

June 16, 2010

ATTORNEY GENERAL OPINION NO. 2010- 13

Kathleen Selzler Lippert
Executive Director
Kansas Board of Healing Arts
235 SW Topeka Blvd.
Topeka, Kansas 66603

Re: Public Health--Healing Arts--Revocation, Suspension, Limitation or Denial of Licenses; Censure of Licensee; Grounds; Application of 2008 Amendment Adding Single Occasion of Ordinary Negligence as Disciplinary Ground to pre-2008 Single Occasion of Ordinary Negligence; Whether Given Retroactive Application

Synopsis: The 2008 amendment to the healing arts statutes establishing a new basis for disciplinary action for a single occasion of substandard patient care operates prospectively. Cited herein: K.S.A. 2009 Supp. 65-2836; 65-2837.

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Dear Ms. Selzler Lippert:

As Executive Director of the Kansas Board of Healing Arts (Board), you inquire whether a 2008 amendment establishing a new basis for disciplinary action can be applied retroactively to conduct occurring prior to its enactment.

Prior to July 1, 2008, K.S.A. 65-2836(b) authorized the Board to take disciplinary action if a physician committed an act of professional incompetency. By virtue of a 2008 amendment to that statute,¹ the following disciplinary ground was added:

Any conduct or professional practice on a *single occasion* that, if continued, would reasonably be expected to constitute an inability to practice the healing arts with reasonable skill and safety to patients or unprofessional

¹L. 2008, ch. 154, § 6(b).

conduct as defined in K.S.A. 65-2837, and amendments thereto.²

Whether this provision can be applied retroactively is governed by two general rules:

First, a statutory amendment operates prospectively unless the language of the statute clearly shows that it is the intention of the legislature that it operate retroactively. Second, even if there is a clear indication the legislature intends the amendment to operate retroactively, it will not be applied if doing so interferes with vested, substantive rights.³

In determining whether the legislature intended this provision to be applied retroactively, it is helpful to review its origin.

In October of 2006, the Kansas Legislative Division of Post Audit issued its performance audit report addressing a variety of legislative concerns with the Board, including its backlog of disciplinary cases and its complaint and investigation process.⁴ The report noted that the Board had always investigated single incidents of substandard patient care until June of 2005 when it adopted a policy that single incidents would no longer be investigated. Instead, allegations of substandard patient care would not be investigated until there was a historical pattern which the Board defined as three complaints within a three year period.⁵

The reason for the policy change, cited by the Board, was inadequate staffing resources and concern that the disciplinary statutes did not authorize the Board to discipline for a single incident of substandard patient care unless there was evidence of "gross negligence."⁶ While a physician could be disciplined for professional incompetency,⁷ the definition embraced only multiple instances of substandard patient care unless a single incident rose to the level of "gross negligence."⁸ The audit report expressed concern that the Board's policy of not investigating complaints of substandard patient care until a pattern had developed raised "questions about whether the public is being adequately protected."⁹ In response to the post audit report, the Board adopted, in

²Emphasis added.

³*Kelly v. Vinzant, M.D.*, 287 Kan. 509, 521 (2008).

⁴*Performance Audit Report- Board of Healing Arts: Reviewing Issues Related to Complaint Investigations, Background Investigations, and Composition of the Board*, (Performance Audit Report) October, 2006 http://www.kslegislature.org/postaudit/audits_perform/06pa10a.pdf

⁵*Id.* at 10.

⁶*Id.* at 11. K.S.A. 65-2836; K.S.A. 65-2837. See also *Minutes, Senate Health Care Strategies Committee*, February 26, 2008, Attachment 1; March 18, 2008, Attachment 2 (Testimony of Board Executive Director Larry Buening, Jr.)

⁷K.S.A. 65-2836(b).

⁸K.S.A. 2006 Supp. 65-2837(a).

⁹Performance Audit Report at 18.

October, 2007, a policy that it would investigate allegations of substandard patient care "without waiting for repeated instances or a pattern of practice to develop."¹⁰

The Board, with the assistance of the Kansas Medical Society, also pursued legislative changes through H.B. 2620.¹¹ Because of the Board's concern that it could not discipline a physician for a single incident of substandard patient care not involving gross negligence, the above-referenced amendment was added to the Board's disciplinary authority.

Neither the amendment itself or the legislative history reveal a clear intent that the legislature intended for this statutory provision to operate retroactively. Accordingly, the 2008 amendment to the healing arts statutes establishing a new basis for disciplinary action for a single occasion of substandard patient care operates prospectively.

Sincerely,

Steve Six
Attorney General

Mary Feighny
Deputy Attorney General

SS:MF:jm

¹⁰Policy Statement No. 07-02.

¹¹*Minutes*, Senate Health Care Strategies Committee, March 18, 2008, Attachment 2.