STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT
ATTORNEY GENERAL

MEMORIAL HALL
120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.AG.KS.GOV

February 4, 2020

ATTORNEY GENERAL OPINION NO. 2020- 2

Daniel W. Peters
Senior Vice President, General Counsel
University of Kansas Health System
4000 Cambridge St.
Kansas City, KS 66160

Re: Public Health—Regulation of Nursing—Nurses—Advanced Practice Registered Nurse; Roles; Delegation of the Determination of Cardiopulmonary Death; Accepted Medical Standards

Public Health—Healing Arts—Kansas Healing Arts Act; Purpose; Definitions; Reports to State Board of Healing Arts—Licensees Who Direct, Supervise, Order, Refer, Accept Responsibility For, Enter Into Practice Protocols With or Delegate Acts Which Constitute Practice of Healing Arts to Others; Requirements and Limitations; Delegation of the Determination of Cardiopulmonary Death; Accepted Medical Standards

Public Health—Physician Assistants—Definitions; Practice of Physician Assistant; Direction and Supervision of Physician; Rules and Regulations; Delegation of the Determination of Cardiopulmonary Death; Accepted Medical Standards

Statutes; Administrative Rules and Regulations and Procedure—Statutory Construction; Determination of Death; Delegation of the Determination of Cardiopulmonary Death; Accepted Medical Standards

Synopsis: A physician licensed by the Kansas State Board of Healing Arts to practice medicine and surgery may delegate acts which would constitute the practice of healing arts to a person licensed by the Kansas State Board of Healing Arts as a physician assistant pursuant to a detailed plan of care with the physician. A physician licensed by the Kansas State Board Healing Arts to practice medicine and surgery may delegate acts which would constitute

the practice of healing arts to a person licensed by the Kansas State Board of Nursing as an advanced practice registered nurse in the role of clinical nurse specialist or nurse practitioner pursuant to a collaborative practice agreement with the physician. No statutes or regulations prohibit or limit a physician delegating to a physician assistant the determination of cardiopulmonary death pursuant to the detailed plan of care with the supervising physician or to an advanced practice registered nurse pursuant to the collaborative practice agreement with the physician. Whether a physician assistant or an advanced practice registered nurse practicing as a clinical nurse specialist or nurse practitioner can make a determination of cardiopulmonary death "in accordance with accepted medical standards" is a question of fact. Cited herein: K.S.A. 22a-231; 65-1113; 65-2412; 65-2801; 65-2836; 65-2837; 65-2869; 65-2870; 65-2873; 65-28,127; 65-28a01; 65-28a02; 65-28a08; 77-202 (Weeks); 77-204; 77-205; 77-206; K.A.R. 60-11-101; K.A.R. 60-11-102; K.A.R. 60-11-104; K.A.R. 60-11-107; K.A.R. 100-28a-6; K.A.R. 100-28a-9; K.A.R. 100-28a-10.

* * *

Dear Mr. Peters:

As general counsel for the University of Kansas Health System, you ask for our opinion on whether determinations of cardiopulmonary death may be made by (1) a licensed advanced practice registered nurse (APRN) in the role of clinical nurse specialist or nurse practitioner pursuant to accepted medical standards and a collaborative practice agreement with a physician or (2) a licensed physician assistant (PA) pursuant to accepted medical standards and a detailed plan of care with a physician. For the reasons explained below, we opine that the answer to your questions is yes if the physician is licensed by the Kansas State Board of Healing Arts to practice medicine and surgery, the statutory requirements for delegation are met, and the accepted medical standards do not prohibit such delegation to a PA or APRN.

Determinations of Death

The earliest statute addressing the determination of death required that the determination be made "in the opinion of a physician, based on ordinary standards of medical practice."[1] In 1984, the Kansas Legislature repealed this statute[2] and enacted the Uniform Determination of Death Act (UDDA).[3] Under the UDDA, death occurs when an individual has "sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem."[4] The former definition of death is referred to as "cardiopulmonary death" and the latter is

[1] L. 1970, Ch. 378, § 1; codified in K.S.A. 77-202 (Weeks).
[2] L. 1984, Ch. 345, § 4.
[3] *Id*. at §§ 1 - 3. The UDDA was codified in K.S.A. 77-204 through K.S.A. 77-206.
[4] K.S.A. 77-205.

referred to as "brain death."[5] The UDDA is silent on who makes the determination of death. Thus, we first review the Kansas Healing Arts Act[6] to determine whether there are any statutory prohibitions or restrictions on a physician delegating the determination of cardiovascular death.

