

SUNSET EVALUATION REPORT
ACUPUNCTURE
Chapter 436D, Hawaii Revised Statutes

A Report to the Governor and the Legislature of the State of Hawaii

Submitted by the
Legislative Auditor of the State of Hawaii

Report No. 84-6
January 1984

FOREWORD

Under the "Sunset Law," licensing boards and commissions and regulated programs are terminated at specified times unless they are reestablished by the Legislature. Hawaii's Sunset Law, scheduled for termination 38 occupational licensing programs over a six-year period. These programs are repealed unless they are specifically reestablished by the Legislature. In 1979, the Legislature assigned the Office of the Legislative Auditor responsibility for evaluating each program prior to its repeal.

This report evaluates the regulation of acupuncture under Chapter 436D, Hawaii Revised Statutes. It presents our findings as to whether the program complies with the Sunset Law and whether there is a reasonable need to regulate acupuncture to protect public health, safety, or welfare. It includes our recommendation on whether the program should be continued, modified, or repealed.

We acknowledge the cooperation and assistance extended to our staff by the Board of Acupuncture, the Department of Commerce and Consumer Affairs, and other officials contacted during the course of our examination.

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January 1984

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Chapter 1

INTRODUCTION

The Hawaii Regulatory Licensing Reform Act of 1977, or Sunset Law, repeals statutes concerning 38 state licensing boards and commissions over a six-year period. Each year, six to eight licensing statutes are scheduled to be repealed unless specifically reenacted by the Legislature.

In 1979, the Legislature amended the law to make the Legislative Auditor responsible for evaluating each licensing program prior to its repeal and to recommend to the Legislature whether the statute should be reenacted, modified, or permitted to expire as scheduled. In 1980, the Legislature further amended the law to require the Legislative Auditor to evaluate the effectiveness and efficiency of the licensing program, even if he determines that the program should not be reenacted.

Objective of the Evaluation

The objective of the evaluation is: To determine whether, in light of the policies set forth in the Sunset Law, the public interest is best served by reenactment, modification, or repeal of Chapter 436D, Hawaii Revised Statutes.

Scope of the Evaluation

This report examines the history of the statute on the licensing of acupuncturists and the public health, safety, or welfare that the statute was designed to protect. It then assesses the effectiveness of the statute in preventing public injury and the continuing need for the statute.

Organization of the Report

This report consists of three chapters: Chapter 1, this introduction and the framework developed for evaluating the licensing program; Chapter 2, background information on the regulated industry and the enabling legislation; and Chapter 3, our evaluation and recommendations.

Framework for Evaluation

Hawaii's Regulatory Licensing Reform Act of 1977, or Sunset Law, reflects rising public antipathy toward what is seen as unwarranted government interference in citizens' lives. The Sunset Law sets up a timetable terminating various occupational licensing boards. Unless reestablished, the boards disappear or "sunset" at a prescribed moment in time.

In the Sunset Law, the Legislature established policies on the regulation of professions and vocations. The law requires that each occupational licensing program be assessed against these policies in determining whether the program should be reestablished or permitted to expire as scheduled. These policies, as amended in 1980, are:

1. The regulation and licensing of professions and vocations by the State shall be undertaken only where reasonably necessary to protect the health, safety, or welfare of consumers of the services; the purpose of regulation shall be the protection of the public welfare and not that of the regulated profession or vocation.

2. Where regulation of professions and vocations is reasonably necessary to protect consumers, government regulation in the form of full licensure or other restrictions on the professions or vocations should be retained or adopted.

3. Professional and vocational regulation shall be imposed where necessary to protect consumers who, because of a variety of circumstances, may be at a disadvantage in choosing or relying on the provider of the services.

4. Evidence of abuses by providers of the services shall be accorded great weight in determining whether government regulation is desirable.

5. Professional and vocational regulation which artificially increases the costs of goods and services to the consumer should be avoided.

6. Professional and vocational regulation should be eliminated where its benefits to consumers are outweighed by its costs to taxpayers.

7. Regulation shall not unreasonably restrict entry into professions and vocations by all qualified persons.

We translated these policy statements into the following framework for evaluating the continuing need for the various occupational licensing statutes.

Licensing of an occupation or profession is warranted if:

1. There exists an identifiable potential danger to public health, safety, or welfare arising from the operation or conduct of the occupation or profession.
2. The public that is likely to be harmed is the consuming public.
3. The potential harm is not one against which the public can reasonably be expected to protect itself.
4. There is a reasonable relationship between licensing and protection of the public from potential harm.
5. Licensing is superior to other optional ways of restricting the profession or vocation to protect the public from the potential harm.
6. The benefits of licensing outweigh its costs.

The potential harm. For each regulatory program under review, the initial task is to identify the purpose of regulation and the dangers from which the public is intended to be protected.

Not all potential dangers warrant the exercise of the State's licensing powers. The exercise of such powers is justified only when the potential harm is to public health, safety, or welfare. "Health" and "safety" are fairly well understood. "Welfare" means well-being in any respect and includes physical, social, and economic well-being.

This policy that the potential danger be to the public health, safety, or welfare is a restatement of general case law. As a general rule, a state may exercise its police power and impose occupational licensing requirements only if such requirements tend to promote the public health, safety, or welfare. Under particular fact situations and statutory enactments, courts have held that licensing requirements for paperhangers, housepainters, operators of public dancing schools, florists, and private land surveyors could not be justified.¹ In Hawaii, the State Supreme Court in 1935 ruled that legislation requiring photographers to be licensed bore no reasonable relationship to public health, safety, or welfare and constituted an unconstitutional

1. See discussion in 51 *American Jurisprudence*, 2d., "Licenses and Permits," Sec. 14.

encroachment on the right of individuals to pursue an innocent profession.² The court held that mere interest in the practice of photography or in ensuring quality in professional photography did not justify the use of the State's licensing powers.

