

**SUNSET EVALUATION REPORT**  
**OSTEOPATHY**  
**Chapter 460, 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. 85-7**  
**January 1985**

## 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, or the Hawaii Regulatory Licensing Reform Act of 1977, 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 These programs are repealed unless they are specifically reestablished by the Legislature.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 osteopathic physicians and osteopathic physicians and surgeons under Chapter 460, 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 osteopathic physicians and osteopathic physicians and surgeons 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 It includes our recommendation on whether the program should be continued, modified, or repealed.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 Osteopathic Examiners, the Department of Commerce and Consumer Affairs, and other officials contacted during the course of our examination.

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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 Each year, six to eight licensing statutes are scheduled to be repealed unless specifically reenacted by the Legislature.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 460, Hawaii Revised Statutes.

#### **Scope of the Evaluation**

This report examines the history of the statute on the regulation of osteopathic physicians and osteopathic physicians and surgeons 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.<sup>1</sup> 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.<sup>2</sup> 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 460, Hawaii Revised Statutes, requires all individuals practicing as osteopathic physicians or osteopathic physicians and surgeons to be licensed by the State. This chapter provides background information on the occupation, its history, and the current status of regulation in Hawaii.

#### **Occupational Characteristics of Osteopathic Physicians**

Osteopathic physicians (D.O.s) diagnose and treat diseases and other conditions of the human body. They place special emphasis on the musculo-skeletal system of the body which includes the bones, muscles, ligaments, and nerves. One of the basic methods of treatment in osteopathy is the manipulation of the musculo-skeletal system with the hands. Osteopathic physicians also use surgery, drugs, and other standard methods of medical treatment. Most osteopathic physicians are "family doctors" who engage in general practice. These physicians usually see patients in their offices, make house calls, and treat patients in osteopathic, and other private and public hospitals.

In 1983, the American Osteopathic Association estimated that there were 21,510 D.O.s in the United States. Of these, most were engaged in office based practices. About 24 percent of all osteopathic physicians were certificated by various osteopathic specialty boards to practice in specialty areas such as: anesthesiology, dermatology, emergency medicine, internal medicine, neurology and psychiatry, nuclear medicine, obstetrics and gynecology, ophthalmology, pathology, pediatrics, radiology, and surgery.<sup>1</sup>

1. *American Osteopathic Association Yearbook and Directory of Osteopathic Physicians, 1983-84*, 75th ed., October 1983, pp. 430-431.

**Development of osteopathy in the United States.** Osteopathy originated through the theories and practices of Dr. Andrew Still who, in 1874, formulated the basic osteopathic concept that like a machine, the human body should function well if it is mechanically sound. Still's philosophy was rejected by the traditional medical practitioners of that time, and he was ostracized for his ideas.

The rejection of Still and the field of osteopathy in the early years was instrumental in setting the profession on a path separate from the traditional medical community. Osteopaths eventually established their own separate state and national organizations and their own colleges and hospitals.

In 1892, the first college of osteopathy was established in Kirksville, Missouri. In 1897, the osteopathic profession founded the American Association for the Advancement of Osteopathy, later renamed the American Osteopathic Association (AOA). By 1902, the AOA had adopted standards for the approval of osteopathic colleges. In 1936, the AOA conducted its first inspection and approval of an osteopathic hospital for the training of interns, and in 1947, the AOA approved the first osteopathic hospital for residency training.<sup>2</sup>

In recent years, osteopathic physicians have found greater acceptance by the medical profession. A 1955 and a 1961 American Medical Association (AMA) investigative committee looking into osteopathic educational institutions found that differences in treatment between medical and osteopathic professions had narrowed significantly.<sup>3</sup>

**Education of osteopathic physicians in the United States.** Like doctors of medicine (M.D.s), osteopathic physicians must have a considerable amount of technical and scientific knowledge. The educational training of osteopathic physicians is comparable to that required of M.D.s. A review of the curriculum of M.D. and osteopathic educational institutions by the AMA in 1955 found few

2. *American Osteopathic Association Yearbook*, pp. 445-446.

3. George A. La Marca, "Do D.O.s and M.D.s Have Equal Rights to Hospital Staff Privileges?" *Legal Aspects of Medical Practice*, August 1979, pp. 46-47.

differences.<sup>4</sup> The similarity of training was reconfirmed in 1961 when the AMA conducted another study and found even fewer differences.<sup>5</sup>

The minimum educational requirement for entry into an osteopathic educational institution is three years of college work, but in practice almost all osteopathic students have a baccalaureate degree. Applicants must have completed college level courses in chemistry, physics, biology, and English for entry into an osteopathic college.<sup>6</sup>

There are currently 15 osteopathic colleges in the United States.<sup>7</sup> The AOA accredits osteopathic colleges through its Bureau of Professional Education. All of the 15 osteopathic colleges have AOA approval.<sup>8</sup>

Osteopathic colleges require students to complete four years of professional study for a Doctorate of Osteopathy (D.O.). Courses include basic and clinical science subjects such as anatomy, physiology, biochemistry, pharmacology, pathology, microbiology, pediatrics, medicine, obstetrics and gynecology, surgery, psychiatry, neurology, radiology, physical diagnosis, preventive medicine, and other related subjects. The role of the musculo-skeletal system in maintaining health and preventing disease is emphasized. Structural factors in the disease process are stressed, and students are trained in osteopathic manipulative therapy as well as standard medical and surgical therapies. Each college has access to hospitals for students to have experience with patients and clinical practice.

After graduation, most D.O.s serve a 12-month rotating internship at one of 107 hospitals that have AOA approved postdoctoral training.<sup>9</sup> The AOA has established standards for internship/residency approval through its Committee on Postdoctoral Training (COPT). The Board of Trustees of the AOA has delegated to COPT the authority to conduct onsite inspections of residency training programs, to evaluate

4. Erwin A. Blackstone, "The AMA and the Osteopaths: A Study of the Power of Organized Medicine," *The Antitrust Bulletin*, v. 22, no. 2, Summer 1977, p. 408.

5. La Marca, *Legal Aspects of Medical Practice*, p. 47.

6. U.S. Department of Labor, *Occupational Outlook Handbook*, 1982-83 ed., April 1982, p. 152.

7. *American Osteopathic Association Yearbook*, p. 438.

8. *Ibid.*, p. 496.

9. *Ibid.*, p. 442, and U.S. Department of Labor, *Occupational Outlook Handbook*, p. 153.

inspection findings, and to recommend to the Board of Trustees whether these programs should be granted or denied approval.<sup>10</sup>

Those D.O.s who wish to specialize must have an additional two to five years of training beyond the approved internship or residency. The AOA has established a board to standardize the various specialties and fields of practice in the area of osteopathy. The Advisory Board for Osteopathic Specialists was organized in 1939 and, it not only establishes and maintains standards of specialization and the pattern of training for specialties, it also acts as a central point for the exchange of experiences between the various certifying boards.<sup>11</sup>

**Licensing.** All 50 states and the District of Columbia require osteopathic physicians to be licensed.<sup>12</sup> The professional composition of the licensing boards varies from state to state but generally fall into three categories: boards whose professional members are only M.D.s, boards whose professional members are only D.O.s, and boards whose professional members are a mixture of both M.D.s and D.O.s. Table 2.1 shows the frequency of the various board compositions.

