STATE OF ARIZONA
OFFICE OF THE
AUDITOR GENERAL

A PERFORMANCE AUDIT
OF THE

BOARD OF OSTEOPATHIC EXAMINERS IN MEDICINE & SURGERY

DECEMBER 1981

A REPORT TO THE
ARIZONA STATE LEGISLATURE

REPORT 81-16

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STATE OF ARIZONA
OFFICE OF THE
AUDITOR GENERAL

December 10, 1981

Members of the Arizona Legislature
The Honorable Bruce Babbitt, Governor
Richard O. McGill, D.O., Secretary-Treasurer
Board of Osteopathic Examiners in Medicine and Surgery

Transmitted herewith is a report of the Auditor General, A Performance Audit of the Board of Osteopathic Examiners in Medicine and Surgery. This report is in response to a January 30, 1980, resolution of the Joint Legislative Oversight Committee. The performance audit was conducted as a part of the Sunset review set forth in A.R.S. §§41-2351 through 41-2379.

The blue pages present a summary of the report; a response from the President, Michael Mignella, J.D., and the Secretary-Treasurer of the Board is found on the yellow pages preceding the appendices.

My staff and I will be pleased to discuss or clarify items in the report.

Respectfully submitted,

Douglas R. Norton

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Enclosure

OFFICE OF THE AUDITOR GENERAL

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SUMMARY

The Office of the Auditor General has conducted a performance audit of the Board of Osteopathic Examiners in Medicine and Surgery in response to a January 30, 1980, resolution of the Joint Legislative Oversight Committee. This performance audit was conducted as part of the Sunset review set forth in Arizona Revised Statutes (A.R.S.) §§41-2351 through 41-2379.

The Board of Osteopathic Examiners in Medicine and Surgery was established in 1949 to examine and license osteopathic physicians and to protect the public from incompetent and harmful practitioners. Its membership consists of four licensed osteopathic physicians and one public member. All members are appointed by the Governor to five-year terms.

Our review found that improvements are needed in the Board's complaint review process in order for it to comply with statutory requirements and adequately protect the public. The Board has delegated excessive complaint review authority to its staff secretary-treasurer; has violated the confidentiality provisions of A.R.S. §32-1855, subsection A, by sending complaints signed by the complainant to physicians involved in the complaint; and has exceeded its authority by requesting doctors involved in complaints to refund money or adjust fees. Furthermore, the Board's secretary-treasurer appears to have a conflict of interest, which has not been declared, in cases involving patients treated at Phoenix General Hospital since he is Medical Director at that hospital. (page 7)

Although the Board took 11 disciplinary actions during the period January 1979 through March 1981, in only one of these cases had a complaint file been established by the Board. The one case for which a complaint file was available related to a 1978 complaint. Of the 106 complaints received by the Board in 1979 and 1980, and for which files were available, the Board did not impose any official sanctions. We found that the Board lacks adequate resources to thoroughly investigate complaints, and, therefore, is unable to fully protect the public. (page 17)

If the Board is continued as a separate entity, we recommend that: 1) every complaint be reviewed and resolved by the full Board, 2) complainant names not be disclosed to doctors involved in the complaint in compliance with A.R.S. §32-1855, subsection A, 3) the Board discontinue requesting doctors who overcharge patients to adjust fees or refund money to patients, 4) reports from other agencies concerning possible violation by physicians be documented in a complaint file, 5) the secretary-treasurer declare his conflict of interest and refrain from involvement in complaints involving care at Phoenix General Hospital, 6) A.R.S. §32-1825, subsection B, be amended to remove the current $50 ceiling on license renewal fees, and 7) the Board be appropriated funds to hire a part-time or full-time investigator. (page 24)

As an alternative, we recommend that the Board of Osteopathic Examiners and the Board of Medical Examiners be combined into a single regulatory unit. Combining Boards would improve the Osteopathic Board's effectiveness and accessibility to the public. Thirty states and the District of Columbia license and regulate osteopathic physicians and medical doctors, both of whom have the same scope of practice, through a composite board. A survey of ten states with composite boards disclosed no adverse consequences or professional friction resulting from regulation of osteopathic physicians and medical doctors by the same board provided osteopathic physicians are adequately represented on the Board. (page 27)

Under Arizona law, osteopathic physicians are required to attend a two day (12 hour) educational program prior to renewing their license each year. Our review indicated that changes are needed in Board statutes pertaining to continuing education since: 1) the Board lacks sufficient authority to waive the requirement or grant extensions, and 2) most states which have a continuing education law for osteopathic physicians require more hours than Arizona. We recommend that A.R.S. §32-1825 be amended to either: 1) allow the Board more flexibility in granting waivers and extensions on an annual basis, or 2) require that continuing education be reported every three years rather than annually. We also recommend that the Board be allowed to set the minimum continuing education requirement through its rule making authority. (page 39)

Finally, Board members have been receiving $30 per day compensation consistent with most other state regulatory agencies. Board statutes, however, set the compensation rate at $50 per day. As a result, Board members were underpaid a total of $1,060 in fiscal year 1980-81. We recommend that Board statutes pertaining to compensation of members be brought into conformity with provisions applicable to other regulatory boards. (page 43)

INTRODUCTION AND BACKGROUND

The Office of the Auditor General has conducted a performance audit of the Board of Osteopathic Examiners in Medicine and Surgery, in response to a January 30, 1980, resolution of the Joint Legislative Oversight Committee. This performance audit was conducted as part of the Sunset review set forth in Arizona Revised Statutes (A.R.S.) §§41-2351 through 41-2379.

Osteopathic medicine is a branch of medical science founded in the late 19th century in reaction to the widespread, unscientific use of drugs for the treatment of disease. In its early days, osteopathic physicians shunned the use of most drugs, stressing instead the benefits of treating disease through manipulation of the musculo-skeletal system. Osteopathic physicians today, however, use all current medical treatment methods, including drugs, surgery and radiation.

From 1913 to 1948, osteopathic physicians in Arizona were licensed by the Board of Medical Examiners. In 1949, however, the Legislature passed SB 100, establishing a separate Osteopathic Board of Registration and Examination. The purpose of the Board is to examine and license osteopathic physicians and surgeons, to renew licenses annually, to review complaints and hold hearings and to enforce the standards of practice of the osteopathic profession. The Board is comprised of five members, of whom four are licensed, practicing osteopaths and one is a representative of the public.

Staffed by two full-time employees, the Board operates on an annual General Fund appropriation. As shown in Table 1, Board expenditures have increased from $35,140 in fiscal year 1976-77 to $53,602 in 1980-81. Ninety percent of examination and licensing fees received by the Board are deposited in a special Board fund to support its operation.

TABLE 1

BOARD EXPENDITURES AND REVENUES:
FISCAL YEARS 1976-77 THROUGH 1980-81

Expenditures	'76-77	'77-78	'78-79	'79-80	'80-81
Personal services	$23,906	$26,094	$29,374	$31,900	$35,086
Employee-related	3,356	4,018	5,050	5,307	5,805
Professional and outside services	352	572	2,440	3,201	2,950
Travel:					
In-State	1,168	1,041	1,257	1,238	1,920
Out-of-State	471	80	1,261		
Other operating expenses	5,887	5,807	6,443	6,904	7,841
Total expenditures	$35,140	$37,612	$45,825	$48,550	$53,602
Revenues	$40,735	$46,780	$46,292	$60,090	$60,592

Board activity has remained relatively stable in recent years, as shown in Table 2.

TABLE 2

LEVEL OF BOARD ACTIVITY

Activity	Fiscal Years				
	1976-77	1977-78	1978-79	1979-80	1980-81
New licenses issued	75	85	59	75	64
Licenses renewed	1,007	1,050	1,075	1,108	1,147
Board meeting and hearing days	8	15	13	9	11
Complaints received	56	56	22	68	61

The Auditor General expresses appreciation to the members of the Board and the Board staff for their cooperation and assistance during the course of our audit.

SUNSET FACTORS

Nine factors were considered to determine, in part, whether the Board of Osteopathic Examiners in Medicine and Surgery should be continued or terminated, in accordance with Arizona Revised Statutes (A.R.S.) §§41-2351 through 41-2379.

SUNSET FACTOR: THE OBJECTIVE AND PURPOSE IN ESTABLISHING THE BOARD

Statutes do not state explicitly the purpose of the Board. However, A.R.S. §32-1803 establishes duties of the Board:

> "A. The Board shall:
>
> "1. Conduct all examinations for applications for a license under this chapter, issue licenses, conduct hearings, place physicians on probation, revoke or suspend licenses, and administer and enforce all provisions of this chapter.
>
> "2. Be charged with and enforce within the osteopathic profession in this state the standards of practice prescribed by this chapter and the rules and regulations adopted by the board pursuant to the authority granted by this chapter."

In addition, the following goals of the Board were stated in the Board's fiscal year 1980-81 budget:

> "The goal of the Board of Osteopathic Examiners in Medicine and Surgery is to provide for the people of Arizona the highest quality of osteopathic medical care. To accomplish this goal, the Board carefully reviews the qualifications of applicants for licensure, investigates complaints, holds hearings when necessary to determine if an existing license should be suspended or revoked and in general exerts supervision over the osteopathic profession to ensure adherence to the prescribed standards of practice."

SUNSET FACTOR: THE DEGREE TO WHICH THE BOARD HAS BEEN ABLE TO RESPOND TO THE NEEDS OF THE PUBLIC AND THE EFFICIENCY WITH WHICH IT HAS OPERATED

The Board has not been fully responsive to the needs of the public due to a lack of investigative resources and limited accessibility. See pages 17 and 32. The Board appears to have operated efficiently. The only change in Board staffing in the past 30 years has been the addition of an administrative assistant in spite of a four-fold increase in the number of Board licensees.

SUNSET FACTOR: THE EXTENT TO WHICH THE BOARD HAS OPERATED WITHIN THE PUBLIC INTEREST

The Board's current complaint-review procedures are not in compliance with law or in the public interest. The Board secretary-treasurer has resolved most of the Board's complaints on his own, without full Board involvement. In addition, a few of the complaints involved patients treated at Phoenix General Hospital, where the secretary-treasurer is employed as Medical Director. This apparent conflict of interest has not been declared.

SUNSET FACTOR: THE EXTENT TO WHICH RULES AND REGULATIONS OF THE BOARD ARE CONSISTENT WITH LEGISLATIVE MANDATE

In 1980, a law clerk working for the Attorney General reviewed the Board's rules and regulations in detail and recommended amending Rule R4-22-05(A) to establish specifically the Federation Licensing Exam (FLEX) as the Board's written examination. He also recommended that the Board repeal Rule R4-22-06(D), (1), (2) and (3) pertaining to advertising, because it is unconstitutional.

SUNSET FACTOR: THE EXTENT TO WHICH THE BOARD HAS ENCOURAGED INPUT FROM THE PUBLIC BEFORE PROMULGATING ITS RULES AND REGULATIONS AND THE EXTENT TO WHICH IT HAS INFORMED THE PUBLIC AS TO ITS ACTIONS AND THEIR IMPACT ON THE PUBLIC

A survey by the Office of the Auditor General indicates that the Board has met the statutory requirement to post notice of meetings and rule changes, and has publicized its activities in the State professional association newsletter. However, the Board has not exceeded the minimal statutory requirement with regard to informing the public, and public awareness of the Board appears to be low when compared to public awareness of the Board of Medical Examiners. (page 33)

SUNSET FACTOR: THE EXTENT TO WHICH THE BOARD HAS BEEN ABLE TO INVESTIGATE AND RESOLVE COMPLAINTS THAT ARE WITHIN ITS JURISDICTION

Board complaint-review procedures are not in compliance with law, and the Board lacks investigative resources to investigate and resolve complaints and protect the public adequately. (pages 10 and 17)

SUNSET FACTOR: THE EXTENT TO WHICH THE ATTORNEY GENERAL OR ANY OTHER APPLICABLE AGENCY OF STATE GOVERNMENT HAS THE AUTHORITY TO PROSECUTE ACTIONS UNDER ENABLING LEGISLATION

According to the Board's assistant Attorney General, the Board lacks clear authority to enforce its own orders, because violations of Board orders are not established specifically in statute as a cause for disciplinary action.

SUNSET FACTOR: THE EXTENT TO WHICH THE BOARD HAS ADDRESSED DEFICIENCIES IN ITS ENABLING STATUTES WHICH PREVENT IT FROM FULFILLING ITS STATUTORY MANDATE

In 1979, the Board suggested legislation to: 1) require mandatory reporting of incompetent physicians by the Arizona Osteopathic Medical Association and health care institutions, 2) enable the Board to conduct informal interviews with physicians and to censure or place physicians on probation following such interviews, and 3) to establish advertising in a "false, deceptive or misleading manner" as unprofessional conduct subject to disciplinary action. The legislation was passed as part of House Bill 2067 and signed by the Governor on April 17, 1979.

SUNSET FACTOR: THE EXTENT TO WHICH CHANGES ARE NECESSARY IN THE LAWS OF THE BOARD TO ADEQUATELY COMPLY WITH THE FACTORS LISTED IN THIS SUBSECTION

Our review determined that additional statutory changes are needed if the Board is continued as a separate entity. (pages 25 and 45)

FINDING I

IMPROVEMENTS ARE NEEDED IN THE BOARD'S INVESTIGATION AND RESOLUTION OF COMPLAINTS IN ORDER FOR IT TO COMPLY WITH STATUTORY REQUIREMENTS AND PROTECT THE PUBLIC ADEQUATELY.

The Board of Osteopathic Examiners in Medicine and Surgery is responsible for investigating complaints against osteopathic physicians. A.R.S. §32-1855 establishes procedures for reviewing complaints and authorizes the Board to take disciplinary action. Our review of the Board's performance in resolving complaints revealed:

- Most of the complaints received by the Board during 1979 and 1980 pertained to physician's fees (42 percent), quality of care (17 percent) and the necessity of services provided (15 percent).
- From January 1979 to March 1981, the Board placed three physicians on probation, ordered six summary supensions, revoked one license and accepted one permanent resignation. However, the Board did not establish complaint files for ten of these eleven cases. The one case for which a complaint file was available was related to a 1978 complaint. Of the 106 complaints the Board received during 1979 and 1980, and for which complaint files were available, the Board did not impose any official sanctions.
- The Board has delegated excessive complaint review authority and responsibility to its secretary-treasurer.
- The Board violates the confidentiality provisions of A.R.S. §32-1855, subsection A, when it routinely sends complaints which are signed by the complainant to the physician named in the complaint.
- The Board exceeds its authority when it requests doctors involved in complaints to refund money or adjust fees.
- The Board's secretary-treasurer appears to have a conflict of interest when complaints involve patient care at Phoenix General Hospital, because he is the Medical Director at that hospital.

