Approved February 3, 1986
Date

MINUTES OF THE House COMMITTEE ON Judiciary.

The meeting was called to order by Chairman Joe Knopp at
Chairperson

3:30 ~~a.m.~~/p.m. on January 27, 1986 in room 313-S of the Capitol.

All members were present except:

Representatives Bideau and Duncan were excused.

Committee staff present:

Mike Heim, Legislative Research Department
Mary Torrence, Revisor of Statutes Office

Jan Sims, Committee Secretary

Conferees appearing before the committee:
Ron Green, Legislative Division of Post Audit
Don Strole, General Counsel, Kansas Board of Healing Arts

The Chairman asked Mike Heim to summarize for the Committee the provisions of HB2661 pertaining to the Board of Healing Arts and the recommendations made thereon by the interim committee.

Ron Green of the Legislative Division of Post Audit appeared before the committee indicating that his office conducted an audit of the Board of Healing Arts from June through August 1985. He presented the Division's Performance Audit Report on the Board of Healing Arts to the committee and reviewed same. He indicated that all of the recommendations of his report have been included in HB2661 with the exception of the recommendation requiring other state agencies and law enforcement agencies to file reports with the Board. Committee members questioned Mr. Green on his report. (Attachments 1 and 2)

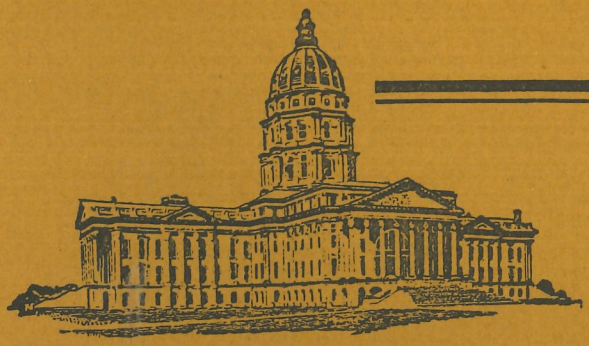
Don Strole, General Counsel for the Kansas Board of Healing Arts responded to the Performance Audit Report and explained to the Committee the Board's actions regarding the report. (Attachment 3) He stated that although it supports a majority of the provisions of HB2661, the Board recommends two amendments. One would be to give the Board subpoena power to obtain records necessary for its investigations. The second amendment concerns new subsection (r) to Section 34 prohibiting a physician from prescribing for himself or a member of his family. Committee members questioned Mr. Strole on his report.

The minutes of the meetings of January 13, 14, 15, 16 and 21 were approved.

The Chairman announced that the Committee had received a request for a bill from Rep. Shriver concerning penalties for DUI; a request from Rep. Fuller for a bill concerning criteria for detention of juveniles; a request from Rep. Solbach for a bill for alternate funding of the Health Care Stabilization Fund by adding a ¼% surcharge on insurance premiums; a request from Rep. Knopp for a bill for alternate funding of the Health Care Stabilization Fund by assessing a $10.00 surcharge for each hospital admission; a request from the Kansas Judicial Council for a bill relating to the physician/patient privilege and a request from the Kansas Judicial Council for a bill relating to traffic infraction and municipal ordinance violations.

Rep. Teagarden moved that all requests be submitted to staff. Motion seconded by Rep. Shriver. Motion carried.

The Chairman adjourned the meeting at 5:15 P.M.



PERFORMANCE AUDIT REPORT

Board of Healing Arts

A Report to the Legislative Post Audit Committee
By the Legislative Division of Post Audit
State of Kansas

August 1985

Attachment 1
House Judiciary
1/27/86

Legislative Post Audit Committee

Legislative Division of Post Audit

THE LEGISLATIVE POST Audit Committee and its audit agency, the Legislative Division of Post Audit, are the audit arm of Kansas government. The programs and activities of State government now cost about $3 billion a year. As legislators and administrators try increasingly to allocate tax dollars effectively and make government work more efficiently, they need information to evaluate the work of governmental agencies. The audit work performed by Legislative Post Audit helps provide that information.

As a guide to all their work, the auditors use the audit standards set forth by the U.S. General Accounting Office and endorsed by the American Institute of Certified Public Accountants. These standards were also adopted by the Legislative Post Audit Committee.

The Legislative Post Audit Committee is a bipartisan committee comprising five senators and five representatives. Of the Senate members, three are appointed by the President of the Senate and two are appointed by the Senate Minority Leader. Of the Representatives, three are appointed by the Speaker of the House and two are appointed by the Minority Leader.

Audits are performed at the direction of the Legislative Post Audit Committee. Legislators or committees should make their requests for performance audits through the Chairman or any other member of the Committee.