Kansas Healing Arts Act

Under the Healing Arts Act, a physician is a person who is licensed by the Kansas State Board of Healing Arts (Board of Healing Arts) to practice medicine and surgery and osteopathic medicine and surgery.[7] The Healing Arts Act authorizes a physician to delegate to others, as follows.

> Every supervising or responsible licensee who directs, supervises, orders, refers, accepts responsibility for, enters into written agreements or practice protocols with, or who delegates acts which constitute the practice of the healing arts to other persons shall:
>
> (1) Be actively engaged in the practice of healing arts in Kansas;
>
> (2) review and keep current any required written agreements or practice protocols between the supervising or responsible licensee and such persons, as may be determined by the board;
>
> (3) direct, supervise, order, refer, enter into a written agreement or practice protocol with, or delegate to such persons only those acts and functions which the supervising or responsible licensee knows or has reason to believe can be competently performed by such person and is not in violation of any other statute or regulation;
>
> (4) direct, supervise, order, refer, enter into a written agreement or practice protocol with, or delegate to other persons only those acts and functions which are within the normal and customary specialty, competence and lawful practice of the supervising or responsible licensee;
>
> (5) provide for a qualified, substitute licensee who accepts responsibility for the direction, supervision, delegation and written agreements or practice protocols with such persons when the supervising or responsible licensee is temporarily absent; and

[5] In a memorandum attached to your opinion request, it was emphasized the request did not encompass determinations of death under K.S.A. 77-205(2), which presents a more complex set of medical questions, and is based on neurological criteria or an anticipated effort to transplant a person's organs before cessation of heart or lung functions as those events usually coincide with brain death determinations. Memorandum by Fred Logan and Andrew Logan, Logan, Logan & Watson, L.C., Attorneys at Law, dated June 12, 2019, at p. 2 and 3.
[6] K.S.A. 65-2801 *et seq*. and K.S.A. 65-28,122 through K.S.A. 65-28,132.
[7] Attorney General Opinion No. 87-42.

> (6) comply with all rules and regulations of the board establishing limits and conditions on the delegation and supervision of services constituting the practice of medicine and surgery.[8]

A responsible licensee is a physician who "has accepted responsibility for the actions of persons who perform acts pursuant to written agreements or practice protocols with . . . such responsible licensee."[9]

In summary, the Healing Arts Act gives a physician broad authority to delegate acts which would constitute the practice of the healing arts to a PA or an APRN if the PA or APRN is competent to perform the delegated act or function; the delegated act and function is within the supervising physician's specialty, competence, and lawful practice; and the delegation does not violate any law. The first two conditions involve questions of fact that are determined on a case-by-case basis. The last condition requires determining whether there are any restrictions or prohibitions regarding delegation by a physician. One such restriction may occur if the physician is required to notify the coroner of a death from other than natural causes.[10] We therefore review the Physician Assistant Licensure Act[11] and the Kansas Nurse Practice Act (KNPA)[12] to determine if those acts have limitations or prohibitions on the delegation of the determination of cardiopulmonary death.

Physician Assistant Licensure Act

A PA is a person licensed by the Board of Healing Arts "who provides patient services under the direction and supervision of a supervising physician."[13] A "supervising physician" is "a physician who has accepted responsibility for the medical services rendered and actions of the physician assistant while performing under the direction and supervision of the supervising physician."[14] The "direction and supervision" by the supervising physician does not require the immediate or physical presence of the supervising physician during the performance of work by the PA.[15] Like the Healing Arts Act, the Physician Assistant Licensure Act authorizes only physicians who are licensed to practice medicine and surgery to be a supervising physician for a PA.[16]

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[8] K.S.A. 65-28,127(a).
[9] K.S.A. 65-28,127(b). An osteopathic physician and surgeon is licensed to practice medicine and surgery, thus, such licensees are also deemed to be physicians. *See* K.S.A. 65-2870(b).
[10] K.S.A. 22a-231.
[11] K.S.A. 65-28a01 *et seq*.
[12] K.S.A. 65-1113 *et seq*.
[13] K.S.A. 65-28a-02(a)(4).
[14] K.S.A. 65-28a02(a)(5).
[15] K.S.A. 65-28a02(a)(2).
[16] K.S.A. 65-28a02(a)(3).