The above deficiencies appear to: 1) be the result primarily of limited Board resources, 2) increase the Board's exposure to legal challenge, and 3) impair the Board's ability to protect the public.

The Board Has Authority to Investigate Complaints and Discipline Physicians

A.R.S. §32-1855, subsection A, establishes the Board's authority to investigate complaints against osteopathic physicians:

> "A. The board on its own motion may investigate any information which appears to show that an osteopathic physician and surgeon is or may be guilty of unprofessional conduct or is or may be mentally or physically unable safely to engage in the practice of medicine. Any osteopathic physician or surgeon or the Arizona osteopathic medical association or any health care institution as defined in §36-401 shall, and any other person may, report to the board any information such physician or surgeon, association, health care institution or such other person may have which appears to show that an osteopathic physician and surgeon is or may be guilty of unprofessional conduct or is or may be mentally or physically unable safely to engage in the practice of medicine...."

The Board has established general procedures for handling complaints:

1. When received, the complaint is assigned a complaint number and documented in a log.

2. The complaint is reviewed by the Board's staff secretary-treasurer, an osteopathic physician, who normally sends a copy of the signed complaint to the cited doctor for a response.

3. The doctor's response and supporting medical information is reviewed by the secretary-treasurer.

4. On occasion, the complaint is sent to a Board member or the Attorney General for review.

5. The secretary-treasurer makes a determination as to how to resolve the complaint, and a letter of decision is sent to the complainant. The letter may include a copy of the doctor's rebuttal.

6. The secretary-treasurer may bring the complaint to the full Board for review.

Following an informal interview with the physician or a hearing, the Board may: 1) dismiss the complaint, 2) issue a decree of censure, 3) place the doctor on probation, or 4) suspend, or 5) revoke the doctor's license. A license can be suspended or revoked only after a formal hearing.

Nature of Complaints Received by the Board

We reviewed all 106 complaints received by the Board during 1979 and 1980. As shown in Table 3, 42 percent of the complaints pertained to physician fees, 17 percent pertained to the quality of care provided to patients, and 15 percent pertained to the necessity of services provided.

TABLE 3

NATURE OF COMPLAINTS RECEIVED BY THE BOARD IN 1979 AND 1980

Nature of Complaint	Number	Percentage
Physician's fee	45	42%
Quality of care	18	17
Necessity of services provided	16	15
Overprescribing drugs	6	6
Failure to diagnose correctly	5	5
Unethical behavior	4	4
Advertising	2	2
Other	8	7
Not available for review	2	2
Total	106	100%

For details regarding the Board's unclear jurisdiction in fee matters, see page 48.

Disposition of Complaints Received By the Board During 1979 and 1980

From January 1979 to March 1981, the Board placed three physicians on probation, ordered six summary suspensions, revoked one license and accepted one permanent resignation. In only one case reported to the Board in 1978, however, was the information documented in a complaint file, despite the fact that violations were substantiated and disciplinary action was taken by the Board. As a result, it is not possible to determine specifically when and by whom such reports have been filed, how many other such reports have been received by the Board and whether or not they were investigated.

Our review of the 106 complaints received during 1979 and 1980, and for which complaint files were available, revealed that the Board did not impose official disciplinary sanctions, that is, revocation, suspension, probation or censure, against any of the doctors involved in the complaints.

Excessive Authority and Responsibility are Vested with the Board's Secretary-Treasurer

The Board has given the secretary-treasurer, who has been employed by the Board since 1967, excessive complaint-handling responsibility. For example, Board minutes indicate that in 1977 the Board delegated to the secretary-treasurer authority to informally hear minor complaints received by the Board. Such action appears to have been approved by the assistant Attorney General then assigned to the Board.

However, according to the Legislative Council in an opinion dated July 22, 1981, the secretary-treasurer does not have authority to review and resolve complaints:

"The secretary-treasurer has only those powers and duties as prescribed by statute. A.R.S. sections 32-1804 and 32-1855.01 set forth the duties of the secretary-treasurer. They are nondiscretionary and ministerial in nature. The secretary-treasurer does not have the authority to review complaints against osteopathic physicians and surgeons. It is the responsibility of the board to investigate complaints against osteopathic physicians and surgeons."*

Furthermore, the Board cannot delegate this responsibility to the secretary-treasurer:

> "....An administrative board cannot legally confer upon its employees authority that under law may be exercised only by the board....2 Am. Jur. 2d Administrative Law section 222 (1962).

"The Board cannot authorize the secretary-treasurer to act in its behalf by reviewing and resolving complaints against osteopathic physicians and surgeons because the legislature made the board responsible for enforcing the standards of practice within the osteopathic profession and investigating complaints. A.R.S. sections 32-1803, subsection A, paragraph 2 and 32-1855.

> "The Legislature apparently intended those functions to be performed by the persons designated as members of the Board.
>
> "[I]f it is reasonable to believe the legislature intended a particular function to be performed by designated persons because of their special qualifications, then a subdelegation is invalid; but where no particular qualifications are necessary for the exercise of a function its exercise may be delegated to subordinate officials. Sutherland, Statutes and Statutory Construction section 4.14 (4th ed., Sands, 1972).

"The board cannot delegate its enforcement responsibilities to the secretary-treasurer."

Because the secretary-treasurer resolves most complaints on his own without Board involvement, his decisions are not checked to determine if they are fair and appropriate.

---

* For opinion text, see Appendix I.

We surveyed every complainant and physician involved in complaints in 1979 and 1980.* Although most physician respondents (more than 80 percent) were satisfied with Board handling of their complaints, about one-third of the complainant respondents said the fairness of the review and the Board's decision were "poor" or "very poor". A few complainants specifically criticized the secretary-treasurer's handling of their complaints. For example:

> "The attitude, and I believe it was the secretary of the Board, was defensive and an apparent attempt to cover up for the physician."
>
> "The gentleman calling to inquire about the case could be more kind and sympathetic. In my case, he tried to get me to change my mind and ended up arguing for 30 minutes over the phone."

According to the Legislative Council, it is the responsibility of the Board to review and resolve complaints. Review of complaints by the full Board is more likely to be fair to complainants, because Board membership includes one lay member who is independent of the osteopathic profession.

Sending Signed Complaints to
Physicians Violates Confidentiality

The practice of sending copies of signed complaints to the doctors involved violates statutory confidentiality provisions. A.R.S. §32-1855, subsection A, states that:

> ".....Any person who reports or provides information to the board in good faith shall not be subject to an action for civil damages as a result thereof and such person's name shall not be disclosed unless such person's testimony is essential to the disciplinary proceedings conducted pursuant to this section."

* Survey results are presented in detail on page 47.

According to the Legislative Council in an opinion dated August 4, 1981:

> "The meaning of the language in A.R.S. section 32-1855, subsection A prohibiting disclosure of names is clear. The name of any person who reports or provides information to the Board in good faith shall not be disclosed unless such person's testimony is essential to a disciplinary proceeding conducted pursuant to A.R.S. section 32-1855. Giving the language of this statute its plain meaning does not result in impossible or absurd consequences.
>
> "The Board's practice of sending a copy of the signed complaint to the osteopathic physician involved in the complaint for the purpose of resolving the complaint without any formal Board action does not comply with A.R.S. section 32-1855, subsection A. In cases where the Board takes formal action under A.R.S. section 32-1855 disclosure of the name of the complainant may be necessary to advise the accused physician of the charges against him. See 61 Am. Jur. 2d Physicians, Surgeons, etc. sections 105 and 114 (1962)."*

According to the Board's assistant Attorney General, disclosing names of complainants to doctors involved in the complaint could have the effect of discouraging patients from filing complaints with the Board. Although half the complainants surveyed (49 percent) rated confidentiality of the Board's complaint investigation as "good" or "very good", some complainants (13 percent) thought confidentiality was poorly maintained. One complainant stated the following:

> "There was no confidentiality because [the] Board sent copies of my letters to the doctor...to get both sides of the story and our arguments."

* For opinion text, see Appendix II.

Of complainants responding to the survey 38 percent said they would not file another complaint with the Board. Lack of confidentiality may be one reason three complainants stated that, as a result of filing complaints, their relationships with their physicians had been impaired. Although filing a complaint in itself may strain a patient's relationship with his doctor, sending a copy of the complaint signed by the patient to the doctor is more likely to result in friction, ill-feelings and subsequent problems for the patient.

Board Lacks Authority to Request Fee Adjustments

The Board on occasion has requested physicians to adjust their fees or to refund money. According to the Legislative Council in an opinion dated July 31, 1981, the Board does not have authority to take such action:

> "After an informal interview with the physician concerned the Board may issue a decree of censure or fix a period and terms of probation, or both. After a formal hearing the Board may subject the physician to any one or more of the following: censure, probation, suspension of license or revocation of license. The Board only has authority to discipline osteopathic physicians as provided in A.R.S. section 32-1855. The Board does not have authority to notify the complainant that the fee is excessive and request an osteopathic physician to adjust the fee or refund the overcharge."*

* For opinion text, see Appendix III.

Board's Secretary-Treasurer Appears To Have a Conflict of Interest Which Has Not Been Declared

The Board's secretary-treasurer appears to have a conflict of interest which has not been declared. The secretary-treasurer works for the Board and, at the same time, serves as Medical Director for Phoenix General Hospital (Osteopathic). In the latter capacity he is responsible for the quality of care provided by the hospital's medical staff and is involved in physician disciplinary matters at the hospital. We identified one Board complaint received in 1979 and two in 1980 involving care and treatment received by patients at Phoenix General Hospital. All three complaints were reviewed and resolved by the secretary-treasurer on his own, without full Board involvement.

According to the Legislative Council, if the secretary-treasurer had authority to review complaints, it appears he would have a conflict of interest in those cases involving patients treated at Phoenix General Hospital. In an opinion dated August 12, 1981, the Legislative Council stated that the secretary-treasurer would be subject to potential criminal prosecution for failing to declare this conflict:

> "It appears...that the secretary-treasurer, as medical director at Phoenix General Hospital, would have a conflict of interest in those cases involving treatment of patients by osteopathic physicians and surgeons at Phoenix General Hospital. Failure to declare the conflict of interest or failure to refrain from participating in a decision involving the conflict would subject the secretary-treasurer to potential criminal prosecution and, if found guilty, loss of his employment."*

* For the opinion text, see Appendix IV.

Exposure to Legal Challenge

The Board's noncompliance with statutory requirements regarding complaint-handling appears to increase the Board's exposure to legal challenge. In April 1981 a physician with several complaints on file at the Board filed a $1.5 million claim against the State, alleging that illegal and improper actions had been taken by the secretary-treasurer without Board authority. These actions included the manner in which a complaint was handled involving the doctor and another physician for whom he was apparently serving as a preceptor (supervisor). In a letter to the Board dated March 30, 1981, the doctor's attorney criticized the secretary-treasurer for failing to conduct a fair and impartial investigation, and for absolving the other doctor of misconduct:

> "Obviously, you exonerated [the other doctor] of any wrongdoing or any breach of ethics in your position as a member of the 'Board' without consulting other members of the Board and without bringing the matter to a hearing, which action has jeopardized [the doctor's medical groups'] future ability to obtain preceptors."*

According to the doctor's attorney, the secretary-treasurer's unauthorized, biased and prejudicial actions against his client left him few alternatives other than to sue the Board.

* The secretary-treasurer is an employee of the Board, not a Board member.

Board Lacks Investigative Resources

The Board lacks adequate resources to investigate complaints thoroughly. Current staff consists solely of the secretary-treasurer and an administrative assistant. The only change in the staffing level in 30 years has been the addition of the administrative assistant, despite more than a four-fold increase (from about 250 in 1951 to 1,147 in 1980) in numbers of licenses granted annually by the Board. The Board has never had its own investigators and, due to the statutory $50 limitation on renewal fees,* will not be able to generate sufficient revenue in the future to pay for investigative services. Because of the lack of investigative resources, the Board has been forced to rely on other agencies to develop sufficient information for the Board to take disciplinary action.

We reviewed every official disciplinary action taken by the Board from January 1979 through March 1981. During this period, as noted earlier, the Board placed three physicians on probation, ordered six summary suspensions, revoked one license and accepted one permanent resignation.** All cases involved drug violations which had been investigated for the most part by the Department of Public Safety (DPS), the Board of Pharmacy or the Federal Drug Enforcement Administration (DEA).

Because the Board lacks investigative resources, it is unable to protect the public fully since: 1) disciplinary action cannot be taken or is delayed when the Board is unable to investigate fully complaints from the public and violations discovered by other agencies, 2) violations occur which go undetected, and 3) the Board is unable to monitor adequately the activities of licensees on probationary status. The following case examples illustrate how lack of investigative resources impairs the Board's performance.

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* A.R.S. §32-1825, subsection B, sets the Board's maximum renewal fee at $50. To cover expenses, the Board plans to raise the fee from $40 to the $50 maximum for the next renewal cycle.

** While the disciplinary actions were documented in Board minutes, the Board had established a complaint file for only one of these actions, which related to a 1978 complaint.

CASE I

In approximately September 1980,* DPS reported an osteopathic physician to the Board for overprescribing drugs. According to a DPS investigator, the doctor prescribed narcotics to known drug abusers and dealers. One of the doctor's patients was described by DPS as a "kingpin" in the "illicit Dilaudid** market" in the Phoenix area, who earned $21,000 a week selling drugs on the street. The doctor claimed the patient was a legitimate cancer patient. Another patient was a known drug "middleman," whom the doctor claimed had intimidated and threatened him into writing narcotic prescriptions. A DPS and Phoenix police investigation revealed, however, that the doctor was financially involved with the patient in that: 1) the doctor had provided the patient a $3,000 down payment toward the purchase of a car, 2) the doctor offered the patient free treatments and remitted hospital costs in exchange for sexual favors from women provided by the patient, and 3) the doctor and patient had an informal business agreement in which the patient was to provide financial backing for a cancer clinic in exchange for narcotic prescriptions written for unseen patients.

Board Action

After a hearing by the Board in February and March 1981, the doctor was placed on probation and his prescription-writing privileges were restricted. It should be noted that during the two years before receiving the DPS report, the Board received ten other complaints against the same doctor. These complaints pertained to the doctor's prescription-writing practices, diagnostic testing procedures, treatment methods and fees. The Board's investigation of these complaints appears to have been limited, and no official Board disciplinary action was taken. In addition, during the course of our audit, we were made aware of additional activities of the doctor, unknown to the Board, which are under criminal investigation and within the Board's regulatory scope.