The public. The Sunset Law states that for the exercise of the State's licensing powers to be justified, not only must there be some potential harm to public health, safety, or welfare, but also the potential harm must be to the health, safety, or welfare of that segment of the public consisting mainly of consumers of the services rendered by the regulated occupation or profession. The law makes it clear that the focus of protection should be the consuming public and not the regulated occupation or profession itself.

Consumers are all those who may be affected by the services rendered by the regulated occupation or profession. Consumers are not restricted to those who purchase the services directly. The provider of services may have a direct contractual relationship with a third party and not with the consumer, but the criterion set forth here may be met if the provider's services ultimately flow to and adversely affect the consumer. For example, the services of an automobile mechanic working for a garage or for a U-drive establishment flow directly to the employer, but the mechanic's workmanship ultimately affects the consumer who brings a car in for repairs or who rents a car from the employer. If all other criteria set forth in the framework are met, the potential danger of poor workmanship to the consuming public *may* qualify an auto mechanic licensing statute for reenactment or continuance.

Consumer disadvantage. The consuming public does not require the protection afforded by the exercise of the State's licensing powers if the potential harm is one from which the consumers can reasonably be expected to adequately protect themselves. Consumers are expected to be able to protect themselves unless they are at a disadvantage in selecting or dealing with the provider of services.

Consumer disadvantage can arise from a variety of circumstances. It may result from a characteristic of the consumer or from the nature of the occupation or profession being regulated. Age is an example of a consumer characteristic which may cause the consumer to be at a disadvantage. The highly technical and complex

2. *Terr. v. Fritz Kraft*, 33 Haw. 397.

nature of the occupation is an illustration of occupational character that may result in the consumer being at a disadvantage. Medicine and law fit into the latter illustration. Medicine and law were the first occupations to be licensed on the theory that the general public lacked sufficient knowledge about medicine and law to enable them to make judgments about the relative competencies of doctors and lawyers and about the quality of services provided them by the doctors and lawyers of their choice.

However, unless otherwise indicated, consumers are generally assumed to be knowledgeable and able to make rational choices and to assess the quality of services being provided them.

Relationship between licensing and protection. Occupational licensing cannot be justified unless it reasonably protects the consumers from the identified potential harm. If the potential harm to the consumer is physical injury arising from possible lack of competence on the part of the provider of service, the licensing requirement must ensure the competence of the provider. If, on the other hand, the potential harm is the likelihood of fraud, the licensing requirements must be such as to minimize the opportunities for fraud.

Alternatives. Depending on the harm to be protected against, licensing may not be the most suitable form of protection for the consumers. Rather than licensing, the prohibition of certain business practices, governmental inspection, or the inclusion of the occupation within some other existing business regulatory statute may be preferable, appropriate, or more effective in providing protection to the consumers. Increasing the powers, duties, or role of the consumer protector is another possibility. For some programs, a nonregulatory approach may be appropriate, such as consumer education.

Benefit-costs. Even when all other criteria set forth in this framework are met, the exercise of the State's licensing powers may not be justified if the costs of doing so outweigh the benefits to be gained from such exercise of power. The term, "costs," in this regard means more than direct money outlays or expenditure for a licensing program. "Costs" includes opportunity costs or all real resources used up by the licensing program; it includes indirect, spillover, and secondary costs. Thus, the Sunset Law asserts that regulation which artificially increases the costs of goods and services to the consumer should be avoided; and regulation should not unreasonably restrict entry into professions and vocations by all qualified persons.

Chapter 2

BACKGROUND

Chapter 436D, Hawaii Revised Statutes, regulates the practice of acupuncture. The statute prohibits persons from practicing, advertising or announcing themselves as acupuncturists unless they have a valid license from the Board of Acupuncture. This chapter provides some background information on the occupation and its regulation.

Occupational Characteristics

Acupuncture is defined as the “insertion of needles into the human body by piercing the skin of the body for the purpose of controlling and regulating the flow and balance of energy in the body.”¹ The therapeutic use of acupuncture involves the positioning of needles at one or several points on the body of a patient located by “meridians” or channels for the flow of energy, and the stimulation of the needles by mechanical twirling and/or tapping.

There are several methods of therapeutic acupuncture based on the four or five standard sizes of acupuncture needles, varying in length from 1 to 10 centimeters. There are also several different schools of acupuncture that differ in their selection of acupuncture points. Some recommend points close to the diseased or injured area while others recommend points remote from the affected area. Still other schools suggest that point selection should be based on symptoms of the patient.

All schools of acupuncture insert and advance the needle until a “take” is experienced by the patient. This “take” is described as a feeling of tingling, heaviness, and numbness. Once the needle has been inserted into the selected acupuncture point, then manual stimulation may be carried out for several minutes. In recent years, electro-acupuncture, in which electrical stimulation is applied through the inserted needles or directly to the skin, has gained widespread use because of the ease, uniformity, and continuity of stimulation.

1. Section 463D-1, HRS.

Other forms of stimulation have also evolved in recent years such as sonopuncture (stimulation by sound or ultrasound) and photopuncture (stimulation by light). Both sonopuncture and photopuncture may or may not be used in conjunction with inserted needles.

Other forms of therapeutic acupuncture include the injection of sterile water, saline, procaine, morphine or vitamins into acupuncture points (aquapuncture); the application of pressure for several minutes to the acupuncture point (acupressure); and the application of burning floss or a hot cup over the underlying acupuncture point (moxabustion). Thread acupuncture involves the insertion of a threaded surgical needle through one acupuncture point and out another. The thread is left in place for several weeks to produce stimulation.²

Theory of acupuncture. Traditional Chinese medicine is based on the belief that, in composition and function, man is a microcosm of the universe and subject to identical laws. The theories of acupuncture are drawn from the Chinese philosophy that the universe operates through two opposite forces, Yin and Yang. Yin represents the negative, dark, cold, female force and Yang the positive, hot, light, male force. In the body the forces responsible for life and death are in the form of Ch'i (vital energy). The flow of Ch'i through the body is controlled by the interaction of the Yin and Yang.

