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ATTORNEY GENERAL OPINION NO. 91- 45

The Honorable Roy M. Ehrlich
State Senator, 55th District
State Capitol, Room 138-N
Topeka, Kansas 66612

Patsy L. Johnson, R.N., M.N.
Executive Administrator
Kansas State Board of Nursing
Landon State Office Bldg., 551-S
Topeka, Kansas 66612

Re: State Boards, Commissions and Authorities --
Regulation of Nursing -- Acts Which are not
Prohibited; Auxiliary Patient Care Services

Synopsis: The practice of nursing is reserved for licensed nurses. As an exception to the licensure requirement, unlicensed persons may, in certain instances, provide auxiliary services. Auxiliary services may be performed by unlicensed persons if supervised by a licensed nurse, or directed by a medical doctor or dentist. The phrase "auxiliary patient care services" does not refer to specific tasks, and is not to be given a broad definition. It refers to acts which support or assist nursing services. Any process exceeding this function of support or assistance must be performed by a licensed nurse unless otherwise authorized by law. Cited herein: K.S.A. 65-1113, 65-1114, 65-1123; K.S.A. 1990 Supp. 65-1124; K.S.A. 65-1129; 74-1106.

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Senator Roy M. Ehrlich
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Dear Senator Ehrlich and Ms. Johnson:

You have submitted separate requests for our opinion regarding the Kansas nurse practice act. Your specific inquiry involves the scope of the phrase "auxiliary patient care services" as used in K.S.A. 1990 Supp. 65-1124(h).

The practice of nursing is defined as:

"[t]he process in which substantial specialized knowledge derived from the biological, physical, and behavioral sciences is applied to: the care, diagnosis, treatment, counsel and health teaching of persons who are experiencing changes in the normal health processes or who require assistance in the maintenance of health or management of illness, injury or infirmity; administration, supervision or teaching of the process as defined in this section; and the execution of the medical regimen as prescribed by a person licensed to practice medicine and surgery or a person licensed to practice dentistry." K.S.A. 65-1113(d).

This definition is open-ended, and describes nursing as a process rather than as specific tasks.

To practice nursing without a nursing license is prohibited by K.S.A. 65-1114, and may be enjoined pursuant to K.S.A. 65-1123. This prohibition is subject to the rules of construction stated in K.S.A. 1990 Supp. 65-1124. Subsection (h) states that the nurse practice act shall not be construed as prohibiting:

"auxiliary patient care services performed in medical facilities, adult care homes or elsewhere by persons under the direction of a person licensed to practice medicine or surgery or a person licensed to practice dentistry or the supervision of a registered professional nurse or a licensed practical nurse."

In construing the phrase "auxiliary patient care services," we apply the principle rule of statutory construction that the intent of the legislature governs. See Harris Enterprises, Inc. v. Moore, 241 Kan. 59, Syl. ¶ 1 (1987). Legislative intent may be determined by considering the historical background of the enactment and the purposes sought to be

accomplished. State v. Thompson, 237 Kan. 562, 563 (1985). Ordinary words are to be given their ordinary meaning. State v. Thompson, 237 Kan. 562, 567 (1985). The term "auxiliary," used throughout the history of subsection (h), is generally defined as helping, aiding, assisting or supporting; subsidiary; or supplementary. Websters Twentieth Century Dictionary, Unabridged, 128 (2nd ed. 1979). We presume the legislature applied this ordinary meaning in the enactment of K.S.A. 65-1124.

Subsection (h) of K.S.A. 1990 Supp. 65-1124 originated from Proposal No. 69 of the special committee on public health and welfare. Reports of Special Committees to the 1975 Kan. Legislature, at 1363 (hereinafter, Reports). Attached to the proposal was 1975 House Bill No. 2009. Section 11 of the proposed bill amended K.S.A. 65-1124 to delete authorization for unlicensed practical nursing, and adding a statement that the act is not to be construed

"as prohibiting auxiliary services provided by persons carrying out duties necessary for the support of nursing service including those duties which involve minor nursing services for persons performed in medical care facilities, adult care homes or elsewhere under the direction of a person licensed to practice medicine or surgery or a person licensed to practice dentistry or the supervision of a registered professional nurse or a licensed practical nurse." Reports, at 1380-81 (emphasis added).