* Exact date is not known due to lack of documentation.

** Dilaudid is an addictive pain killer used in the treatment of cancer and other diseases.

Comment

Due to its lack of investigative resources, the Board was unable to investigate fully the doctor's practices, and Board action may have been unduly delayed. In addition, the Board was not aware at the time of our audit of other similar alleged violations that currently are under criminal investigation.

CASE II

In July 1972, an osteopathic physician was arrested after attempting to sell almost 1,000 vials of amphetamines (at $10 a vial) to a DPS officer. The doctor was found guilty of unlawful distribution of dangerous drugs, a felony, and placed on probation by a State Superior Court in February 1973. In addition, the doctor, who had been addicted to amphetamines, was convicted of related Federal drug violations in the U. S. District Court in Arizona.

Board Action

Following his criminal convictions, the Board censured the doctor and placed him on probation for ten years. Terms of his probation included reporting to the Board twice yearly and not engaging in activity which would constitute unprofessional conduct.

In 1976, a Board of Pharmacy inspector discovered that the doctor, who still was on Board-ordered probation, had been prescribing and obtaining large amounts of Demerol (an addictive pain killer) for personal use. The doctor subsequently was admitted to the hospital for Demerol addiction, treated and discharged in 1977 with a "poor" prognosis for overcoming his chemical dependence.

In January 1978, the Board considered the doctor's request that his Federal permit to prescribe controlled drugs, which had expired, be reissued. The Board denied the request until the doctor's physical condition could be fully evaluated. In April 1978, following a personal interview with the doctor, the Board voted to recommend reissuance of his permit to prescribe drugs, but that the permit not include Schedule II (narcotic) substances.*

In 1979, a Board of Pharmacy inspector found that the doctor again was obtaining controlled drugs for his own use. The Board learned that the doctor had applied for and received a permit to prescribe Schedule II substances contrary to the Board's directive of April 1978, and had written Demerol prescriptions for his wife.

Following a hearing in June 1980, the Board ordered a summary suspension of the doctor's license until such time as he surrendered his Schedule II permit to Federal authorities. The doctor complied with the Board's order four days after it was signed, and the suspension of his license was withdrawn.

In September 1980, a Board of Medical Examiners investigator found that seven prescriptions for Talwin, an addictive Schedule IV substance, had been written by the doctor. Three of the prescriptions were for the doctor's office use, and three were made out to his wife.

After an interview with the doctor, who indicated the prescriptions were written legitimately for patients and for his wife, the Board advised him that medication for his wife should be prescribed by a physician other than himself.

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* The Federal Drug Enforcement Administration has developed a classification system for controlled substances based on addiction potential and other drug characteristics. Schedule II drugs include the most addictive narcotic substances available for medical use.

Comment

The Board was unable to monitor adequately the activities of a licensee on probationary status. The Board relied on information provided by other agencies, since it was unable to investigate fully the activities of the doctor on its own. For example, no pharmacy surveys were made by the Board to determine the doctor's compliance with Board orders.

In addition, during the course of our audit, we reviewed recent information obtained by the Department of Public Safety which indicates the doctor again may be improperly dispensing drugs, and that those activities appear to warrant investigation. The Board was unaware of these activities at the time of our audit.

CASE III

In October 1973, investigators from the Board of Pharmacy and DEA found that an osteopathic physician had more than 100,000 dosage units of straight amphetamine capsules stored at his home in violation of Federal regulations. The doctor claimed that the drugs were used in his weight control program and were stored at his home because of numerous burglary attempts at his office. In the presence of the investigators the drugs were transferred to a storage warehouse.

However, in 1975 Federal authorities discovered that the doctor, who operated a weight control clinic and had been prescribing large amounts of amphetamines to his patients, had moved his office without notifying DEA, and was using an expired DEA registration number.

Board Action

In 1979, almost six years after the initial investigation of the doctor, the Board held a hearing and found that since 1966 the doctor had prescribed indiscriminately and dispensed amphetamines to numerous patients, despite no appreciable medical benefit and against the patients' best interests. In some cases, no physical examinations were conducted prior to dispensing the drugs, medical records were lacking, and no monitoring of physical progress and reactions was done. In one case, drugs were mailed regularly to a patient who had moved to Tennessee. The doctor was placed on probation by the Board and ordered to discontinue prescribing drugs for weight control.

Comment

The doctor's medical violations, dating back to 1966, went undectected by the Board until 1973 when investigators from other agencies informed the Board. Subsequent Board action may have been delayed because it lacked its own investigative resources.

CASE IV

An insurance company wrote to the Board in November 1979, requesting that the Board review treatment provided and fees charged to three patients by an osteopathic physician.

Board Action

At its January 1980 meeting, the Board reviewed the matter and determined that, in all three cases, unnecessary treatment had been provided and fees had been excessive. Diagnoses were made which were not substantiated and the reasons for many office visits were not apparent.

In addition, the Board found a possibility of fraud in the doctor's laboratory billings and directed its secretary-treasurer to investigate further. The secretary-treasurer, whose statutory responsibilities do not include investigating complaints, attempted to investigate the possibility of fraud by visiting the doctor's office. The office was closed at the time of his visit and no determination could be made. The Board did not pursue the question of fraud and the matter was dropped.

Comment

The Board did not investigate fully the possibility of fraud discovered during review of the insurance company complaint.

Board Members Claim an Investigator is Needed

During the course of our audit, we interviewed the five members of the Board, its secretary-treasurer, the assistant Attorney General assigned to the Board and officials of other agencies. All agreed the Board needs investigative resources. Board members stated that either an investigator is needed or that having one would be helpful. The assistant Attorney General assigned to the Board described the Board's lack of an investigator as its "one big deficiency." By contrast, the Board of Medical Examiners, which also licenses physicians and surgeons, has four full-time investigators and three half-time medical consultants available to investigate complaints.

A Health Council is an Alternative To Individual Regulatory Agencies

In two 1979 performance audit reports (Report 79-10 and Report 79-11) it was recommended that the Legislature consider establishing a Health Occupation's Council, based on a model regulatory structure developed by the Council of State Governments. One of the benefits of such a council, made up of representatives of each regulated profession and the public, is to coordinate and centralize certain staff functions, including investigations of complaints. Under such an arrangement, investigative services are available to smaller boards, such as the Board of Osteopathic Examiners in Medicine and Surgery, which lack investigative resources of their own.

CONCLUSION

Board complaint-review procedures are not in compliance with law in that: 1) the Board's secretary-treasurer does not have authority to review and resolve complaints, 2) the practice of sending copies of signed complaints to doctors involved violates confidentiality requirements, and 3) the Board does not have authority to request doctors to adjust fees or provide refunds to patients. It was noted during our audit that some agency reports on physician violations had not been documented in a complaint file, and the secretary-treasurer appears to have a conflict of interest which has not been declared. In addition, the Board does not have its own investigative resources. As a result, it is unable to protect the public fully in that: 1) disciplinary action cannot be taken, or is delayed when the Board is unable to investigate fully complaints and violations discovered by other agencies, 2) violations occur which go undetected by the Board, and 3) the Board is unable to monitor adequately the activities of licensees on probationary status.

RECOMMENDATIONS

If the recommendation in Finding II* is not adopted, then consideration should be given to the following recommendations:

1. Every complaint be reviewed and resolved by the full Board.

2. Complainant names not be routinely disclosed to doctors involved in the complaint in compliance with A.R.S. §32-1855, subsection A.

3. The Board discontinue requesting doctors who overcharge patients to adjust fees or make refunds to patients.

4. Reports from other agencies concerning possible violations by physicians be documented in a complaint file.

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* Finding II explores the advisability of merging the Board with the Board of Medical Examiners.

5. The secretary-treasurer declare his conflict of interest and refrain from involvement in complaints involving care at Phoenix General Hospital.

6. A.R.S. §32-1825, subsection B, be amended to remove the current ceiling of $50 on license renewal fees.

7. The Board be appropriated funds to hire an investigator part-time or full-time.

It is also recommended, as an alternative, that the Legislature consider establishing a Health Occupation's Council with centralized staff resources.

FINDING II

COMBINING THE BOARD OF OSTEOPATHIC EXAMINERS IN MEDICINE AND SURGERY AND THE BOARD OF MEDICAL EXAMINERS WOULD IMPROVE THE OSTEOPATHIC BOARD'S EFFECTIVENESS AND ACCESSIBILITY TO THE PUBLIC.

Unlike statutes in most other states, Arizona statutes provide for both a Board of Osteopathic Examiners in Medicine and Surgery and a Board of Medical Examiners (BOMEX), despite the fact that: 1) both regulate physicians and surgeons in the same scope of practice, and 2) the statutory responsibilities and functions of the two boards are essentially the same. Thirty other states license and regulate doctors of osteopathy and doctors of medicine through a single composite board. Our review indicated that combining the Osteopathic Board with BOMEX would: 1) improve the Osteopathic Board's effectiveness, 2) increase its public accessibility and awareness, and 3) promote efficiency in the use of clerical services and physical facilities.

Members of the Osteopathic Board oppose merging with BOMEX primarily because of differences in medical philosophy and concerns regarding adequate representation. Staff interviews with officials in ten of the 30 states with combined boards, however, revealed no adverse consequences or professional friction resulting from one board regulating the two professions, provided that the osteopathic profession is adequately represented on the board.

Current Statutes Provide for Separate Boards

Arizona law provides for a Board of Osteopathic Examiners in Medicine and Surgery pursuant to A.R.S. §32-1801, et seq., and a Board of Medical Examiners (BOMEX) in accordance with A.R.S. §32-1401, et seq. The Osteopathic Board licenses physicians who earn a doctor of osteopathy (DO) degree. BOMEX licenses physicians who earn a doctor of medicine (MD) degree. The scope of medical practice of DOs and MDs, however, is the same, and includes the use of drugs, radiation and surgery in the treatment of disease.

A comparison of the statutory functions of both boards revealed that their responsibilities are essentially the same. As shown in Table 4, both boards issue licenses by examination and by endorsement, grant temporary licenses, have authority to issue area permits, renew licenses annually, reinstate licenses, investigate complaints and reports filed against licensees, hold informal interviews and formal hearings, discipline physicians and review malpractice reports filed by insurance carriers.

TABLE 4

COMPARISON OF BOARD OF OSTEOPATHIC EXAMINERS AND BOARD OF MEDICAL EXAMINERS STATUTORY FUNCTIONS

Function	Osteopathic Board	Medical Board
Issue licenses by examination	National Board or FLEX* exam; personal interview required	FLEX exam; personal interview not required
Issue licenses by endorsement	Personal interview required	Oral exam required if license was granted more than 15 years from time of application
Issue limited licenses	Not granted	Issued up to five years for areas in medical need
Issue temporary licenses	Issued for six months for local or national emergency or in areas lacking medical care	Issued for six months in areas lacking medical care
Issue area permits	Issued to nonresidents of Arizona	Same as Osteopathic Board
Renew licenses, reinstate licenses, register interns and residents	Renewed annually; does not register interns or residents; continuing education requirement must be met (12 hours annually)	Renewed annually; registers interns and residents; continuing education requirement (60 hours) must be met every three years
Register Locum Tenens**	Not done	Registers such physicians in medical facilities with recognized need
Investigate complaints and reports	Conducts investigations of licensed physicians as a result of complaints and reports	Same as Osteopathic Board; notification of physicians within 120 days is required
Hold informal interviews and formal hearings, discipline physicians	May censure or place physician on probation after informal interview; may suspend or revoke license after a hearing	Same as Osteopathic Board
Review malpractice reports filed by insurers; report malpractice actions to Department of Insurance	Malpractice actions must be reviewed and report must be filed annually with Department of Insurance	Same as Osteopathic Board
Publish a directory	Not done	Directory of licensees published annually
Meet as Joint Board of Medical Examiners and Osteopathic Examiners in Medicine and Surgery	Regulate physician assistants	Same as Osteopathic Board

* The Osteopathic National Board examination is uniquely osteopathic and given in three parts. The Federation Licensing Exam (FLEX) is offered to both MDs and DOs and is administered twice annually over a three-day session.

** A temporary physician.

Some of the differences shown in Table 4 include: 1) the Osteopathic Board does not issue limited licenses, register physicians or interns, or publish an annual directory - as does BOMEX, and 2) BOMEX does not require each license applicant to meet with the Board for a personal interivew - as does the Osteopathic Board. Further, the Osteopathic Board requires of its licensees 12 hours of continuing education a year; BOMEX requires of its licensees 60 hours of continuing education every three years. Both boards meet as the Joint Board of Medical Examiners and Osteopathic Examiners in Medicine and Surgery to regulate physician assistants only.*

Most States Regulate DOs
and MDs through Composite Board

As shown in Table 5, 30 states and the District of Columbia license and regulate osteopathic physicians and medical doctors through a single composite board.

* Medical personnel supervised by doctors.

TABLE 5

SUMMARY OF REGULATORY BOARD COMPOSITION FOR OSTEOPATHIC PHYSICIANS AND MEDICAL DOCTORS IN THE 50 STATES AND THE DISTRICT OF COLUMBIA

States with Composite Boards	States with Separate Osteopathic Boards	States with Special Circumstances
Alabama	Arizona	Louisiana
Alaska	California	Maryland
Arkansas	Connecticut	Montana
Colorado	Florida	North Carolina
Deleware	Hawaii	
District of Columbia	Maine	
Georgia	Michigan	
Idaho	Nevada	
Illinois	New Mexico	
Indiana	Oklahoma	
Iowa	Pennsylvania	
Kansas	Tennessee	
Kentucky	Utah	
Massachusetts	Vermont	
Minnesota	Washington	
Mississippi	West Virginia	
Missouri		
Nebraska		
New Hampshire		
New Jersey		
New York		
North Dakota		
Ohio		
Oregon		
Rhode Island		
South Carolina		
South Dakota		
Texas		
Virginia		
Wisconsin		
Wyoming		

Only 16 states, including Arizona, maintain separate osteopathic and medical boards. In four states (Louisiana, Maryland, Montana and North Carolina) osteopathic physicians may be licensed by an osteopathic board and a medical board, but the scopes of practice differ within those states.

Improvements Would Result from Combining Boards

Our review indicates that combining the Osteopathic Board with BOMEX would: 1) improve the Osteopathic Board's effectiveness, 2) increase its public accessibility and awareness, and 3) promote efficiency in the use of clerical services and physical facilities.

