

**Awaiting Formal Approval
MINUTES**

**UTAH
ACUPUNCTURE
LICENSING BOARD
MEETING**

November 30, 2012

**Room 474 – 4th Floor – 10:00 A.M.
Heber Wells Building
Salt Lake City, UT 84111**

CONVENED: 10:04 A.M.

ADJOURNED: 11:56 A.M.

Bureau Manager:
Board Secretary:

Noël Taxin
Karen McCall

Board Members Present:

Michele Zabriskie
Regan J. Archibald, L.Ac.
Natalie Clausen, L.Ac.
Lynn A. Gershan, MD
Tiffany Garofalo, L.Ac.

Board Members Absent:

Vacant Position

Guests:

Bea Hammond
Chris Rogers
Mark Montgomery
Anita Pascoe
Brent Ottley
Mark Brinton
Michelle McOmber
Alyssa Johnson
Kris Justesen

DOPL Staff Present:

Mark B. Steinagel, Division Director
Ray Walker, Division Regulation and Compliance
Officer
Karl Perry, Assistant Attorney General
Tony Patterson, Assistant Attorney General

TOPICS FOR DISCUSSION

ADMINISTRATIVE BUSINESS:

Board and Division Introductions

Swearing in of Lynn A. Gershan, MD, and Tiffany Garofalo, L.Ac., as Board members

Board Chairperson

MINUTES:

APPOINTMENTS:

Mr. Archibald, Board Chairperson

10:15 am

Karl Perry, Assistant Attorney General, and Tony Patterson, Assistant Attorney General, Discussed the Proposed Rules

DECISIONS AND RECOMMENDATIONS

Board members and Division Staff introduced themselves.

Ms. Taxin conducted the swearing in of Dr. Gershan and Ms. Garofalo as Board members. **The Board welcomed them.**

Ms. Garofalo and Mr. Archibald voiced interest in being Board Chairperson.

As this is her first meeting Ms. Garofalo nominated Mr. Archibald for Board Chairperson.

Ms. Zabriski seconded the motion.

The Board vote was unanimous.

The minutes from the August 7, 2012 Board meeting were read.

Ms. Zabriskie made a motion to approve the minutes as read. Ms. Garofalo seconded the motion. **The Board vote was unanimous.**

Mr. Archibald turned the time over to Mr. Perry and Mr. Patterson for the proposed Rules discussion.

Mr. Perry explained at the last meeting the Board talked about Ms. Taxin writing proposed Rules. He stated Mr. Steinagel had some questions and requested the AG's office review the proposed Rules to be sure they met the requirements of the current statute. He stated he and Mr. Patterson have reviewed those proposed Rules.

Mr. Perry stated the Acupuncture Act was changed at the 2011 Legislative session. He then read the Law

58-72-102(4)(b): (4)(b) Adjunctive therapies within the scope of practice of acupuncture may include:(i) manual, mechanical, thermal, electrical, light, and electromagnetic treatments based on traditional oriental medicine diagnosis and modern research. Mr. Perry stated it was the desire of the Association to write Rules to expand the practice from the previous language to include injection therapy and the ordering of lab reports. He stated the Division of Occupational and Professional Licensing is limited in writing Rules to further explain the Statute when the Statute does not give authority by instructing specifically to make rules. Mr. Perry then read the Online Prescribing Law which included the language “by Administrative Rule”. He stated this language is specific in setting forth the authority and intent to further clarify by Rule. He stated the Division cannot expand beyond what the Statute allows.

Mr. Perry stated the AG’s office seeks the intent of the Legislature when faced with this type of situation. He stated he read the Legislative information and research found “**Administer**” allowed in the Wildlife Research Act, the Pharmacy Act and the Controlled Substance Act specifically include injections. He stated they also reviewed the tapes from the Legislative meeting to determine if the Legislature knew and identified their intent was for injections. He stated there was no such designation in the Legislative meetings.

Ms. Garofalo asked if the AG’s office could not think the definition should include injections.

Mr. Perry responded no as it is not specifically in the Law.

Ms. Clausen commented part of the consideration of the sponsor and the committee was not to be specific but to leave the Law more general as when it is specific it is not as clear and something might inadvertently be left out. She stated the committee believed the word “Administer” was to be left more general because of all the different things that would have to be included.

