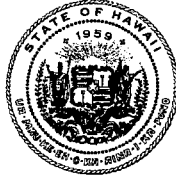


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August 18, 2003

The Honorable Mark E. Recktenwald
Director of Commerce and
Consumer Affairs
State of Hawaii
1010 Richards Street
Honolulu, Hawaii 96813

Dear Mr. Recktenwald:

Re: Medical Acupuncture as It Relates to the Scope of
Practice of Acupuncture

By memorandum dated July 9, 2003, you asked for legal advice as to whether medical acupuncture is sufficiently distinct from traditional acupuncture so as to fall outside the scope of the practice of acupuncture and whether physicians¹ licensed by the Board of Medical Examiners ("BME") may practice medical acupuncture without having to also be licensed by the Board of Acupuncture ("BOA").

BRIEF ANSWER

The short answers to these questions are: (1) medical acupuncture is not sufficiently distinct from traditional acupuncture so as to fall outside the scope of the practice of acupuncture and (2) physicians licensed by the BME cannot practice medical acupuncture absent licensure by the BOA.

¹ By Act 248, Session Laws of Hawaii 1999, the Legislature repealed the Board of Osteopathic Examiners and transferred its authority and functions, under chapter 460, Hawaii Revised Statutes (HRS), to the Board of Medical Examiners. Thus, the use of the term "physicians" in this document is meant to include both medical doctors (allopathic physicians) regulated under HRS chapter 453 and osteopathic physicians regulated under HRS chapter 460.

DISCUSSION

It is well settled that regulations affecting a trade, business, or occupation come within the proper exercise of the State's police power. Gundling v. Chicago, 177 U.S. 183, 188, 20 S. Ct. 633, 635, 44 L. Ed. 725, 728 (1900). The State, through reasonable requirements designed to protect the public health and safety, has the right to regulate certain occupations that may become dangerous or unsafe. New York State ex rel. Lieberman v. Van De Carr, 199 U.S. 552, 558, 26 S. Ct. 144, 145, 50 L. Ed. 305, 309 (1905).

The State Legislature exercises control over businesses, trades, or occupations pursuant to the police powers. Application of Herrick, 82 Haw. 329, 338, 922 P.2d 942, 951 (1996). The Legislature has authority to change or even annul licensure provisions whenever the public welfare demands it. Id., (citing State ex rel. Kelley v. Bonnell, 119 Ind. 494, 21 N.E. 1101 (1889)). In Hawaii, the Legislature made a specific finding that the public health, safety, and welfare require that the practice of acupuncture be regulated.²

A. LEGISLATIVE HISTORY

There was a time when the Legislature specifically exempted physicians from having to comply with the requirements of the acupuncture chapter. In 1985, the Legislature enacted HRS section 436E-4,³ which exempted physicians from the jurisdiction

²HRS section 436E-1 provides:

The legislature hereby finds and declares that the practice of acupuncture is a theory and method for treatment of illness and disability and for strengthening and invigorating the body and as such affects the public health, safety, and welfare, and therefore there is a necessity that individuals practicing acupuncture be subject to regulation and control.

[Emphases added.]

³ Although the Legislature first passed laws creating the BOA in 1974 (Act 206, 1974 Haw. Sess. Laws 444), abuses by the BOA and factionalism in the occupation led to its repeal effective

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of the BOA, so long as they were certified by their respective boards (BME and Board of Osteopathic Examiners ("BOE")).

Upon its enactment, section 436E-4, in relevant part, provided:

§436E-4 Exemptions. (a) Any person licensed under chapters 448 [dentistry], 453 [medical doctors], and 460 [osteopaths], if certified by their respective boards as qualified to practice acupuncture by reason of formal training in acupuncture shall be exempt from this chapter.

Act 214, 1985 Haw. Sess. Laws 387, 388.

In 1989, the Legislature determined that it would take a different approach in certifying physicians to practice acupuncture. It decided to delete the exemption provisions of HRS section 436E-4(a). See Act 180 § 1, 1989 Haw. Sess. Laws 345. In lieu of that exemption, the Legislature enacted HRS section 436E-3.5, which continued to allow physicians to be certified by their respective boards as qualified to practice acupuncture. However, certification was to be pursuant to rules adopted jointly by the BOA, BME, and BOE. As enacted in 1989, section 436E-3.5 provided:

§436E-3.5 Certification. Persons licensed under chapters 453 and 460 who desire to practice acupuncture may, in lieu of licensure under this chapter, be certified by their respective boards as qualified to practice acupuncture in accordance with rules to be adopted jointly by the board of acupuncture, the board of medical examiners, and the board of osteopathic examiners in accordance with chapter 91. The rules shall contain the certification procedure, criteria for certification, and the powers of the respective boards to remove the certification for cause.