Improved Effectiveness

As noted in Finding I, the Osteopathic Board lacks investigative resources to investigate adequately complaints from the public and matters reported by other agencies. BOMEX, on the other hand, has four full-time staff investigators and three half-time medical consultants. BOMEX investigators conduct pharmacy surveys (audits of physician prescriptions on file in pharmacies), assist in the investigation of complaints, undertake undercover activities and work cooperatively with investigators from other agencies. If the Osteopathic Board had access to such capability, its effectiveness could be increased. (see case examples beginning on page 18)

Increased Public Accessibility and Awareness

The Osteopathic Board's office normally is staffed solely by its administrative assistant. The Board secretary-treasurer spends about 75 percent of his time at Phoenix General Hospital, where he serves as Medical Director. During the course of our audit, it was noted that the Board sometimes is inaccessible to the public since the Board office is closed when the administrative assistant is absent from the premises. At such times the Board uses an answering service to take messages; however, the answering service cannot respond to questions about Board-related activities and matters. In addition, the Board has only one telephone line into the office, which often is busy. By contrast, BOMEX is accessible to the public from 8 a.m. to 5 p.m., Monday through Friday, and has multiple telephone lines into the office. Thus, combining the boards would increase public accessibility to the Osteopathic Board.

A public opinion survey commissioned by the Auditor General and conducted by Arizona State University (ASU) found that public awareness of BOMEX was significantly greater than awareness of the Osteopathic Board. More than 700 randomly selected citizens throughout Arizona were interviewed by ASU researchers. Of those persons who responded to the survey, 70 percent were aware of the Board of Medical Examiners, whereas only 22 percent were aware of the Board of Osteopathic Examiners in Medicine and Surgery. Of those who had received medical care in the past two years, 79 percent were aware of BOMEX, compared to 23 percent who were aware of the Osteopathic Board.

A separate survey of State agencies conducted by the Office of the Auditor General revealed that the BOMEX level of effort to inform the public of Board activities appears to be greater than the Osteopathic Board's effort. For example, notice of BOMEX meetings and minutes of meetings are distributed routinely to news media and to consumer groups on request. Thus, combining the boards also would appear to increase public awareness of the Osteopathic Board.

Improved Efficiency

Both the Osteopathic Board and BOMEX perform similar clerical functions such as: 1) processing license applications, 2) renewing licenses annually, 3) preparing meeting materials, 4) processing correspondence, 5) preparing legal documents, and 6) maintaining records and files. Combining the boards would promote efficiency and flexibility in use of clerical staff. Clerical resources could be pooled and assigned tasks based on workload requirements. During peak periods, such as annual license renewal times, extra help would be available to the Osteopathic Board to meet the growing demand. Currently, the Board's administrative assistant must do this work by herself, and, at the same time, fulfill other administrative responsibilities and handle telephone calls.

Further, combining the boards would result in more efficient use of physical facilities. The Osteopathic Board does not have a meeting room or facility of its own to examine license applicants although, on occasion, it has used BOMEX conference space. Combining boards would increase the Osteopathic Board's accessibility to and use of BOMEX facilities.

Cost of Combining Boards

The cost of combining the Osteopathic Board with BOMEX does not appear to outweigh the benefits discussed above. At our request, the Executive Director of BOMEX estimated the additional administrative cost of combining BOMEX, the Osteopathic Board, and the Joint Board of Medical and Osteopathic Examiners* into a single regulatory unit to be $80,000 in fiscal year 1982-83. Most of this $80,000 would be used for an osteopathic medical consultant, an additional investigator, clerical support for the Joint Board and expanded office space.

It should be noted that the cost of combining the boards, however, could be significantly offset by converting the Osteopathic Board secretary-treasurer position into a medical consultant position. The Board's current secretary-treasurer is an osteopathic physician who performs the functions of an osteopathic medical consultant. Thus the actual cost of combining the boards could be considerably less than the $80,000 estimate.

* A separate Joint Board of Medical Examiners and Osteopathic Examiners in Medicine and Surgery, responsible for regulating physician assistants, may not be necessary if the Osteopathic Board and BOMEX were combined. The Joint Board is scheduled for "Sunset" review prior to its termination on July 1, 1988, in accordance with A.R.S. §41-2365.

Board Members Oppose Combining Boards

In Arizona, osteopathic physicians have had their own licensing board since 1949. Current members of the Osteopathic Board oppose combining the Osteopathic Board with BOMEX because they: 1) claim their medical philosophy differs from that of medical doctors, 2) foresee representation problems on the larger medical board because there are nine medical doctors for every osteopathic physician in Arizona, and 3) prefer to maintain their own Board identity. However, our review of the experience in other states with composite boards appears to indicate that these concerns can be overcome successfully.

States Surveyed Reported Few Difficulties Licensing Both DOs and MDs

We interviewed medical board officials in ten of the 30 states which license and regulate osteopathic physicians and medical doctors through composite boards.

In five states, we also contacted the state osteopathic association for their view of the composite board.* Medical board officials reported no adverse consequences or professional friction resulting from one board regulating the two professions and four of the five professional associations expressed a favorable opinion of the combined board. It appears that the key to the success of a combined board is adequate representation of the osteopathic physicians.

* The American Osteopathic Association was also contacted. Although it has no official position on state regulatory structure, a separate board is preferred because it is better equipped to adequately examine the unique training of osteopathic license applicants.

Medical Board Officials

We selected ten states with composite boards which represented a diversity in: 1) geographic location, and 2) numbers of licensed osteopathic physicians. As shown in Table 6, two states, New York and Texas, have more osteopathic physicians than Arizona, and eight have less. In all ten states, osteopathic physicians are outnumbered by medical doctors by ratios greater than the nine to one margin in Arizona. Ratios of medical doctors to osteopathic physicians range from 14 to 1 in Kansas to 196 to 1 in South Carolina.

TABLE 6

BOARD COMPOSITION AND RATIO OF MEDICAL DOCTORS TO OSTEOPATHIC PHYSICIANS IN ARIZONA AND TEN STATES WITH COMPOSITE BOARDS SURVEYED

	Board Composition*								
State	MDs	DOs	DCs	DPMs	Public	Total	Number of MDs**	Number of DOs***	Ratio
Arizona	N/A	N/A	N/A	N/A	N/A	N/A	4,569	482	9:1
North Dakota	9	1	0	0	0	10	835	10	84:1
Montana	6	1	0	0	2	9	1,027	24	43:1
South Carolina	8	1	0	0	1	10	3,914	20	196:1
Kansas	5	3	3	1	1	13	3,548	249	14:1
Delaware	9	1	0	0	2	12	951	59	16:1
Texas	9	3	0	0	3	15	20,570	1,101	19:1
New York	20	2	0	0	2	24	45,570	638	71:1
Colorado	7	2	0	0	2	11	5,671	305	19:1
Wyoming	4	1	0	0	0	5	474	16	29:1
Oregon	6	1****	0	0	1	8	4,327	212	20:1

A telephone survey of medical board officials was conducted to determine how well the composite boards were working in the ten states. All officials contacted stated that the boards were functioning effectively with no major problems.

* MD - Medical Doctor, DO - Osteopathic Physician, DC - Chiropractor, DPM - Podiatrist.

** As of January 1, 1979 - Source: 1980 Statistical Abstract of the U.S.

*** Source: 1979-80 Annual Yearbook of the American Osteopathic Association.

**** Board membership includes another DO who serves as an alternate and votes in case of a tie.

In Kansas, osteopaths and medical doctors are regulated by a Board of Healing Arts which also regulates chiropractors and podiatrists. According to the Board's Executive Secretary, the MDs and DOs work well together. The Board is comprised of five MDs, three DOs, three chiropractors, one podiatrist and one public member, and cannot make official decisions if one of the three major medical professions is not represented.

According to the Secretary of the Delaware Medical Board, philosophical differences between DOs and MDs make little difference and cause no problems on the Board. The standards required of both professions are the same. The Delaware Board, consisting of 12 members, includes one osteopathic physician.

Also reporting little difficulty in regulating both professions through a single board were medical officials in the states of North Dakota, Montana, South Carolina, Texas, Wyoming, New York, Colorado and Oregon.

Most State Osteopathic Associations
Also Reported Favorable Experience

We also contacted state osteopathic associations in five of the states. Associations in four states, New York, Delaware, Colorado and Kansas, reported no difficulties with the board and no complaints from their membership. Most expressed a personal preference for a separate board, however, and stipulated that adequate osteopathic representation is essential for the board to work successfully. It should be noted that in all states contacted, osteopathic physicians are represented on the board in greater proportion than their numbers in the medical community. (see Table 6)

In Texas, the experience of the osteopathic profession with the composite board has not been favorable. According to the Executive Director of the Texas Osteopathic Medical Association, the medical board in Texas has made decisions disregarding the interests and opinions of the osteopathic profession in the State. However, the unfavorable experience with a composite medical board in Texas appears to have resulted from inadequate representation of osteopathic physicians on the Texas Medical Board. At the time of our survey, the Texas Medical Board had one osteopathic physician on the 15-member board. Texas law was recently amended, in line with a "sunset" review recommendation to require more osteopathic physicians on the board. As shown in Table 6, three osteopathic physicians will now serve on the Texas Medical Board.

Alternative legislation establishing a separate osteopathic board was not recommended by the Sunset Advisory Commission and was defeated by the Texas Legislature.

CONCLUSION

Thirty states and the District of Columbia license and regulate osteopathic physicians and medical doctors through a composite board. Our review indicates that combining the Osteopathic Board and the Board of Medical Examiners would: 1) improve the Osteopathic Board's effectiveness; 2) increase public accessibility and awareness; and 3) promote efficiency in the use of clerical services and physical facilities. A survey of ten states with composite boards disclosed no adverse consequences or professional friction resulting from regulation of the two professions by the same board provided osteopathic physicians are adequately represented on the board.

RECOMMENDATION

Consideration should be given to the following recommendation:

- That the Board of Osteopathic Examiners in Medicine and Surgery and the Board of Medical Examiners be combined and that both osteopathic physicians and medical doctors be licensed and regulated by a single, composite board.

FINDING III

CHANGES ARE NEEDED IN BOARD STATUTES PERTAINING TO CONTINUING EDUCATION REQUIREMENTS AND BOARD MEMBER COMPENSATION.

Under the Board's 1949 law, osteopathic physicians are required to attend a two-day educational program prior to renewing their license each year. Under certain circumstances the requirement, the equivalent of 12 hours of continuing education, may be waived by the Board. Our review indicated that the Board's law pertaining to continuing education needs to be revised since: 1) the Board does not have authority to waive the requirement or grant an extension if a physician has no valid reason for failing to meet the requirement, and 2) most states which have a continuing education law for osteopathic physicians require more hours than Arizona.

In addition, Board statutes pertaining to Board member compensation need to be revised to bring the Board into conformity with other State regulatory bodies. Although Board members have been receiving $30 per day compensation consistent with other boards, Osteopathic Board statutes require Board members to receive $50 per day.

Continuing Education Required By Law

A.R.S. §32-1825, passed in 1949 when the Board of Osteopathic Examiners was established, requires physicians to meet a continuing education requirement annually prior to renewing their license. Subsection B of the law states the following:

> "The licensee shall furnish to the secretary-treasurer evidence of having attended, within the calendar year prior to the renewal date, an educational program, approved by the American osteopathic association, of at least two days duration...."

Subsection C allows the Board to waive the continuing education requirement, the equivalent of 12 consecutive hours, under certain circumstances:

> "[I]f upon application for waiver, the board finds that the failure of the licensee to attend an approved educational program was due to the licensee's disability, military service or absence from the continental United States of America, or was due to other circumstances beyond the control of the licensee which are deemed good and sufficient by the board, then upon notation of such finding in the record of the proceedings, the requirement shall be deemed waived for that year only and the license shall be renewed upon the payment of the fees as herein provided."

Our review revealed that the Board waived the continuing education requirement for several licensees for special reasons not noted in the minutes, including eleven such waivers in January 1981. According to the Board secretary-treasurer, one waiver was granted due to the physician's age (over 90), another for serious family illness, and a third because the physician's contractual obligation to his employer did not permit him time off needed to attend educational courses. In eight other cases, however, the physicians simply forgot to meet the requirement, and the Board directed the physicians to make up the requirement in the ensuing year.

According to Legislative Council, in an opinion dated August 18, 1981,* the Board is not in compliance with law unless it makes a finding, noted in the minutes, that the reasons for the waiver were justified by circumstances beyond the licensee's control:

* For full text of this memorandum, see Appendix V.

> "The Board must make a finding that the licensee's failure to attend an approved educational program was due to circumstances beyond the control of the licensee which are deemed to be good and sufficient by the Board and then make a notation of that finding in the records of the proceeding in order for the continuing education requirement to be deemed waived. Since the Board did not note a finding in its minutes that certain licensees listed in the minutes were prevented from attending a continuing education program by circumstances beyond their control which were deemed good and sufficient by the Board, the waivers were not granted to those licensees in compliance with A.R.S. section 32-1825, subsection C."

According to Legislative Council, licenses granted in this manner may not be valid, depending upon how a court might rule:

> "The acts of the Board in violation of the statute raise questions about the validity of such licenses. We cannot predict how a court would act if the license renewed under the facts as presented to us was subject to question because of the improper manner in which it was renewed."

In addition, according to Legislative Council, the Board does not have authority to require additional hours over and above the statutory requirement:

> "Administrative agencies have no common law or inherent powers. Instead their powers are to be measured by the statutes under which they operate. Kendall v. Malcolm, 98 Ariz. 329, 404 P.2d 414 (1965). The statutes under which the Board operates do not grant it the authority to require a licensee to attend more than the two day program required under A.R.S. section 32-1825, subsection B."
>
> "Additionally, A.R.S. section 32-1825, subsection C provides that the requirement of attendance of an approved educational program 'shall be deemed waived for that year only.' 'Waiver' means 'the act of waiving or intentionally relinquishing or abandoning a known right, claim, or privilege.' Webster's Third New International Dictionary 2570 (1976). If the Board grants a waiver of the educational requirement to a licensee it has abandoned any claim it had against the licensee for the attendance of an approved educational program and cannot require the licensee to make it up the next year."

Loss of a license appears to be an unreasonably harsh penalty for failing to fulfill 12 hours of continuing education. The continuing education requirement for physicians licensed by the Board of Medical Examiners, and by osteopathic boards in some other states, are more flexible in that physicians must fulfill the continuing education requirement every three years rather than annually and in some cases licensees are allowed a grace period to make up the continuing education hours they need.