The Yin and Yang Ch'i (energy) are conveyed through 12 pairs of main ducts plus two trunk ducts which run in the front and back midline of the body. These ducts or channels have been designated the "meridians" in the Western world. Acupuncture treatment is based on controlling the Ch'i energy by increasing or decreasing the energy of a meridian by stimulating or sedating the preceding meridian. When the Yin and Yang elements are in balance the result is good health. Diseases result from an imbalance of these forces.³

In keeping with the theory, acupuncturists attempt to locate the energy imbalance by such diagnostic techniques as taking the patient's pulse, physical

2. Rogers J. Smith, M.D., Chairman, "Report of the Council on Scientific Affairs, Subject: Acupuncture," Adopted by the American Medical Association, House of Delegates, 1981.

3. Joseph B. Davis, M.D. and Lillian Yin, Ph.D., "Acupuncture Past and Present," *FDA Consumer*, DHEW Publication No. (FDA) 74-4001, May 1973.

examination, auscultation,⁴ and smell. Acupuncturists then seek to restore the balance by inserting needles in one or several locations and by leaving them in for a specific period of time. The treatment is expected to restore the equilibrium of Yin and Yang and cure the disease. Herbs may also be prescribed as part of acupuncture therapy.

Regulation in the United States

State regulation. Only 17 states have enacted laws relating to the practice of acupuncture. Of these, five provide for regulation under an acupuncture board or advisory committee. In the majority of the states, acupuncture is not regulated by statute but through medical board rules, and policy statements or state attorney general opinions. Although all states permit physicians to practice acupuncture, only five states with laws relating to acupuncture require physicians to have training in acupuncture.

Most medical boards limit the practice of acupuncture to physicians by defining it through policy or rule as a "practice of medicine." Therefore, nonphysician acupuncturists are excluded from the practice of acupuncture by this limitation. Three states have statutes that limit the practice of acupuncture to licensed physicians. Five states have statutes allowing nonphysician acupuncturists to practice under the supervision of a physician as physician's assistants. There are also three other states and the District of Columbia that permit, through medical policy or rule, nonphysician acupuncturists to practice under medical supervision.⁵

Federal acupuncture regulation. In 1973, the Food and Drug Administration (FDA) issued guidelines for labeling acupuncture needles and electro-acupuncture machines which it considered as medical devices under their purview. The guidelines are still in effect and state that the FDA will consider acupuncture devices as misbranded if the labeling makes any claims of diagnostic or therapeutic effectiveness, or fails to state that the device is experimental.

4. Auscultation is the act of listening to sounds arising within organs as an aid to diagnosis and treatment.

5. Ginger McRae. "A Critical Overview of U.S. Acupuncture Regulation," *Journal of Health Politics, Policy and Law*, vol. 7, no. 1, Spring 1982, pp. 166-172.

Furthermore, the FDA guidelines also state that the device must be limited to investigational use by or under the direct supervision of a licensed physician or dentist, with the informed consent of patients, under an approved scientific protocol, where conditions for such use are in accordance with state law.

In 1978, the FDA announced that it would not object to the sale of acupuncture devices to persons licensed as acupuncturists by individual states, so long as the devices are labeled in accordance with FDA guidelines.

Legislative History

The first attempt to regulate acupuncturists occurred in 1973 with the introduction of Senate Bill No. 325 which proposed the regulation of acupuncturists under a Board of Examiners for the Practice of Acupuncture. The Department of Health (DOH) and the Hawaii Medical Association both opposed the bill contending that the practice of acupuncture falls within the practice of medicine and, as such, should be under purview of the Board of Medical Examiners.

The Senate then adopted a resolution requesting the DOH "to promulgate rules relating to the practice of acupuncture or submit reasons why this cannot be done." Several reasons were given for the need for such rules, including interest and concern in acupuncture as a medical practice; the use of acupuncture by many prominent people, particularly athletes; and the lack of a body of medical knowledge about the practice. The intent of the resolution was to have the DOH regulate acupuncture under its existing statutory authority to adopt regulations to protect public health and safety.⁶

The DOH requested an opinion from the Department of the Attorney General (AG) whether it had the legal authority to formulate rules to control the practice of acupuncture. In response, the AG concluded that DOH was not the proper body to promulgate such rules, but since acupuncture may constitute "the practice of medicine" under Chapter 453, "it may be appropriate to refer Senate Resolution No. 217 (1973) to the Board of Medical Examiners for consideration and possible action."⁷

6. Senate Committee on Health, Standing Committee Report No. 668, Regular Session of 1973.

7. Letter to Dr. Walter B. Quisenberry, Director of Health, from Gerald Y. Y. Chang, Deputy Attorney General, November 9, 1973.

In 1974, the Legislature enacted Act 206, SLH 1974. Despite opposing testimony from various groups, the Legislature decided to place the control of acupuncture under an independent board instead of the Board of Medical Examiners. The Legislature also decided that physicians and dentists should be exempt from the provisions of this law.

The law has remained virtually unchanged since its enactment in 1974. The only significant change was made in 1983 to exempt osteopathic physicians from regulation as acupuncturists on the grounds that osteopathic physicians have all the same privileges, rights, and responsibilities as other physicians.

The records of the Department of Commerce and Consumer Affairs show that as of October 1983 there were 81 licensed acupuncturists of which 63 had addresses in the State.⁸

The Licensing Law

Chapter 436D requires the licensing of all individuals who practice acupuncture except those who are licensed under Chapters 448, Dentistry; 453, Medicine and Surgery; and 460, Osteopathy.

The board's rules limit authorized treatment to pain relief and analgesia and functional disorders, including functional components of diseases and abnormal conditions. The licensed acupuncturist may also treat other areas when referred by licensed medical doctors or dentists and, in turn, acupuncturists may refer patients with ailments beyond their scope of treatment to doctors or dentists.

Licensees are required to maintain records of each patient and such records must be maintained for a minimum of five years, subject to inspection by the board or its representative.

