

CALIFORNIA ACUPUNCTURE BOARD

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State of California
Department of Consumer Affairs
Arnold Schwarzenegger, Governor



October 8, 2004

Ms. Tara Dias
Consultant
Joint Committee on Boards,
Commissions, and Consumer Protection
1020 N Street, Room 521
Sacramento, CA 95814

RE: Board's Response to Additional Sunset Review Questions

Dear Ms. Dias:

This is in response to the Joint Committee's request that the Board address the additional sixteen questions raised by the Joint Committee on Boards, Commissions, and Consumer Protection, outlined in the Commission's letter dated September 21, 2004. The following is the Board's response:

1. What is the Board doing to resolve vacancy issues? Is the Governor planning to fulfill the appointment positions? If not, is the Board corresponding with the Governor's office to ensure that appointment positions on the Board are filled?

Boards Response: The Board has no authority over the functions of the Governor's Office, however the Board regularly provides the Governor's office with the status of Board members terms, impending vacancies and quorum needs. In addition, in an effort to keep the appointments and functions of the Board at a maximum, the Board has historically worked directly with all administrations evaluating and running security checks on possible new appointees. Three new appointments were made to the Board towards the end of Governor Davis' term, however, since the Acupuncture Board appointees are required to be confirmed by the Senate these appointments were held during the transition of the new administration and were withdrawn by Governor Schwarzenegger upon taking office. Since then the Board has again been working directly with the administration evaluating and running security and license checks on possible new appointments to the Board. In addition, the Board notified the new administration of the Department of Consumer Affairs, which has been working with the Governor's office to secure appointments, not only for the Acupuncture Board, but also for five other DCA boards affected by the lack of a quorum. It is the Board's understanding that the Governor's Office is working on getting board vacant positions filled.

2. If the Board isn't at full membership, are recommendations still made by the four committees? If the Board doesn't have a quorum (a majority), which appears to oftentimes be the case, are decisions still made?

Boards Response: Historically the Board never lacked a quorum until SB 1951 (Chapter 714, Statutes of 2002) amended the language in B&P Code section 4933(c) to define that "five members of the board shall constitute a quorum to conduct business". With the Board down to three members this is the first time the Board has ever experienced not having a quorum. The Executive Committee is the only functioning committee of the Board until a quorum is reestablished.

3. Is "unprofessional conduct" defined in regulations for acupuncturists?

Boards Response: Unprofessional conduct is not defined in regulations, but rather in statute. B&P Code Section 4955 defines a list of specified acts that constitutes unprofessional conduct, and acupuncturists 'Standards of Practice' are defined in regulations in CCR Section 1399.450 through 1399.456.

4. On page 5, which specific legislation effective in January 2003 strengthened the Board's enforcement ability for unprofessional conduct?

Boards Response: The Board presented enforcement legislative proposals in its September 2001 Sunset Review report for the Joint Committee's consideration. The Joint Committee accepted the amendments to B&P Code sections 4935, 4955, 4955.1, 4955.2 and 4960.2, which were included in SB 1951 (Chapter 714, Statutes of 2002).

5. The Governor is supposed to be appointing a Board member who is on the faculty of a California acupuncture school. This was a recommendation by the Joint Legislative Sunset Review Committee (JLSRC) in 2002 and still no appointment has been made to the Board. Why hasn't this occurred and is the Board in discussions with the Governor's office to fill this vacancy?

Boards Response: Three new appointments were made to the Board towards the end of Governor Davis' term in 2003. One of those appointees was designated as filling the professional/faculty member position. However, as stated in the Board's response to Question No. 1, the Acupuncture Board appointees are required to be confirmed by the Senate and the appointment was held during the transition of the new administration and were withdrawn by Governor Schwarzenegger upon taking office. It is the Board's understanding that the Governor's Office is working on getting the Board's vacant positions filled, including the professional/faculty member position.

6. What, if anything, does the Board do to be proactive in assuring that the Board has a constant quorum? What calls and or correspondence has the Board made with the Governor, the Senate Rules Committee, and the Assembly Speaker?