Mr. Perry stated he spoke with Senator Hinkins, the

sponsor of the Bill. He again stated when he listened to the minutes from the meeting there was nothing about injections mentioned. He stated lab reports was mentioned and he believes Ms. Justesen commented the profession was not really interested in lab reports at this time.

Ms. Justesen stated she believes the AG's office is reviewing the information with rose colored glasses as acupuncture is point injection.

Ms. Garofalo clarified the Law is written to state something and the Rule further defines what that something is.

Mr. Steinagel responded if the Law allows for further definition and clearly gives authority then the Division shall or may create Rules to further define.

Ms. Garofalo voiced not understanding if the language is in the Law why it cannot be further defined by Rule.

Mr. Steinagel responded his first meeting with the Acupuncture Board had discussion regarding injections. He stated the Association and Board believed expanding on the scope of practice should be written in Rule but Rules cannot be used to expand a practice without Law authority. He stated the charge for the Legislature is no administrative Rules are to be written to expand or take away from the scope of practice outlined in the Law. Mr. Steinagel stated he discussed the issue with Ms. Clausen and Mr. Ottley. He stated he requested the AG's office to review the proposed Rules to make sure they were appropriate before the Division submitted something not intended by Law.

Ms. Garofalo voiced understanding not to expand by Rule but she believes the scope of practice was already stated. She then read the list in the Law again.

Mr. Perry responded when other Practice Acts want to be able to do injections the language is specific in their Act.

Mr. Patterson responded they also reviewed Practice Acts for other States and the language is specific in those they reviewed. He stated there is a difference between Utah and most other States in that the plain language written does not clarify administration includes injections. He stated the Practice Acts for other States is clear regarding injection language. He again stated in listening to the committee minutes injections was not a point of discussion and when they contacted the sponsor he said the intent was not to include injections.

Mr. Patterson stated the Law does not have the clear language intent or documentation to stand before a judge and say there is documentation which clearly gives the intent. He stated Rules can be used only to define terms or to help clarify the Law but a definite statement cannot be used to expand the scope of practice. He stated Mr. Steinagel and the AG's office are giving clarification to this issue in an attempt to make sure DOPL does not get sued for not using clear, plain language.

Ms. Garofalo stated the Florida Law does not have injections specifically mentioned in their Law.

Mr. Perry stated he printed the Florida Law as it is specific.

Mr. Montgomery stated Ms. Clausen received a letter from Dr. Mangum, the previous Board member and chairperson. He asked if she could read the letter as he believed it states the two ways Rule can be written; authority in the Law and further specified in renewing licensure of retaining the NCCAOM Certification. Mr. Montgomery stated the national certification does accept injections as within the practice of Acupuncture and he believes Utah should accept them as well.

Mr. Perry clarified NCCAOM Certification documents having met qualifications for licensure and Utah chooses to use certification as the standard and many professions require certification. He used the example of next year the NCCAOM including blood letting in

the practice. He stated the scope and practice in Utah cannot be expanded by Rule next year to include blood letting because of the NCCAOM change. He stated it would require a Law change.

Mr. Montgomery voiced not understanding if the NCCAOM is used for licensure why it could not be incorporated for practice.

Mr. Steinagel responded the practice definition is a higher Law than certification which makes the implied definition incorrect.

Ms. Justesen stated maintaining the NCCAOM Certification is required to maintain the Utah Acupuncture license.

Ms. Taxin clarified that maintaining the NCCAOM Certification may be accepted for the CE requirements to renew but not all licensees are NCCAOM Certified and they may complete the CE requirements to renew their licenses.

Mr. Montgomery commented it seems the Law should require different classifications of licensure.

Mr. Steinagel responded the Law would need to be changed to allow for different classifications. He stated the Division Umbrella Law requires licensees to be competent with their practice but there is no creation of competency beyond original education.

Mr. Montgomery read the Law again regarding adjunctive therapies. He stated NCCAOM teaches adjunctive therapies.

Ms. Garofalo stated she has just reviewed the Florida Law and cannot find the specific language in that Law.

Mr. Perry stated he did not concentrate on the Florida Law and would need to go back and review it again for specifics but he believed that Law was specific.

Mr. Steinagel commented he was contacted by a Legislator last week saying he was contacted by

someone to make a change in the Acupuncture Law.