Continuing Education Requirements Are Minimal Compared To Other States

A review of statutes of other states revealed that Arizona's 12-hour continuing education requirement appears minimal compared to other states which have continuing education requirements. Table 7 summarizes the continuing education hour requirements in the 50 states.

TABLE 7

SUMMARY OF CONTINUING EDUCATION HOUR REQUIREMENTS FOR OSTEOPATHIC PHYSICIANS IN THE 50 STATES

Number Of Hours Per Year	Number Of States	Percent
No requirement	27	54%
Less than 25 hours	7	14
25-49 hours	3	6
50 hours or more	13	26
Total	50	100%

As shown above, 23 states require osteopathic physicians to meet a continuing education requirement. Of these, 16 mandate an average of 25 hours or more per year and only seven states, including Arizona, require less than 25 hours. In addition, physicians licensed by the Board of Medical Examiners are required to fulfill 60 hours of continuing education every three years; an average of 20 hours annually.

Most osteopathic physicians in Arizona obtain substantially more than 12 hours of continuing education per year. We randomly sampled continuing education reports filed by 44 physicians who applied for license renewal in 1980 and found the average continuing education reported was over 45 hours per physician; nearly four times the statutory requirement.

Changes Are Needed In Board Compensation Statutes

Members of the Board of Osteopathic Examiners have been receiving compensation at the rate of $30 per day pursuant to the provisions of A.R.S. §38-611, subsection D:

> "Except as otherwise provided by statute or specific legislative appropriation members of boards, commissions, councils or advisory committees who are authorized by law to receive compensation may receive compensation at the rate of not to exceed thirty dollars for each day engaged in the service of such board, commission, council or advisory committee." (Emphasis added)

The section of law is a general provision which applies to most state regulatory agencies similar to the Osteopathic Board. However, Board statutes contain a separate provision on Board compensation which appears to conflict with the general provisions in Title 38. A.R.S. §32-1802, subsection C, states:

> "Each board member shall receive fifty dollars for each day actually engaged in carrying out his duties as an officer or member of the board, together with all expenses necessarily and properly incurred in attending meetings or in performing his duties. Compensation and expenses shall be paid from the board fund." (Emphasis added)

According to Legislative Council, in a memorandum dated July 10, 1981,* the specific provisions of A.R.S. §32-1802, providing for $50 per day compensation, are applicable:

> "A.R.S. section 32-1802 was the subject of two conflicting amendments passed by the 1970 Legislature. Prior to these amendments, this section authorized compensation at a rate of twenty dollars a day. Laws 1970, chapter 138 increased the compensation to fifty dollars a day while Laws 1970, chapter 204 provided that compensation would be paid under the provisions of A.R.S. section 38-611 which prescribed thirty dollars per day as compensation. These conflicting versions of A.R.S. section 32-1802 remained in effect until 1973 when the chapter 204 version was repealed by the Legislature in Laws 1973, chapter 157. From that point on it is clear that the fifty dollar per day compensation rate controlled over the provisions of A.R.S. section 38-611. A specific exemption is created in A.R.S. section 38-611, subsection D by the phrase 'except as otherwise provided by statute.' A.R.S. section 32-1802 is a statute which 'otherwise provides' and is controlling. See also 70 Op. Att'y Gen. 13-L (1970) which is directly on point." (Emphasis added)

According to the Board's secretary-treasurer, the Board has been paying $30 per day compensation since 1973 following the advice of a former assistant Attorney General assigned to the Board.

In its opinion on the matter, Legislative Council noted that Arizona law prescribes a 90-day statute of limitations within which State officials must bring an action for salary owed. Board members could use the annual omnibus claims bill to apply to the Legislature for payment of the correct compensation. We estimated, based on number of Board meeting days in fiscal year 1980-81, that Board members were underpaid a total of $1,060. The amount each board member was underpaid is dependent on individual participation in Board business.

* For full text of this memorandum, see Appendix VI.

CONCLUSION

Board statutes require osteopathic physicians to fulfill the equivalent of 12 hours of continuing education each year prior to renewing their license. Our review found that the Board lacks authority to waive the requirement or grant an extension if the physician forgets to meet the requirement. Arizona's continuing education requirement is also minimal compared to those states that have continuing education requirements. In addition, Board members have been receiving $30 per day compensation consistent with most other State regulatory agencies. Board statutes, however, require the Board to pay $50 per day compensation. As a result, Board members were underpaid a total of $1,060 in fiscal year 1980-81.

RECOMMENDATIONS

Consideration should be given to the following recommendations:

1. A.R.S. §32-1825 be revised to either: a) allow the Board more flexibility in granting waivers and extensions on an annual basis, or b) require that continuing education be reported every three years, rather than annually.

2. A.R.S. §32-1825 be revised to allow the Board to establish the minimum continuing education requirement through its rule making authority.

3. A.R.S. §32-1802, subsection C, be repealed and that Board members be compensated in accordance with the provisions of A.R.S. §38-611.

OTHER PERTINENT INFORMATION

During the course of our audit of the Board of Osteopathic Examiners, the following additional information was reviewed.

Survey of Complainants and Physicians

All complainants and physicians involved in complaints in 1979 and 1980 were surveyed to obtain their opinion of the Board's complaint review process. Responses were received from 39 (49 percent) of the complainants and 28 (47 percent) of the physicians surveyed.

As shown in Table 8, doctors involved in complaints viewed the Board's handling of their complaint more favorably than complainants. Eighty-two percent of the physicians rated the quality of the Board's investigation as "good" or "very good" compared to 44 percent of the complainants. About one third of the complainants (34 percent) believed the Board's investigation was of poor quality.

TABLE 8

SUMMARY OF SURVEYED COMPLAINANT AND OSTEOPATHIC PHYSICIAN OPINIONS OF THE BOARD'S COMPLAINT REVIEW PROCESS

	Very Good	Good	Poor	Very Poor	No Opinion
Quality of Investigation					
Complainants	31%	13%	13%	20%	23%
Physicians	57	25	4	7	7
Fairness of Review, Impartiality					
Complainants	23	13	5	28	31
Physicians	57	28	7	4	4
Opinion of Final Decision					
Complainants	18	13	8	28	33
Physicians	50	32	4	4	10

Most of the physicians (over 80 percent) were also satisfied with the impartiality of the Board's review and the Board's final decision, whereas complainants were more varied in their opinion. Thirty-six percent of complainants rated the impartiality of the Board's review as "good" or "very good", 33 percent rated it as "poor" or "very poor", and 31 percent expressed no opinion. Complainants were similarly divided in their assessment of the Board's final decision.

Most complainants (54 percent) said they would consider filing another complaint with the Board, however only 31 percent believed the Board protects the public from harmful or incompetent physicians. By contrast, 82 percent of the physicians surveyed believed the Board adequately protects the public.

Board Jurisdiction in Fee Matters

As noted on page 9, 42 percent of complaints received by the Board in 1979 and 1980 involved physicians fees. Many of these complaints were, in fact, requests from insurance companies to review the reasonableness of charges for insurance purposes.

In August 1979, the secretary-treasurer of the Board requested an opinion from the assistant Attorney General assigned to the Board regarding the Board's role and jurisdiction in such matters. In response, the assistant Attorney General rendered an opinion which stated that each case must be judged on its own merits:

> "A complaint involving a 'fee dispute' may or may not constitute unprofessional conduct as that term is defined under the Osteopathic Practice Act. Such a determination can only be made based on the facts of the particular complaint."

According to the opinion, fee matters which may fall within the Board's jurisdiction would include complaints involving rebates, unnecessary testing on surgery, or false advertising.

In an opinion dated July 31, 1981, the Legislative Council stated that the Board may also have jurisdiction over complaints pertaining to excessive fees:

> "...the Board may investigate any information which appears to show that an osteopathic physician and surgeon is or may be guilty of unprofessional conduct. Unprofessional conduct includes making false or fradulent statements and any conduct contrary to the ethical standards of the osteopathic medical profession.* The American Osteopathic Association Code of Ethics requires physician fees to be reasonable and to compensate the physician for services actually rendered....If the information investigated is found to be true, the Board may discipline the physician as provided in A.R.S. §32-1855 1B."(Emphasis added)**

According to the Board's current assistant Attorney General, assigned to both the Osteopathic Board and the Board of Medical Examiners, fees are the most difficult area for the two Boards to address. To clarify their jurisdiction, he suggests that the Boards could adopt a rule modeled after the State Bar Rule which defines excessive fees for legal services.

Rule 29(a), DR 2-106, subsections (A) and (B) of the Rules of the Supreme Court states the following:

> "(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.
>
> "(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

---

* "Unprofessional conduct" is defined in A.R.S. 32-1854 and includes: "Knowingly making any false or fradulent statement, written or oral, in connection with the practice of medicine except as the same may be necessary for accepted therapeutic purpose," and "any conduct or practice contrary to recognized standards of ethics of the osteopathic medical profession...."

** For the full text of this opinion, see Appendix III.

"(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

"(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

"(3) The fee customarily charged in the locality for similar legal services.

"(4) The amount involved and the results obtained.

"(5) The time limitations imposed by the client or by the circumstances.

"(6) The nature and length of the professional relationship with the client.

"(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

"(8) Whether the fee is fixed or contingent."

According to the Board's assistant Attorney General, a similar rule could be developed and tailored to apply to the medical profession.

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November 30, 1981

Douglas R. Norton
Auditor General
Legislative Services Wing, Suite 300
State Capitol
Phoenix, Arizona 85007

Dear Mr. Norton:

This is the response of the Arizona Board of Osteopathic Examiners in Medicine and Surgery submitted following receipt and review of the preliminary report draft of the performance audit conducted as part of the Sunset review as set forth in A.R.S. Sec. 41-2351 through 41-2379.

FINDING I

The Auditor General finds that improvements are needed in the Board's investigation and resolution of complaints. The Board agrees and, in fact, has been working toward this very end. At the suggestion of the Assistant Attorney General now representing the Board, all complaints are being brought before the Board for its review and, ultimately, a decision. Likewise, the practice of sending a copy of the complaint to the physician complained about has been discontinued. Currently, the physician is provided with an explanation of the complaint without disclosing the complainant's name.

Regarding fee complaints, this is a troublesome subject. If the Board completely divests itself of jurisdiction in such matters, this leaves the consumer without any recourse. On the other hand, the Board's jurisdiction to address complaints of this sort is unclear at best. Accordingly, the Board solicits the assistance of the Legislature in defining whether and to what extent it should exercise authority over fee complaints. It would suggest that there should possibly be an addition to the list of acts comprising unprofessional conduct such as "Charging or collecting a clearly excessive fee".

As for the Board's Secretary-Treasurer reviewing complaints involving patient cases at Phoenix General Hospital (the other place of his employment), the Board does not believe that thia constitutes a conflict of interest. Nevertheless, it does appreciate the Auditor's concern and therefore has directed that its Secretary-Treasurer recuse himself from investigations and proceedings involving such matters. (Additionally, his contract with the hospital will terminate in May of 1982 and will not be renewed.) In this vein, it should also be noted that the claim described under "Exposure to Legal Challenge" misinterprets the operative facts and was denied. As of this date, it has not otherwise been pursued.

Finally, the Auditor General finds that the Board lacks investigative resources. The Board fully agrees. Investigative

and physician/consultant services would greatly strengthen the capabilities of the Board.

FINDING II

Concerning the recommendation that the Osteopathic Board be combined with the Board of Medical Examiners, the members of the Osteopathic Board believe, very strongly, that separate licensure will help preserve the distinctiveness of the osteopathic profession and facilitate its growth. An allopathic or combined examination cannot as fully or appropriately measure and assure the competency of osteopathic physicians. This is especially important in the field of osteopathic manipulative therapy. The existence of separate licensing authority will promote continued growth of the osteopathic profession in the state. Additionally, since 75% of all D.O.s are general practitioners, the profession can be expected to continue to provide the kind of growth Arizonans need most. The history and experience of the Arizona Board of Osteopathic Examiners in Medicine and Surgery demonstrates its effectiveness in most capacities and justifies its continued existence.

FINDING III

Concerning this finding, suffice is to say that the Board wholly supports the Auditor General's recommendations concerning continuing education requirements and Board Member compensation and will suggest proposed legislation to correct these matters.

The Board disputes the Legislative Council's Opinion (0-81-81) as contained in Appendix V which states in part: "If the Board grants a waiver of the educational requirement to a licensee it has abandoned any claim it had against the licensee for the attendance of an approved educational program and cannot require the licensee to make it up the next year."

The last sentence of Sec. 32-1825, A.R.S. states, "A certificate may be reinstated by complying with the conditions necessary to renew a license and the payment of an additional fee of not more than one hundred dollars."

If a license certificate has been automatically suspended because of failure to meet the educational requirement during the previous year prior to January 1, a situation exists which is impossible to meet without an extension of time. To meet "the conditions necessary to renew a license" the licensee must attend an educational course which would have met the requirement had it been attended in the prior year. Submission of this evidence together with the additional fee is the only way a license can currently be reinstated. The alternative to this is permanent suspension of the license.

Finally, the Board questions the validity of the statistics contained in Table 8, Page 47. It stands to reason that both physicians and complainants will rate the quality of investigation, fairness of review, impartiality and opinion of the

final decision according to the outcome, whether against them or in their favor.

Also included in this response are proposed legislative changes which will correct most situations.

Respectfully submitted,

THE ARIZONA BOARD OF OSTEOPATHIC EXAMINERS IN MEDICINE AND SURGERY

BY

Michael Mignella

Michael Mignella, J.D.
President of the Board

Richard O. McGill D.O.

Richard O. McGill, D.O.
Secretary-Treasurer

ROM:kw
cc: All Board Members
C. E. Buri, Assistant Attorney General

PROPOSED CHANGES IN THE ARIZONA OSTEOPATHIC PRACTICE ACT

1. Sec. 32-1802.C

Each board member shall receive ~~fifty~~ ONE HUNDRED dollars for each day actually engaged in carrying out his duties as an officer or member of the board, together with all expenses necessarily and properly incurred in attending meetings or in performing his duties. Compensation and expenses shall be paid from the board fund.

Sec. 32-1802.D New Subsection

MEMBERS OF THE BOARD SHALL BE PERSONALLY IMMUNE FROM SUIT WITH RESPECT TO ALL ACTS DONE AND ACTIONS TAKEN IN GOOD FAITH AND IN FURTHERANCE OF THE PURPOSES OF THIS CHAPTER.