Boards Response: The Board has historically worked directly with each administration, assisting in the evaluation of, making recommendations to, and running security checks on possible new appointments to the Board. The Department and Governor's office has always welcomed this input and interaction from the Board, which is also essential to

ensure professional appointees in good standing. Once appointed the Board works with the Governor's office, Senate Rules and the newly appointed member to ensure all required documents are filed in a timely manner. Regardless that this was the first time the Board has ever experienced not having a quorum, the Board was a proactive participant to work with the appropriate authorities to move appointment recommendations through as soon as possible and in as timely a manner as possible in this political environment.

7. On page 16, the JLSRC recommended that the Board should be subject to professional reporting laws like other health care professionals. How did the Board determine that it was already meeting professional reporting laws? Did the JLSRC recommend something that was already being done? If not, how did the Board come to the conclusion that it "was meeting necessary professional reporting laws"? Please provide details.

Boards Response: This issue was part of the Departments and Joint Committees 2001 preliminary recommendations, however after further discussions during the hearings the Joint Committee determined that, though the Acupuncture Board is not specifically named in B&P Code section 800, the Board maintains a central file of the names of all licensees and disciplinary information. The boards within the Department utilize the Department's 'Consumer Affairs System (CAS)', which electronically tracks each licensees renewal data, continuing education compliance, duplicate licenses, clinic addresses, disciplinary information, etc. In addition, hard copy files are maintained in the Board's central file room on each licensee from the time of filing original application for examination. The public can also access 'license verification' on the Board's website, which provides current information on a licensee and the status of their license, address of record and disciplinary actions.

8. The JLSRC's 2002 recommendations suggested that further study of the profession by an independent consultant is needed to determine educational requirements and scope of practice. Section 4934.1 required the Little Hoover Commission (LHC) to report to the Legislature regarding this requirement by September 1, 2004. What is the status of the report and has the Board been corresponding and cooperating with the LHC to ensure the timely release of this report?

Boards Response: Throughout 2003-2004 the Board worked intimately and extensively with the Little Hoover Commission on the comprehensive analysis of the scope of practice for acupuncturists, along with educational standards, and the school approval and examination processes. In addition to being a participatory part of the public hearings and members of the Advisory Committee, the Board met independently with the Commission regarding these issues and provided extensive amounts of data and support documents throughout the two years. The Commission released its report to the Joint Committee, the Board and public Thursday, September 30, 2004.

9. Does the Board interpret that acupuncturists are authorized to "diagnose" based on Business and Professions Code Section 4926? On page 19, the report claims that "acupuncturists are primary health care professionals." Section 4926 is only "Legislative Intent." Is this the only authority the Board has construed as authorizing acupuncturists to be "Primary Health Care Professionals" who "provide initial health care services to a patient ... for initial diagnosis and treatment"? Please explain and clarify.

Boards Response: The Board feels it has adequately addressed this issue on Pages 18 and 19 of the Board’s 2004 Sunset Review Report. B&P Code sections 4927 and 4937, in conjunction with Legal Opinion 93-11, prepared by Board’s legal counsel in 1993, defines acupuncture and the wide range of modalities to treat most common disorders and diseases. The Board believes the current scope of practice for a practitioner of acupuncture and Oriental medicine is adequate. The legislative intent in B&P Code Section 4926 defines an acupuncturist as individuals practicing acupuncture subject to regulation and control as a primary health care profession. B&P Code Section 4927(d) defines acupuncture to mean “the stimulation of certain point or points on or near the surface of the body by the insertion of needles to prevent or modify the perception of pain or to normalize physiological functions, including pain control, for the treatment of certain diseases or dysfunctions of the body and includes the techniques of electroacupuncture, cupping and moxibustion.” B&P Code Section 4937 authorizes an acupuncturist to utilize Oriental medicine treatment modalities and procedures used to promote, maintain, and restore health; including the use of Oriental massage, acupressure, breathing techniques, exercise, heat, cold, magnets, nutrition, diet, herbs, plant, animal, and mineral products, and dietary supplements. Acupuncturists were included as primary treating physicians in the Workers Compensation system in 1989 and approved as a Qualified Medical Evaluator (QME)(Labor Code Section 3209.3(a)). Since the elimination of requiring a physician referral in 1979, an acupuncturist’s scope of practice has expanded to include diagnosis. Thus an acupuncturist is allowed to diagnose, prescribe and administer treatment in the practice of acupuncture and Oriental medicine.