Table 2.1  
M.D. and D.O. Composition of State Boards  
Licensing the Field of Osteopathy

<i>M.D.s Only</i>	<i>D.O.s Only</i>	<i>Combination of D.O.s and M.D.s</i>	<i>Total</i>
9* (18%)	14 (27%)	28 (55%)	51* (100%)

\*Includes the District of Columbia.

Source: *1983-84 Yearbook and Directory of Osteopathic Physicians*, 75th ed., October 1983.

The majority of the boards are composed of both D.O.s and M.D.s, about one-fourth of the boards are composed solely of D.O.s, with the least number of boards being those controlled solely by M.D.s.

10. *American Osteopathic Association Yearbook*, p. 521.

11. *Ibid.*, p. 579.

12. *Ibid.*, pp. 473-482.

All 50 states and the District of Columbia grant the same scope of practice to osteopaths as they do to M.D.s. Although D.O.s who graduated more than 25 years ago, with fewer standardized credentials, are sometimes subject to different standards of eligibility.

Generally, a license can be obtained in one of three ways: (1) through an examination administered by the state board, (2) acceptance of a certificate issued by the National Board of Examiners for Osteopathic Physicians and Surgeons (NBEOPS), and (3) by reciprocity.

Licensing through examination is based either on an examination prepared by the state board or on the Federation Licensing Examination (FLEX). The FLEX is an objective, multiple-choice, comprehensive examination designed to test knowledge and ability in the basic medical sciences, clinical sciences, and competency in patient management. The FLEX is also used by all states in licensing M.D.s. In addition, individual states may require other osteopathic examinations.

Some states accept a certificate issued by NBEOPS in lieu of their examination requirements. To obtain the certificate, candidates must first pass the NBEOPS examination. The examination consists of three parts: (1) Part I covers anatomy, physiology, biochemistry, pharmacology, pathology, microbiology, and osteopathic principles; (2) Part II covers surgery, obstetrics and gynecology, pediatrics, neurology and psychiatry, public health, medicine, osteopathic principles, and medical jurisprudence; and (3) Part III contains a written and clinical examination in general practice, surgery, and obstetrics and gynecology to assess the candidates' clinical competence.<sup>13</sup>

The three parts are taken in series after completing designated portions of osteopathic training. Candidates may take Part II only upon successful completion of Part I. They are eligible to take Part III only after completing Part II, graduating from an osteopathic college approved by the AOA, and completing at least six months of a one-year AOA approved internship.<sup>14</sup> The certificate is awarded after successful completion of the internship.

13. *Ibid.*, p. 486.

14. *Ibid.*

As of 1983, 39 states and the District of Columbia accept the FLEX, and 47 states and the District of Columbia accept the NBEOPS certificate.<sup>15</sup>

An osteopath licensed in one state may be licensed in another state by reciprocity. However, reciprocity or endorsement of a license is not automatic. All licensing boards reserve the right to exercise discretion in evaluating the personal, professional, and moral qualifications of the candidate.

### **Legislative History**

Osteopathic physicians have been regulated in Hawaii since 1921. Act 14 that year authorized the State to “regulate the practice of osteopathic physicians and surgeons, to provide penalties for the violation of the Act and to repeal all laws and parts of laws in conflict therewith.” Act 14 provided for two separate licenses, one for osteopathic physicians and a separate license for osteopathic physicians and surgeons. The latter license authorized osteopathic physicians to perform major surgery.

The law established an osteopathic board of three licensed osteopathic physicians, educational standards, eligibility standards for examination, and grounds for refusal and revocation of licenses.

In 1947, Act 185 was passed to “strengthen and modernize the statutory provisions relating to the practice of osteopathy. . . .” The act included the following changes: (1) it established good moral character as a requirement for licensure; (2) it required a one-year internship from an AOA approved school plus one year under a qualified surgeon as an assistant for applicants wishing to obtain an osteopathic physician and surgeons license; (3) it required graduation from an “approved” college; and (4) it added abortion as a basis for revoking or refusing a license.<sup>16</sup>

In 1949, more grounds were added for refusing or revoking a license, including employing “cappers” or “steerers,” obtaining fees on the assurance that an incurable

15. *Ibid.*, pp. 473-482.

16. Act 185, SLH 1947.

disease can be cured, advertising medicine and therapy for regulation or reestablishment of menses, and being convicted of any felony or misdemeanor involving moral turpitude.<sup>17</sup>

Finally, in 1978, the number of board members was increased to five to allow for public representation on the board.

### **The Nature of Regulation in Hawaii**

Chapter 460 prohibits an individual from practicing as an osteopathic physician or an osteopathic physician and surgeon for pay or gratuity, without a license issued by the Board of Osteopathic Examiners.

The statute also prevents an individual from offering to practice, advertising, announcing, or using the letters "DR." or "D.O.," with the intent to imply qualifications, without first obtaining a valid license from the board.

**Board of Osteopathic Examiners.** The board is composed of five members. Three are either osteopathic physicians or osteopathic physicians and surgeons, and two are public members. Among the powers and duties of the board are the following: (1) to examine applicants for licensure as osteopathic physicians or osteopathic physicians and surgeons or, at its discretion, waive examination requirements if certain conditions are met; (2) to make, amend, or repeal all regulations relating to the enforcement of Chapter 460; (3) to construct, review, and initiate appropriate action on applications for licensure; (4) to conduct a board hearing on occasions specified by statute or regulation; and (5) to refuse, revoke, suspend, or reinstate a license.

**Licensing requirements.** Applicants must submit evidence that they are 18 years of age or older, of good moral character, and graduates of an osteopathic school or college approved by the AOA. Applicants must also designate on their applications whether they plan to practice as an osteopathic physician or as an osteopathic physician and surgeon.

17. Act 120, SLH 1949.

Individuals applying for licensure as osteopathic physicians and surgeons have to submit evidence to the board that they have served an internship of at least one year at a hospital approved by the AOA and the American College of Osteopathic Surgeons and that they have completed one year of assistantship under a qualified surgeon. The board can accept equivalencies for applicants who graduated prior to 1943.

A license can be obtained either through examination or by endorsement. The board's exam consists of a written and an oral-practical component. The written component has not been given since 1974. In lieu of its own written examination, the board normally accepts the successful completion of the FLEX or the NBEOPS certificate. In these cases, applicants must still pass the board's oral-practical examination.

A second means to licensure is by endorsement. This is open to individuals who are licensed in another country, state, territory, or province. Conditions for licensure by endorsement are that: (1) the applicant be of good moral character; (2) the applicant designate on the application the desire to be an osteopathic physician or osteopathic physician and surgeon; (3) the requirements for licensure in the country, state, territory, or province are deemed by the board to be practically equivalent to Hawaii licensure requirements; and (4) the applicant has practiced as an osteopathic physician for three years prior to application.

