

THE DELIBERATIONS OF THE BOARD OF HEALTH ON THE PROPOSAL TO LICENSE
ACUPUNCTURISTS

JULY 19, 1999

COMMENTS BY THE 407 COMMITTEE CHAIRPERSON TO THE FULL BOARD OF HEALTH

During the deliberations of the full Board of Health, Board of Health Chairperson asked Board member Richard Fitzgerald, DDS, Chairperson of the 407 Committee to comment on the work of this committee on the acupuncture proposal. Board member Fitzgerald stated that the proposal was defeated on three of the four statutory criteria during the committee's deliberations. Board member Fitzgerald commented that the voting was close on each of the four votes. Board member Fitzgerald added that the 407 Committee members felt that the full Board should be given complete documentation on the review and act on each of the four criteria at the July 19, 1999 bimonthly meeting of the Board.

COMMENTS BY PROPONENTS OF THE PROPOSAL TO THE FULL BOARD OF HEALTH

Board Chairperson Tempero asked for comments from the applicant group on their proposal. Sheldon LeBron, JD, came forward to testify on behalf of the applicant group. Mr. LeBron stated that there is still an access to care issue vis-à-vis acupuncture care regardless of the recent Attorney General's ruling which stated that acupuncture is part of chiropractic scope of practice. Mr. LeBron informed the Board members that Nebraskans still do not have access to the services of the most highly qualified acupuncturists, and that this is something that the applicants' proposal seeks to correct.

Mr. LeBron then introduced Barbara Mitchell, JD, and expert in the area of acupuncture education and training from the state of Washington to give a presentation on the education and training of acupuncturists to the Board members. Ms. Mitchell informed the Board members that in only twelve states are physicians who provided acupuncture services required to receive up to 300 hours of training in acupuncture. This testifier also informed the Board members that in only twenty-three states are chiropractors who provide acupuncture services required to receive up to 200 hours of training in acupuncture. Ms. Mitchell informed the Board members that by comparison oriental medicine practitioners receive three to four years of masters level education and training, and that this program of education and training is recognized in thirty-eight states plus the District of Columbia. This testifier stated that oriental medicine practitioners are trained to practice independently, and to have sufficient knowledge of western health professions to make an appropriate referral. This testifier stated that the accreditation process for this education ensures that there is a strong biosciences background for all graduates of acupuncture programs in all schools of oriental medicine.

Ms. Mitchell presented information to the Board members documenting the disciplinary record of the profession in states where there is credentialing for acupuncturists, commenting that the disciplinary record of acupuncture is much better than for such professions as massage therapy, for example. Ms. Mitchell stated that there is no evidence to indicate that any harm has occurred because a new client did not first receive a diagnosis of their health condition from a physician prior to seeking acupuncture care.

Ms. Mitchell stated that acupuncturists have no intention of becoming primary care givers, or physicians; nor do they have any intention of offering a "western" medical diagnosis of a client's overall health condition. A licensed acupuncturist in Nebraska would inform new clients of these realities of practice, and advise them to seek out a physician for a physical examination if they have not had such an examination in a time-frame specified in the licensing statute. This testifier stated that this process of "informed consent" means that it is unnecessary to create a requirement for physician referral as a precondition for practice by acupuncturists in Nebraska, and went on to state that some states that had a

physician referral requirement have since dropped this requirement because there was no evidence that it was needed.

Board member Allen Dvorak, MD, then asked Ms. Mitchell whether or not the treatments administered by acupuncturists to relieve pain could result in the masking of serious illness. Ms. Mitchell responded by stating that an acupuncturist carefully monitors his/her patients, and if there are no positive results from acupuncture treatment, the practitioner makes a referral. This testifier added that acupuncture education provides a ten-week course to prepare practitioners to make appropriate referrals to other health care providers.

Board member Dvorak asked Ms. Mitchell whether or not acupuncturists do a patient's medical history. Ms. Mitchell responded that acupuncturists do an extensive medical history for each of their patients, followed by a detailed "eastern diagnosis" of their condition.

Board Chairperson Richard Tempero, MD, DDS, asked Ms. Mitchell whether the herbology component would be brought back in any legislative version of the proposal. Ms. Mitchell responded that it would not be included in any upcoming legislation.

Board member Linda Lazure, RN, asked Ms. Mitchell about the accreditation of acupuncture schools. Ms. Mitchell responded by informing the Board members that ninety percent of acupuncture students graduate from about thirty accredited schools in the United States. This testifier added that the accreditation process is only fourteen years old, and that there are very good schools that are not yet included under the accreditation process.