The Board of Acupuncture. The board is comprised of seven members, five licensed acupuncturists and two private citizens. Among the powers and duties of the board are the following: (1) develop licensing standards; (2) prepare and administer examinations; (3) issue, renew, suspend, and revoke licenses; and (4) investigate and conduct hearings regarding violations.

8. Department of Commerce and Consumer Affairs, *Geographic Report*, October 1983.

Licensing requirements. All applicants must pass an examination. To be eligible for the examination, applicants must furnish proof that they are residents of the State, of good moral character, and have completed a course in acupuncture and received a certificate or diploma from an institution or private tutorship approved by the board.

Applications for licensing must be accompanied by an application fee; a doctor's statement dated no more than 30 days prior to application that the applicant is free of any communicable disease, syphilis, and tuberculosis; two sworn statements certifying to the applicant's good moral character; passport-type photograph; and other documents required by the board.

Education and training. The minimum formal education and training is two years (1,056 hours), including 18 months (576 hours) of academic study of acupuncture or Oriental traditional medicine and six months (480 hours) of supervised practical clinical acupuncture practice under the direction of a private practitioner who qualifies as a private tutor under the board's rules.

According to the board's rules, the acupuncture or Oriental traditional medicine curriculum should include such subjects as: history and philosophy of Oriental medicine; human anatomy including location of acupuncture points; physiology including the five elements organ theory; clinical diagnosis including pulse diagnosis; pathology; laws of acupuncture; classification and function of points; needle techniques; complications; forbidden points; resuscitation; safety and precautions; use of electrical devices for diagnosis and treatment; public health and welfare, hygiene and sanitation; and practical clinical acupuncture practice.

Training by private tutors may be substituted for formal academic study. The minimum requirements are four hours per day, five days per week, for 100 weeks, for a total of 2,000 hours, extended over a period of two years. Of the 2,000 hours, there must be 1,400 hours of practical observation, including history and physical examination, treatment planning, and clinical acupuncture practice, and 600 hours of history and philosophy of Oriental medicine, including traditional human anatomy, locations, and functions of meridians and points.

Applicants are required to submit to the board evidence of their tutor's qualifications. Tutors residing in the State of Hawaii must be approved and registered with the board prior to the tutorial training. In order to qualify, tutors have to be licensed acupuncturists who have practiced acupuncture in the State or elsewhere for a total of five years.

Verification of education and training. Applicants must verify their education by submitting: (1) a copy of a school-issued certificate or diploma as evidence of having met the educational requirements, along with the school transcript, or (2) a notarized affidavit or statement bearing the official school seal and signed by an officer of the school certifying that the applicant has satisfactorily completed the academic and clinical training, including the subjects and hours, or (3) a sworn affidavit indicating that the school no longer exists or that the records have been destroyed. The application must be accompanied by other information such as the name and address of the school, the dates of enrollment, the curriculum completed or any other information required by the board.

To verify the clinical training portion, applicants must submit certified statements from tutors that they have completed the course of clinical training. Applicants must also furnish the name of the tutor, the business address, the number of hours of training, and a statement of his or her duties, and the practitioner's qualifications to supervise clinical training.

Applicants who have been trained entirely by tutors must submit, basically, the same kinds of verification documents required for clinical training.

Examinations. The acupuncture examinations are made up of three parts: the written examination, the oral-practical examination on inanimate objects, and the clinical demonstration on a human subject. Each part of the examination must be successfully completed and passed before applicants are eligible to be examined in the next part. The passing score in each part is 70 percent.

The written examination consists of multiple choice and true and false questions on such topics as the board's rules, health and safety requirements, sanitation, federal laws and regulations governing use of acupuncture devices, theory and practice of Oriental traditional medicine and related philosophy, and basic knowledge of human anatomy and physiology.

The second part, the oral-practical examination, assesses whether applicants have sufficient knowledge and proficiency to undertake the clinical demonstration on a human subject.

The third part is the clinical demonstration test which evaluate the applicants' proficiency in treating a human subject, including briefing a first-time patient, establishing a patient record, diagnosis techniques and procedures, point/meridian selection, positioning the patient for treatment, and needle techniques. Each candidate for examination must bring a person to serve as a patient model and whatever materials are needed for the test.

The board also has discretionary power to conduct a special interview with a candidate to make a final determination on the qualifications of the candidate.

Candidates are given credit for the part they passed and may apply for re-examination of any parts failed. Applicants may repeat the examination any number of times by submitting an application and the required fee.

License renewals. License holders must reregister biennially and pay a fee. Failure to pay the renewal fee when due results in automatic forfeiture of the license.

Revocation or suspension of licenses. Licenses may be revoked or suspended by the board at any time for any of the following acts:

- (1) Obtaining a fee on the assurance that a manifestly incurable ailment can be permanently cured;
- (2) Making any untruthful and improbable statement in advertising one's acupuncture practice or business;
- (3) False, fraudulent or deceptive advertising;
- (4) Being habitually intemperate;
- (5) Habitually using any habit-forming drug such as opium or any of its derivatives, morphine, heroin, cocaine or any other habit-forming drug;
- (6) Procuring a license through fraud, misrepresentation or deceit and;
- (7) Professional misconduct or gross carelessness or manifest incapacity in the practice of acupuncture.

When the board revokes or suspends a license, it must notify the licensee in writing of such action. The board may also restore licenses as provided in its rule.

Public health and sanitation. The board requires acupuncturists to meet certain sanitation standards. For example, offices must be equipped with washroom and toilet facilities and the board or any authorized employee of the Department of Commerce and Consumer Affairs may inspect such facilities during normal working hours. A number of other specific sanitation requirements are prescribed by rule.

Advertisement. Licensed acupuncturists are limited by rule in advertising their acupuncture practices. They can only advertise their names, nature of practice, office address, telephone number, and office hours. The board's rule prohibits licensees from using the terms "Doctor" or "Dr." However, a licensee awarded a doctoral degree, academic or honorary, may use the designation "Ph.D." or "Honorary Ph.D." if the degree was granted from a university or college recognized and approved by the board. Claims or guarantees of cures of any ailment or type and method of treatment are prohibited in advertisements.