The board may also, at its discretion, issue a license without examination to an osteopathic physician who is a graduate of an approved osteopathic college and who has passed an examination for admission into the medical corps of one of the armed services or the public health service.

**License renewals.** Licensees must reregister biennially by paying a fee. Failure to pay the renewal fee when due results in automatic forfeiture of the license.

**Code of ethics.** The board has adopted the code of ethics of the AOA as printed in the 1970 association's directory.

**Refusal, suspension, or revocation of a license.** Licenses may be refused, suspended, or revoked by the board at any time for the following acts:

- (1) Procuring or aiding or abetting in procuring a criminal abortion;

- (2) Employing "cappers" or "steerers;"
- (3) Obtaining any fee on the assurance that an incurable disease can be permanently cured;
- (4) Willfully betraying a professional secret;
- (5) Making any untruthful and improbable statement in advertising one's practice or business under Chapter 460;
- (6) False, fraudulent, or deceptive advertising;
- (7) Advertising any medicine or therapy which claims that a women's menses can be regulated or reestablished;
- (8) Being habitually intemperate;
- (9) Habitual use of any habit-forming drug such as opium, morphine, heroin, or cocaine;
- (10) Procuring a license through fraud, misrepresentation, or deceit;
- (11) Professional misconduct, gross carelessness, and manifest incapacity in the practice of osteopathy.

When the board revokes or suspends a license, it must notify the licensee in writing of such action pursuant to Chapter 91, HRS. In such proceedings, the board may subpoena, administer oaths to, and examine witnesses on any matter relevant to the proceeding. Any person who willfully and knowingly makes a false statement, under oath, before the board, is guilty of perjury.

**Penalties.** Individuals may be charged with a misdemeanor for any of the following acts:

- (1) Practicing or attempting to practice osteopathy without a license;
- (2) Obtaining or attempting to obtain a license, a practice in the profession, money or anything of value by fraudulent misrepresentation;
- (3) Advertising, practicing, or attempting to practice under any name other than one's own;

(4) Making any willfully false oath whenever an oath is required by Chapter 460; and

(5) Violating Chapter 460.

**Other regulation of osteopathy.** Osteopaths must also comply with other statutes regulating physicians. In 1983, osteopathic physicians were included in Chapter 671, relating to medical torts. Osteopathic physicians are required to comply with (1) the Board of Medical Examiners' standards for informed consent, (2) the reporting and review requirements relating to medical tort claims, and (3) provisions relating to the review of claims by the medical claims conciliation panels.

Of particular importance are the provisions for the medical claims conciliation panel, since the change to Chapter 671 mandates that all medical tort claims against osteopathic physicians will now be heard by the panel. The purpose of the panel is to render findings and advisory opinions on liability and damages in medical malpractice claims.

## Chapter 3

### EVALUATION OF THE REGULATION OF OSTEOPATHY

This chapter contains our evaluation of the regulation of osteopathy under Chapter 460, Hawaii Revised Statutes. It includes our assessment of the regulation of the practice of osteopathy by the Board of Osteopathic Examiners and our recommendations on the continued regulation of osteopathic physicians.

#### Summary of Findings

We find as follows:

1. The practice of osteopathic medicine does present a clear and significant potential for harm to the public's health, safety, and welfare, and therefore, licensing of osteopathic physicians should be continued. However, a separate board for regulating osteopathic physicians is not necessary.
2. The licensing standards are out of date and do not reflect the development of osteopathy as a system of medicine.
3. The board's oral-practical examination has some troubling deficiencies, and our assessment is that the examination is not necessary.
4. There are problems in the board's review of applications, especially the inadequate procedures for checking on the disciplinary history of applicants.
5. Statutes relating to disciplinary action are inadequate and have impeded the board's ability to act efficiently and effectively in protecting the public.
6. Osteopathic physician's assistants are not currently covered by the medical practice act and require regulation.

## Need for Regulation

**Potential harm.** The practice of osteopathic medicine presents a clear and significant potential for harm to the public's health, safety, and welfare. Osteopathic physicians (D.O.s), like other physicians (M.D.s), have unlimited rights to practice medicine and surgery, and the dangers posed to the public by incompetent or unethical practitioners of both systems of medicine are the same. Therefore, osteopathic physicians must be regulated for the same reasons that the State licenses M.D.s.

In our 1984 evaluation of the regulation of medicine and surgery, we explained the need for regulating physicians as follows:

"The practice of medicine by physicians poses a considerable danger to the health, safety, and welfare of the public. Medicine is a highly complex and technical field of knowledge that deals with profound issues of life and death. Consumers are at a disadvantage in choosing and relying on physicians. They often lack sufficient knowledge to make judgments about the competence of physicians or to assess the quality of care provided by them. In medical emergencies, consumers rarely have the luxury of choosing who will attend to their immediate medical needs. For these reasons, the State must intervene to ensure that physicians are qualified to enter medical practice and that they are competent in the performance of their medical duties."<sup>1</sup>

Moreover, we noted that:

"Physicians diagnose and treat a variety of routine and serious medical conditions. Incompetent diagnosis or treatment may result in loss of life, permanent disability, or temporary disability. It may also result in substantial emotional distress and financial loss to patients and their families."<sup>2</sup>

Licensing of the osteopathic profession must be maintained to enable the State to establish minimum standards of competency for entry into osteopathic medical practice and to monitor the ongoing quality of care provided by osteopathic

1. State of Hawaii, Legislative Auditor, *Sunset Evaluation Report, Medicine and Surgery, Chapter 453, Hawaii Revised Statutes*, Report No. 84-5, January 1984, p. 26.

2. *Ibid.*

physicians. Currently, all states require osteopathic physicians to be licensed in order to practice.<sup>3</sup>

**Separate osteopathic licensing board.** Although licensing should be continued, a separate board for regulating osteopathic physicians is not warranted.

The primary functions of the Board of Osteopathic Examiners are to promulgate rules, review applications for licensure, prepare and administer examinations, issue licenses, and make decisions on disciplinary action. The preparation and administration of examinations require some expertise in osteopathy. However, the state written examination has traditionally been prepared by the National Board of Examiners for Osteopathic Physicians and Surgeons (NBEOPS), not the board. Furthermore, as will be shown later in this report, the oral-practical examination, which is prepared and administered by the board, is unnecessary.

In addition, the amount of regulatory activity generated by osteopathy is minimal. Although there are about 250 osteopathic physicians with Hawaii licenses, only 30 to 50 actually practice in the State. The Board of Osteopathic Examiners averages three applicants per meeting or about 18 applicants per year. There are also only two to three complaints against board licensees each year.

For these reasons, there is little justification for a separate Board of Osteopathic Examiners. It would be more appropriate for osteopathic physicians to be regulated by a reconstituted Board of Medical Examiners, composed of its present members plus at least one osteopathic physician.