Legal Opinion 93-11 found that the Legislature in repealing B&P Code Section 2155 (i.e., eliminating the need for a physician referral as a precondition for treatment by an acupuncturist) (Statutes of 1979, Chapter 488, effective January 1, 1980) authorized acupuncturists to diagnose a patient’s condition prior to providing any treatment. Thus, although an acupuncturist is authorized to diagnose this critical function it is not clearly stated in the law. Since 1980 acupuncturists have been authorized to diagnose within their current scope and in their daily practice. ‘Primary health care’ means a licensed health care provider who provides initial health care services to a patient and who, within the scope of their license, is responsible for initial diagnosis and treatment, health supervision, preventative health services, and referral to other health care providers when specialized care is indicated. As a primary health care professional an acupuncturist may provide comprehensive, routine and preventative treatments, that includes but is not limited to, TCM diagnosis, palliative, therapeutic and rehabilitative care. Amending Section 4937 would accurately reflect the current scope and practice. On a daily basis acupuncturists assess and diagnose patients in order to provide an effective and quality treatment plan.

This was recognized in 2002 by the Joint Sunset Review Committee and the Department of Consumer Affairs in the written comments reported in their final recommendations regarding Issue No. 1, relating to continuance of regulating the profession, wherein they stated, “Acupuncturists diagnose, administer treatment, and prescribe various treatments and herbs to promote patient health.” This is further recognized by the Little Hoover Commission in their September 2004 report recently released, wherein on Page ii of the Executive Summary, they state “clear statutory language is needed to affirm that consumers have direct access to acupuncturists who can diagnose patients using traditional Oriental techniques....”, and again on Page v in

Recommendation 1, wherein they state, “the scope of practice should include an explicit authorization to conduct traditional Oriental diagnosis”.

10. How is the Board planning to proceed with regulations for acupuncture assistants? What will the process be to promulgate the regulations? Specifically, is the Board intending to hold public hearings on the subject? If so, when and where? How will the Board solicit and ensure comments from consumer groups and the general public about proposed training procedures and regulations, etc?

Boards Response: B&P Code section 4934.2 specifically required the Board to, “...conduct the following studies and reviews, and shall report its findings and recommendations to the department and the Joint Committee” and 4934.2 (a) required the Board to, “...conduct a comprehensive study of the use of unlicensed acupuncture assistants and the need to license and regulate those assistants”. The Board is reporting its findings and recommendations on Pages 25 through 28 of its September 2004 Sunset Review Report. The report concludes by recommending the Joint Committee accepts and ‘supports’ the Board’s findings and recommendations. If accepted by the Department and the Joint Committee the Board will convene a task force by the end of 2004 to define the procedures that an assistant may and may not perform, the type of coursework and on-the-job training required, the responsibilities of the licensee overseeing the assistant, the number of assistants that may be employed, and draft a training manual. Once the specific requirements were defined the Board would file a notice of proposed regulations with the Office of Administrative Law, hold public hearings and proceed with finalizing the final rulemaking file by the end of 2005.

11. On page 29 of the report, the JLSRC recommended that the Board examine ways to ensure consumers aren’t harmed by “exempted practitioners” and report the results to the Committee at the next review. According to the report, “the Board has been unable to complete the review of this issue.” Why wasn’t this accomplished? When will the Board complete this task? Please explain. Also, please clarify what an “exempted practitioner” is? Who are “exempted practitioners”?