The Physician Assistant Licensure Act governs the relationship between a supervising physician and a PA.[17] In pertinent part, it states:

> (a) The practice of a physician assistant shall include medical services within the education, training and experience of the physician assistant that are delegated by the supervising physician. Physician assistants practice in a dependent role with a supervising physician, and may perform those duties and responsibilities through delegated authority or written agreement. Medical services rendered by physician assistants may be performed in any setting authorized by the supervising physician, including, but not limited to clinics, hospitals, ambulatory surgical centers, patient homes, nursing homes and other medical institutions.
>
> (b)(1) A person licensed as a physician assistant may perform, only under the direction and supervision of a physician, acts which constitute the practice of medicine and surgery to the extent and in the manner authorized by the physician responsible for the physician assistant and only to the extent such acts are consistent with rules and regulations adopted by the board which relate to acts performed by a physician assistant under the supervising physician's direction and supervision. A physician assistant may prescribe drugs pursuant to a written agreement as authorized by the supervising physician.[18]

The Board of Healing Arts is required to adopt regulations that govern the practice of a PA, "including the delegation, direction and supervision responsibilities of a supervising physician," and establish conditions and limitations that the Board of Healing Arts determines to be necessary to protect the public health and safety.[19] In doing so, the Board of Healing Arts must consider:

> [T]he amount of training and capabilities of physician assistants, the different practice settings in which physician assistants and supervising physicians practice, the needs of the geographic area of the state in which the physician assistant and the supervising physician practice and the differing degrees of direction and supervision by a supervising physician appropriate for such settings and areas.[20]

A physician assistant may perform acts that constitute the practice of medicine and surgery if authorized on the practice form submitted to the Board of Healing Arts by the physician assistant and the physician.[21] This form includes information about each

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[17] K.S.A. 65-28,127(c). "[T]he physician assistant licensure act shall govern the direction and supervision of physician assistants by persons licensed by the [Board of Healing Arts] to practice medicine and surgery," except as provided by regulations adopted by the Board of Healing Arts to implement K.S.A. 65-28,127.
[18] K.S.A. 65-28a08.
[19] K.S.A. 65-28a08(d)(1).
[20] *Id*.
[21] K.A.R. 100-28a-6(c) and K.A.R. 100-28a-9.

practice location and the type of medical services provided to patients.[22] The physician assistant must also submit the written agreement that contains, *inter alia*, "a description of the medical services and procedures that the physician assistant may perform at each practice location," and "a list of medical services and procedures that the physician assistant is prohibited from performing."[23] Another regulation states the supervising physician may:

> Delegate to the physician assistant only those acts that constitute the practice of medicine and surgery and meet the following conditions:
>
> (A) The supervising physician believes or has reason to believe that the acts can be competently performed by the physician assistant, based upon the physician assistant's background, training, capabilities, skill, and experience; and
>
> (B) the acts are within the supervising physician's clinical competence and customary practice.[24]

The Board of Healing Arts also adopted a regulation regarding the evaluation of the PA, review of patient records by the supervising physician, and periodic review by the supervising physician of the PA's performance.[25]

In summary, the statutory authorization for a supervising physician to delegate to a PA is broad and there are no regulations that prohibit a supervising physician from delegating to a PA a determination of cardiopulmonary death or that limit the circumstances or practice setting in which a supervising physician may make such delegation to a PA. Rather, the physician determines the practice location and the acts that the physician assistant may do or is prohibited from doing. We conclude that there are no statutory or regulatory limitations or prohibitions for a supervising physician to delegate determinations of cardiopulmonary death to a PA pursuant to a detailed plan of care with the supervising physician.

Kansas Nurse Practice Act

Under the KNPA, an APRN is a professional nurse who is licensed by the Kansas State Board of Nursing (Nursing Board) to function in an advanced role.[26] The practice of a professional nurse includes:

> [T]he process in which substantial specialized knowledge derived from the biological, physical, and behavioral sciences is applied to: the care,

[22] K.A.R. 100-28a-9(d)((1)-(2).
[23] K.A.R. 100-28a-9(e)(1)-(2).
[24] K.A.R. 100-28a-10(a)(8).
[25] K.A.R. 100-28a-10(b).
[26] K.S.A. 65-1113(g).