Sheldon LeBron then informed the Board members that the applicant group intends to administer the credential via direct administration wherein the Department would directly administer the credential without a board of examiners. Mr. LeBron stated that this is being proposed because licensure fees to support a board would be prohibitive for professional members. Board member Lazure commented that the peer review aspect of a board is a positive aspect of the traditional method of regulation. Barbara Mitchell then stated that in some states an advisory committee is used to assist the respective departments in doing the work of regulation and enforcement.

Board member Jerry Vaughan, OD, asked the applicants to compare medical, chiropractic, and acupuncture education and training pertinent to acupuncture competency. Ms. Mitchell responded that medical and chiropractic acupuncture is primarily oriented towards pain relief, and that there is no interface with eastern diagnostics in their use of acupuncture. This testifier added that acupuncture can be used to treat a wide range of illnesses and conditions including the treatment of asthma, but that most physicians and chiropractors are not sufficiently trained to use acupuncture to treat illnesses.

Board member Gary Bieganski asked the applicants about third party reimbursement for their services. Ms. Mitchell informed the Board members that Medicaid and Medicare do not reimburse for acupuncture services, but that many private insurance companies do reimburse for these services. This testifier stated that Medicare and Medicaid will eventually pay for these services, and that acupuncture will eventually have its own "DRG" codes for both hospital care and for care in out-patient settings.

Board member Bieganski asked whether or not hospitals have credentialed acupuncturists. Ms. Mitchell responded that hospitals in Minnesota have credentialed acupuncturists for chemical dependency care, for example.

COMMENTS BY OPPONENTS OF THE PROPOSAL TO THE FULL BOARD OF HEALTH

Board Chairperson Tempero asked representatives of those opposed to the proposal to present testimony. David Buntain, JD, came forward to testify on behalf of the Nebraska Medical Association. Mr. Buntain stated that the principal concern of the Nebraska Medical Association with the proposal is with independent practice by members of the applicant group, and that the rationale for this concern is that acupuncturists are not capable of adequately diagnosing a patient's health condition. Mr. Buntain went on to state that NMA is not opposed to the idea of acupuncturists participating in delivering acupuncture services as long as there is some assurance that their patients first see a physician for a medical diagnosis of their condition.

Mr. Buntain stated that the concept in the proposal of a "disclaimer" whereby an acupuncture practitioner would inform a new patient of the fact that acupuncturists do not "do" "western" medical diagnoses would not be an effective way of protecting members of the public from misdiagnosis of their health condition. Mr. Buntain stated that the disclaimer process leaves too much room for misunderstandings between the patient and the practitioner, and that it could result in missed chances for speedy and appropriate care for patients.

Mr. Buntain commented on applicant group assertions about the fact that malpractice insurance has not increased significantly in states that have licensed acupuncturists by stating that malpractice insurance is not universal, and that it will occur only where people think that they can be successful sue practitioners. These facts make this a less than accurate indicator of the safety and effectiveness of a professions' services.

Board member Steve Wooden asked Mr. Buntain if he had any specific information pertinent to the potential for harm from the proposal, other than hypothetical examples of what could go wrong. Mr. Buntain indicated that he did not have such information.

Board Chairperson Tempero then recognized John DeCamp, JD, Executive Director of the Nebraska Chiropractic Physicians' Association, for additional opponent testimony on the proposal.

Mr. DeCamp stated that the proposal as revised by the applicant group is very different from the one originally submitted for review. Mr. DeCamp stated that the original proposal called for the licensing of a health profession, namely, "oriental medicine practitioners." Mr. DeCamp then commented that the proposal as amended calls for the licensing of oriental medicine practitioners only for the purpose of providing acupuncture services, and not the full range of oriental medicine. This testifier stated that the amended version of the proposal creates significant confusion over exactly what would be licensed if the proposal were to pass, and commented that the amended proposal was a "Trojan horse" that the state would have a difficult time effectively regulating. This testifier stated that under the current regulatory situation in Nebraska, acupuncture is effectively regulated via the boards of Medicine and Surgery and chiropractic, and that passing the proposal would jeopardize this system of protection.

Mr. DeCamp commented that he felt that approving this the proposal would undermine the 407 process.