Boards Response: B&P Code section 4935(b) defines, “Notwithstanding any other provision of law, any person, other than a physician and surgeon, a dentist, or a podiatrist, who is no licensed under this article but is licensed under Division 2 (commencing with Section 500) who practices acupuncture involving the application of a needle to the human body....” Exempt practitioners refers to an allopathic doctor, podiatrist or dentist who are authorized to perform acupuncture by virtue of their own scope of practices (i.e., needle insertion).

The Board feels that the 200-300 hour course in Oriental medicine often taken by many allopathic doctors, podiatrists or dentists is totally inadequate. It is the Board’s understanding that the majority of allopathic doctors, podiatrists or dentists who perform acupuncture and Oriental medicine in their practices, do so without having taken any coursework or training. The Board feels that proper, adequate and ‘complete program training’ in acupuncture and Oriental medicine diagnosis is essential to ensure safe and effective acupuncture treatment.

The Little Hoover Commission in their September 2004 report (Executive Summary, page v) supports this position and stated, “Practitioners interested in mastering both

Eastern and Western methods should continue to seek licensure under both systems”. Given the extremely sensitive political battle that would ensue, the Board’s legal counsel has recommended the Board not pursue this issue. Changes would be required in each of respective practice acts of the practitioners identified in B&P Code section 4935(b). Additionally, over the years, no separate and independent legislation has been proposed to accomplish this goal.

12. Explain why continuing education requirements taught in a foreign language with translation only allow for 50% credit? Is this consistent with other professionals’ continuing education requirements?

Boards Response: B&P Code section 4934.2 specifically required the Board to, “...conduct the following studies and reviews, and shall report its findings and recommendations to the department and the Joint..Committee”, and 4934.2 (b) required the Board to, “...study and recommend ways to improve the frequency and consistency of their auditing and the quality and relevance of their courses”. In the last two years the Board conducted an extensive licensee survey and held four focus group panel meetings to thoroughly evaluate the continuing education process, which are addressed in the Board’s September 2004 Sunset Review Report on Pages 30 through 33 and in Attachments G, H, I, J, K and L. One of the recommendations generated from this review, adopted by the Board, and included in the ‘proposed regulatory language’ located in Attachment M, was if “CE course is taught in a foreign language with translation, only 50% credit is allowed”.

Classes are often taught in two languages during the same course, wherein the provider teaches in one language followed by a translator of another language. For instance the course may primarily be taught in English and then the attendees wait while the same text is translated into Mandarin to accommodate the Chinese speaking attendees. Only half the hours taught in the class consist of one language or the other, therefore only half the credits should be awarded. However, on a case-by-case review, a higher percentage of credit could be approved if translation is performed simultaneously with no lost of course time due to the translation. The language diversity remains consistently split within the exam applicants and licensees of one-half Caucasian, one-quarter Chinese and one-quarter Korean. The California Acupuncture Licensing Examination (CALE) is given in English, Chinese (Mandarin dialect) and Korean to accommodate the language needs of the candidates. The Board is unaware of other professions that accommodate similar language diversity.

13. On page 33, the Board plans to “make filing of complaints and feedback easier via online CE course complaint forms and onsite CE course feedback forms directly mailed to the board.” How and when is the Board planning on doing this and how will it make it “easier” for licensees to make complaints?

Boards Response: Included with course applications distributed to continuing education providers, the Board provides samples of acceptable course certifications, attendance records and evaluation forms. Pursuant to CCR Section 1399.482(d)(2), CE providers are required to submit to the Board the participant evaluation forms for each approved course given. The Board has received complaints sent directly to the board office that are in opposition to the evaluation the licensee completed at the conclusion of the course that was turned into the instructor or provider. There are times when a

licensee feels they cannot be totally honest knowing the provider is going to personally review the evaluations before submitting them to the Board. Duplicating the process the Board offers on its website for filing complaints against a licensee, a CE course complaint form will be available to download, complete and mail to the Board, or complete online and submit via the Board's website. Instructions regarding how to file these complaint forms, as well as an explanation of the complaint process will also be included on the website. The evaluation form provided to the CE provider with the course application is being revised with a disclosure statement at the bottom advising the licensee of the capability of filing a complaint directly with the Board online. The website CE course complaint form is also being drafted. Both forms should be completed, reviewed by legal counsel, and ready for use by the end of the year.