December 31, 1984. However, in 1985, the Legislature felt that the profession should be given another chance to put its house in order. As a result, the Legislature enacted HRS chapter 436E (the current BOA chapter). See S. Stand. Comm. Rep. No. 693, in 1985 Haw. S. Journal, at 1183-84.

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See Act 180, § 2, 1989 Haw. Sess. Laws 345 ("Act 180") (emphases added).

The legislative history of HRS section 436E-3.5 is instructive in understanding how it came to be that physicians became subject to the regulation of the BOA in Hawaii. During the course of the legislative hearings on Act 180, the BME and the BOE expressed concerns regarding their lack of expertise to certify their licensees in acupuncture. The House Consumer Protection and Commerce Committee noted these concerns and observed that the BOA should take over the certification process, stating in relevant part:

The Board of Medical Examiners testified in support of this bill, stating that the certification process is an undesirable burden because the medical board lacks the expertise and standards to certify its licensees in acupuncture. Further, such certification is inconsistent with the medical board's current practice of not certifying any of its physician licensees in the recognized thirty-two specialties and forty-eight subspecialties of the practice of medicine.

The Board of Osteopathic Examiners, and the Board of Dental Examiners gave similar testimony in support of this bill. The boards stated that they lack the expertise, standards, and working knowledge to certify their respective licensees in acupuncture.

. . . .

Given the confessed lack of expertise of the dental, medical and osteopathy boards to certify their licensees to practice acupuncture, your Committee believes that the public interest is not being served by the current certification process. It finds that the Board of Acupuncture should take over the acupuncture certification process for practitioners in the dental, medical and osteopathy fields. Your Committee urges the medical and dental professions and the Board of Acupuncture to work together promptly to facilitate the certification of those practitioners for whom acupuncture certification may be appropriate.

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Hse. Stand. Comm. Rep. No. 606, in 1989 Haw. House Journal, at 1056-57 (emphases added).

The House Committee's concerns were repeated by the Senate Consumer Protection and Commerce Committee. That committee believed that an amendment, requiring collaboration among the boards for certification, would alleviate potential problems when it stated, in relevant part:

In prior hearings on this bill, the Board of Medical Examiners, the Board of Dental Examiners, and the Board of Osteopathic Examiners testified that they lacked the knowledge and expertise to create and implement these criteria. Because of this testimony, your Committee believes that the current statute does not adequately protect the consuming public from physicians, dentists, and osteopaths who wish to practice acupuncture and who may not be adequately prepared to do so. Your Committee has amended the bill to provide this protection.

The newly amended version of this bill leaves the task of certifying physicians and osteopaths who wish to practice acupuncture with their respective Boards. However, it requires these Boards to work directly with the Board of Acupuncture to develop certification criteria. By working with the Board of Acupuncture, the osteopathic and medical Boards will utilize the acupuncture expertise of the Board of Acupuncture. The osteopathic and medical boards will provide expertise in their respective fields, thus insuring that the acupuncture certification criteria for physicians and osteopaths will be both fair to the licensees and safe for consumers.

Sen. Stand. Comm. Rep. No. 1150, in 1989 Haw. Senate Journal, at 1234 (emphases added).

Likewise, the Conference Committee, in formulating the 1989 version of section 436E-3.5, believed that rule collaboration among the boards was the key to resolving the Legislature's concerns, stating:

The purpose of this bill is to allow medical doctors and osteopathic physicians to practice

acupuncture, if they are certified by their respective boards as qualified to practice acupuncture. For such practitioners, certification would provide an alternative to the requirement of a license to practice acupuncture under Chapter 436E, Hawaii Revised Statutes.

Your Committee is aware of concerns expressed by the medical and osteopathic boards as to their lack of the knowledge and expertise necessary to make rules regarding certification of acupuncture practitioners. These concerns should be allayed by the bill's provision that rules for certification be adopted jointly by the board of acupuncture, the board of medical examiners, and the board of osteopathic examiners.

This bill would delete the current provision of Section 436E-4, which exempts dentists, medical doctors and osteopathic physicians from the requirements of the acupuncture law if they are certified by their respective boards as qualified to practice acupuncture.