2. Sec. 32-1804.B New Item 8:

THERE SHALL BE NO MONETARY LIABILITY ON THE PART OF AND NO CAUSE OF ACTION SHALL ARISE AGAINST THE SECRETARY-TREASURER OR SUCH OTHER PERMANENT OR TEMPORARY PERSONNEL OR PROFESSIONAL OSTEOPATHIC MEDICAL INVESTIGATORS FOR ANY ACT DONE OR PROCEEDING UNDERTAKEN OR PERFORMED IN GOOD FAITH AND IN FURTHERANCE OF THE PURPOSES OF THIS CHAPTER.

3. Sec. 32-1822.4

Sucessfully pass an examination as provided in this chapter, but the board may waive any such examination if the applicant possesses a certificate from the national board of examiners for osteopathic physicians and surgeons indicating he has been examined by questions approved by

the board OR PRODUCES EVIDENCE THAT HE HAS PASSED THE FEDERAL LICENSING EXAMINATION (FLEX) WITH A WEIGHTED GRADE AVERAGE AS ESTABLISHED BY THE OSTEOPATHIC BOARD, or possesses a currently active license to practice as an osteopathic physician and surgeon issued under the authority of any other state, territory or the District of Columbia, whose standards are comparable to those provided in this chapter, as determined by the board.

4. Sec. 32-1835.B

The licensee shall furnish to the secretary-treasurer evidence of having attended within the calendar year prior to the renewal date, ~~an~~ educational programS, approved by the ~~American-osteopathic-association~~ BOARD, ~~of~~ TOTALLING at least ~~two-days-duration~~ TWENTY CLOCK HOURS and shall pay to the board the annual renewal fee of not more than ~~fifty~~ ONE HUNDRED dollars as prescribed by the Board. The secretary-treasurer shall thereupon issue a proper renewal receipt to the licensee.

Sec. 32-1835.C

Failure on the part of the licensee to furnish evidence of having attended ~~an-American-osteopathic-association approved-education-program~~ THE REQUIRED NUMBER OF CLOCK HOURS, during the preceding calendar year, shall preclude renewal of his license unless waived by the board upon application therefor. If upon application for waiver the

board finds that the failure of the licensee to attend ~~an-approved-educational-program~~ THE REQUIRED NUMBER OF CLOCK HOURS was due to the licensee's disability, military service or absence from the ~~continental~~ United States of America, or was due to other circumstances beyond the control of the licensee which are deemed good and sufficient by the board, then upon notation of such finding in the record of the proceedings, the requirement shall be deemed waived for that year only and the license shall be renewed upon the payment of the fees as herein provided. Failure to renew a certificate shall automatically suspend the rights and privileges granted under this chapter. IN THE EVENT THAT THE LICENSEE FAILS TO ATTEND THE REQUIRED NUMBER OF CLOCK HOURS FOR REASONS OTHER THAN THOSE SPECIFIED, THE BOARD MAY GRANT AN EXTENSION OF TIME NOT TO EXCEED NINETY DAYS FOR THE LICENSEE TO ATTEND THE REQUIRED NUMBER OF CLOCK HOURS IN WHICH HE IS DEFICIENT. A ~~certificate~~ SUSPENDED LICENSE may be reinstated by complying with the conditions necessary to renew a license and the payment of an additional fee of not more than one hundred dollars.

Sec. 32-1835.D <u>New Subsection</u>

THE BOARD MAY WAIVE THE ANNUAL REGISTRATION FEE AND EDUCATIONAL REQUIREMENT WHEN A LICENTIATE PRESENTS SATISFACTORY EVIDENCE THAT HE HAS PERMANENTLY RETIRED FROM THE PRACTICE OF OSTEOPATHIC MEDICINE AND HAS PAID ALL FEES REQUIRED BY THIS CHAPTER PRIOR TO WAIVER.

Sec. 32-1835.E New Subsection

DURING SUCH PERIOD OF WAIVER HE SHALL NOT ENGAGE IN THE PRACTICE OF OSTEOPATHIC MEDICINE AND A VIOLATION OF THIS PROVISION SHALL SUBJECT HIM TO THE SAME PENALTIES AS ARE IMPOSED IN THIS CHAPTER UPON A PERSON WHO PRACTICES OSTEOPATHIC MEDICINE WITHOUT A LICENSE AND WITHOUT BEING EXEMPT FROM LICENSURE UNDER THIS CHAPTER.

Sec. 32-1835.F New Subsection

THE BOARD MAY REINSTATE SUCH A RETIRED LICENTIATE TO ACTIVE PRACTICE UPON PAYMENT OF THE ANNUAL REGISTRATION FEE AND PRESENTATION OF EVIDENCE SATISFACTORY TO THE BOARD THAT HE IS PHYSICALLY AND MENTALLY ABLE SAFELY TO ENGAGE IN PRACTICE AND STILL POSSESSES THE MEDICAL KNOWLEDGE REQUIRED THEREFOR. THE BOARD MAY REQUIRE SUCH PHYSICAL AND MENTAL EXAMINATION AND SUCH EXAMINATION OF MEDICAL KNOWLEDGE AS IT MAY DEEM NECESSARY TO DETERMINE THESE QUALIFICATIONS.

5. Sec. 32-1854 Definition of unprofessional conduct

(The board suggests that the following be added to the list of definitions of unprofessional conduct. They may simply be added or else inserted wherever it would be more applicable chronologically.)

a. FAILING OR REFUSING TO MAINTAIN RECORDS ON A PATIENT OR FAILING OR REFUSING TO MAKE SUCH RECORDS PROMPTLY AVAILABLE TO ANOTHER PHYSICIAN UPON REQUEST AND RECEIPT OF PROPER AUTHORIZATION.

b. USE OF CONTROLLED SUBSTANCES OR PRESCRIPTION ONLY DRUGS EXCEPT WHEN PROVIDED BY ANOTHER PHYSICIAN DURING A COURSE OF TREATMENT.

c. PRESCRIBING CONTROLLED SUBSTANCES TO MEMBERS OF ONE'S IMMEDIATE FAMILY.

d. PRESCRIBING CONTROLLED SUBSTANCES INCLUDING BUT NOT LIMITED TO AMPHETAMINES AND SIMILAR SYMPATHOMIMETIC DRUGS IN THE TREATMENT OF OBESITY IN EXCESS OF THIRTY DAYS IN ANY ONE CALENDAR YEAR OR THE NON-THERAPEUTIC USE OF INJECTABLE AMPHETAMINES.

e. VIOLATION OF A FORMAL ORDER, PROBATION OR STIPULATION ISSUED BY THE BOARD UNDER THE PROVISIONS OF THIS CHAPTER.

f. CHARGING OR COLLECTING A CLEARLY EXCESSIVE FEE.

g. USE OF EXPERIMENTAL FORMS OF THERAPY WITHOUT PROPER INFORMED PATIENT CONSENT AND WITHOUT CONFORMING TO GENERALLY ACCEPTED CRITERIA, WHICH SHALL INCLUDE PROTOCOLS, DETAILED LEGIBLE RECORDS, PERIODIC ANALYSIS OF RESULTS AND PERIODIC REVIEW BY A COMMITTEE OF PEERS.

APPENDIX I

LEGISLATIVE COUNCIL OPINION (O-81-66)

JULY 22, 1981

ARIZONA LEGISLATIVE COUNCIL

MEMO

July 22, 1981

TO: Douglas R. Norton
Auditor General

FROM: Arizona Legislative Council

RE: Request for Research and Statutory Interpretation (O-81-66)

This is in response to a request submitted on your behalf by Gerald A. Silva in a memo dated July 10, 1981. No input was received from the attorney general concerning this request.

FACT SITUATION:

The secretary-treasurer of the board of osteopathic examiners in medicine and surgery (board) serves as administrative assistant to the board and performs such other functions as are authorized by Arizona Revised Statutes (A.R.S.) section 32-1804, subsection B. The secretary-treasurer has reviewed and resolved numerous complaints against osteopathic physicians on his own initiative without any formal board action or involvement.

QUESTIONS PRESENTED:

1. Does the secretary-treasurer of the board have the authority to review complaints against osteopathic physicians and surgeons on his own initiative without board authorization or involvement?

2. Can the board authorize the secretary-treasurer to act in its behalf in reviewing and resolving complaints against osteopathic physicians and surgeons?

3. If so, what formal board action would be required to empower the secretary-treasurer to act on the board's behalf?

4. If the secretary-treasurer has improperly acted on the board's behalf in reviewing and resolving complaints against osteopathic physicians, what are the ramifications to the board, the secretary-treasurer, the licensee?

ANSWERS:

1. Administrative officers and agencies have no common law or inherent powers. Their powers and duties are to be measured by the statute creating them. Kendall v. Malcolm, 98 Ariz. 329, 404 P.2d 414 (1965).

A.R.S. section 32-1803 provides that:

> A. The board shall:
> 1. Conduct all examinations for applicants for a license under this chapter, issue licenses, conduct hearings, place physicians on probation,

revoke or suspend licenses, and administer and enforce all provisions of this chapter.

2. Be charged with and enforce within the osteopathic profession in this state the standards of practice prescribed by this chapter and the rules and regulations adopted by the board pursuant to the authority granted by this chapter.

* * *

5. Maintain a record of its acts and proceedings, including, but not limited to, the issuance, refusal, renewal, suspension or revocation of licenses to practice according to the terms of this chapter.

* * *

D. The board may make and adopt rules and regulations necessary or proper for the administration of this chapter.

* * *

This section confers broad discretionary licensing and enforcement powers on the board.

A.R.S. section 32-1804 provides that:

A. The board shall appoint a secretary-treasurer, not a member of the board, who shall serve at the pleasure of the board and who shall receive compensation as determined pursuant to section 38-611 to be paid from the board fund, payable in monthly installments.

B. The secretary-treasurer shall:

1. Serve as administrative assistant to the board.
2. Collect all monies due and payable to the board.
3. Pay to the state treasurer any monies received by the board.
4. Prepare bills for authorized expenditures of the board and obtain warrants from the department of administration division of finance for payment of bills certified by the president or vice-president and secretary-treasurer of the board.
5. Administer oaths.
6. Act as custodian of the seal, books, records, minutes and proceedings.
7. Do and perform any other duty prescribed for him elsewhere in this chapter.

This section is a delineation of nondiscretionary ministerial or administrative acts required of the secretary-treasurer. The authority to review and resolve complaints is not included.

With regard to the complaint process only the board has authority to review and resolve complaints against osteopathic physicians and surgeons. A.R.S. section 32-1855 provides that:

A. The board on its own motion may investigate any information which appears to show that an osteopathic physician and surgeon is or may

be guilty of unprofessional conduct or is or may be mentally or physically unable safely to engage in the practice of medicine. Any osteopathic physician or surgeon or the Arizona osteopathic medical association or any health care institution as defined in section 36-401 shall, and any other person may, report to the board any information such physician or surgeon, association, health care institution or such other person may have which appears to show that an osteopathic physician and surgeon is or may be guilty of unprofessional conduct or is or may be mentally or physically unable safely to engage in the practice of medicine. Any person who reports or provides information to the board in good faith shall not be subject to an action for civil damages as a result thereof and such person's name shall not be disclosed unless such person's testimony is essential to the disciplinary proceedings conducted pursuant to this section. It shall be an act of unprofessional conduct for any osteopathic physician or surgeon to fail to report as required by this section. Any health care institution which fails to report as required by this section shall be reported by the board to such institution's licensing agency.

B. If, in the opinion of the board, it appears such information is or may be true, the board may request an informal interview with the physician concerned. . . . (Emphasis added.)

The only statutory provision regarding the secretary-treasurer and the complaint process is A.R.S. section 32-1855.01, which states that:

A. In connection with the investigation by the board on its own motion or as the result of information received pursuant to section 32-1855, subsection A, the board or its duly authorized agents or employees shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documents, reports, records or any other physical evidence of any person being investigated, or the reports, records and any other documents maintained by and in possession of any hospital, clinic, physician's office, laboratory, pharmacy or any other public or private agency, and any health care institution as defined in section 36-401, if such documents, reports, records or evidence relate to medical competence, unprofessional conduct, or the mental or physical ability of an osteopathic physician or surgeon safely to practice medicine.

B. For the purpose of all investigations and proceedings conducted by the board:

1. The board on its own initiative, or upon application of any person involved in the investigation, may issue subpoenas compelling the attendance and testimony of witnesses, or demanding the production for examination or copying of documents or any other physical evidence if such evidence relates to medical competence, unprofessional conduct, or the mental or physical ability of an osteopathic physician or surgeon safely to practice medicine. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the board to revoke, limit or modify the subpoena. The board shall revoke, limit or modify such subpoena if in its opinion the evidence required does not relate to unlawful practices covered by this chapter, is not relevant to the charge which is the subject matter of the hearing or investigation, or does not describe with sufficient particularity the physical evidence whose production is required. Any

member of the board, or any agent designated by the board may administer oaths or affirmations, examine witnesses and receive such evidence. (Emphasis added.)

The secretary-treasurer has only those powers and duties as prescribed by statute. A.R.S. section 32-1804 and 32-1855.01 set forth the duties of the secretary-treasurer. They are nondiscretionary and ministerial in nature. The secretary-treasurer does not have the authority to review complaints against osteopathic physicians and surgeons. It is the responsibility of the board to investigate complaints against osteopathic physicians and surgeons.

> 2. An administrative board cannot legally confer upon its employees authority that under law may be exercised only by the board. . . . 2 Am. Jur. 2d Administrative Law section 222 (1962).

The board cannot authorize the secretary-treasurer to act in its behalf by reviewing and resolving complaints against osteopathic physicians and surgeons because the legislature made the board responsible for enforcing the standards of practice within the osteopathic profession and investigating complaints. A.R.S. sections 32-1803, subsection A, paragraph 2 and 32-1855.

The legislature apparently intended those functions to be performed by the persons designated as members of the board.

> /I/f it is reasonable to believe the legislature intended a particular function to be performed by designated persons because of their special qualifications, then a subdelegation is invalid; but where no particular qualifications are necessary for the exercise of a function its exercise may be delegated to subordinate officials. Sutherland, Statutes and Statutory Construction section 4.14 (4th ed., Sands, 1972).

The board cannot delegate its enforcement responsibilities to the secretary-treasurer.

3. See answer 2.

4. The function of this office in connection with performance audits by the auditor general is to provide legal research and statutory interpretation. It would be inappropriate for this office to apply legal principles to a question which asks what the impact of a particular administrative action would be if the result would imply the same conclusion in all cases. A subjective application of the law can only be done on a case-by-case basis and is properly left to the administrative authority in the first instance and to the courts in the second.