There are 28 jurisdictions with similar composite-type medical boards.<sup>4</sup>

In addition to being more efficient administratively, a composite board should result in more effective regulation by coordinating regulatory operations and making timely modifications to the osteopathic practice act.

The medical practice act has evolved over the years to keep pace with changes in the profession. In comparison, the osteopathic practice act has remained static

3. *American Osteopathic Association Yearbook and Director of Osteopathic Physicians, 1983-84, 75th ed., October 1983, pp. 473-482.*

4. *Ibid.*

and is out of date. There are unwarranted differences between the two statutes in such areas as the minimum requirements for licensure and grounds for disciplinary action. Since the two professions are similar and have the same practice rights, the licensing standards of these groups should be consistent with one another.

**Definition of osteopathy.** Among the changes needed in improving Chapter 460 is the addition of a definition for osteopathy. Chapter 460 does not have a definition of the practice of osteopathy, but Section 460-8 does describe some of the rights accorded licensees. These rights include, but are not limited to, practicing obstetrics and surgery (only minor surgery in the case of osteopathic physicians) and administering anesthetics, antiseptics, germicides, parasiticides, biologicals, narcotics, and antidotes.

In comparison, Chapter 453, HRS, the medical practice act, contains a definition for the practice of medicine which provides that "the practice of medicine includes the use of drugs and medicines, water, electricity, hypnotism, or any means or method, or any agent, either tangible or intangible, for the treatment of disease in the human subject."<sup>5</sup> Each licensed M.D. is authorized to practice medicine within the scope of this definition.

According to the Department of Commerce and Consumer Affairs (DCCA) staff, the lack of a definition for the practice of osteopathy has hindered the department's ability to act in cases of unlicensed activity relating to this profession.<sup>6</sup> The Legislature should consider adding a separate definition for the practice of osteopathy in Chapter 460 which is the same as the definition for the practice of medicine.

### **The Licensing Program**

**Licensing standards.** Studies conducted by the American Medical Association have found that the education and training of osteopathic physicians are comparable to the education and training required of M.D.s. Students applying to osteopathic medical school must complete at least three years of undergraduate education, and

5. Section 453-1, HRS.

6. Memorandum from Alan T. Shimabukuro, legal staff, to Calvin Kimura, Supervising Investigator, Regulated Industries Complaints Office, Department of Commerce and Consumer Affairs, October 11, 1984.

most applicants have baccalaureate degrees. Osteopathic medical school consists of another four years of training which encompasses the basic medical sciences, such as anatomy and physiology, and clinical sciences, such as medicine and surgery.<sup>7</sup> Upon graduation, most D.O.s serve a 12-month rotating internship in a hospital that has been approved for postdoctoral training by the American Osteopathic Association (AOA).<sup>8</sup>

Although the education and training of D.O.s are equivalent to the education and training followed by M.D.s, the State's licensing standards for osteopathy do not reflect the similarities between the two professions. Standards for osteopathy are different from those established for medicine and surgery without cause. These standards are out of date, and they do not reflect changes that have taken place in the osteopathy profession over the years. Table 3.1 summarizes the differences between the licensing by examination requirements for D.O.s and M.D.s.

Among the differences in licensing standards are the following:

1. Two kinds of licenses are issued for osteopathy, one for an "osteopathic physician," and the other for an "osteopathic physician and surgeon." Only one type of license is issued for M.D.s.
2. Applicants for a license as an "osteopathic physician and surgeon" must have one year of internship and another year as an assistant to a qualified osteopathic surgeon. M.D.s are only required to have one year of postdoctoral training.
3. Applicants for an osteopathic license must meet age and good moral character requirements and pass an oral-practical examination. There are no similar requirements for M.D.s.
4. The statutes do not authorize the board to exempt applicants who have passed the Federation Licensing Examination (FLEX) from the state examination requirement. Such an exemption is available for M.D.s.

7. *American Osteopathic Association Yearbook*, p. 496.

8. U.S. Department of Labor, *Occupational Outlook Handbook*, 1982-83 ed., April 1982, p. 153.

Table 3.1

Comparison of Licensing Requirements for  
Osteopathy and Medicine and Surgery

	<i>Chapter 460, HRS</i>		<i>Chapter 453, HRS</i>
	<i>Osteopathic Physician</i>	<i>Osteopathic Physician and Surgeon</i>	<i>Medicine and Surgery</i>
<b>Scope of practice</b>	Unlimited except for major surgery.	Unlimited.	Unlimited.
<b>Qualifications for licensure</b>	Graduate of an osteopathic school or college approved by the American Osteopathic Association.	Graduate of an osteopathic school or college approved by the American Osteopathic Association.	Graduate of a medical school approved by the Council on Medical Education and Hospitals of the American Medical Association; or if a graduate of a foreign medical school, have at least two years of residency in an approved hospital and a national certificate of the Educational Commission for Foreign Medical Graduates.
	Satisfactory scores on the state written examination and the oral-practical examination;* or board may accept the examination of the National Board of Examiners for Osteopathic Physicians and Surgeons in lieu of its own examination.	Satisfactory scores on the state written examination and the oral-practical examination;* or board may accept the examination of the National Board of Examiners for Osteopathic Physicians and Surgeons in lieu of its own examination.	Diplomates of the National Board of Medical Examiners or those passing the Federation Licensing Examination with satisfactory scores and who fulfill all other requirements shall be licensed without necessity of further examination.
	Eighteen years of age or older.	Eighteen years of age or older.	—
	Good moral character.	Good moral character.	—
		Served an internship of at least one year in an approved hospital.	Served a residency of at least one year in an approved hospital or program.
		Certified evidence that the applicant has served at least one year as an assistant to a qualified surgeon or surgeons.	
<b>Discretionary powers of the board</b>	Board may issue a license without examination to an osteopathic physician who is a graduate of an approved osteopathic college and who has passed an examination for admission into the medical corps of the U.S. Army, Navy, or Public Health Service.	Board may issue a license without examination to an osteopathic physician who is a graduate of an approved osteopathic college and who has passed an examination for admission into the medical corps of the U.S. Army, Navy, or Public Health Service.	Demonstrates competence and professional knowledge.
			Board may require letters of evaluation, professional evaluation forms, and interviews with physicians associated with the applicant during the applicant's training or practice.

\*Oral-practical required under the rules of the Board of Osteopathic Examiners, Section 16-93-12.

*Problems with two levels of licensing.* In accordance with Hawaii statutes, the board issues licenses for individuals to practice as an “osteopathic physician” or as an “osteopathic physician and surgeon.” Only individuals holding the latter license are authorized to perform major surgery.

The two levels of osteopathic practice were established by the original licensing statute in 1921 when the profession was in its early stages. Although the precise reason for establishing two categories of osteopathic licenses in Hawaii is unclear, the statutory distinction is inappropriate today and should not be continued.

Surgery is now a specialty field. To be certified by the American Osteopathic Board of Surgery, an applicant must graduate from an approved osteopathic college, serve at least one year in a hospital approved for intern training, and complete at least three to four years of formal training in surgery or a surgical specialty, among other requirements.<sup>9</sup> The State’s requirement of one year of internship and one year of assistantship under a qualified surgeon does not correspond with current certification requirements.