Ms. Justesen stated this issue has been on the table for several years and she was in a 2010 Board meeting where the Board, Mr. Perry and Mr. Steinagel said something needed to be in the Law so the Division could write a Rule. She stated it made sense and the Association changed the Law to include the word “Administer”. She stated she met with the Legislators and explained the word “Administer” was recommended and it was included in the Law language.

Ms. Zabriskie responded to use the word “Administer” is too general.

Mr. Perry stated he believes the language was not brought back before Ms. Taxin and the Board to review prior to putting it before the Legislature.

Mr. Steinagel stated the only reference he has been able to find regarding the discussion was in the November 2010 minutes. He read that section of the minutes and stated he could not verify Ms. Justesen’s comments.

Dr. Gershan commented she believes those who practice Acupuncture know what acupoint treatment means. She stated the Colorado Law further defines Acupuncture points as using Acupuncture needles.

Mr. Patterson commented Colorado Law also has the verbage of injections where the Utah Law does not.

Dr. Gershan responded she believes the word traditional should cover the injections.

Ms. Clausen commented on a professional level of schools and licensing the committees say what the schools teach and approve for accreditation as there is a general understanding of what is acceptable for the profession.

Mr. Perry stated the Law does not clarify what is acceptable within the profession.

Ms. Clausen responded that is the reason modern research was put in the Law. She stated it is interesting the Legislative legal people reviewed, discussed and made recommendations to use the words “modern research” and did not have a problem.

Mr. Steinagel responded Legislative legal usually contacts him regarding Law changes and they did not contact him.

Ms. Clausen stated the intent was not for a closed Bill. She then asked if she could read Dr. Magnum’s letter. Ms. Clausen read the letter.

Mr. Patterson reminded the Board to remember the scope of practice for the profession. He stated the Division needs to be sure those people applying for licensure meet specific criteria and the criteria has been effective in licensing people. He stated the Legislature establishes the guidelines for the profession and sometimes the Board or Division have the authority to help set the criteria. Mr. Patterson stated the Acupuncture Law is not in the plain language and the courts do not permit the Division to expand by Rule to include injections. He stated the AG’s office looks at the administration, then they look at the Legislative intent and last they review to see if they can extrapolate the wanted language. He stated none of the above indicated injections in this case.

Ms. Clausen stated Mr. Perry and Mr. Patterson have talked about specific Laws that include injections. She asked if the Utah Chiropractic Law has injections included.

Mr. Steinagel voiced his biggest fear was for this meeting to evolve into what other professions do. Mr. Steinagel stated Utah is an uncommon model as most Boards are autonomous. He stated it is a challenge for many professions that are at the Legislature every year. He stated his concern is that the Law is clear enough that it does not become a turf battle among professions. Mr. Steinagel stated the Acupuncture Law does not give the Division or Board the authority

to expand on the scope of practice by writing Rules.

Ms. Justesen commented maybe the Legislative discussion was in the hall or chairs behind but it was discussed. She explained their sponsor walked out prior to the session and the Association discovered there were two Bills listed and both were empty so they had to scramble to get the Law changed in 2012. She stated the Senator who sponsored the Bill recommended they not come before the Legislature every year with Law changes.

Ms. Zabriskie stated she would like to know what Chiropractors are allowed to do.

Ms. Taxin stated she believed the Chiropractic information referred to is under unprofessional conduct.

Mr. Steinagel responded when the Chiropractors were trying to expand their scope of practice they were given the same information as is being given to this Board today.

Ms. Clausen stated the profession wants to know why the Acupuncturists have to hold to a standard for practice when others do not and are doing injections. She stated Chiropractors can injections without proper training.

Mr. Steinagel responded every profession is held to the same standard. He stated professions overlap and he has had the same conversation with other professions who have tried to expand their scope of practice without changing their Law. Mr. Steinagel stated he would be willing to review the Chiropractic Law but that is not the issue today.

Mr. Walker responded Chiropractors have a totally different scope of practice than Acupuncturists and the Board is trying to discuss apples and oranges.

Ms. Clausen argued that Mr. Perry is saying the Acupuncturists have to hold to a standard and she wanted to know why it is not the standard for

Chiropractors.

Mr. Ottley asked if the basis for Mr. Perry's and Mr. Patterson's standard is the information needs to be clear language in the Law.

Mr. Perry responded yes.

Mr. Ottley stated there has never been anything about the administration of herbs and it has never been defined. He asked why it is necessary to be specific about injections when herbs can be given orally and they have never been in questioned.