The minutes of the house committee on public health and welfare indicate that the nursing profession considered this exclusion too broad. Consistent with Kansas Attorney General Opinion No. 74-199, it was believed that nurses' aides would be allowed under the proposal to give medications in hospitals. Minutes of the House Committee on Public Health and Welfare, January 30, 1975. This concern was also expressed in the written testimony of a conferee speaking on behalf of the Kansas state nurses' association. The written testimony included a request to amend the portion of section 11 cited above to state:

"nor shall it be construed as prohibiting auxiliary patient care services in medical care facilities, adult care homes or elsewhere performed under the supervision of a registered professional nurse or

licensed practical nurse or under the directions of a person licensed to practice medicine or surgery or a person licensed to practice dentistry." J. Runnells, R.N., Kansas State Nurses' Association Statement to the House Committee on Public Health and Welfare (presented January 30, 1975).

The house committee considered the bill again on February 4, 1975. The bill was amended to adopt, with some changes to its present form, the approach suggested by the association. This was specifically intended to alleviate the concerns of the nursing profession. Minutes of the House Committee on Public Health and Welfare, February 4, 1975, at p. 2.

The legislative intent is clarified by this procedural history. "Auxiliary patient care services" does not include "minor nursing services." Therefore, the section does not authorize medication administration by unlicensed persons. Likewise, the section does not authorize acts which constitute the practice of nursing, as defined in K.S.A. 65-1113, beyond those acts which support the nursing services provided by the licensed persons. There is no definitive list of procedures which may be performed under authority of subsection (h) by unlicensed persons. Based on the above, any nursing task which requires substantial specialized knowledge is not an auxiliary service. It is therefore incumbent upon the supervising nurse or directing physician or dentist to determine whether a task requires substantial specialized knowledge or is within the framework of support and assistance of nursing services.

We understand that there is an issue concerning which specific tasks are normally considered "auxiliary patient care services" and that health care providers and facilities desire some guidance concerning which tasks are considered auxiliary care. The Kansas Board of Nursing is vested with general rule and regulatory authority pursuant to K.S.A. 74-1106(c)(2) and K.S.A. 65-1129. Thus, the board may adopt regulations which do not exceed the authority of that administrative agency and which are not contrary to the intent of the legislature. The agency may not exceed its authority in defining a list of procedures which may be performed pursuant to K.S.A. 1990 Supp. 65-1124(h) if such procedures are not normally considered "auxiliary patient care services". However, regulatory guidance when combined with board expertise may permit some regulatory definitions. Nevertheless, there may be special circumstances when a task that does not ordinarily require substantial specialized knowledge, and thus may ordinarily be regarded as auxiliary patient care, will require

more training than usual or have special significance. For example, although changing linens may ordinarily be considered auxiliary patient care, the nature of the situation or patient may require an increased level of specialized training to the point that the task can no longer be considered auxiliary care. Thus, it may be impossible to enact all encompassing definitions by rule or regulation. The legislature may also attempt to clarify or define specific tasks that are ordinarily considered "auxiliary patient care services". However, legislative attempts may also be hampered by the nature of the process and there may be no satisfactory or encompassing definition due to the necessity of case by case decisions.

In the absence of a legislative or regulatory definition of what may normally be considered "auxiliary patient care services", the facts of a specific situation should be determined on a case by case basis. Such factual determinations may eventually require investigation or hearing by the Kansas State Board of Nursing.

In conclusion, it is our opinion that the practice of nursing is reserved for licensed nurses. An exception to the licensure requirement is the provision of auxiliary services. The practice of nursing is defined open-endedly, being process oriented, not task oriented. The phrase "auxiliary patient care services" does not refer to specific tasks. The legislature intended unlicensed persons to be authorized to perform acts supporting nursing services. The subsection allowing unlicensed persons to perform these tasks was not intended to be interpreted broadly. Auxiliary services may be performed by unlicensed persons if supervised by a licensed nurse, or directed by a medical doctor or dentist. Any process exceeding this supporting or assisting function must be performed by a licensed nurse unless otherwise authorized by law.

Very truly yours,


ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS


Theresa Marcel Nuckolls
Assistant Attorney General