In specifically authorizing D.O.s with “osteopathic physician and surgeon” licenses to perform major surgery, the State is licensing a specialty field. This is inconsistent with licensing practices for M.D.s in Hawaii. All M.D.s receive a medicine and surgery license, whether they perform major surgery or not. Specialty fields such as surgery are certified by national specialty boards within the medical and osteopathic professions, not by state licensing boards.

Osteopathic physicians who have fulfilled training requirements similar to those required of M.D.s should receive one license—that of an osteopathic physician and surgeon. This would be consistent with licensing practices in most other states where D.O.s are issued only one type of license.<sup>10</sup>

*Experience requirements.* In establishing a single license as an osteopathic physician and surgeon, the one year of internship in an approved hospital should be retained but the requirement for one year of assistantship to a qualified osteopathic surgeon should be eliminated. The one year of assistantship added to the one year of

9. *American Osteopathic Association Yearbook*, p. 595.

10. *Ibid.*, pp. 473-482.

internship exceeds the experience requirement for M.D.s, and it is beyond what is generally required to enter the osteopathic profession. According to AOA, 39 states require only one year of internship for licensure of osteopathic physicians. Only Hawaii, Nebraska, and New Hampshire require two or more years of postdoctoral training.<sup>11</sup>

*Other inconsistencies.* In addition to eliminating the osteopathic physician license, the age and good moral character requirements should be deleted from Chapter 460. The age requirement is unnecessary because it is highly unlikely that an osteopathic college graduate would be younger than 18 years old. The good moral character requirement should be eliminated as well because a board determination of "bad" moral character would be highly debatable and present tenuous grounds for the denial of a licensure.

In addition, the statutes should be amended to exempt applicants passing FLEX from taking the state written examination. In practice, the board has done this. FLEX is an objective, multiple-choice examination which is designed to "test knowledge and ability in the basic medical sciences and the clinical sciences, and competence in patient management."<sup>12</sup> It is used by all states in licensing M.D.s, and 39 states use FLEX as their state board examination for osteopathic physicians.<sup>13</sup> It would be appropriate for Hawaii to recognize applicants passing FLEX as fulfilling the State's examination requirement for licensing D.O.s.

*Oral-practical examination.* According to the board's rules, applicants must pass oral and practical examinations on osteopathic medical concepts and manipulation in order to qualify for licensure. In practice, the board administers a single oral-practical examination to all applicants.

The board has developed a new two-page oral-practical examination guide which outlines six areas of practice from which test questions are drawn and five categories in which applicants' responses are evaluated. Each applicant is given two problems to demonstrate on a subject. The examination generally lasts from 15 to 30 minutes and is administered every other month at regular meetings of the board.

11. *Ibid.*

12. *Ibid.*, p. 486.

13. *Ibid.*, pp. 473-482.

The following sections will discuss some troubling deficiencies in the board's oral-practical examination and the reasons why the examination is not necessary.

*Examination development.* The department expressed concern about the validity of the board's oral-practical examination in 1982 and again in 1983.<sup>14</sup> This prompted the board to construct a new oral-practical examination in 1984. According to board members, questions for the new examination were obtained by the osteopathic physicians on the board from a variety of professional resources.

In our 1982 evaluation of the department's professional and vocational licensing program, we outlined the steps that should be taken in constructing valid and reliable licensing examinations.<sup>15</sup> First among these steps is an analysis of the occupation to identify the critical elements that need to be tested. There is no evidence that the board attempted to formally identify critical job skills needed for safe and effective entry level practice. Without such an analysis, there is no assurance that the examination is fair and accurately reflects general osteopathic physician practices at the entry level.

*Examination administration.* The oral-practical examination is administered and graded solely by the three osteopathic physicians on the board. In the past, public members were also allowed to ask questions.

The examination is administered in an informal manner. Although the board keeps records of which questions are asked of applicants, there are no answer keys to the problems to evaluate the applicant's response. In addition, the examination is not tape-recorded, which poses a potential problem if there is a complaint about the examination from an applicant who fails.

Moreover, the board has not developed guidelines to determine when examiners should be disqualified from participation in the oral-practical examination. Because of the small number of osteopathic physicians in Hawaii, board members are more likely to know and be affected by new applicants. Therefore, standards and procedures must be established to prevent unfair treatment or conflict of interest in licensing practitioners of this profession.

14. Minutes of the Board of Osteopathic Examiners, May 20, 1982; and Minutes of the Board of Osteopathic Examiners, August 11, 1983.

15. State of Hawaii, Legislative Auditor, *Evaluation of the Professional and Vocational Licensing Program of the Department of Regulatory Agencies*, Report No. 82-1, January 1982, p. 38.

*Need for oral-practical examination.* The actual need for a state oral-practical examination is questionable. The purpose of the examination is to test knowledge of osteopathic manipulative concepts and competency in osteopathic manipulative techniques.<sup>16</sup> However, the potential for harm to patients from osteopathic manipulation appears to be limited. We can find no documented evidence of injury to patients in Hawaii due to osteopathic manipulation.

Moreover, board licensing records dating back to 1977 indicate that no one applying for licensure by examination between 1977 and November 1984 failed to pass the oral-practical examination. The current requirements for a D.O. degree and one year internship in an AOA-approved hospital adequately protect the public from harm in the performance of osteopathic manipulation. Therefore, the board's rules should be amended to delete the requirements for oral and practical examinations. This will conform with standards set by more than 40 states that do not require an oral-practical examination for licensing osteopathic physicians.<sup>17</sup>

**Licensing by endorsement.** There are currently two ways to obtain a D.O. license in Hawaii. The first is by examination, where applicants take the state oral-practical examination, in addition to fulfilling all other board requirements. The second route is by endorsement. The board is authorized to grant a license without examination if an applicant has a license in another country, state, territory or province, and if the applicant meets certain other requirements. One of these requirements is that the applicant must have practiced as an osteopathic physician for three years prior to the date of the application.

The three-year experience requirement is overly restrictive for establishing entry-level competency. This provision was written into the licensing statute in 1921 when national competency based tests were not available. It may have been a useful criterion for determining competency to practice at that time. Today, other standards such as the national board examination and internship are more appropriate. Moreover, it should be noted that the medical board does not have a similar requirement for licensing M.D.s.

16. Board of Osteopathic Examiners, *Oral/Practical Examination*, March 23, 1984.

17. *American Osteopathic Association Yearbook*, pp. 473-482.

**Applications administration.** Two key problems in the board's applications process are the board's confusion over licensing requirements and the lack of adequate procedures to check on the disciplinary history of applicants.

*Confusion relating to licensing requirements.* Interviews with board members indicate some confusion over specific board licensing requirements. For example, some board members believed that an internship is required for all applicants. This is not true for applicants seeking an osteopathic physician license.