Chapter 3

EVALUATION OF THE REGULATION OF ACUPUNCTURISTS

This chapter contains our evaluation of the regulation of acupuncturists under Chapter 436D, Hawaii Revised Statutes. It includes our assessment of the need for regulation, the scope of regulation and the effectiveness and efficiency of operations under the Board of Acupuncture.

Summary of Findings

1. There is sufficient potential harm to the public health, safety, and welfare to warrant continued regulation of the practice of acupuncture.
2. There is a danger that acupuncture could be used inappropriately to treat diseases that do not respond to acupuncture.
3. The statute has no provision to exempt students so that they might practice on human subjects prior to licensure.
4. There are numerous problems with the board's requirements for licensing and with the examinations.
5. Some board members have acted in a self-serving manner, and the board has failed to enforce the law and its own rules concerning the use of titles in advertising.

Need for Regulation

There is general agreement in the scientific literature that acupuncture is a safe mode of treatment when practiced by competent practitioners. However, there is considerable risk if it is performed by untrained or unqualified acupuncturists.

Improper insertion of acupuncture needles can cause injury or even death. There are points in the body where insertion of needles into these points can cause death. There are also points that are known to cause loss of consciousness or collapse. Improper use of needles may also result in broken needles or the penetration and perforation of nerves, organs, and blood vessels. This could cause

hematomas (bleeding from a blood vessel into the surrounding tissues), hemorrhages, possible neurological complications, and aggravation of existing symptoms.¹

The medical community has expressed concern about the transmission of communicable diseases through the use of unsterilized needles and inadequate antiseptic practices. An Australian National Health and Research Council reported that its investigating teams which reviewed acupuncture in Korea, the United States, Hong Kong, and China often found inadequate antiseptic techniques such as failure to sterilize needles, disinfect the skin or scrub prior to treating patients.² This could result in infections such as hepatitis and peritonitis. A more recent fear is the possible transmission of acquired immune deficiency syndrome.

Because of the potential danger to the public health and safety presented by the practice of acupuncture, Chapter 436D should be reenacted to continue the regulation of acupuncturists.

Scope of Regulation

Need for informed consent. Medical research has been unable to produce any satisfactory explanations for the success of acupuncture in treating certain kinds of diseases. Acupuncture has been found to be useful in treating medical problems such as chronic pain syndromes, arthritis, allergies, headaches, and migraines. Illnesses that do not respond to acupuncture include infectious diseases, heart disease, cancer, and urinary tract diseases such as nephritis.³ There is a danger that the inappropriate use of acupuncture could delay more appropriate medical treatment with serious consequences for patients.

There is also a danger that acupuncturists may not have the diagnostic skills to be able to distinguish between those diseases that respond to acupuncture treatment and those that do not. Acupuncturists use diagnostic techniques that differ from Western medical techniques. The four basic techniques used by traditional

1. Frank Z. Warren, *Handbook of Medical Acupuncture*, New York, Van Nostrand Reinhold Co., 1976, p. 19.
2. Australia National Health and Medical Research Council, *Acupuncture, A Report to the National Health and Medical Research Council*, Canberra, Australian Government Publishing Service, 1974, p. 8.
3. Louise Oftedal Wensel, M.D., *Acupuncture in Medical Practice*, Reston, Va., Reston Publishing Co., 1980, pp. 113-119.

acupuncturists are: (1) inspection and observation of the color and appearance of the patient, (2) auscultation and olfaction in which the practitioner listens to respiration and notes any odors emitted by the patient,⁴ (3) inquiry about the history of the illness and its symptoms, and (4) pulse diagnosis and palpation in which acupuncturists feel and press different parts of the body. These methods are used in combination to make a determination of the disease with pulse diagnosis being the cornerstone in determining choice of treatment method.⁵

Western scientists say these methods are suspect and subjective. They comment that effective use of these methods depends on the skills of the individual acupuncturists and different acupuncturists will diagnose different ailments in the same patient using a method such as pulse diagnosis.⁶

One measure that can be taken to reduce the danger of misdiagnosis and delay of more appropriate treatment is to require patients to be provided with a disclosure statement that informs patients about the scope of acupuncture, its limitations, the potential risks, and alternative modes of treatment. Patients should be told that acupuncture is not effective for all illnesses, and that certain illnesses do not respond to acupuncture.

The statute should be amended to require disclosure of the scope of practice of acupuncture and its limitations in treating certain conditions and also to require patients to sign informed consent forms for the treatment to be provided. The board should adopt rules and develop forms to carry out these provisions and make them available to the public and to acupuncturists. One model is the informed consent rule adopted by the Board of Medical Examiners. In order to obtain informed consent to medical treatment or surgical procedures, the Board of Medical Examiners requires health care providers to inform patients of the following:

1. The condition being treated;
2. The nature and character of the proposed treatment or surgical procedure;

4. In auscultation, practitioners listen to sounds emitted by the patient's internal organs; and in olfaction, practitioners use their sense of smell to diagnose diseases.

5. Dr. Rolla J. Pennell, et al., "How to Diagnose the Chinese Pulse," *American Journal of Acupuncture*, vol. 1, 1973, p. 169.

6. Warren, *Handbook of Medical Acupuncture*, pp. 15-16.

3. The anticipated results;
4. The recognized possible alternative forms of treatment; and
5. The recognized serious possible risks, complications, and anticipated benefits involved in the treatment or surgical procedure, and in the recognized possible alternative forms of treatment, including nontreatment.⁷

Provision for students of acupuncture. Chapter 436D, HRS, restricts the practice of acupuncture to those licensed by the board. No provision is made for students to practice acupuncture on human subjects prior to licensure. This means students are denied the opportunity to develop their techniques or to gain experience in using acupuncture on human subjects. Most other health related professions allow students to practice on human subjects under direct supervision or controlled circumstances prior to licensure. Similar provision should be made for acupuncture students in the statute.