> 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 the prevention or management of illness, injury or infirmity; . . . and the execution of the medical regimen as prescribed by a person licensed to practice medicine or surgery . . . .[27]

An APRN is authorized "to make independent decisions about advanced practice nursing needs of families, patients, and clients and medical decisions based on the authorization for collaborative practice with one or more physicians" but the immediate and physical presence of the physician is not required when care is provided by an APRN.[28] A physician is "a person licensed to practice medicine and surgery" by the Board of Healing Arts.[29]

Your request identified only two of the four roles of APRNs—a clinical nurse specialist and a nurse practitioner.[30] The Nursing Board has specified the functions that a clinical nurse specialist and a nurse practitioner are authorized to perform.[31] A nurse practitioner and a clinical nurse specialist are both authorized to "develop and manage the medical plan of care[32] for patients or clients, based on the authorization for collaborative practice."[33] An authorization for collaborative practice means:

> [A]n APRN is authorized to develop and manage the medical plan of care for patients or clients based upon an agreement developed jointly and signed by the APRN and one or more physicians. Each APRN and physician shall jointly review the authorization for collaborative practice annually. Each authorization for collaborative practice shall include a cover page containing the date of review by the APRN and physician. Each authorization for collaborative practice shall be maintained in either hard copy or electronic format at the APRN's principal place of practice."[34]

Neither the KNPA nor the regulations adopted by the Nursing Board place any condition, limitation, or prohibition on including the delegation of the determination of cardiopulmonary death in a collaborative practice agreement between a physician and a clinical nurse specialist or nurse practitioner. Thus, we conclude that there are no

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[27] K.S.A. 65-1113(d)(1). The KNPA does not define "medical regimen;" however, it differentiates between a "medical diagnosis" and a "diagnosis." In the context of nursing practice, a diagnosis is the "identification of and discrimination between physical and psychosocial signs and symptoms essential to effective execution and management of the nursing regimen and shall be construed as distinct from a medical diagnosis." K.S.A. 65-1113(b).
[28] K.A.R. 60-11-101(a).
[29] K.A.R. 60-11-101(c).
[30] K.S.A. 65-1113(g) and K.A.R. 60-11-102(a), (d), respectively. The functions of an APRN in the role of a nurse practitioner are set forth in K.A.R. 60-11-104. The functions of an APRN in the role of a clinical nurse specialist are set forth in K.A.R. 60-11-107.
[31] *See* K.A.R. 60-11-104(b) (nurse practitioner) and K.A.R. 60-11-107(b) (clinical nurse specialist).
[32] The term "medical plan of care" is not defined in the KNPA or a regulation adopted by the Nursing Board.
[33] K.A.R. 60-11-104(b) (nurse practitioner) and K.A.R. 60-11-107(b) (clinical nurse specialist).
[34] K.A.R. 60-11-101(b).

statutory or regulatory limitations or prohibitions that apply to a physician delegating a determination of cardiopulmonary death to an APRN who is a clinical nurse specialist or a nurse practitioner pursuant to a collaborative practice agreement.

Accepted Medical Standards

The UDDA requires the determination of death to "be made in accordance with accepted medical standards."[35] Thus, the UDDA does not explicitly require a physician to make the determination of death. Nevertheless, in Attorney General Opinion No. 90-81, Attorney General Robert Stephen concluded that the determination of death under the UDDA was a medical diagnosis that is made by a physician. The opinion then clarified:

> [W]e do not opine that a physician will actually examine the dead body in every instance prior to making the determination of death. In some instances, a medical diagnosis of death could be made based upon the statements of a nurse attending the patient. However, the recognition that the patient is dead in-fact must come from the physician. . .. The degree to which the physician may rely on other than personally gained knowledge is to be determined by application of accepted medical standards, as well as by the legal standard being applied.[36]

The opinion, however, did not address the delegation questions that you raise—whether a physician may delegate the determination of a cardiopulmonary death *in accordance with accepted medical standards*. The phrase "in accordance with accepted medical standards" is not defined in the UDDA, the Healing Arts Act, the Physician Assistant Licensure Act, or the KNAP or in any regulation adopted by the Board of Healing Arts or the Board of Nursing. The memorandum included with your opinion request posits that:

> [Physician assistants and APRNs] have the requisite training and competency to make determinations of cardiopulmonary death under Kansas law and accepted medical standards. It is well established that the accepted standard for determining [cardiopulmonary] death has been the permanent absence of respiration and circulation. And it is properly within the training and education of an APRN and a PA, under Kansas law, to make a medical assessment as to whether a patient is no longer breathing or their heart no longer beating.[37]

By contrast, the Board of Healing Arts in its input letter posits that "accepted medical standards generally require the ultimate medical determination of cardiopulmonary death to be made by a physician. … Through the licensing process, such physicians are