Board members also have different ideas about what parts of the national board examination are required. The licensing statutes allow the NBEOPS certificate to be substituted for the state written examination. In such cases, the applicant must submit a certificate from the national board. In order to obtain a certificate, however, an osteopathic physician must pass all three parts of the national board examination. One applicant was almost allowed to receive a license after submitting verification of completing only Parts I and II because the board believed Part III was not required.

This confusion over specific licensing requirements is of concern because it can lead to the inconsistent and erroneous application of board "standards." Should the board be continued, it must study its statutes to establish clear policies in its regulations to guide board actions, especially in reviewing applications.

*Procedures to check on disciplinary history of applicants.* Applicants for licenses must report to the board whether any disciplinary action has been taken against their licenses in other states. In addition, applicants who apply for a license by endorsement must send a form to the state board where they were originally licensed to verify both state examination scores and the disciplinary history of the applicant in that state.

The board also uses its certificate of recommendation form to obtain "clues" as to whether applicants may possibly be unethical or incompetent to practice. The certificate of recommendation replaced the board's certificate of moral character in late 1984 and is essentially the same as the old moral character form. The certificate is filled out by persons acquainted with the applicant and asks questions such as, "(t)o your knowledge, has there ever been any question of his mental or physical fitness to practice osteopathic medicine/surgery?" If a recommendation is suspicious, the board then contacts the other state boards for further information.

We find the board's current procedures for checking on the disciplinary history of applicants to be inadequate and haphazard. The board does not have a systematic and comprehensive method of checking the disciplinary history of all applicants. It asks for verification from other state boards only if an applicant took a state examination or if a certificate of recommendation looks suspicious. A sampling of board licensing files indicates that no verification of disciplinary information was obtained by the board, even in cases where applicants had between two to five licenses from other states.

At its November 8, 1984 meeting, the board recognized this problem and voted to require that disciplinary information be obtained from each state in which an applicant is licensed, prior to issuing a Hawaii license. In addition to its new requirement, the board should also initiate a study of procedures and resources used in other states to obtain disciplinary as well as criminal information regarding applicants for osteopathic licenses. Improving procedures for reviewing applications is crucial for protecting the public from those osteopathic physicians who have already shown themselves to be unethical or incompetent.

### **Enforcement Program**

The State's ability to protect the public from incompetent and unethical osteopathic physicians depends in large part upon an effective and efficient enforcement program. However, statutes relating to disciplinary action and information reporting requirements are inadequate, and in some cases, this had impeded efficient and effective action by the State in protecting the public.

**Disciplinary action.** Section 460-12, HRS, sets forth the grounds for disciplinary action against licensed osteopaths. The bulk of the provisions were adopted in 1921 and 1949. Through the years, there has been little revision to this section. In comparison, the medical practice act has evolved and improved its statutes in this area. Table 3.2 compares the grounds for disciplinary actions contained in Chapter 453 on medicine and surgery and Chapter 460.

Both chapters have provisions relating to criminal abortions, employment of persons to solicit patients, advertising violations, drug and alcohol use, fraudulent procurement of a license, and professional misconduct. However, Chapter 453 also

Table 3.2

Comparison of the Grounds for Disciplinary Action  
Between the Medical and Osteopathic Practice Acts  
Sections 453–8 and 460–12, Hawaii Revised Statutes

<i>Medical Practice Act Chapter 453, HRS</i>	<i>Osteopathic Practice Act Chapter 460, HRS</i>
<p>Section 453–8. Revocation, limitation or suspension of licenses. License to practice . . . may be revoked, limited, or suspended by the board . . . for any one or more of the following acts or conditions:</p>	<p>Section 460–12. Refusal and revocation of license. The board may refuse to issue a license, or may suspend or revoke any license at anytime . . . upon one or more of the following grounds:</p>
<p>Procuring, or aiding or abetting in procuring, a criminal abortion;</p>	<p>Procuring or aiding or abetting in procuring a criminal abortion;</p>
<p>Employing any person to solicit patients for one's self;</p>	<p>Employing what are popularly known as "cappers" or "steerers";</p>
<p>Engaging in false, fraudulent, or deceptive advertising, including, but not limited to:</p>	<p>False, fraudulent, or deceptive advertising;</p>
<ul style="list-style-type: none"> <li>. Assuring a permanent cure for an incurable disease;</li> </ul>	<ul style="list-style-type: none"> <li>. Obtaining any fee on the assurance that a manifestly incurable disease can be permanently cured;</li> </ul>
<ul style="list-style-type: none"> <li>. Making any untruthful and improbable statement in advertising one's medical or surgical practice or business;</li> </ul>	<ul style="list-style-type: none"> <li>. Making any untruthful and improbably statement in advertising one's practice or business under this chapter;</li> </ul>
<ul style="list-style-type: none"> <li>. Making excessive claims of expertise in one or more medical specialty fields;</li> </ul>	<ul style="list-style-type: none"> <li>. Advertising any medicine or any means whereby the monthly periods of women can be regulated or the menses reestablished if suppressed;</li> </ul>
<p>Being habituated to the excessive use of drugs or alcohol; or being addicted to, dependent on, or a habitual user of a narcotic, barbiturate, amphetamine, hallucinogen, or other drug having similar effects;</p>	<p>(Habitual use of drugs or alcohol)</p> <ul style="list-style-type: none"> <li>. Habitual use of any habit-forming drug such as opium, or any of its derivatives, morphine, heroin, cocaine, or any other habit-forming drug;</li> </ul>
<p>Procuring a license through fraud, misrepresentation, or deceit or knowingly permitting an unlicensed person to perform activities requiring a license;</p>	<p>Procuring a license through fraud, misrepresentation, or deceit;</p>
<p>Professional misconduct or gross carelessness or manifest incapacity in the practice of medicine or surgery;</p>	<p>Professional misconduct, gross carelessness and manifest incapacity in the practice of osteopathy;</p>
<p>Practicing medicine while the ability to practice is impaired by alcohol, drugs, physical disability, or mental instability;</p>	<p>Being habitually intemperate;</p>
<p>Negligence or incompetence, including, but not limited to, the consistent use of medical service which is inappropriate or unnecessary;</p>	<p>Procuring a license through fraud, misrepresentation, or deceit;</p>
<p>Conduct or practice contrary to recognized standards of ethics of the medical profession as adopted by the Hawaii Medical Association or the American Medical Association;</p>	<p>Professional misconduct, gross carelessness and manifest incapacity in the practice of osteopathy;</p>
<p>Violation of the conditions or limitations upon which a limited or temporary license is issued;</p>	<p>Willfully betraying a professional secret.</p>
<p>Revocation, suspension, or other disciplinary action by another state of a license or certificate for reasons as provided in this section;</p>	
<p>Conviction, whether by nolo contendere or otherwise, of a penal offense substantially related to the qualifications, functions, or duties of a physician, notwithstanding any statutory provision to the contrary;</p>	
<p>Violation of Chapter 329, Uniform Controlled Substance Act, or any regulation promulgated thereunder.</p>	

NOTE: Statutory provisions rearranged for purpose of comparison.

provides seven other specific grounds for disciplinary action not mentioned in Chapter 460. These additional grounds include such things as practicing medicine while impaired, negligence or incompetence, and disciplinary action taken in another state.