CONCLUSIONS:

1. The secretary-treasurer of the board does not have authority to review complaints against osteopathic physicians and surgeons.

2. The board cannot delegate its enforcement responsibilities to the secretary-treasurer.

3. See answer 2.

4. It would be inappropriate for this office to answer this question for the reasons set forth above.

cc: Gerald A. Silva
Performance Audit Manager

APPENDIX II

LEGISLATIVE COUNCIL OPINION (O-81-75)

AUGUST 4, 1981

ARIZONA LEGISLATIVE COUNCIL

MEMO

August 4, 1981

TO: Douglas R. Norton
Auditor General

FROM: Arizona Legislative Council

RE: Request for Research and Statutory Interpretation (O-81-75)

This is in response to a request submitted on your behalf by Gerald A. Silva in a memo dated July 27, 1981. No input was received from the Attorney General concerning this request.

FACT SITUATION:

Arizona Revised Statutes (A.R.S.) section 32-1855, subsection A provides that any person may report to the Arizona Board of Osteopathic Examiners in Medicine and Surgery (Board) an osteopathic physician who may be guilty of unprofessional conduct or unable to safely practice medicine. In addition, the law states that:

> Any person who reports or provides information to the board in good faith shall not be subject to an action for civil damages as a result thereof and such person's name shall not be disclosed unless such person's testimony is essential to the disciplinary proceedings conducted pursuant to this section.

As a matter of procedure, the Board normally sends copies of signed complaints to the respondent osteopathic physician for the purpose of obtaining the doctor's rebuttal. Many of these complaints are resolved without formal Board action.

QUESTIONS PRESENTED:

1. Does the practice of sending signed complaints to the doctor involved in the complaint comply with the provisions of A.R.S. section 32-1855, subsection A?

2. What are the ramifications if the Board has not acted properly in this regard?

ANSWERS:

It is an elementary rule of statutory construction that each word in a statute will be given effect. Sutherland, Statutes and Statutory Construction section 46.06 (4th ed., Sands, 1972); State v. Superior Court for Maricopa County, 113 Ariz. 248, 550 P.2d 626 (1976). The words of a statute are to be given their common meaning unless it appears from the context or otherwise that a different meaning is intended. Ross v. Industrial Commission, 112 Ariz. 160, 540 P.2d 1234 (1975). A.R.S. section 32-1855, subsection A provides in relevant part as follows:

> Any person who reports or provides information to the board in good faith shall not be subject to an action for civil damages as a result thereof and such person's name shall not be disclosed unless such person's testimony is essential to the disciplinary proceedings conducted pursuant to this section. (Emphasis added.)
>
> It is a fundamental rule of statutory construction that plain, clear and unambiguous language of a statute is to be given that meaning unless impossible or absurd consequences may result. Balestrieri v. Hartford Accident and Indemnity Insurance Co., 112 Ariz. 160, 163, 540 P.2d 126, 129 (1975).

The meaning of the language in A.R.S. section 32-1855, subsection A prohibiting disclosure of names is clear. The name of any person who reports or provides information to the Board in good faith shall not be disclosed unless such person's testimony is essential to a disciplinary proceeding conducted pursuant to A.R.S. section 32-1855. Giving the language of this statute its plain meaning does not result in impossible or absurd consequences.

The Board's practice of sending a copy of the signed complaint to the osteopathic physician involved in the complaint for the purpose of resolving the complaint without any formal Board action does not comply with A.R.S. section 32-1855, subsection A. In cases where the Board takes formal action under A.R.S. section 32-1855 disclosure of the name of the complainant may be necessary to advise the accused physician of the charges against him. See 61 Am. Jur. 2d Physicians, Surgeons, etc. sections 105 and 114 (1962).

2. The function of this office in connection with performance audits by the Auditor General is to provide legal research and statutory interpretation. It would be inappropriate for this office to apply legal principles to a question which asks what the impact of a particular administrative action would be if the result would imply the same conclusion in all cases. A subjective application of the law can only be done on a case-by-case basis and is properly left to the administrative authority in the first instance and to the courts in the second.

cc: Gerald A. Silva
Performance Audit Manager

APPENDIX III

LEGISLATIVE COUNCIL OPINION (O-81-74)

JULY 31, 1981

ARIZONA LEGISLATIVE COUNCIL

MEMO

July 31, 1981

TO: Douglas R. Norton
Auditor General

FROM: Arizona Legislative Council

RE: Request for Research and Statutory Interpretation (O-81-74)

This is in response to a request submitted on your behalf by Gerald A. Silva in a memo dated July 27, 1981. No input was received from the attorney general concerning this request.

FACT SITUATION:

The Board of Osteopathic Examiners (Board) has received many complaints from the public pertaining to fees charged by osteopathic physicians. On occasion, insurance carriers have also contacted or have been referred to the Board for a review of physician charges. In some cases, the Board has taken the position that disputes over fees are not within its jurisdiction and no action has been taken. However, in cases involving very excessive fees and possible fraud the Board has reviewed the matter and made a determination as to the appropriateness of the fees. Where the Board has determined fees to be excessive, the complainant or insurance carrier has been so notified and the doctor, on occasion, asked to adjust the fee or refund the overcharges.

QUESTIONS PRESENTED:

1. Does the Board have jurisdiction to review matters pertaining to physician fees?

2. If the Board determines that a fee is excessive, does the Board have authority to so notify the complainant and request the doctor to adjust the fee or refund the overcharge?

3. Is the Board required to hold an informal interview or formal hearing with the doctor if it determines fees to be excessive or to involve possible fraud?

4. What are the ramifications if the Board has not taken proper action on matters pertaining to fees?

ANSWERS:

1. Administrative officers and agencies have no common law or inherent powers. Their powers are to be measured by the statute creating them. Kendall v. Malcolm, 98 Ariz. 329, 404 P.2d 414 (1965).

The Board may investigate any information which appears to show that an osteopathic physician and surgeon is or may be guilty of unprofessional conduct or is or may be mentally or physically unable safely to engage in the practice of medicine.

Arizona Revised Statutes (A.R.S.) section 32-1855, subsection A. A.R.S. section 32-1854 provides that:

> "Unprofessional conduct" shall include the following acts, whether occurring in this state or elsewhere:
>
> * * *
>
> 16. Knowingly making any false or fraudulent statement, written or oral, in connection with the practice of medicine except as the same may be necessary for accepted therapeutic purposes.
>
> * * *
>
> 20. Any conduct or practice contrary to recognized standards of ethics of the osteopathic medical profession or any conduct or practice which does or might constitute a danger to the health, welfare or safety of the patient or the public or any conduct, practice or condition which does or might impair the ability safely and skillfully to practice medicine.
>
> * * *

The Board may investigate information appearing to show false or fraudulent statements and conduct or practices contrary to recognized osteopathic standards of ethics.

Arizona Code of Administrative Rules and Regulations (A.C.R.R.) R4-22-07 provides that:

> All questions of ethical conduct or ethical procedures shall be considered in accordance with the Code of Ethics as currently outlined and adopted by the American Osteopathic Association and the Arizona Osteopathic Medical Association.

The American Osteopathic Association Code of Ethics (revised July, 1965) provides that:

> Section 19. Any fee charged by a physician shall be reasonable and shall compensate the physican for services actually rendered.

To summarize, the Board may investigate any information which appears to show that an osteopathic physician and surgeon is or may be guilty of unprofessional conduct. Unprofessional conduct includes making false or fraudulent statements and any conduct contrary to the ethical standards of the osteopathic medical profession. The American Osteopathic Association Code of Ethics requires physician fees to be reasonable and to compensate the physician for services actually rendered. The Board may investigate information pertaining to physician fees to determine if an osteopathic physician and surgeon is or may be guilty of unprofessional conduct. If the information investigated is found to be true, the Board may discipline the physician as provided in A.R.S. section 32-1855.

2. The powers of administrative officers and agencies are to be measured by the statutes creating them. Kendall v. Malcolm, 98 Ariz. 329, 404 P.2d 414 (1965). A.R.S. section 32-1855 provides that:

A. The board on its own motion may investigate any information which appears to show that an osteopathic physician and surgeon is or may be guilty of unprofessional conduct or is or may be mentally or physically unable safely to engage in the practice of medicine. Any osteopathic physician or surgeon or the Arizona osteopathic medical association or any health care institution as defined in section 36-401 shall, and any other person may, report to the board any information such physician or surgeon, association, health care institution or such other person may have which appears to show that an osteopathic physician and surgeon is or may be guilty or unprofessional conduct or is or may be mentally or physically unable safely to engage in the practice of medicine. Any person who reports or provides information to the board in good faith shall not be subject to an action for civil damages as a result therof and such person's name shall not be disclosed unless such person's testimony is essential to the disciplinary proceedings conducted pursuant to this section. It shall be an act of unprofessional conduct for any osteopathic physician or surgeon to fail to report as required by this section. Any health care institution which fails to report as required by this section shall be reported by the board to such institution's licensing agency.

B. If, in the opinion of the board, it appears such information is or may be true, the board may request an informal interview with the physician concerned. If the physician refuses such request or if he accepts the request and the results of the interview indicate suspension or revocation of license may be in order, a complaint shall be issued and a formal hearing held in compliance with this section. If, at such informal interview, together with such mental, physical or medical competence examination as the board deems necessary, the board finds the information provided under subsection A of this section to be true but not of sufficient seriousness to merit suspension or revocation of license, it may take either or both of the following actions:

1. Issue a decree of censure.

2. Fix such period and terms of probation best adapted to protect the public health and safety and rehabilitate or educate the physician concerned. Such probation, if deemed necessary, may include temporary suspension or restriction of the physician's license to practice osteopathic medicine and surgery. Failure to comply with any such probation shall be cause for filing a summons, complaint and notice of hearing pursuant to subsection C of this section based upon the information considered by the board at the informal interview and any other acts or conduct alleged to be in violation of this chapter or rules and regulations adopted by the board pursuant to this chapter.

C. If, in the opinion of the board, it appears such charge is of such magnitude as to warrant suspension or revocation of license the board shall serve on such physician a summons and a complaint by fully setting forth the conduct or inability concerned and setting a date for a hearing to be held before the board in not less than thirty days therefrom, stating the time and place of such hearing.

* * *

J. Any osteopathic physician who, after a hearing as provided in this section, is found to be guilty of unprofessional conduct or is found to be mentally or physically unable safely to engage in the practice of osteopathic medicine shall be subject to any one or more of the following: censure, probation, suspension of license, or revocation of license, and for such period of time, or permanently, and under such conditions as the board deems appropriate for the protection of the public health and safety and just in the circumstances. (Emphasis added.)

After an informal interview with the physician concerned the Board may issue a decree of censure or fix a period and terms of probation, or both. After a formal hearing the Board may subject the physician to any one or more of the following: censure, probation, suspension of license or revocation of license. The Board only has authority to discipline osteopathic physicians as provided in A.R.S. section 32-1855. The Board does not have authority to notify the complainant that the fee is excessive and request an osteopathic physician to adjust the fee or refund the overcharge.

3. The action required to be taken by the Board varies with the fact situation in each case. The Board has the power to subject a physician found guilty of unprofessional conduct to any one or more of the following: censure, probation, suspension of license or revocation of license depending on the magnitude of the unprofessional conduct. A.R.S. section 32-1855. If a physician's license may be suspended or revoked or he refuses to attend an informal interview, then a formal hearing is required. A.R.S. section 32-1855, subsections B and C.

In cases in which the Board is of the opinion that the excessive fees charged or the fraud perpetrated is unprofessional conduct of such magnitude as to warrant suspension or revocation of a physician's license, a formal hearing is required. An informal interview is necessary before the Board may censure a physician or place a physician on probation. A.R.S. section 32-1855, subsection B.

4. The function of this office in connection with performance audits by the Auditor General is to provide legal research and statutory interpretation. An answer to this question would require a subjective application of the law. A subjective application of the law can only be done on a case-by-case basis and is properly left to the administrative authority in the first instance and to the courts in the second.

CONCLUSIONS:

1. The Board may investigate information pertaining to physician fees to determine if an osteopathic physician is or may be guilty of unprofessional conduct. If the information investigated is found to be true, the Board may discipline the physician as provided in A.R.S section 32-1855.

2. The Board only has authority to discipline osteopathic physicians as provided in A.R.S. section 32-1855. That authority does not include notifying the complainant that the fee is excessive and requesting a physician to adjust a fee or refund an overcharge.

3. The action required to be taken by the Board varies with the fact situation in each case.

4. It would be inappropriate for this office to answer this question for the reasons set forth above.

cc: Gerald A. Silva
Performance Audit Manager

APPENDIX IV

LEGISLATIVE COUNCIL OPINION (O-81-77)

AUGUST 12, 1981

ARIZONA LEGISLATIVE COUNCIL

MEMO

August 12, 1981

TO: Douglas R. Norton
Auditor General

FROM: Arizona Legislative Council

RE: Request for Research and Statutory Interpretation (O-81-77)

This is in response to a request submitted on your behalf by Gerald A. Silva in a memo dated August 5, 1981. No input was received from the attorney general concerning this request.

FACT SITUATION:

The secretary-treasurer of the board of osteopathic examiners in medicine and surgery (board) serves as administrative assistant to the board and performs such other functions as authorized by Arizona Revised Statutes (A.R.S.) section 32-1804, subsection B. The current incumbent of this position simultaneously is employed by Phoenix General Hospital (Osteopathic) as medical director. As such, the secretary-treasurer of the board has reviewed and resolved numerous complaints against osteopathic physicians, some of which involved treatment received by complainants at Phoenix General Hospital.

QUESTIONS:

1. If the secretary-treasurer had authority to review and resolve complaints (see Arizona Legislative Council Memorandum (O-81-66)), would he have a conflict of interest which falls under the provisions of A.R.S. section 38-501 et seq. in those cases involving patients treated at Phoenix General Hospital?

2. If so, what are the ramifications if this conflict of interest has not been declared?

ANSWERS:

See discussion.

DISCUSSION:

1. A.R.S. section 38-503, subsection B provides that:

> B. Any public officer or employee who has, or whose relative has, a substantial interest in any decision of a public agency shall make known such interest in the official records of such public agency and shall refrain from participating in any manner as an officer or employee in such decision.

A.R.S. section 38-502, paragraph 11 defines "substantial interest" as "any pecuniary or proprietary interest, either direct or indirect, other than a remote interest." (A.R.S. section 38-502, paragraph 10, which defines "remote interest", is not relevant to this discussion.)