Mr. Perry responded the issue of injections is clear in other professions Statutes and not in Acupuncture.

Ms. Garofalo again stated Florida Law defines adjunctive therapies as defined by Rule and the Rule defines adjunctive therapies as the use of injections.

Mr. Patterson again stated the purpose of turning to other States Statutes is to research how they have used terms. He stated he and Mr. Perry reviewed the Utah Legislative Committee minutes and the Legislature has intended the term be defined by Statute. He stated they also reviewed other States Statutes to see how they have defined injections.

Mr. Steinagel stated the Chiropractic Law does not give clear authority for them to use injections. He asked if Acupuncturists are currently administering by injections.

Ms. Justesen responded some are if they have specific training.

Mr. Steinagel stated he has treated the Chiropractors the same as he is the Acupuncturists today and he would hold the same standard.

Ms. Justesen suggested Mr. Steinagel go back and listen to the Legislative Committee minutes again and listen to the 2010 Acupuncture Board meeting and he will hear the discussion of injections.

Mr. Walker clarified that he works for DOPL. He explained he is an attorney and he steers the compliance for the agency. He stated he is not the legal counsel but the AG's office is the legal counsel. He stated his role is to keep bureau managers consistent and to assist in writing and reviewing Rules. Mr. Walker stated whenever he attends a Board meeting if there is a legal question he defers it to the AG's office. Mr. Walker stated the discussion has always recommended a Legislative change for this issue. He stated when the Division finally saw the language they were distressed that the language did not hit the target and believed the Law would need to go back to the Legislature for the language to be made clearer. He stated the guidance was for the Association to go to the Legislature for the language to be more clearly stated.

Mr. Patterson stated the only thing the AG's office can officially point to are the minutes of the meetings. He stated it appears something was said and what was heard was different. He stated the focus and effort of the AG's office was to make their best effort to determine how the Legislative court would look at the interpretation and if the interpretation would be the same if anyone disagreed. He stated it appears the Division would be ok with the Association making the recommended Legislative change in the Law.

Dr. Gershan asked what the process is now.

Mr. Patterson stated his advice is to recommend a change in the Statute. He again stated the scope of practice cannot be expanded by making a policy statement.

Ms. Garofalo commented the lack of understanding of the practice of Acupuncture is what makes Mr. Perry and Mr. Patterson think the Law needs to be changed instead of writing a Rule.

Mr. Perry responded in the minutes from the January 2011 meeting he had informed the Board that injections needed to be specifically put in the Law. He stated again it was not part of the Legislative intent.

He stated modern research is a broad term.

Mr. Patterson stated modern research is research and not practice.

Ms. Garofalo asked if practice training could be defined by Rule. She stated the intent was not to expand the scope of practice but to define.

Mr. Perry stated the AG's have to determine if language will survive a challenge and they do not believe the proposed Rules will.

Ms. Garofalo asked what is meant by survive a challenge.

Mr. Perry and Mr. Patterson responded it means could a Law suit be filed due to the lack of being specific.

Dr. Gershan asked if "Administer" was further clarified to mean it is not intravenous injections then there would not be an issue of someone challenging it.

Mr. Patterson stated if the old minutes were pulled and reviewed it could be determined injections have not traditionally been in the scope of Acupuncture practice for Utah. He stated they are trying to work within the confines of Utah.

Mr. Steinagel voiced having learned a lot today. He stated he has the AG offices advisement and has listened to the comments in this meeting. He stated the Association will need to decide if they want to run a Bill this coming Legislative session or not. Mr. Steinagel stated the Division will not be doing a big enforcement push but he is not leaving the meeting with a definite no or a definite yes regarding the proposed Rules. He recommended people contact him by email if there are any additional thoughts for him to review.

Mr. Steinagel and Mr. Walker left the meeting.

Ms. Clausen stepped out to talk with Mr. Steinagel.

Ms. Garofalo voiced not understanding why the Rule does not further define and why the Law is too broad.

Mr. Patterson used the analogy of a fenced area. He stated if you move the corner post for a small adjustment then the Legislature does not question but when it is moved significantly they do question. He stated the Legislature may say the profession has exceeded the intent.

Ms. Zabriskie stated the issue is not resolved and the Legislative session starts January 28, 2013.

