



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

June 6, 1989

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

ATTORNEY GENERAL OPINION NO. 89- 70

H. Philip Elwood
Attorney at Law
Goodell, Stratton, Edmonds & Palmer
215 E. 8th Ave.
Topeka, Kansas 66603-3999

Re: Public Health -- Regulation of Dentists and Dental Hygienists -- Act Inapplicable to Certain Practices, Acts and Operations; Exceptions

Synopsis: The dental board may identify specific dental services as being included in the statutory prohibition against dentists delegating certain dental tasks. As the board did not formulate policy or exercise quasi-legislative authority conferred by statute, but merely explained an existing statute, identification of the services does not constitute rule-making subject to the procedures set forth in article 4 of chapter 77. Cited herein: K.S.A. 65-1421; 65-1422; 65-1423; 1988 Supp. 65-1436; K.S.A. 65-1456; 77-415.

* * *

Dear Mr. Elwood:

As counsel for the Kansas dental board, you have requested our opinion regarding the authority of the board to identify certain dental procedures as being non-delegable under the dental practices act. A notice to all dentists, hygienists, and dental assistants was given by order of the board in which

the specific procedures were identified. A copy of that notice is attached.

A person is deemed to be engaged in the practice of dentistry if they perform any act specified in K.S.A. 65-1422. The unlicensed practice of dentistry is prohibited by K.S.A. 65-1421. Certain categories of individuals are excluded from the prohibition by K.S.A. 65-1423. Subsection (g) excludes those who perform dental services under the supervision and in the office of a licensed dentist. However, an unlicensed person is not allowed to perform the following:

- "(1) Any and all removal of or addition to the hard or soft tissue of the oral cavity.
- (2) Any and all diagnosis of or prescription for treatment for disease, pain, deformity, deficiency, injury or physical condition of the human teeth or jaws, or adjacent structure.
- (3) Any and all correction of malformation of teeth or of the jaws.
- (4) Any and all administration of general or local anaesthesia of any nature in connection with a dental operation.
- (5) A prophylaxis." K.S.A. 65-1423(g).

Disciplinary action may be taken against a licensed dentist who willfully violates the dental practices act. K.S.A. 1988 Supp. 65-1436(a).

Some dental services may be performed by a licensed dental hygienist, as provided in K.S.A. 65-1456. If a dentist delegates to a licensed hygienist any operation not permitted by the practice act, both licensees are subject to disciplinary action. K.S.A. 65-1456.

You state that, in 1980, the dental board distributed a list of duties which could be delegated to hygienists and assistants. The present board determined that the list conflicted with K.S.A. 65-1423(g), and licensees who relied on that list could be subject to disciplinary action. In order to encourage compliance with the statute, the board determined that a new notice regarding delegable functions would be more

fair and efficient than commencing proceedings against those who were in violation of the practice act.

We believe that the dental board acted within its authority when it notified the licensees that the previous list was an incorrect summary of the law. Administrative agencies have only those powers expressly or impliedly conferred by statute. Woods v. Midwest Conveyor Co., 231 Kan. 763, 770 (1982). As previously stated, those who violate the dental practices act are subject to the disciplinary action by the board. This implies the authority to notify persons who are regulated by the board that they have been misinformed about the statutes regulating those persons. The dental board was not under a legal duty to renounce the information supplied by the previous board because past error does not preclude future agency enforcement of the law. Boswell, Inc. d/b/a Reno County Adult Care Home v. Harkins, 230 Kan. 610, 614 (1982). However, it is the public policy that state agencies correct intra-departmental errors. State v. Damman, 244 Kan. 487, 491 (1989).

You also ask whether the board's action was procedurally valid. We believe that the statutes do not prescribe a specific procedure for issuing a notice such as the one recently issued by the dental board. Rules and regulations must be adopted through the rule-making procedure set forth in the Kansas Statute Annotated, Chapter 77, article 4. However, by definition, the notice is not a rule and regulation because it is explanatory, not interpretive. See K.S.A. 77-415(4)(p). The notice does not express agency policy, nor is it an exercise of quasi-legislative authority conferred by statute. It is merely an announcement that the agency had previously applied the statutes incorrectly, and that the statutes would be applied correctly in the future.

Administrative regulations which are properly adopted have the force and effect of law. Kansas Gas & Electric Co. v. Kansas Comm'n on Civil Rights, 242 Kan. 763, 765 (1988). The notice issued by the dental board was not promulgated as a regulation, and by itself does not have the force and effect of law. The prohibition against unlicensed persons performing certain tasks arises solely from the statute, and not from the notice. Any dental service identified by the notice which, as a matter of law, is not included in the language of K.S.A. 65-1423(g), is not made non-delegable by the notice.

