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ATTORNEY GENERAL OPINION NO. 86- 135

Charles V. Hamm
Special Assistant to the Secretary
Department of Health and Environment
Forbes Field, Building 740
Topeka, Kansas 66620-0110

Re: Public Health -- Home Health Agencies -- Scope of
the Home Health Agency Act

Synopsis: A physician, when utilizing his own staff to
provide home health services for a patient at the
patient's residence, is subject to the requirements
of the home health agency statutes and regu-
lations. These laws apply to solo practitioners
as well, when an agency relationship between doctor
and staff exists. These laws do not apply when the
doctor personally provides these home health
services. Cited herein: K.S.A. 65-2837, as
amended by L. 1986, ch. 229, §42(b)(26); 65-5101;
65-5102; 65-5112; K.A.R. 28-51-100 et seq.
(temporary, effective July 1, 1985).

* * *

Dear Mr. Hamm:

As Special Assistant to the Secretary of the Department of
Health and Environment, you request our opinion regarding
K.S.A. 65-5101 et seq., also known as the Home Health
Agency Act. Specifically you ask whether a physician,
utilizing his own staff to treat a patient at the patient's
residence, is subject to the requirements of the Act.
Further, you ask whether a solo practitioner can be an "agency
or organization" under the definition of "home health agency."

K.S.A. 65-5102 states:

"No home health agency, including medicare and medicaid providers, shall provide one or more of the home health services specified in subsection (c) of K.S.A. 65-5101 or shall hold itself out as providing such home health services or as a home health agency unless it is licensed in accordance with the provisions of this act."

K.S.A. 65-5101 states in part:

"(b) 'home health agency' means a public or private agency or organization or a subdivision or subunit of such agency or organization that provides for a fee one or more home health services at the residence of a patient . . . ;

"(c) 'home health services' means any of the following services provided at the residence of the patient on a full-time, part-time or intermittent basis: Nursing, physical therapy, nutritional or dietetic consulting, occupational therapy, respiratory therapy, home health aid or medical social service;"

For a physician to be subject to the home health agency statutes and regulations, he must be a "public or private agency or organization" under the definition of "home health agency." K.S.A. 65-5101(b). An "agency" is a fiduciary relationship whereby one person is authorized to represent or act for another, generally or in particular matters. United Packinghouse Workers of America v. Maurer-Neuer, Inc., 272 F.2d 647, cert. den. 4 L.Ed.2d 555 (C.A. Kan. 1960). Agency is implied if it appears from statements and other relevant circumstances that the intention was to "clothe" the agent with such an "appearance of authority" that others would rely upon the agent's acts as being authorized by the principal. Shawnee State Bank v. North Olathe Indus. Park, Inc., 228 Kan. 231 (1980). A physician can be an agency. See Morris v. Francisco, 238 Kan. 71 (1985) (a surgeon was held liable for the acts of a resident); McCullough v. Bethany Medical Center, 235 Kan. 732 (1984) (a physician or surgeon is liable for the acts of his assistants); 8 Wigmore, Evidence §2382 (McNaughton rev. 1961) (statements made to a nurse as physician's agent may be privileged communications). Therefore, if the circumstances surrounding a

physician's actions are such as to imply the existence of an agency, the physician is the principal in an agency relationship.

K.S.A. 65-5112(a) states:

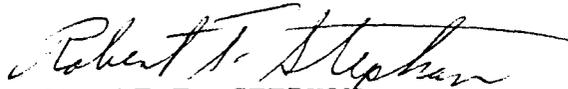
"The provisions of this act shall not apply to individuals who personally provide one or more home health services if such persons are not under the direct control and doing work for and employed by a home health agency."

The common law concept of agency, coupled with the fact that the only exemption in the Act, K.S.A. 65-5112, applies only to one working on the basis of his or her own licensure, e.g. the physician himself, leads us to conclude that physicians using their own staff to treat their own patients at the patient's residence are subject to the Act. Further, it is our opinion that the Act applies to all physicians, whether or not they are solo practitioners.

When a physician sends members of his staff to the homes of his patients for the purpose of providing home health services, an agency relationship exists. Therefore, all physicians who act in such a manner are subject to the requirements of the home health agency statutes and regulations. See K.S.A. 65-5101 et seq., and K.A.R. 28-51-100 et seq. (temporary, effective July 1, 1985). See also L. 1986, ch. 229, §42(b)(26), which defines "unprofessional conduct" as a delegation of authority by a doctor to someone the doctor knows or should know is not qualified.

In conclusion, a physician, when utilizing his own staff to provide home health services for a patient at the patient's residence, is subject to the requirements of the home health agency statutes and regulations. These laws apply to solo practitioners as well.

Very truly yours,


ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS


Thomas Lietz
Assistant Attorney General