Sen. Conf. Comm. Rep. No. 44, in 1989 Haw. Senate Journal at 775-76 (emphases added).

However, the certification rules, that the Legislature anticipated would be adopted in consultation among the three boards, did not materialize. As a result, in 1993, the Legislature withdrew the physicians' exemption and mandated that they comply with the acupuncture chapter.

The rationale for this change was clearly articulated by the Senate's Consumer Protection Committee, in relevant part, as follows:

Your Committee has heard this subject matter in a prior hearing on a Senate Bill and is still bothered that the medical and osteopathic professions feel that training under their respective specialties would justify an exemption under the licensing requirements of chapter [sic] 436E-3.5, Hawaii Revised Statutes.

In 1989, the Legislature provided these boards with the opportunity to come together for the purpose

of jointly developing the certification procedure for licensed physicians and osteopaths in order to exempt them from the licensing law for acupuncturists. Your Committee discovered that nothing was done since 1989 to develop procedures, and instead, the two professions are coming back to the Legislature to exempt themselves from the licensing laws for acupuncture because they feel their profession encompasses acupuncture. Your Committee is quite disturbed that the Legislature gave the two professions an opportunity to work with the Board of Acupuncture to develop procedures.

Your Committee has serious questions about the soundness of assuming that a licensed physician or osteopath is qualified to practice in acupuncture because the physician or osteopath is licensed in their own profession.

Sen. Stand. Comm. Rep. No. 1325, in 1993 Haw. Senate Journal, at 1247-48 (emphases added).

The conference committee report also made it very clear in enacting HRS section 436E-3.5 that physicians, who desire to practice acupuncture, shall be subject to the BOA, when it stated in relevant part:

The purpose of this bill is to state that those persons licensed under Chapters 453 and 460, Hawaii Revised Statutes, who desire to practice acupuncture shall be subject to licensing under Section 436E-3.5.

Conf. Comm. Rep. No. 136, in 1993 Haw. House Journal, at 938, and in 1993 Haw. S. Journal, at 801-02 (emphases added).

Thus the Legislature specifically and unequivocally decided to make the physicians subject to the licensing requirements under the acupuncture chapter. As a result, the Legislature amended section 436E-3.5, with the Ramseyer version of that section reading as follows:

[[§436E-3.5]] [Certification.] Physicians and osteopaths not exempt. Persons licensed under chapters 453 and 460 who desire to practice acupuncture [may, in lieu of licensure under this chapter, be certified by their respective boards as qualified to practice

acupuncture in accordance with rules to be adopted jointly by the board of acupuncture, the board of medical examiners, and the board of osteopathic examiners in accordance with chapter 91. The rules shall contain the certification procedure, criteria for certification, and the powers of the respective boards to remove the certification for cause.] shall be subject to licensing under this chapter.

Act 260, § 1, 1993 Haw. Sess. Laws 454 (statutory material to be repealed is bracketed and new statutory material is underscored).

Based upon the foregoing legislative history, it is evident that the Legislature did not intend to authorize physicians licensed by the BME or BOE to practice acupuncture without also being licensed by the BOA. Section 436E-3.5 unequivocally states that physicians, licensed under HRS chapters 453 (medicine) and 460 (osteopathy), who wish to practice acupuncture, must be licensed by the BOA. There is no ambiguity.

B. MEDICAL ACUPUNCTURE

Your letter to us states that the medical community recognizes "medical acupuncture" as a discrete field within the practice of medicine and thus suggests that physicians should be allowed to practice acupuncture without BOA regulation. However, it is the Legislature that determines the scope of practice for occupations and professions. There is no evidence to suggest that the Legislature expressly recognized the concept of "medical acupuncture" as distinct from the field of acupuncture. In fact, based upon the foregoing legislative history, it is clear that the Legislature's view is to the contrary. The term "medical acupuncture" is not found in Hawaii's statutes and currently it is not defined in any other state's law.

Even assuming that "medical acupuncture" is recognized by the medical community as a discrete field within the practice of medicine, that recognition in and of itself would not defeat the Legislature's serious concerns about "the soundness of assuming that a licensed physician or osteopath is qualified to practice in acupuncture because the physician or osteopath is licensed in their own profession". See Sen. Stand. Comm. Rep. No. 1325, in 1993 Haw. Senate Journal, at 1248. The Legislature has expressly stated that it is "bothered that the medical and osteopathic professions feel that training under their respective specialties

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would justify an exemption under the licensing requirements of [section] 436E-3.5." See id.