Regulatory Operations

Our review of the licensing operations of the board revealed serious problems. The board has instituted numerous requirements that have no clear relationship to competency; applicants are required to submit items which are irrelevant and unnecessary, training requirements are vague, there are deficiencies in the board's examinations, and finally, the board has not always acted in the public interest.

Irrelevant requirements. In addition to educational requirements, the law requires applicants to provide proof that they are residents of the State and are of good moral character. Residency requirements have been held by the courts to be unconstitutional. Letters attesting to good moral character have little relevance to competency and fail to provide assurance of this as the department either ignores this requirement or files away the character references. Most boards have had their statutes and rules amended to delete these two requirements.

To the statutory requirements, the board has added the requirements by rule that applicants submit a doctor's report that they are free of any communicable disease, a blood test report for syphilis, and a chest X-ray for tuberculosis that are

7. Title 16, Department of Regulatory Agencies, Chapter 85, Rules Relating to Physicians, Chapter 453, Hawaii Revised Statutes, Subchapter 4.

dated not more than 30 days prior to the application. The board has also required aliens to submit alien registration cards although this requirement is neither in the statutes or its rules.

According to the Department of Health (DOH), the danger of transmitting syphilis is extremely low and the risk of transmitting tuberculosis is real, but independent of the use of acupuncture. The chief of the DOH's Epidemiology Branch comments, "In general, all health care workers should be aware of their increased risk of acquiring and transmitting various communicable diseases. Acupuncturists, therefore, should take the same precautions as other health care workers by practicing good surgical technique and taking any other steps to protect themselves and their patients."⁸

Other health care professionals are not required to present doctors' certificates verifying that they are free of tuberculosis or syphilis before they are licensed and it does not appear to be necessary to single out acupuncturists.

The examination process. There are numerous problems with the board's examination. The written examination is unreliable and of questionable validity. The oral-practical and clinical examinations are not completely standardized, anonymity of applicants is not protected, and there is no valid basis for the passing score.

The written examination. The written examination consists of 100 true-false or multiple choice questions on such subjects as the history of acupuncture, theory and related philosophy, clinical diagnosis, and hazards of acupuncture. There are complaints that the written test is too easy. Examiners say that many applicants who pass the written examination are subsequently unable to pass the oral-practical and clinical examinations. A review of the pass/fail rates from 1977 to 1982 shows that 92 percent of the applicants passed the written examination but only 57 percent of those who passed the written examination were able to pass the oral-practical examination.

A reliability test made of the examination by the Testing Branch of the Department of Commerce and Consumer Affairs (DCCA) found the test to be

8. Letter from Arthur P. Liang, M.D., M.P.H., Chief, Epidemiology Branch, Communicable Disease Division, Department of Health to Mr. Milton Migita, Office of the Legislative Auditor, November 7, 1983.

unreliable with a reliability score of only .5797. This means that the test does not yield consistent results. The majority of standardized tests have a reliability score of .90 to .95. The Department of Education recommends that no purchases be made of tests with reliability scores of less than .80.

The written test contains many questions that appear to have little relevance to establishing competency in acupuncture. For example, one question asks when interest was developed in acupuncture in the United States. Another defect is that there is only one examination. Since there is no restriction on the number of times that any applicant can take the examination, applicants can pass the examination simply by becoming familiar with it.

Oral-practical and clinical examinations. Applicants who have passed the written examination are allowed to proceed to Part II, the oral-practical examination on inanimate objects before taking Part III, the clinical examination on a human subject.

The DCCA has encouraged all boards to conduct their practical examinations with maximum anonymity and to increase the objectivity of the practical examinations because of a suit brought against the State's Board of Dental Examiners in 1976. The suit alleged bias and discrimination in testing. It was settled when the State agreed to pay damages and to modify significantly the dental practical examination.

In the case of acupuncture examinations, we found insufficient efforts being made to protect the anonymity of applicants. Board members review and decide on the eligibility of applicants for the examination. During this review, board members see a passport photograph of each applicant and learn about their backgrounds. Even though applicants are identified by number during the examination, the examiners (who are also board members) are already familiar with the applicants.

The board has also allowed a board member who operates an acupuncture school to be present during the practical and clinical examinations of some of his students. This board member even served as the examiner for two of the applicants. Even though the two applicants were not his students, this appears to be a conflict of interest and makes the objectivity of scoring suspect.

During the oral-practical and the clinical examinations, examiners ask a series of standardized questions. However, examiners introduce subjectivity by asking

additional questions which are not on the examination form. In addition, there are no written guidelines on how answers should be scored and no calibration sessions have been held for the examiners. We found wide variations in the scores applicants receive from different examiners. One examiner would fail an applicant while another would give the applicant an almost perfect score. Neither is grading done independently. We also observed that examiners compared notes with each other before completing the grading.

Passing score. The passing score for each part of the examination is 70 percent. Applicants must pass each part of the test before they can proceed to the next. All of the board members said in interviews that they do not know the basis for setting the score at 70 percent. There is no evidence that this score has any significance in establishing a minimum level of competency for those who pass.

At the same time, board members say that they feel the passing score is too low and should be raised. In December 1980, and again in August 1983, the board moved to raise the passing score to 75 percent. This issue is still pending as the score is set at 70 percent in the rules and a public hearing must be held to make the change. Since there is no basis for the score, raising the score would merely result in restricting entry into the occupation without any assurance that those who pass are any more competent.

Instead of raising the passing score, the board and the department should devote its attention to developing more valid and reliable written examinations as well as more objective practical and clinical examinations. Steps should be taken to ensure that examinations are administered and graded in an objective, uniform, and fair manner.

Discretionary powers of the board. The board has given itself broad discretionary powers in the licensing process that could easily be abused. The rules allow the board to ask for additional information or interviews with applicants at several points in the licensing process without specifying exactly what the board is looking for and how the information is to be used. These discretionary powers are authorized by the following rules:

“Sufficiency of documents. . . . The board may request further proof of qualification and may also require a personal interview with the applicant to establish the applicant’s qualification.” Section 16-72-26.