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[35] K.S.A. 77-205.
[36] Attorney General Opinion No. 90-81; *see also* K.S.A. 65-2869, K.S.A. 65-2870, and K.S.A. 65-2873.
[37] Memorandum by Fred Logan and Andrew Logan, Logan, Logan & Watson, L.C., Attorneys at Law, dated June 12, 2019, at p. 4. Internal quotations and citation omitted.

determined by the Board to have the minimum medical education and training to make such medical conclusions."[38] Additionally, the Board of Healing Arts "disagrees with any suggestion that [the determination of cardiovascular death] is limited to simply taking measurements of pulse and respiration. . . . [T]his characterization underestimates the clinical complexity that often accompanies a medical determination of 'irreversible cessation of circulatory and respiratory functions.'"[39]

These inconsistent positions show the phrase "accepted medical standards" relates not only to the procedure for the determination of cardiovascular death but also to who can make that determination. During the hearing on the UDDA, the legal counsel for the National Conference of Commissioners on Uniform State Laws testified the adoption of the UDDA clarifies the "responsibilities of physicians and eliminates the barriers to the modern practice of medicine," and discussed "the use of life-saving machines and when death was determined when [life-saving machines] are used."[40] The Kansas Medical Society requested an amendment that stated: "A determination of death must be made in accordance with accepted medical standards *by a person licensed to practice medicine and surgery*."[41] No action was taken on the request for this amendment.[42]

It is possible that the issue of whether the determination of cardiopulmonary death can be made only by a physician may be subject to change since the adoption of the UDDA in 1984. The Kansas Supreme Court explained the concept of "accepted medical standards" as follows:

> "Ordinary standards of medical practice" change as medical knowledge and technology improve. Under the instructions given in this case, it was for the jury to determine whether the medical standards required by K.S.A. 1976 Supp. 77-202 had been met. Much of the testimony presented at trial went to this very point. The attack on the statute for failure to specifically enumerate criteria is held to be without merit.[43]

In another case, the Court rejected the argument that the phrase "ordinary medical standards" as used in the statutory definition of death prior to the UDDA should be

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[38] Tucker L. Poling, Interim Executive Director of the Kansas Board of Healing Arts, dated November 4, 2019, at p. 1.
[39] *Id*. at pp. 1-2. The Board of Healing Arts cautioned that it would investigate a complaint of improper delegation for unprofessional conduct, which includes "delegating professional responsibilities to a person when the [physician] knows or has reason to know that such person is not qualified by training, experience or licensure to perform them. *See* K.S.A. 65-2836(b) and K.S.A. 65-2837(b)(26). We also caution that even if the physician delegates the determination of cardiovascular death, the physician retains the responsibility to complete the medical certification of cause of death for the death certificate. *See* K.S.A. 65-2412(b).
[40] *Minutes*, House Judiciary Committee, Senate Bill 81, March 21, 1983. Testimony of John McCabe.
[41] *Minutes*, House Judiciary Committee, Senate Bill 81, March 21, 1983. Attachment 2, Section2 (Emphasis added). Testimony of Jerry Slaughter.
[42] *Minutes*, House Judiciary Committee, Senate Bill 81, March 28, 1983
[43] *State v. Shaffer*, 223 Kan. 244, 250 (1977).

defined.[44] The Court reiterated that the question of whether the medical standards required had been met was a question of fact to be determined from the evidence.[45]

Thus, we conclude that the question of whether "accepted medical standards" permit a physician to delegate the determination of cardiovascular death to a PA or APRN is one of fact. Accordingly, we decline to opine on whether a PA or APRN can make a determination of cardiovascular death "in accordance with accepted medical standards."

In summary, we conclude that a physician licensed by the Kansas State Board of Healing Arts to practice medicine and surgery may delegate acts which would constitute the practice of healing arts to (1) a person licensed by the Kansas State Board of Healing Arts as a physician assistant pursuant to a detailed plan of care with the physician or (2) a person licensed by the Kansas State Board of Nursing as an advanced practice registered nurse in the role of clinical nurse specialist or nurse practitioner pursuant to a collaborative practice agreement with the physician. No statutes or regulations limit or prohibit such delegation for the determination of cardiopulmonary death. However, whether a PA or an APRN practicing as a clinical nurse specialist or nurse practitioner can make a determination of cardiopulmonary death "in accordance with accepted medical standards" is a question of fact and, as such, is outside the scope of this opinion.

Sincerely,

Derek Schmidt
Kansas Attorney General

Janet L. Arndt
Assistant Attorney General

DS:AA:JLA:sb

[44] *State v. Shaffer*, 229 Kan. 310, 317-19 (1981).
[45] *Id*. at 319.