Ms. Clausen returned to the meeting and asked if DOPL has people to help them when they go before the Legislature with Law changes. She stated the Acupuncture Association is small and they have to do it themselves. She asked if there is any way the Division can support the amendment as the Board is not allowed to support the Association or is there a way the Board can support the Association.

Mr. Patterson responded yes, the Division does have assistance but it is primarily the responsibility of the Associations to approach the Legislature for changes in their Law. He stated there have been a few instances when the Division has requested a sponsor for a Bill. He stated the Board is advisory to the Division and the Board can make a recommendation to Mr. Steinagel. He stated it is not uncommon in the AG's office for them to give legal opinions regarding Legislation if they are asked. He reminded the Board that the AG's office represents DOPL in court but they have given support for Legislation.

Ms. Clausen asked if the Board can officially ask Mr. Steinagel to assist the Association with the amendment as it seemed the Association believed they had done what was requested and necessary and put the effort into the amendment.

Ms. Zabriskie asked how the Law should read now everyone knows the intent.

Mr. Patterson responded the Law should include the

word injections.

Ms. Zabriskie asked how they can help the Association without making this a band aide for now.

Mr. Patterson responded the scope of practice does not matter to the AG's office. He stated the Legislature sets the parameters.

Mr. Steinagel and Mr. Walker returned to the meeting.

Ms. Zabriskie asked how the Association can move forward so every little thing that comes up does not have to go back to the Legislature.

Mr. Steinagel responded there is no perfect answer. He stated every time the Law is opened you take a chance but all modalities should be incorporated when the Law is opened.

Ms. Clausen asked if there is a way the Division would support an amendment since the Division goes to the Legislature anyway.

Mr. Steinagel responded the Division would not oppose Legislation unless some study came out from a national institute. He stated the Division will remain neutral on scope of practice changes. He stated usually when a Bill goes before the Legislature they send it to him to review and for a response.

Ms. Justesen asked if the AG's office has the final say regarding the proposed Rules and if they are now off the table.

Mr. Patterson responded the AG's office reviews the Legislative history, committee meetings and when Legislation was on the floor. He stated the discussions before the Board would not have the legal weight that Legislative discussions would have.

Mr. Steinagel clarified Ms. Justesen is asking if meeting with the Board and Division is good enough. He stated no, it is like someone calling in to ask if they need a residency program and a staff member

saying they do not. He stated he cannot honor the staff comment as he needs to be sure people meet specific requirements. He stated there is also a good chance the recording from the 2010 meeting is no longer available as recordings are only kept one year.

He stated there is no Statutory language to write a rule to further clarify "Administration". He stated the Board presented the Rules and due to his concerns he requested the AG's office to give a legal opinion, which they have now given.

Mr. Walker commented when there are discussions in Board meetings they are just discussions unless the AG's office is invited for formal legal counsel. He stated the Association is trying to hang their hat on a hook of discussion that took place in 2010 and the Division had concerns when the official language of the Law came out as it was not the language that was suggested.

Ms. Zabriskie asked if Ms. Justesen wants to open the Law again.

Mr. Montgomery clarified he is now the president of the Association and the Association will need to discuss the issue before a decision is made.

Mr. Steinagel suggested they might contact Senator Vickers as he ran a Bill for them before.

Mr. Patterson stated any action before a Board has to be posted for the public and the Board cannot act on an item that is not on the agenda and published. He recommended the Board refrain from making a recommendation as it is a Class B misdemeanor.

Ms. Garofalo asked what is next in the process.

Ms. Clausen responded DOPL Director has said he will consider assisting.

The discussion came to an end.

DISCUSSION ITEMS:

2013 Board Meeting Schedule

Ms. Taxin informed the Board of the dates scheduled for 2013. She stated if there is no business to conduct meeting may be cancelled.

The Board noted the following dates for the 2013 Board meeting schedule: January 15, May 28 and September 17, 2013.

NEXT MEETING SCHEDULED FOR: January 15, 2013

ADJOURN: The time is 11:56 am and the Board meeting is adjourned.

Note: These minutes are not intended to be a verbatim transcript but are intended to record the significant features of the business conducted in this meeting. Discussed items are not necessarily shown in the chronological order they occurred.

Date Approved

Chairperson, Utah Acupuncture Licensing Board

December 20, 2012
Date Approved

(ss) Noël Taxin
Bureau Manager, Division of Occupational &
Professional Licensing