LEGISLATIVE POST AUDIT COMMITTEE

Representative Robert H. Miller,
Chairperson
Representative William W. Bunten
Representative Duane Goossen
Representative Ruth Luzzati
Representative Bill Wisdom

Senator August Bogina, Jr.,
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Senator Neil H. Arasmith
Senator Norma Daniels
Senator Ben E. Vidricksen
Senator Joe Warren

LEGISLATIVE DIVISION OF POST AUDIT

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Topeka, Kansas 66612-1285
(913) 296-3792

PERFORMANCE AUDIT REPORT

The Board of Healing Arts and the Health Care Stabilization Fund

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OBTAINING AUDIT INFORMATION

This audit was conducted by Ron Green, Senior Auditor, and Tom Vittitow and Curt Winegarner, Auditors, of the Division's staff. If you need any additional information about the audit's findings, please contact Mr. Green at the Division's offices.

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Summary of Legislative Post Audit's Findings

This audit was conducted to address several questions about the performance of the Board of Healing Arts and about the solvency of the Health Care Stabilization Fund.

Do current procedures for reporting cases of incompetent health care practitioners to the Board appear to be adequate? Although recent legislation has helped to increase the Board's sources of information regarding unsafe health care practitioners, Board officials do not believe that doctors and hospitals are reporting in all cases required by law. Kansas' reporting requirements are less stringent than those recommended by the Federation of State Medical Boards. For example, Kansas law appears to require reporting to the Board of Healing Arts only for clearcut violations rather than suspected or possible violations.

The auditors' recommendations in this area are designed to ensure that the Board receives information about all possible violations of the Healing Arts Act, that all licensees and organizations are fully aware of their legal obligation to report to the Board, and that all malpractice petitions filed with the Insurance Department are received by the Board.

How effective is the Board in protecting the public against unprofessional, improper, or unqualified practice of the healing arts? While the Board has performed well in some areas, a number of its procedures have not served to protect the public. In reviewing disciplinary case files, the auditors noted these significant problems:

- --the Board's recordkeeping system does not allow adequate tracking of disciplinary cases
- --complaints most commonly relate to patient care problems, but most disciplinary actions relate to overprescription of drugs or impaired physicians
- --malpractice petitions are not being used as intended to generate investigations of allegedly incompetent doctors
- --current procedures do not ensure that all doctors practicing in Kansas have the required malpractice liability insurance.

Several recommendations are made to address these problems, to clarify the responsibility for supervising disciplinary activities, and to ensure adequate representation of the public interest.

What is the trend in the balance of the Health Care Stabilization Fund? After declining for three years, the balance in the Fund increased significantly in fiscal year 1985. The number of claim awards paid by the Fund has increased each year since fiscal year 1980, and the average amount per award has also risen sharply. These escalating awards have been offset by reimposition of the premium surcharge paid by health care providers. In fiscal year 1985, an 80 percent surcharge enabled the Fund to grow by about $1.8 million. The surcharge was raised to 110 percent for fiscal year 1986, and is projected to remain at about 100 percent for the next two years.

THE BOARD OF HEALING ARTS AND THE HEALTH CARE STABILIZATION FUND

The State Board of Healing Arts was established by the Legislature in 1957. The Board is responsible for licensing and regulating medical doctors, osteopathic doctors, chiropractors, and podiatrists. Board records show that these licensees total nearly 7,500, about 4,000 of whom are actively practicing in Kansas. In addition, the Board registers physical therapists and physicians' assistants. As part of its responsibilities, the Board is empowered to revoke, suspend, or limit a license after an investigation and hearing.

In the last several years, concerns have been raised regarding the effectiveness of the Board's reporting and disciplinary procedures. In fiscal years 1984 and 1985, the Legislature attempted to address these concerns by increasing the Board's budget and staff, and by establishing mandatory reporting requirements for health care providers and licensees of the Board. Concerns have also been raised over the solvency of the Health Care Stabilization Fund, which pays for successful claims against doctors in malpractice suits when the amount awarded exceeds the minimum amount of liability insurance the State requires each doctor to carry.

On May 15, 1985, the Legislative Post Audit Committee directed the Legislative Division of Post Audit to conduct a performance audit to address the following questions:

1. Do current procedures for reporting cases of incompetent health care practitioners to the Board appear to be adequate?

2. How effective is the Board in protecting the public against unprofessional, improper, unauthorized, and unqualified practice of the healing arts?

3. What is the trend in the balance of the Health Care Stabilization Fund?

To answer these questions, the auditors interviewed staff of the Board, surveyed Board members, and reviewed numerous disciplinary case files. They also interviewed and obtained data from the staff of the Insurance Department, which is responsible for managing the Health Care Stabilization Fund. In general, the auditors found that reporting requirements are not entirely adequate, that the Board's actions are not always effective in protecting the public, and that the Health Care Stabilization Fund balance has risen after declining for the past three years. These findings are discussed in the following sections, preceded by a brief description of the Board of Healing Arts and its major responsibilities and activities.