In conclusion, it is our opinion that the dental board may identify specific dental services as being included in the

statutory prohibition against delegating certain dental tasks. As the board did not formulate policy or exercise quasi-legislative authority conferred by statute, but merely explained an existing statute, identification of the services does not constitute rule-making subject to the procedures set forth in article 4 of Chapter 77.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Mark W. Stafford
Assistant Attorney General

RTS:JLM:MWS:bas

AUBREY A. GENTRY, D.D.S.
PRESIDENT
1428 S. 32ND STREET
KANSAS CITY, KANSAS 66106-2192
TELEPHONE NO. (913) 877-1509

STATE OF KANSAS



BUSINESS OFFICE
KANSAS DENTAL BOARD
4301 HUNTOON, SUITE 4
TOPEKA, KANSAS 66604-1996
TELEPHONE NO. (913) 273-0780

NORMAN G. GIEBLER, D.D.S.
VICE PRESIDENT
3003 HALL
HAYS, KANSAS 67601-1897
TELEPHONE NO. (913) 625-3117

BOARD OF DENTAL EXAMINERS

MARIANNE SPANO
OFFICE SECRETARY

CYNTHIA G. BARRETT, R.D.H.
SECRETARY-TREASURER
3115 W. 20TH
TOPEKA, KANSAS 66604-3239
TELEPHONE NO. (913) 357-6693

NOTICE TO ALL DENTISTS, DENTAL HYGIENISTS
AND DENTAL ASSISTANTS

BOARD ATTORNEY
H. PHILIP ELWOOD
215 E. 6TH
TOPEKA, KANSAS 66603-3999
TELEPHONE NO. (913) 233-0593

PHYLLIS WATKINS
BOARD MEMBER
613 INDIANA
LAWRENCE, KANSAS 66044-2329
TELEPHONE NO. (913) 842-8794

L. THANE FRAZIER, D.D.S.
BOARD MEMBER
109 W. MAIN STREET
LYONS, KANSAS 67554-1927
TELEPHONE NO. (316) 257-5104

It has come to the attention of the Kansas Dental Board (the Board) that certain auxiliaries including Dental Hygienists and Dental Assistants are asked to perform procedures for which they are not legally qualified or, in the case of Dental Hygienists, licensed.

K.S.A. 65-1423(g) authorizes a dentist to delegate the performance of certain functions to a Dental Hygienist or a Dental Assistant if the work is performed under the supervision of a Dentist; however, there are exceptions to the Dentists' authority to delegate. These exceptions are clearly stated in the Statute. Below is a summary of those exceptions and specific procedures which have been identified so far by the Board as non-delegable; other prohibited procedures may be, from time to time, identified by the Board.

Neither a Dental Hygienist nor a Dental Assistant is to be allowed to perform any of the following dental procedures with or without supervision.

1. Any and all removal of or addition to the hard or soft tissue of the oral cavity.

[K.S.A. 65-1423(g)(1)]

Procedures delegation of which is prohibited include:

- * Condense and carve amalgams;
- * Place and finish composites;
- * Cement temporary crowns or bridges;
- * Cement finished inlays, crowns or bridges;
- * Place or remove surgical dressings;
- * Place intra-oral sutures.

[Note: a Dental Hygienist may, with supervision, do the following; a Dental Assistant may not do the following:]

- * Place pit and fissure sealants;
- * Place or remove periodontal dressings;

- * Place or remove with a hand instrument temporary restorations;
- * Use a cavitron;
- * Remove cement from sub-gingival or inter-proximal spaces.

2. Any and all diagnosis or prescription for treatment for disease, pain, deformity, deficiency, injury or physical condition of the human teeth or jaws or adjacent structure.

[K.S.A. 65-1423(g)(2)]

Procedures delegation of which is prohibited include:

- * The taking of final impressions for inlays, crowns, bridges, partials or dentures;
- * Performance of bite registration procedures to determine occlusal relationships;
- * Placement of bases and liners.

3. Any and all correction of malformation of teeth or of the jaws.[K.S.A. 65-1423(g)(3)]

Procedures delegation of which is prohibited include:

- * Placement or adjustment of orthodontic bands, brackets, or wires;
- * Placement or adjustment of other orthodontic corrective devices including headgear, retainers, and splints.

4. Any and all administration of general or local anesthesia of any nature in connection with a dental operation.

[K.S.A. 65-1423(g)(4)]

Procedures delegation of which is prohibited include:

- * Begin administration of nitrous oxide with or without a dentist being present in the operator.
- * Monitor nitrous oxide with or without a dentist being present in the operator.

5. No auxiliary other than a Licensed Dental Hygienist may perform a prophylaxis.

[K.S.A. 65-1423(g)(5)]

The prohibitions against delegation of specific functions are set out in Kansas statutory law. The specific provisions of K.S.A. 65-1423(g) have been highlighted above to make them clear and emphasize them to each licensee. If there are questions concerning delegation of functions to either Dental Hygienists or Dental Assistants, they should be directed, in writing, to Aubrey A. Gentry, D.D.S., President, Kansas Dental Board, 4301 Huntoon, Topeka, Kansas 66604.

THIS NOTICE given by order of the Kansas Dental Board entered October 22, 1988.

KANSAS DENTAL BOARD

BY:


Aubrey A. Gentry, D.D.S.
President