. . . . “*Oral examination and practical examination (part II)* The part II examination shall test the applicant’s knowledge and ability in: Other matters as the board may deem appropriate and necessary.” Section 16-72-38(8).

. . . . “*Clinical demonstration (part III)* The following subject areas may be included in the clinical examination: Other subject areas as the board may deem appropriate and necessary.” Section 16-72-39(11).

. . . . “*Oral interview after examinations.* After a candidate has taken the three parts of the examination, the board, if it deems necessary and appropriate, may conduct a special interview with the candidate to make a final determination as to the candidate’s qualifications.” Section 16-72-40.

These additional requirements are particularly disturbing as the board has no guidelines or procedures on how and when they are to be imposed. Board members have reported that applicants have been denied licensure on the basis of these additional requirements or interviews. The procedures are manifestly unfair as they are not applied uniformly or with objectivity and impartiality. Since it is not clear what these additional requirements are or the reasons for their use, they should be deleted.

The board has been self-serving. We find that some board members have participated openly in official actions in which they have a personal interest. The board has also failed to enforce the law and its own rules and have sought changes which would have the effect of restricting entry into the profession.

Conflicts of interest. The State’s code of ethics for public officers and employees prohibits employees or members of boards and commissions from taking official actions affecting directly any business or undertaking in which the employee or board member has a substantial financial interest.⁹

Some members appear to have violated the State’s code of ethics by making decisions that directly further their own personal interests. For example, a board member who operates an acupuncture school has also been actively involved in

9. Section 84-14, HRS.

reviewing applications, examining applicants, evaluating other acupuncture schools, and recommending changes to rules relating to school requirements and training.

Other board members have also taken action in matters in which they have personal interests. For example, one board member has made motions and voted in an action that involved an acupuncture association in which he is an officer.

Failure to enforce statute and rules. The board's rules on advertising prohibit licensees from advertising as "doctor" or appending the designation "Dr." to the licensee's name. The board has also been advised by the Department of the Attorney General (AG) that acupuncture practitioners may not refer to themselves as "Dr." or "physicians" as the term physician refers to medical doctors or those who have been specifically authorized by statute to call themselves physicians. Some board members have themselves circumvented these prohibitions.

In May 1982, a public board member brought to the board's attention that members of a local acupuncture association were using the designations "Dr." and "acupuncture physician" in advertisements in the yellow pages of the telephone directory. The matter was referred to the AG for an opinion on the legality of these usages.

The AG responded in December 1982 that acupuncturists are not entitled to call themselves Dr. or acupuncture physicians. However, the board has yet to take any action on these violations despite the urging of its executive secretary to carry out its responsibilities in enforcing the law. It turns out that the listing of acupuncturists under the category of "acupuncture physician" in the yellow pages was initiated by a board member when he was an officer of the local acupuncture association. Several members of the board are now advertising under this category of "acupuncture physician" even though they were cautioned by other board members that they should refrain from doing so while the issue remains unresolved.

In view of the board's lack of action, the executive secretary with the support of the chairman of the board, sent out a warning letter to those acupuncturists who advertised as "acupuncture physicians" that this is a violation of the law and that they should delete their listing before the deadline for the new directory. Among those to whom the letter was sent were three board members.

Restrictive and self-promoting actions. Many of the board's actions are directed towards restricting entry into the profession and protecting their

self-interests. For example, at two meetings in August 1983, the board voted to raise the passing score from 70 percent to 75 percent, to raise substantially the required amount of formal education and training as well as private tutorship, to limit the number of times applicants may take the examinations, to give examinations only in English, to propose amendments to the statute to permit the use of the title "acupuncture physician" and designations such as "certified acupuncturist," "Doctor of Chinese Medicine," and "Doctor of Oriental Medicine".

Most of these actions were subsequently reversed when the board was advised by DCCA that they were not justified and that the department could not support the board in these actions.

Some board members are quite open in acknowledging their concerns about nonacupuncturists encroaching on their practice, their fears for their livelihood, and their need to protect their interests through the board. One public member voiced his opinion that while the board's primary purpose should be protection of the public, the board gets embroiled in the survival needs of acupuncturists.

The department should take steps to insure that the self-interests and professional relationships of board members do not take precedence over its primary function of protecting public health and safety. DCCA should ask the State Ethics Commission for its assistance in reviewing board actions for conflict of interest and suggesting corrective measures. DCCA should also redirect the board towards its primary statutory duties such as developing valid standards for licensure and preparing and administering examinations, and issuing, suspending, and revoking licenses.

Recommendations

We recommend the following:

1. *Chapter 436D, HRS, be reenacted to continue the regulation of acupuncture. In reenacting the statute, consideration should be given to the following changes:*

requiring disclosure of the scope of practice of acupuncture to all patients and their informed consent to treatment;

- . *providing an exemption for students to allow them to practice on human subjects under the direct supervision of a licensed acupuncturist prior to licensure;*
- . *deleting the requirements for residency and good moral character.*

2. *The Board of Acupuncture amend its rules by deleting the requirements for a doctor's certificate that the applicant is free of communicable disease, a blood test report for syphilis and a chest X-ray for tuberculosis, and deleting its requirements for additional information or interviews.*

3. *The board and the Department of Commerce and Consumer Affairs take steps to improve the examination by doing the following:*

- . *developing new, more valid and reliable written examinations which are available in different sets so that applicants will not take the same test on re-examination;*
- . *developing new practical and clinical examinations that are objective and standardized;*
- . *providing written criteria for examiners and calibration sessions to provide training for examiners;*
- . *making sure that the passing score is validly based in minimum levels of competency;*
- . *taking steps to protect the anonymity of applicants from examiners;*
- . *prohibiting board members who know applicants from being present at examinations or serving as examiners.*