Mr. DeCamp stated that the recent ruling by the Attorney General that acupuncture is part of the scope of practice of chiropractic makes the proposal unnecessary

Board member Vaughan read from a paragraph in the proposal which indicated that the proposal was never intended to license a new type of health care professional; nor was it intended to give the applicant group the full range of services associated with oriental medicine. Board member Vaughan commented that from the inception of the review, the applicant group's proposal was to license members of their group to provide acupuncture services. Board member Vaughan stated that this indicates clearly that the current version of the proposal is not a "Trojan horse."

At the meeting of the 407 Committee Sheldon LeBron responded to opponent comments on the amendments to the proposal by stating that the amended version of the proposal is much the same as the original one. The amended version deletes Chinese herbology. Mr. LeBron commented that the herbology component had never been discussed by the technical committee members, and that the thrust of the review had always been on the acupuncture component.

Mr. LeBron responded to opponent comments pertinent to access to care by stating that under the current practice situation, Nebraskans would continue to be denied access to the services of the best acupuncture practitioners, namely those of the applicant group.

Mr. LeBron responded to comments to the effect that there is a need for physician referral as a precondition for the delivery of acupuncture services by acupuncturists by commenting that other professions such as massage therapy are not deemed to need physician referral to see clients, so why should acupuncturists?

This testifier went on to state that there is no evidence from other states which have licensed acupuncturists to indicate that there is a need to mandate western diagnostic techniques for acupuncture practice.

Board member Janel Foote, RP, asked why the herbology component was dropped from the proposal. Leticia Barajes-Pallares spoke for the applicant group by stating that this component was dropped because as the review of the technical committee progressed, it became increasingly clear that acupuncture rather than herbology was going to receive all of the committee's attention. Mr. LeBron added that the acupuncture component had always been the heart of the proposal anyway.

FORMULATION OF RECOMMENDATIONS BY THE FULL BOARD OF HEALTH

Board member Fitzgerald moved and Board member Wooden seconded that the proposal satisfies the first criterion which states, **ABSENCE OF A SEPARATE REGULATED PROFESSION CREATES A SITUATION OF HARM OR DANGER TO THE HEALTH, SAFETY, OR WELFARE OF THE PUBLIC, AND THE POTENTIAL FOR THE HARM IS EASILY RECOGNIZABLE, AND NOT REMOTE OR DEPENDENT UPON TENUOUS ARGUMENT.**

Voting aye were Balters, Vaughan, Wooden, and York. Voting nay were Bieganski, Dvorak, Fitzgerald, Forney, Ihle, Knortz, Lazure, and Schiefen. The Board members determined that the proposal does not satisfy the first criterion, and that they were not going to recommend approval of the proposal since proposals must satisfy all four criteria.

Board member Fitzgerald moved and Board member Wooden seconded that the proposal satisfies the second criterion which states, **CREATION OF A SEPARATE REGULATED PROFESSION WOULD NOT CREATE A SIGNIFICANT NEW DANGER TO THE HEALTH, SAFETY, OR WELFARE OF THE PUBLIC.**

Voting aye were Balters, Bieganski, Forney, Lazure, Nelson, Vaughan, Wooden, and York. Voting nay were Dvorak, Fitzgerald, Ihle, Knortz, and Schiefen. There were no abstentions. The Board members determined that the proposal satisfied the second criterion.

Board member Fitzgerald moved and Board member Nelson seconded that the proposal satisfies the third criterion which states, **CREATION OF A SEPARATE REGULATED PROFESSION WOULD BENEFIT THE HEALTH, SAFETY, OR WELFARE OF THE PUBLIC.**

Voting aye were Balters, Lazure, Nelson, Vaughan, Wooden, and York. Voting nay were Bieganski, Dvorak, Fitzgerald, Forney, Ihle, Knortz, and Schiefen. There were no abstentions. The Board members determined that the proposal does not satisfy the third criterion.

Board member Fitzgerald moved and Board member Wooden seconded that the proposal satisfies the fourth criterion which states, THE PUBLIC CANNOT BE EFFECTIVELY PROTECTED BY OTHER MEANS IN A MORE COST-EFFECTIVE MANNER.

Voting aye Balters, Forney, Nelson, Vaughan, Wooden, and York. Voting nay were Bieganski, Dvorak, Fitzgerald, Ihle, Knortz, Lazure, and Schiefen. There were no abstentions. The Board members determined that the proposal does not satisfy the fourth criterion.

BY THESE FOUR VOTES THE BOARD MEMBERS DETERMINED THAT THEY WERE NOT GOING TO RECOMMEND APPROVAL OF THE APPLICANTS' PROPOSAL.

RB
September 23, 1999