The Legislature's mandate remains in effect. "[T]hose persons licensed under Chapters 453 and 460, Hawaii Revised Statutes, who desire to practice acupuncture shall be subject to licensing under Section 436E-3.5." Conf. Comm. Rep. No. 136, in 1993 Haw. House Journal, at 938, and in 1993 S. Journal, at 801-02.

C. SCOPE OF PRACTICE

Your letter also suggests that the scope of practice for medicine under HRS chapter 453 is currently broad enough to allow physicians to practice acupuncture without having to comply with BOA requirements. The scope of practice for medicine is defined by HRS section 453-1 as follows:

For the purposes of this chapter 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; provided that when a duly licensed physician pronounces a person affected with any disease hopeless and beyond recovery and gives a written certificate to that effect to the person affected or the person's attendant nothing herein shall forbid any person from giving or furnishing any remedial agent or measure when so requested by or on behalf of the affected person. [Emphases added.]

It appears from your letter that it could be argued that the words "any means or method," in the medical scope of practice are meant to include acupuncture, including the use of needles.

A rational interpretation of a statute is preferred to one that is unreasonable or impracticable, because it is presumed that the Legislature did not intend an absurd result and legislation will be construed to avoid contradiction and illogicality. Kelliipuleole v. Wilson, 85 Haw. 217, 221-22, 941 P.2d 300, 304-05 (1997). Also, we must assume that the Legislature, in enacting statutes, is cognizant of the state of the law. Marsland v. Pang, 5 Haw. App. 463, 485, 701 P.2d 175, 195, cert. denied, 67 Haw. 686, 744 P.2d 781 (1985).

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Accordingly, when the Legislature enacted section 436E-3.5, it was already aware of the scope of practice in section 453-1. The Legislature obviously felt that the physicians' scope of practice did not include the practice of acupuncture or it would not have worded section 436E-3.5 as it did.

When we interpret statutes, such as sections 453-1 and 436E-3.5, it is imperative that we give effect to the intention of the Legislature, which is obtained principally from the statutory wording. State v. Kotis, 91 Haw. 319, 327, 984 P.2d 78, 86 (1999). We may depart from a literal construction of statutes only when such construction would produce an absurd or unjust result and the literal construction is clearly inconsistent with the purposes of the statutes. State v. Villeza, 85 Haw. 258, 272-73, 942 P.2d 533, 534-35 (1997).

The wording of section 436E-3.5 is clear. The Legislature gave no recognition to any subcategory of acupuncture within section 453-1 and it made no revisions to the scope of practice in section 453-1. Therefore, the Legislature's intent to require physicians who wish to practice acupuncture to comply with the BOA's requirements is clear and unambiguous. The Legislature could have carved out an exception for physicians but did not do so.

To interpret section 453-1 to permit physicians to practice acupuncture without BOA regulation would be incompatible with the manifest provisions of section 436E-3.5 that provide that physicians licensed under HRS chapters 453 (medicine) and 460 (osteopathy) who wish to practice acupuncture must be licensed by the BOA. Thus, physicians may not practice acupuncture without complying with the BOA's requirements.

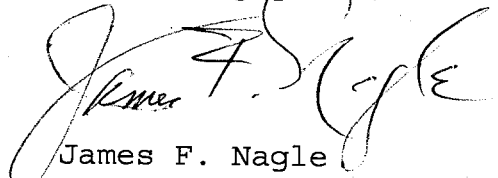
Additionally, the foregoing legislative history presents explicit and compelling reasons why physicians seeking to practice acupuncture should fulfill the BOA's requirements. If we were to depart from the literal construction of section 453-1 in light of section 436E-3.5, we would produce an absurd result. Thus, we cannot read section 453-1 to permit physicians to practice acupuncture absent meeting the BOA's requirements, because this is certainly contrary to section 436E-3.5 and the Legislature's expressed intention.

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CONCLUSION


In conclusion, for the foregoing reasons, we reiterate that medical acupuncture is not sufficiently distinct from traditional acupuncture so as to fall outside the scope of the practice of acupuncture and that physicians licensed by the BME cannot practice medical acupuncture absent licensure by the BOA.

Very truly yours,



James F. Nagle
Deputy Attorney General

APPROVED:



Mark J. Bennett
Attorney General