14. On page 33, the report states "hands-on diagnostic or treatment techniques are not allowed for distant learning credits." Please clarify what a "distant learning" course is? Is it a course taught online? Are there regulations the Board adheres to regarding distant learning courses and the materials that are taught? Please explain.

Boards Response: Distance learning courses are those classified as 'non-classroom settings'. Non-classroom setting may include audio, visual, Internet, etc. Distance education providers and on-site providers are required to comply with the same requirements defined in B&P Code section 4945 and Article 8 of the CCR Sections 1399.480 through 1399.489.1. The proposed regulatory language, Attachment M in the Board's 2004 Sunset Review Report, contains proposed amendments to CCR Section 1399.483(g)(1) that precludes practical/hands on techniques from approved courses for independent or home study. Practical training is reserved for on-site classes where the provider and instructor are responsible for the oversight of the teaching and practice.

15. What is the Board intending to do about the high rate (30%) of unprofessional conduct complaints it receives? What is the Board intending to do about the consistently high percentage of complaints made about criminal charges and convictions? Is the Board planning to increase fines or penalties? Require more CE courses? Please explain.

Boards Response: The Board uses the Department's CAS (Consumer Affairs System) database to log and track complaints. This database limits the number of categories a complaint type can be logged under. Therefore, since a high percentage of complaints received do not fall under the other categories, the complaint category "unprofessional conduct" encompasses a wide range of offenses, whether major or minor offenses. Cases falling under the unprofessional conduct category ranges from parlor prostitution activity to improper advertising. If it appears we are receiving a high volume of complaints of a minor offense, i.e., advertising, the Board sends out notices and warnings via our newsletter in an attempt to curb the problem. In cases of major offenses, i.e., prostitution, the Board works closely with the local authorities to close the operation and subsequently file action against the license.

Approximately 95% of criminal charges and conviction complaints are initiated in-house as a result of: 1) examination applicants answering yes to a question on the examination application of whether they had been convicted of a crime; 2) when the Board receives criminal history information as a result of their fingerprinting; and 3) receipt of a subsequent arrest notification of a current licensee as a result of their

fingerprinting when originally licensed. All of these instances require the enforcement program to contact the courts to obtain documents of case outcome. In that this activity could lead to official denials and subsequent filing with the attorney general's office, it is necessary they be logged as complaints. The majority of these complaints are closed as no violation/unactionable.

16. Does the Board take enforcement actions against individuals who have engaged in the unlicensed practice of acupuncture? If so, how many such actions have been taken in each of the last four years? If the Board does not keep track of this information, please explain. If any of these people were to continue in their unlicensed practice, how would a consumer know of this? Consumers who go to the Board's website would be able to find out that the person does not hold a license. Could that same consumer learn from the Board's website the additional fact that this person had been the subject of a Board enforcement action for the unlicensed practice of acupuncture? If not, would it be possible to make this information available over the website?

Boards Response: The Board does take enforcement action against individuals who have engaged in the unlicensed practice of acupuncture. The action taken ranges from issuing a citation, issuing a cease and desists notice, filing an injunction, to the filing of a criminal complaint with the district or city attorney. Because this type of unlicensed activity relates to health care and is more serious, investigations are more often referred to the local authorities to prosecute to ensure prompt legal action versus administrative action. The only way a consumer would know if an individual were still practicing without a license would be if the consumer contacted our office or visited our website to verify license status. Over the last four years, a total of 126 complaints were filed on unlicensed activity Seventy-five of those were found to be licensed. The Board investigated 105 of these complaints in-house and forwarded 21 for formal investigation. The Board does not maintain on our website a list of individuals who had been the subject of a Board enforcement action for unlicensed activity.

The Board appreciates the opportunity to respond to the Joint Committee's questions and would be happy to provide any additional information as requested.

Sincerely,

Marilyn Nielsen
Executive Officer

Cc: Charlene Zettel, Director, DCA
Hattie Hanley, Project Manager, Little Hoover Commission