4. *The department assist the board to fulfill its statutory responsibilities to protect public health and safety and redirect its efforts toward improving and implementing standards for licensure and the issuance, suspension, and revocation of licenses. As part of this effort, the department should enlist the assistance of the State Ethics Commission to review the actions of the board and to suggest how conflicts of interest can be avoided.*

APPENDIX

RESPONSES OF AFFECTED AGENCIES

ATTACHMENT 1

THE OFFICE OF THE AUDITOR
STATE OF HAWAII
405 E. KING STREET, 8TH FLOOR
HONOLULU, HAWAII 96813

December 14, 1983

COMMENTS ON AGENCY RESPONSES

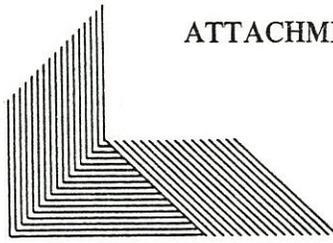
A preliminary draft of this Sunset Evaluation Report was transmitted on December 14, 1983 to the Board of Acupuncture and to the Department of Commerce and Consumer Affairs for their review and comments. A copy of the transmittal letter to the board is included as Attachment 1 of this Appendix. A similar letter was sent to the department. The responses from the board and the department are included as Attachments 2 and 3.

The board responded that it disagrees with many of the findings in the report. The board will discuss the recommendations at its meeting in January 1984 to evaluate and consolidate input from all its members for a full report on our recommendations to the Legislature.

The department commends the comprehensive and critical analysis contained in the report. It states that it has received an opinion from the State Ethics Commission on conflict of interest of board members that will resolve some of the questions raised in the report. The department does not agree that the residency requirement should be deleted from the statutes.

ATTACHMENT 1

THE OFFICE OF THE AUDITOR
STATE OF HAWAII
465 S. KING STREET, RM. 500
HONOLULU, HAWAII 96813



CLINTON T. TANIMURA
AUDITOR

December 14, 1983

COPY

John Char, D.D.S.
Chairman
Board of Acupuncture
Department of Commerce
and Consumer Affairs
State of Hawaii
Honolulu, Hawaii 96813

Dear Dr. Char:

Enclosed are 8 preliminary copies, numbered 4 through 11, of our *Sunset Evaluation Report, Acupuncture*. These copies are for review by you, other members of the board, and your executive secretary. This preliminary report has also been transmitted to Dr. Mary G. F. Bitterman, Director, Department of Commerce and Consumer Affairs.

The report contains our recommendations relating to the regulation of acupuncturists. If you have any comments on our recommendations, we would appreciate receiving them by January 13, 1984. Any comments we receive will be included as part of the final report which will be submitted to the Legislature.

Since the report is not in final form and changes may possibly be made to it, access to this report should be restricted solely to those officials whom you might wish to call upon to assist you in your response. We request that you exercise controls over access to the report and ensure that the report will not be reproduced. Should you require additional copies, please contact our office. Public release of the report will be made solely by our office and only after the report is published in its final form.

We appreciate the assistance and cooperation extended to us.

Sincerely,

Clinton T. Tanimura
Legislative Auditor

Enclosures

ATTACHMENT 2



GEORGE R. ARIYOSHI
GOVERNOR

DIRECTOR

DICK H. OKAJI
LICENSING ADMINISTRATOR

BOARD OF ACUPUNCTURE

STATE OF HAWAII
PROFESSIONAL & VOCATIONAL LICENSING DIVISION
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

P. O. BOX 3469
HONOLULU, HAWAII 96801

January 9, 1984

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OFFICE OF THE AUDITOR
STATE OF HAWAII

The Honorable Clinton T. Tanimura
Legislative Auditor
The Office of the Auditor
465 S. King Street, Room 500
Honolulu, Hawaii 96813

Dear Mr. Tanimura:

Thank you for the opportunity to comment on your sunset evaluation report on acupuncture practitioners. We found the report to be very controversial and there are many areas of disagreement in the summary of findings.

Since the report contains recommendations involving major issues, we will discuss them more thoroughly at our next meeting scheduled for January 23, 1984. Input from all members will be evaluated and consolidated and a full report on your recommendations will be presented to the 1984 Legislature.

Very truly yours,

John K. Char, D.D.S.
Chairman

ATTACHMENT 3



GEORGE R. ARIYOSHI
GOVERNOR

DONALD D. H. CHING
Acting Director
Commissioner of Secu

STATE OF HAWAII
OFFICE OF THE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
1010 RICHARDS STREET
P. O. BOX 541
HONOLULU, HAWAII 96809

RUSSEL S. NAGATA
DEPUTY DIRECTOR

January 13, 1984

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OFF. OF THE AUDITOR
STATE OF HAWAII

The Honorable Clinton T. Tanimura
Legislative Auditor
The Office of the Auditor
465 S. King Street, Room 500
Honolulu, Hawaii 96813

Dear Mr. Tanimura:

Thank you for the opportunity to comment on your sunset evaluation report on acupuncture practitioners.

Your office should be commended for a comprehensive and critical analysis of the Board of Acupuncture and the administration of the acupuncture law.

The Department of Commerce and Consumer Affairs has earlier expressed its concerns to the board on some of the areas discussed in your report -- the use of designation by acupuncture practitioners, examination practices and conflict of interests. The department just received an opinion from the State Ethics Commission on conflict of interests of board members which we believe will help resolve some of the questions raised in your report. The department will continue to assist and guide the board in carrying out its functions.

The department disagrees with your report on the residency requirement for licensure of acupuncture practitioners. The Federal District Court addressed the durational residence requirement and declared it unconstitutional in 1972. The acupuncture law, Chapter 454D, Hawaii Revised Statutes, enacted in 1973, provided for residence requirement which is distinguished from durational residence requirement. Prompted by the court ruling, one of the boards in 1975 removed the two-year residence requirement from the law but retained the residence requirement.

Very truly yours,

Donald D. H. Ching
Acting Director