATTORNEY GENERAL OPINION NO. 85-92

Donald G. Strole
General Counsel
Board of Healing Arts
503 Kansas Avenue, Suite 500
Topeka, Kansas 66603-3449

Re: Insurance -- Health Care Provider Insurance --
Maintenance of Insurance as Condition to Rendering
Services in State

Public Health -- Healing Arts -- Persons Deemed
Engaged in the Practice of Healing Arts

Synopsis: A health care provider who ceases to render professional services in Kansas and who receives an inactive license from the Board of Healing Arts is not required to maintain liability insurance under K.S.A. 1984 Supp. 40-3402, as amended by L. 1985, Ch. 166, §2, or pay the annual surcharge under K.S.A. 1984 Supp. 40-3404, as amended by L. 1985, Ch. 166, §3. A health care provider renders professional services in Kansas within the meaning of K.S.A. 1984 Supp. 40-3402(a), as amended, by performing in Kansas any services which are not incidental and irregular in his or her capacity as a physician. Cited herein: K.S.A. 1984 Supp. 40-3401; 40-3402, as amended by L. 1985, Ch. 166, §2; 40-3404, as amended by L. 1985, Ch. 166, §3; K.S.A. 65-2802; 65-2868; 65-2877.

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Dear Mr. Strole:

On behalf of the Board of Healing Arts you request our opinion concerning health care provider insurance. You first ask whether K.S.A. 1984 Supp. 40-3402(a), as amended by L. 1985, Ch. 166, §2, applies to physicians who reside in Kansas and who are licensed as "inactive" by the Board of Healing Arts, but who continue to practice in Missouri or another bordering state.

K.S.A. 1984 Supp. 40-3402(a), as amended by L. 1985, Ch. 166, §2 provides:

"A policy of professional liability insurance approved by the commissioner and issued by an insurer fully authorized to transact business in this state in which the limit of the insurer's liability is not less than \$200,000 per occurrence, subject to not less than a \$600,000 annual aggregate for all claims made during the policy period, shall be maintained in effect by each resident health care provider as a condition to rendering professional service as a health care provider in this state, unless such health care provider is a self-insurer"

Subsection (b) of that statute prohibits a nonresident health care provider who is not a self-insurer from rendering professional services in Kansas unless such provider maintains the requisite insurance. Read together, these two subsections demonstrate a legislative intent to prohibit any health care provider, regardless of where he or she may reside, from rendering professional service in Kansas without maintaining the statutorily mandated malpractice insurance. This requirement bears a reasonable relationship to the protection of the health and welfare of Kansas citizens. See State ex rel. Schneider v. Liggett, 223 Kan. 610 Syl. ¶2 (1978). Conversely, a health care provider, i.e. a person licensed to practice a branch of the healing arts by the Kansas Board of Healing Arts, is not required to obtain the requisite insurance unless he or she proposes to furnish professional services as a health care provider in this state. Attorney General Opinion No. 77-216.

Although the licensing statutes, K.S.A. 65-2801 et seq., do not expressly provide for the issuance of inactive licenses by the Board of Healing Arts, you advise that the board distinguishes between active and inactive licenses. The board will place an active license on inactive status if the licensee executes and files with the board an affidavit stating that the licensee will not engage in the active practice of the healing arts in Kansas during the term of the license. This practice appears to reflect the statutory determination that the maintenance of liability insurance coverage is not a condition precedent to issuance of a license by the Board of Healing Arts, but is a condition precedent to the actual rendering of professional services by a health care provider. See K.S.A. 1984 Supp. 40-3402, as amended by L. 1985, Ch. 166, §2; K.S.A. 65-2801 et seq.

Under the current statutory scheme, a health care provider is not precluded from ceasing to render professional services in Kansas, receiving an inactive license from the Board of Healing Arts, and subsequently dropping the professional liability insurance coverage otherwise required by K.S.A. 1984 Supp. 40-3402(a), as amended by L. 1985, Ch. 166, §2. Such a health care provider would appear to fall within the definition of an "inactive health care provider" in K.S.A. 1984 Supp. 40-3401(g). An "inactive health care provider", because he or she does not propose to furnish services as a health care provider in Kansas, is not required to maintain insurance under K.S.A. 1984 Supp. 40-3402, as amended, or pay the annual surcharge under K.S.A. 1984 Supp. 40-3404, as amended.

You next inquire what constitutes "rendering professional services" in the State of Kansas. The Health Care Provider Insurance Act, K.S.A. 1984 Supp. 40-3401 et seq., does not define or describe that terminology, and our research has disclosed no Kansas court decisions which address the current statutory language. The question whether a health care provider is rendering professional services in Kansas is a question of fact to be determined on a case by case basis from all surrounding circumstances. Accordingly, this office is reluctant to make generalizations. However, we do find some guidance in the Healing Arts Act, K.S.A. 65-2801 et seq., which includes a definition of the "practice of healing arts."

K.S.A. 65-2868 provides:

"For the purpose of this act the following persons shall be deemed to be engaged in

the practice of the healing arts:
Persons who hold themselves out to the public as being engaged in or who maintain an office for the practice of the healing arts as defined in K.S.A. 65-2802."

K.S.A. 65-2802(a) states:

"The healing arts include any system, treatment, operation, diagnosis, prescription, or practice for the ascertainment, cure, relief, palliation, adjustment, or correction of any human disease, ailment, deformity, or injury, and includes specifically but not by way of limitation the practice of medicine and surgery; the practice of osteopathic medicine and surgery; and the practice of chiropractic."

The Healing Arts Act further provides that the practice of healing arts shall not be construed to include certain persons. Among the persons expressly excluded are:

"Practitioners of the healing arts licensed in another state when and while incidentally called into this state in consultation with practitioners licensed in this state, or residing on the border of a neighboring state, duly licensed under the laws thereof to practice a branch of the healing arts, but who do not open an office or maintain or appoint a place to regularly meet patients or to receive calls within this state." K.S.A. 65-2872(j).

Although the physicians of whom you speak reside in Kansas and therefore do not fall within the express language of this exclusion, the language expresses the legislative intent not to view incidental and irregular consultations, meetings with patients, or receipt of calls in Kansas by a physician licensed and regularly practicing elsewhere as the practice of healing arts in Kansas. In our judgment, the same guidelines would apply to the "rendering of professional services" in Kansas by a physician. Accordingly, any services rendered in Kansas in one's capacity as a physician which are not incidental and irregular are prohibited without previously

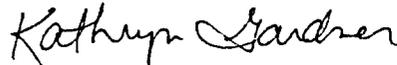
obtaining an "active" license from the Board of Healing Arts and maintaining the requisite liability insurance.

In conclusion, a health care provider who ceases to render professional services in Kansas and who receives an inactive license from the Board of Healing Arts is not required to maintain liability insurance under K.S.A. 1984 Supp. 40-3402, as amended by L. 1985, Ch. 166, §2, or pay the annual surcharge under K.S.A. 1984 Supp. 40-3404, as amended by L. 1985, Ch. 166, §3. A health care provider renders professional services in Kansas within the meaning of K.S.A. 1984 Supp. 40-3402(a), as amended, by performing in Kansas any services which are not incidental and irregular in his or her capacity as a physician.

Very truly yours,



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RTS:JSS:KG:crw