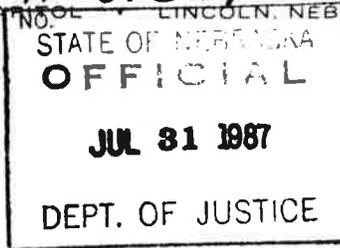


DEPARTMENT OF JUSTICE
STATE OF NEBRASKA
TELEPHONE 402/471-2682

STATE CAPITAL LINCOLN, NEBRASKA 68509



ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General

DATE: July 30, 1987

SUBJECT: Osteopaths as Health Care Providers Under the
Hospital-Medical Liability Act, Neb.Rev.Stat.
§§44-2801 to 44-2855

REQUESTED BY: Senator Rex Haberman
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General
Marilyn B. Hutchinson, Assistant Attorney General

You have asked whether legislation is needed to assure that an osteopath comes within the definition of "physician" in Neb.Rev.Stat. §44-2804 so that he or she is a "health care provider" under Neb.Rev.Stat. §44-2803 who may qualify as provided in §44-2824 for limited personal liability under the Hospital-Medical Liability Act. Then any excess judgment against him or her would be paid from the Excess Liability Fund unless a patient elected not to come under the act as provided in §44-2821. As discussed below, we have concluded that clarifying legislation is needed.

"Physician" is defined as "a person with an unlimited license to practice medicine in this state pursuant to sections 71-1,102 to 71-1,107.14." (Emphasis added.) Neb.Rev.Stat. §44-2804. That definition is controlling. See, Neb.Rev.Stat. §44-2802.

Under §71-1,141, the scope of practice under an osteopathy license depends upon when the licensee graduated from osteopathy college and which examinations he or she has successfully passed. The maximum scope of practice is the license to practice osteopathic medicine and surgery. That is the one issued under §71-1,139.01 which requires not only passing of the examination for physicians and surgeons but also two years of postgraduate training in surgery. Such an osteopath may engage in the unlimited practice of medicine and surgery, the same as any one licensed to practice medicine and surgery; other osteopaths may not.

The confusion in the definition of "physician" arises because a license to practice osteopathic medicine and surgery is not issued "pursuant to sections 71-1,102 to 71-1,107.14." Within those sections, §71-1,103(11) exempts such a licensee from

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Senator Rex Haberman
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Page -2-

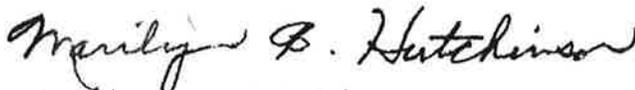
the need to be licensed as a physician and surgeon, but a license to practice osteopathic medicine and surgery is actually issued pursuant to §§71-1,137, 71-1,139.01 and 71-1,141.

Arguably it is the unlimited practice of medicine, not the issuance of the license, which must be "pursuant to sections 71-1,102 to 71-1,107.14." There is a rule of statutory construction which supports such an interpretation. That is, referential and qualifying words in a statute, where no contrary intention appears, refer solely to the last antecedent. See, Haiar v. Kessler, 188 Neb. 312, 196 N.W.2d 380 (1972). Also, there is no rational basis for treating differently licensees who are equivalent practitioners. In fact, to do so would be contrary to an intent stated in §44-2801(1) "to assure continuing availability of medical care and to encourage physicians to enter into the practice of medicine in Nebraska and to remain in such practice as long as such physicians retain their qualifications." Thus it would raise equal protection problems if osteopathic physicians and surgeons are not within the definition and therefore are treated differently. See, Galloway v. Wolfe, 117 Neb. 824, 223 N.W.2d 1 (1929). A statute should be given an interpretation which meets constitutional requirements if it can reasonably be done. Scott v. State ex rel. Board of Nursing, 196 Neb. 681, 688, 244 N.W.2d 683 (1976), quoting Stahmer v. State, 192 Neb. 63, 218 N.W.2d 893 (1974). It can be done in this case by interpreting §44-2804 as including in the definition of "physician" both persons licensed as physicians and surgeons and persons licensed as osteopathic physicians and surgeons in this state.

Because statutory interpretation is needed to reach that conclusion, a safer course is to amend §44-2804 expressly to include osteopathic physicians and surgeons licensed pursuant to §71-1,139.01 in the definition of "physician."

Sincerely yours,

ROBERT M. SPIRE
Attorney General



Marilyn B. Hutchinson
Assistant Attorney General

MBH/bae

cc: Patrick J. O'Donnell
Clerk of the Legislature

APPROVED BY:



Attorney General