In the absence of specific grounds, the State can still take action based on the professional misconduct provision. In many cases, however, having specific grounds delineated in the licensing statutes simplifies the State's case and facilitates more timely action.

Three substantive provisions in Chapter 453 should be included in the regulation of osteopathy. *First*, Section 453-8(13) provides that a violation of Chapter 329, Uniform Controlled Substance Act, or any regulation promulgated thereunder is grounds for board action against a license. The osteopathy statutes do not have a similar provision. In 1980, when a board licensee was convicted of violating Chapter 329, the State had to base its action against the physician on the "professional misconduct" provision in Chapter 460. For reasons outside of its control, the board had still not been able to act upon the physician's license by November 1984.<sup>18</sup> Perhaps more timely and effective action could have been taken if the board had a statutory provision such as Section 453-8(13).

*Second*, Chapter 453 contains a provision which allows board action on a Hawaii license if disciplinary action had been taken against the physician's license in another state. The osteopathy statute does not have a similar provision. This hinders timely action in cases where physicians having problems in another state reactivate their Hawaii licenses and continue to practice medicine here. Such a situation occurred recently, and it was not clear whether the board had the authority to prevent a physician from reactivating his Hawaii license, even though he had his license temporarily suspended in another state after pleading no contest to violations related to his practice.

18. This case was developed prior to the formulation of the Regulated Industries Complaints Office (RICO) and was originally with the Attorney General's (AG) Office. In 1983, the AG's office, through the Department of Health (DOH), gave the case to RICO. Arguing it was already heavily backlogged, RICO returned the case to DOH. There was additional shuffling back and forth of the case between departments, until the case ended up back at the AG's office. A hearing was finally held on the case on December 5, 1984, and the board should be able to act on the hearing officer's recommendation shortly thereafter.

*Third*, Section 453-8(12) allows action to be taken on a license upon "(c)onviction, whether by *nolo contendere* or otherwise, of a penal offense substantially related to the qualifications, functions, or duties of a physician.<sup>19</sup> [Emphasis added.]" Inclusion of such a provision in the osteopathy statute would enable the State to take action in a more timely manner in cases where a physician has been convicted of a crime related to his practice.

In addition, changes should be made to Chapter 460 to provide the board with more options for acting against licensees who pose a danger to the public. Currently, the osteopathic board can only refuse, suspend, or revoke a license. In contrast, the medical board can also limit a license, place a licensee on probation, and require further education, among other sanctions. The medical board can also temporarily suspend a license for up to 30 days without a hearing when necessary.<sup>20</sup> Similar authority in the osteopathy statute would provide the board with greater flexibility and enable it to act more promptly and fairly in carrying out its enforcement function.

While the foregoing discussion covers those additional provisions pertaining to discipline which should be included in an amended Chapter 460, there is one existing provision which should be deleted. Included among the grounds for denial, suspension, or revocation of a license in Section 460-12 is the act of "(w)ilfully betraying a professional secret." It is not at all clear what acts would be prohibited under this provision of long standing but of uncertain origin and intent. We note that the medical practice act contained a similar provision until 1982. In that year, Act 227 repealed the provision following a recommendation by the administration that the language was archaic. A similar deletion should be made in Chapter 460.

**Information reporting requirements.** In our 1984 evaluation of Chapter 453, the medical practice act, we noted that laws had been passed requiring various agencies and individuals to report information on cases involving medical malpractice and unprofessional conduct by licensed physicians to the Board of Medical Examiners. Many of these same requirements also apply to the practice of

19. According to the fifth edition of *Black's Law Dictionary*, a plea of "*nolo contendere*" is one "by which the defendant does not admit or deny the charges, though a fine or sentence may be imposed pursuant to it."

20. Section 453-8.2, HRS.

osteopathy, with some differences. Table 3.3 summarizes the information reporting requirement for physicians (M.D.s) and osteopathic physicians (D.O.s).

The reporting requirements for M.D.s and D.O.s were very similar until changes were made pursuant to Act 168, SLH 1984. The new law mandated, among other things, that all reports relating to medical malpractice and misconduct involving M.D.s now had to be sent to DCCA instead of the medical board. Except for changes made to Section 663-1.7, HRS, requiring hospital and other health care facilities to forward adverse peer review decisions to DCCA, the amendments made by this new law were not extended to include D.O.s.

Reporting requirements relating to narcotics convictions and medical claims conciliation panel decisions are the same for D.O.s and M.D.s except that reports relating to D.O.s are sent to the osteopathic board and reports relating to M.D.s are sent to DCCA. The receiving agencies for reports from insurance companies and self-insured physicians required under Section 671-5, HRS, differ for D.O.s and M.D.s in the same way. However, while the Insurance Commissioner must now forward entire reports to DCCA in cases involving M.D.s, the commissioner can still only send the *names* of D.O.s to the Board of Osteopathic Examiners.

Section 453-8.7, HRS, requires that court clerks, judges and uninsured physicians report to DCCA cases of death and personal injury caused by negligence, error, or omission in practice or the unauthorized rendering of service. This provision does not cover D.O.s, and a similar requirement is not included in Chapter 460.

The improvements made in the reporting requirements for M.D.s should be extended to D.O.s. The statutes should, therefore, be amended to make the reporting requirements uniform for both professions.

### **Regulation of Osteopathic Physician's Assistants**

Osteopathic physicians have used physician assistants in Hawaii to help them in their practice. However, physician's assistants working under osteopathic physicians are not regulated by the osteopathy statute, nor are they subject to the licensing requirements for physician's assistants set forth in Chapter 453, the

Table 3.3

Comparison of Information Reporting Requirements for Physicians (M.D.s) and Osteopathic Physicians (D.O.s)

Statute	Information Reporting Requirements	
	Physicians (M.D.s)	Osteopathic Physicians (D.O.s)
Section 329–44, HRS	Requires court clerks and judges to forward sentences and decisions to DCCA when any M.D. is convicted for violating Chapter 329, Uniform Controlled Substance Act.	Requirement is the same for D.O.s except sentences and decisions are forwarded to the Board of Osteopathic Examiners.
Section 453–( ), new, HRS	Requires DCCA to review all complaints received under 663–1.7 (adverse peer review decisions), 671–5 (insurance companies and self-insured physician reports), 671–15 (medical claims conciliation panel advisory decisions), 329–44 (narcotics convictions), and 453–8.7 (state court clerk/uninsured physician reporting of death or personal injury cases).	Not clear if this section covers osteopathic physicians.
Section 453–8.7, HRS	Requires court clerks, judges, uninsured M.D.s to report cases of death and personal injury caused by negligence, error, or omission in practice or the unauthorized rendering of service to DCCA.	Osteopathic physicians are not covered by this section and do not have a similar provision in their practice act.
Section 663–1.7, HRS	Requires hospitals and other health care facilities and professional organizations to forward adverse peer review decisions to DCCA.	Requirement is the same for osteopathic physicians.
Section 671–5, HRS	Requires self-insured M.D.s and their insurance companies to report that settlements have been reached in cases involving professional negligence, the rendering of professional services without informed consent, or an error or omission in practice which proximately causes death, injury, or other damage. Insurance Commissioner required to forward entire reports to DCCA.	Requirement is the same for self-insured osteopathic physicians and their insurance companies except Insurance Commissioner forwards only the name of the physician to the Board of Osteopathic Examiners.
Section 671–15, HRS	Requires Insurance Commissioner to mail copies of medical claims conciliation panel advisory decisions to DCCA.	Requirement is the same, except decisions are mailed to the Board of Osteopathic Examiners.

