



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 88- 22

Stanley C. Grant, Ph.D.
Secretary
Kansas Department of Health and Environment
Landon State Office Building
900 SW Jackson
Topeka, Kansas 66620-0001

Re: Public Health -- Healing Arts; Kansas Healing Arts
Act -- Exempt Licensees; Not Defined as Health Care
Provider

Synopsis: Physicians employed by the Kansas Department of
Health and Environment (K.D.H.E.) may be eligible
for exempt licensure within the limitations of
K.S.A. 1987 Supp. 65-2809 and the regulations of
the board of healing arts. A K.D.H.E. employee who
has been issued an exempt license, so far as the
limitations of the license are not exceeded, is not
a health care provider within the meaning of the
tort claims act. Therefore, such an employee/
licensee who becomes a defendant in a civil action
for damages arising out of the scope of employment,
is eligible for legal defense provided by the state
pursuant to, and subject to the limitations of, the
tort claims act. Cited herein: K.S.A. 1987
Supp. 40-3401; 65-2809; 75-6108; K.S.A. 75-6115;
K.A.R. 100-10a-4.

* * *

Dear Secretary Grant:

As Secretary for the Kansas department of health and
environment (K.D.H.E.), you have requested our opinion
concerning the Kansas tort claims act. Specifically, you

inquire whether physicians employed by the department and licensed by the board of healing arts in an "exempt" status are entitled to legal defense under the tort claims act.

The Kansas tort claims act, K.S.A. 75-6101 et seq., provides that, upon proper request of the employee, a governmental entity must provide legal defense for an employee in a civil action unless an exception appears in the act. K.S.A. 1987 Supp. 75-6108. The exceptions to this rule appear in subsection (c) of that section. The act does not apply to health care providers, as defined by K.S.A. 1987 Supp. 40-3401. K.S.A. 75-6115. The definition of a health care provider excludes persons holding an exempt license issued by the state board of healing arts. K.S.A. 1987 Supp. 40-3401(f)(3). In summary, any physician employed by K.D.H.E., acting within the scope of an exempt license issued by the board of healing arts, is not a health care provider within the meaning of the tort claims act, and thus is given the protections afforded by the act.

Your specific concern, however, involves situations where the physician having an exempt license performs certain acts which may be in conflict with exempt license regulations. Incidents arise where medical advice is given in the mainstream of public health practice which impacts on the care and treatment of patients. You ask whether this is in conflict with the scope of authority of a practitioner who is issued an exempt license.

The exempt license classification is created by K.S.A. 1987 Supp. 65-2809(f). That section states in part:

"The board may issue an exempt license only to a person who has previously been issued a license to practice the healing arts in Kansas, who is no longer regularly engaged in such practice and who does not hold oneself out to the public as being professionally engaged in such practice."
K.S.A. 1987 Supp. 65-2809(f).

Pursuant to that section, the board of healing arts has established criteria of qualification for exempt licensure by regulation K.A.R. 100-10a-4. Subsection (a) states that the applicant's professional activities must be limited to two general areas. Those areas include:

"(1) Administrative functions, including peer review utilization review and expert opinions, which have no impact on the care

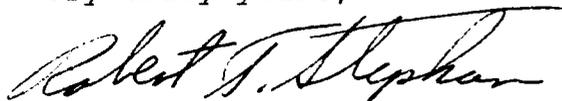
and treatment provided to the patients whose records or charts are reviewed; and

"(2) providing direct patient care services relating to the healing arts on an irregular or infrequent basis to persons who are not charged or liable for the costs of the services." K.A.R. 100-10a-4(a) (Effective Dec. 16, 1987)

If the application describes activities which are not included in the above, then the board may review the application to determine whether otherwise to grant an exempt license. K.A.R. 100-10a-4(b). Activities which disqualify an applicant from exempt licensure are listed in K.A.R. 100-10a-4(c). In light of the statute and regulations concerning exempt licenses, we believe that the scope of authority to practice the healing arts under an exempt license will determine whether an individual is a health care provider for purposes of K.S.A. 1987 Supp. 40-3401(f)(3), and subsequently will be eligible for legal defense pursuant to the tort claims act.

In conclusion, it is our opinion that physicians employed by the department of health and environment may be eligible for exempt licensure within the limitations of K.S.A. 1987 Supp. 65-2809 and the regulations of the board of healing arts. If such exempt license is issued, and if the person does not exceed the limitations of the license, then the licensee is not a health care provider within the meaning of the tort claims act. Therefore, if the licensee is a defendant in a civil action for damages arising out of the scope of employment, then the employee is eligible for legal defense provided by the state pursuant to, and subject to, the limitations of the tort claims act.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Mark W. Stafford
Assistant Attorney General