A.R.S. section 38-508, subsection A provides that:

> A. If the provisions of section 38-503 prevent an appointed public officer or a public employee from acting as required by law in his official capacity, such public officer or employee shall notify his superior authority of the conflicting interest. The superior authority may empower another to act or such authority may act in the capacity of the public officer or employee on the conflicting matter.

The Arizona Supreme Court stated in State v. Bohannan, 101 Ariz. 520, 421 P.2d 877 (1967), that:

> /p/ublic officers must have no personal interest in transactions with the government which they represent. The rule is most aptly stated in Stockton Plumbing and Supply Co. v. Wheeler, 68 Cal. App. 592, 229 P. 1020:
>
> "The principle upon which public officers are denied the right to make contracts in their official capacity with themselves or to be or become interested in contracts thus made is evolved from the self-evident truth, as trite and impregnable as the law of gravitation, that no person can, at one and the same time, faithfully serve two masters representing diverse or inconsistent interests with respect to the service to be performed." (Citation omitted.)
>
> This Court said in Williams v. State, 83 Ariz. 34, 315 P.2d 981:
>
> "In order that he /the public officer/ act only for and on behalf of the state's interest, it is imperative that he have no personal interest that might clash or conflict with that of the state. * * *
> Public policy requires that personal interests not exist as a possible factor influencing a public official in the performance of his duties."
>
> * * *
>
> Respondent urges that section 38-447 has no application because there must be some benefit to him resulting in a profit before a violation of the law exists. We do not pause long in contemplation of this point. It is conduct which may be detrimental to the interests of the state which the statute seeks to prohibit.

More recently, the Arizona Court of Appeals stated in Yetman v. Naumann, 16 Ariz. App. 314, 492 P.2d 1252 (1972), in construing the meaning of a "substantial interest", that:

> The prohibition against participation in a decision of an administrative board by a member having a "substantial interest" in the decision is clearly for

the purpose of preventing a board member from placing himself in a position whereby he would have a possible conflict of interest. (Citation omitted.) The object of conflict of interest statutes is to remove or limit the possibility of personal influence which might bear upon an official's decision. . . .

We do not conceive that the term "substantial interest" suffers from vagueness, as respondent contends. The legislature itself has defined the term, section 38-502, subsec. 6, and such definition is binding on the courts. (Citations omitted.) It is clear that in order to guard against conduct of a public officer or employee potentially inimical to the public interest, the legislature deemed it necessary to give the term "substantial interest" a broad encompassing definition. Therefore, according to the legislative definition, any interest which does not fall within the seven classifications set out in A.R.S. section 38-502, subsec. 5 constitutes a "substantial interest." We do not believe however, that the legislature intended that the word "interest" for purposes of disqualification was to include a mere abstract interest in the general subject or a mere possible contingent interest. Rather the term refers to a pecuniary or proprietary interest, by which a person will gain or lose something as contrasted to general sympathy, feeling or bias.

The Arizona Court of Appeals decision in Yetman is seemingly not in accord with the decision of the Arizona Supreme Court in Bohannan. If the rule stated in Bohannan were applied, it would appear that the secretary-treasurer, as medical director at Phoenix General Hospital, would have a conflict of interest in those cases involving treatment of patients by osteopathic physicians and surgeons at Phoenix General Hospital. However, it is possible that the Arizona Supreme Court would reevaluate its decision and adopt a less restrictive rule similar to that stated by the Arizona Court of Appeals in Yetman.

2. If the secretary-treasurer has a conflict of interest and fails to declare it or declares it and fails to refrain from participating in any manner in a decision involving the conflict pursuant to A.R.S. section 38-503, he would be subject to the penalties prescribed in A.R.S. section 38-510. A.R.S. section 38-510 states that:

A. A person who:

1. Intentionally or knowingly violates any provision of sections 38-503 through 38-505 is guilty of a class 6 felony.

2. Recklessly or negligently violates any provision of sections 38-503 through 38-505 is guilty of a class 1 misdemeanor.

B. A person found guilty of an offense described in subsection A of this section shall forfeit his public office or employment if any.

CONCLUSION:

It appears, based on the stated fact situation, that the secretary-treasurer, as medical director at Phoenix General Hospital, would have a conflict of interest in those cases involving treatment of patients by osteopathic physicians and surgeons at Phoenix General Hospital. Failure to declare the conflict of interest or failure to refrain from participating in a decision involving the conflict would subject the secretary-treasurer to potential criminal prosecution and, if found guilty, loss of his employment.

cc: Gerald A. Silva
Performance Audit Manager

APPENDIX V

LEGISLATIVE COUNCIL OPINION (O-81-81)

AUGUST 18, 1981

ARIZONA LEGISLATIVE COUNCIL

MEMO

August 18, 1981

TO: Douglas R. Norton
Auditor General

FROM: Arizona Legislative Council

RE: Request for Research and Statutory Interpretation (O-81-81)

This is in response to a request submitted on your behalf by Gerald A. Silva in a memo dated August 5, 1981. No input was received from the attorney general concerning this request.

FACT SITUATION:

Arizona Revised Statutes (A.R.S.) section 32-1825, subsections B and C require a licensee to attend at least two days of educational programs, approved by the American Osteopathic Association, prior to having his annual license renewed. However, provision is made for waiver of this requirement:

> C. /I/f upon application for waiver, the board finds that the failure of the licensee to attend an approved educational program was due to the licensee's disability, military service or absence from the continental United States of America, or was due to other circumstances beyond the control of the licensee which are deemed good and sufficient by the board, then upon notation of such finding in the record of the proceedings, the requirement shall be deemed waived for that year only and the license shall be renewed upon the payment of the fees as herein provided.

In January, 1981, the Board of Osteopathic Examiners in Medicine and Surgery (Board) waived the educational requirement for several licensees for reasons not noted in the Board's minutes. According to Board staff, the physicians had no valid excuse for failing to meet the requirement. The licensees were required by the Board to make up the requirement by attending an additional educational program in the ensuing year.

QUESTIONS PRESENTED:

1. Were the waivers granted to the above licensees in compliance with A.R.S. section 32-1825?

2. If not, what is the status of the licenses which were renewed?

3. Does the Board have the authority to require a licensee to attend more than the required two day program?

ANSWERS:

1. It is an elementary principle of statutory construction that each word in a statute will be given effect. Sutherland, Statutes and Statutory Construction section 46.06 (4th ed., Sands, 1972); State v. Superior Court for Maricopa County, 113 Ariz. 248,

550 P.2d 626 (1976). The words of a statute are to be given their common meaning unless it appears from the context or otherwise that a different meaning is intended. Ross v. Industrial Commission, 112 Ariz. 253, 540 P.2d 1234 (1975). A.R.S. section 32-1825, subsection C provides in part as follows:

> If upon application for waiver the board finds that the failure of the licensee to attend an approved educational program was due to the licensee's disability, military service or absence from the continental United States of America, or was due to other circumstances beyond the control of the licensee which are deemed good and sufficient by the board, then upon notation of such finding in the record of the proceedings, the requirement shall be deemed waived for that year only and the license shall be renewed upon the payment of the fees as herein provided. (Emphasis added.)

The Board may waive the requirement of attendance of an approved educational program if it finds that the licensee's failure to attend such a program was due to any one of the following:

1. The licensee's disability.

2. Military service.

3. Absence from the continental United States.

4. Other circumstances beyond the control of the licensee which are deemed good and sufficient by the Board.

If the Board finds the circumstances which prevented a licensee from attending an approved educational program to be good and sufficient then the requirement may be waived.

The Board must make a finding that the licensee's failure to attend an approved educational program was due to circumstances beyond the control of the licensee which are deemed to be good and sufficient by the Board and then make a notation of that finding in the records of the proceeding in order for the continuing education requirement to be deemed waived. Since the Board did not note a finding in its minutes that certain licensees listed in the minutes were prevented from attending a continuing education program by circumstances beyond their control which were deemed good and sufficient by the Board, the waivers were not granted to those licensees in compliance with A.R.S. section 32-1825, subsection C.

2. The acts of the Board in violation of the statute raise questions about the validity of such licenses. We cannot predict how a court would act if the license renewed under the facts as presented to us was subject to question because of the improper manner in which it was renewed.

Some courts hold that a permit issued under a mistake of fact or in violation of law confers no vested right or privilege on the person to whom the license has been issued even if the person acts upon it and makes expenditures in reliance on the license. B & H Investments, Inc. v. City of Coralville, 209 N.W.2d 115 (Iowa 1973). The court in Rose v. Grow, 210 Ga. 664, 82 S.E.2d 222 (1954), held that the Board of Chiropractic Examiners was without authority to issue a particular license, the license was invalid ab initio and the Board could not be enjoined from rescinding the license.

Other courts hold that a state cannot revoke a license unless the licensee commits an act which subjects him to revocation pursuant to statutes. 61 Am. Jur. 2d Physicians, Surgeons, etc. section 80 (1981).

3. Administrative agencies have no common law or inherent powers. Instead their powers are to be measured by the statutes under which they operate. Kendall v. Malcolm, 98 Ariz. 329, 404 P.2d 414 (1965). The statutes under which the Board operates do not grant it the authority to require a licensee to attend more than the two day program required under A.R.S. section 32-1825, subsection B.

Additionally, A.R.S. section 32-1825, subsection C provides that the requirement of attendance of an approved educational program "shall be deemed waived for that year only". "Waiver" means "the act of waiving or intentionally relinquishing or abandoning a known right, claim, or privilege". Webster's Third New International Dictionary 2570 (1976). If the Board grants a waiver of the educational requirement to a licensee it has abandoned any claim it had against the licensee for the attendance of an approved educational program and cannot require the licensee to make it up the next year.

CONCLUSIONS:

1. The waivers granted to the licensees described in the fact situation do not comply with A.R.S. section 32-1825.

2. The acts of the Board in violation of the statute raise questions about the validity of the licenses. We cannot predict how a court would act if the license renewed under the facts as presented to us was subject to question because of the improper manner in which it was renewed.

3. The Board cannot require a licensee to attend more than the required two day program.

cc: Gerald A. Silva
Performance Audit Manager

APPENDIX VI

LEGISLATIVE COUNCIL OPINION (O-80-44)

JULY 10, 1981

ARIZONA LEGISLATIVE COUNCIL

MEMO

July 10, 1981

TO: Douglas R. Norton
Auditor General

FROM: Arizona Legislative Council

RE: Request for Research and Statutory Interpretation (O-80-44)

This is in response to a request submitted on your behalf by Gerald A. Silva in a memo dated July 9, 1981. No input was received from the Attorney General concerning this request.

FACT SITUATION:

Arizona Revised Statutes (A.R.S.) section 32-1802, subsection C states:

> Each board member shall receive fifty dollars for each day actually engaged in carrying out his duties as an officer or member of the board, together with all expenses necessarily and properly incurred in attending meetings or in performing his duties. Compensation and expenses shall be paid from the board fund.

However, A.R.S. section 38-611, subsection D states:

> Except as otherwise provided by statute or specific legislative appropriation members of boards, commissions, councils or advisory committees who are authorized by law to receive compensation may receive compensation at the rate of not to exceed thirty dollars for each day engaged in the service of such board, commission, council or advisory committee.

Members of the Board of Osteopathic Examiners in Medicine and Surgery have been receiving compensation at the rate of thirty dollars per day pursuant to the provisions of A.R.S. section 38-611, subsection D. It was the understanding of the Board staff that this statute supersedes the provisions of A.R.S. section 32-1802, subsection C.

QUESTIONS PRESENTED:

1. Should members of the Board of Osteopathic Physicians and Surgeons be compensated in accordance with the provisions of A.R.S. section 38-611, subsection D or in accordance with A.R.S. section 32-1802, subsection C?

2. What is the Board's liability or other ramifications if members of the Board have not been receiving proper compensation?

ANSWERS:

1. A.R.S. section 32-1802 was the subject of two conflicting amendments passed by the 1970 Legislature. Prior to these amendments, this section authorized compensation at a rate of twenty dollars a day. Laws 1970, chapter 138 increased the compensation to fifty dollars a day while Laws 1970, chapter 204 provided that compensation would be paid under the provisions of A.R.S. section 38-611 which prescribed thirty dollars per day as compensation. These conflicting versions* of A.R.S. section 32-1802 remained in effect until 1973 when the chapter 204 version was repealed by the Legislature in Laws 1973, chapter 157. From that point on it is clear that the fifty dollar per day compensation rate controlled over the provisions of A.R.S. section 38-611. A specific exemption is created in A.R.S. section 38-611, subsection D by the phrase "except as otherwise provided by statute". A.R.S. section 32-1802 is a statute which "otherwise provides" and is controlling. See also 70 Op. Att'y Gen. 13-L (1970) which is directly on point.

2. A.R.S. section 38-602 prescribes a ninety day statute of limitations within which state officers or former state officers must bring an action for salary owed. This limitation would apply to actions by members of the board for the difference in the compensation owed them due to the misinterpretation of the applicability of A.R.S. section 32-1802.

Presumably board members would be able to use the vehicle of the annual omnibus claims bill to apply to the legislature for payment of the correct compensation owed to them (see Laws 1981, chapter 315).

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*For further clarification, it can be noted that proposals to increase the compensation of an individual state official or the members of a board were frequent prior to the enactment of Laws 1970, chapter 204. This enactment was an omnibus bill which incorporated scores of sections of law which had prescribed specific rates of compensation. With regard to members of boards for the greatest part it provided for a uniform compensation rate to be made payable. It was intended that the Legislature would prescribe differing rates of compensation if the qualifications or demands of a specific board membership warranted the distinction. As an example the members of the state industrial commission were made eligible for a fifty dollar daily rate of compensation by the terms of Laws 1970, chapter 204. Thus it is arguable that even in light of the basic rule of statutory construction which renders a subsequent enactment controlling in the face of an apparent conflict that a court may well have held that the stated intent of Laws 1970, chapter 204 in allowing any other statutory provision to control could have been sufficient to incorporate simultaneous as well as subsequent statutory enactments. However since this specific issue was rendered moot by a subsequent repeal we need not further pursue it.

The immunity provisions of A.R.S. section 41-621, subsection G apply only to discretionary actions of state officials. The requirements of A.R.S. section 32-1802 are mandatory. However, reliance on the advice of the attorney general (if there is evidence of it) could serve to shield board members from personal liability. We are unable to predict how a court would rule in such a case. However, it would seem highly irregular for board members to try to, in effect, sue themselves to recover the compensation owed but which by inaction or misinterpretation by the board was not previously paid.

cc: Gerald A. Silva
Performance Audit Manager