medical practice act. Consequently, there appears to be: (1) no provisions for any minimum standards of competency for physician's assistants working with osteopathic physicians; (2) no requirements for licensed osteopathic physicians to retain full professional and personal responsibility for the work of physician's assistants employed by them; and (3) no requirement that standards be established for the degree of supervision required for medical care rendered by physician's assistants. This unregulated practice of medicine can pose a danger to the public.

Since osteopathic physicians and M.D.s have the same unlimited practice rights, there should be comparable standards for the regulation of their respective assistants. According to the director of the AOA Office of Osteopathic Education, there are currently no training or certification programs for osteopathic physician's assistants in the United States. However, there are accredited programs for training physician's assistants of M.D.s. There is also a national certification program for these physician's assistants. In 1984, Act 168 authorized the Board of Medical Examiners to certify and regulate their use. These regulations should be extended to include any physician's assistants that might be employed by osteopathic physicians in Hawaii.

### *Recommendations*

*We recommend that:*

1. *Chapter 460, Hawaii Revised Statutes, be reenacted to provide for the continued regulation of osteopathic physicians. However, the statute should be amended to accomplish the following:*

- . abolishing the Board of Osteopathic Examiners and providing for the regulation of osteopathic physicians and surgeons by the Board of Medical Examiners.*
- . defining the practice of osteopathy.*
- . providing for a single license as an osteopathic physician and surgeon by eliminating the "osteopathic physician" license.*
- . eliminating the requirement for one year of assistantship to a qualified osteopathic surgeon.*

- . *eliminating the age and good moral character requirements.*
  - . *including a provision allowing for the acceptance of the results of the Federation Licensing Examination in lieu of the state written examination.*
  - . *eliminating the three-year experience requirement for a license by endorsement.*
  - . *eliminating “(w)ilfully betraying a professional secret” from the grounds for denial, suspension or revocation of a license.*
2. The board’s oral-practical examination be abolished.
  3. Chapter 453, HRS, be amended to provide for the following:
    - . *the representation of at least one osteopathic physician in the Board of Medical Examiners.*
    - . *the regulation of physician’s assistants employed by osteopathic physicians.*
  4. *The statutes relating to disciplinary action and information reporting requirements for M.D.s be extended to osteopathic physicians.*

## COMMENTS ON AGENCY RESPONSES

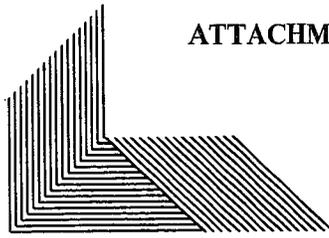
A preliminary draft of this Sunset Evaluation Report was transmitted on December 12, 1984, to the Board of Osteopathic Examiners and the Department of Commerce and Consumer Affairs for their review and comments. A copy of the transmittal letter to the board is included as Attachment 1 of this Appendix. 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 responds that it does not agree with some of the conclusions in the report. It says that it will evaluate and consolidate input from all members and other sources and present a complete response to the Legislature.

The Department of Commerce and Consumer Affairs is in general agreement with the observation and evaluation made in the report.

ATTACHMENT 1

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



CLINTON T. TANIMURA  
AUDITOR

December 12, 1984

*COPY*

Dr. Douglas Hagen, Chairperson  
Board of Osteopathic Examiners  
Department of Commerce and Consumer Affairs  
State of Hawaii  
Honolulu, Hawaii 96813

Dear Dr. Hagen:

Enclosed are five preliminary copies, numbered 4 through 8, of our *Sunset Evaluation Report, Osteopathy, Chapter 460, Hawaii Revised Statutes*. These copies are for review by you, other members of the board, and your executive secretary. This preliminary report has also been transmitted to Russel Nagata, Director, Department of Commerce and Consumer Affairs.

The report contains our recommendations relating to the regulation of osteopathy. If you have any comments on our recommendations, we would appreciate receiving them by January 11, 1985. 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, we request that you limit access to the report to those officials whom you wish to call upon for assistance in your response. Please do not reproduce the report. 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



RUSSEL S. NAGATA  
DIRECTOR

DICK H. OKAJI  
LICENSING ADMINISTRATOR

BOARD OF OSTEOPATHIC EXAMINERS

STATE OF HAWAII

PROFESSIONAL & VOCATIONAL LICENSING DIVISION

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

P. O. BOX 3469

HONOLULU, HAWAII 96801

January 11, 1985

RECEIVED

JAN 11 4 18 PM '85

OFF. OF THE AUDITOR  
STATE OF HAWAII

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

Dear Mr. Tanimura:

This is to acknowledge receipt of the Sunset Evaluation Report, Osteopathy, Chapter 460, Hawaii Revised Statutes.

The Board of Osteopathic Examiners does not agree with some of the conclusions of the report.

Unfortunately, a two-week suspense date during the holiday season did not allow sufficient time to prepare adequate comments. Input from all board members and other sources available to the board will be evaluated and consolidated, and comments on the conclusions of the Sunset Evaluation Report will be presented to the 1985 Legislature. We feel that it would be better to present a complete rather than a partial response.

Very truly yours,

*Douglas P. Hagen D.O.*  
Dr. Douglas P. Hagen, Chairman  
Board of Osteopathic Examiners

DPH:ia

ATTACHMENT 3



GEORGE R. ARIYOSHI  
GOVERNOR

RUSSEL S. NAGATA  
Director  
COMMISSIONER OF SECURITIES

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

ROBERT A. ALM  
DEPUTY DIRECTOR

January 9, 1985

RECEIVED

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STATE OF HAWAII

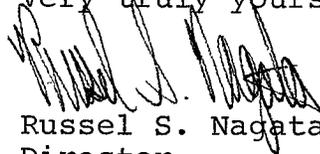
Mr. Clinton T. Tanimura  
Legislative Auditor  
Office of the Auditor  
State of Hawaii  
465 South King Street, Room 500  
Honolulu, HI 96813

Dear Mr. Tanimura:

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

The Department of Commerce and Consumer Affairs is in general agreement with the observation and evaluation you have made of the Board of Osteopathic Examiners. We wish to commend your staff for the thoroughness of the report.

Very truly yours,



Russel S. Nagata  
Director