A Brief Description of the Board of Healing Arts

The Board of Healing Arts is comprised of 13 members appointed by the Governor. Five members are medical doctors, three are osteopaths, three are chiropractors, one is a podiatrist, and one member is from the general public. Each member is appointed to a four-year term, and no member can serve for more than three terms. The Board members annually select a president, vice president, and secretary. The Board secretary is the only salaried Board member. The members of the Board of Healing Arts are listed in Appendix A.

The work of the Board is done under the direction of the secretary and is supervised by the executive secretary. The Board staff includes a general counsel, a disciplinary counsel, an investigator, and six clerical positions. The two attorneys and one clerical position have been added since the start of fiscal year 1984.

The Board of Healing Arts has several areas of responsibility for protecting the public. Each year, the Board conducts two examinations for licensure within each branch of the healing arts. To ensure that persons applying for licensure have received valid medical training, the Board maintains a list of accredited medical schools. When necessary, the Board conducts investigations to determine whether schools are eligible for accreditation. In addition, the Board annually processes license renewals for each of its licensees. In fiscal year 1984, the Board renewed 7,447 licenses. State law has established continuing education requirements for each of the healing arts which must be completed in order to maintain licensure. As part of its license renewal process, the Board requires licensees to submit proof of their continuing education coursework.

Many of these activities are designed to prevent incompetent and unqualified persons from obtaining licensure to practice the healing arts. To deal with questions of competency involving persons who have obtained licensure, the Board has established procedures to investigate and discipline its licensees. Under the Healing Arts Act, the Board may take disciplinary action against a licensee for a number of different acts, including the following:

--one instance of gross negligence, or repeated instances of ordinary negligence
--immoral, unprofessional, or dishonorable conduct
--addiction to or unlawful distribution of alcohol or drugs
--inability to practice with reasonable skill and safety due to illness, alcoholism, or excessive use of drugs
--practice outside the scope of licensure
--fraud, or false advertising
--failure to pay annual renewal fees or complete continuing education requirements
--disciplinary action or restriction of licensure by another state
--conviction of a felony
--failure to report information required by law

If the Board finds that a licensee has committed any of these acts, it can order the revocation, suspension, or limitation of that person's license. The

Board also has the option of entering into a stipulation agreement with a licensee. Stipulation agreements specify limitations or conditions which a licensee must follow in order to avoid further disciplinary measures by the Board. All disciplinary actions must be approved by a majority vote of the Board.

Do Current Procedures for Reporting Cases of Incompetent Health Care Practitioners to the Board Appear to be Adequate?

To adequately regulate its licensees, any medical licensing board must have timely information about licensees who may be incompetent or impaired in their practice of the healing arts. To determine whether the Board of Healing Arts is receiving this type of information, the auditors reviewed recent changes in the reporting laws and compared them with the standards set by the Federation of State Medical Boards.

Recent Legislation Has Focused on Increasing the Board's Sources of Information Regarding Unsafe Health Care Practitioners

Before 1983, the Kansas Healing Arts Act (K.S.A. 65-2801 et. seq) contained few provisions for reporting incompetent and impaired health care practitioners to the Board. Under K.S.A. 65-2898, persons who voluntarily reported information to the Board regarding alleged incidents of malpractice or the qualifications of any licensee, registrant, or certificate holder were granted immunity from civil liability. However, licensees were only required to report persons they thought were practicing without a license, and to furnish evidence relating to alleged violations already being investigated by the Board.

With support from the Board of Healing Arts, the 1983 Legislature attempted to strengthen the Healing Arts Act by adding several reporting requirements. Under these requirements, licensees must immediately report to the Board any knowledge that another licensee has committed an act "which is a ground for the revocation, suspension, or limitation of a license." Hospitals and other organizations employing licensees must report to the Board if they make a finding that a licensee has committed such an act. In addition, any organization employing licensees of the Board must immediately report to the Board if its medical staff recommends the termination, suspension, or limitation of a licensee's practice privileges for reasons relating to that person's professional competence. Failure of a licensee to report when required by the Healing Arts Act is a ground for disciplinary action by the Board. These additions to the Act were intended to increase the participation of health care providers, including hospitals, clinics, and physicians, in the Board's monitoring and enforcement efforts.

To provide the Board with more timely information regarding malpractice cases, the 1983 legislation also contained a provision requiring the Commissioner of Insurance to forward to the Board any malpractice petitions received in conjunction with a claim against the Health Care Stabilization Fund. In 1985, a further provision was added requiring the Commissioner and the attorneys of record in malpractice cases to submit to the Board any expert

witness reports made available to the opposing parties, and to provide other relevant documents in their possession upon the Board's request.

Most Complaints Received by the Board of Healing Arts Come from Patients and Private Individuals

To determine the sources of complaints received by the Board, the auditors reviewed and categorized all complaints recorded in the Board's complaint log for fiscal year 1985. The table below shows a breakdown of the sources from which the Board received complaints that year.

Sources of Complaints to the Board of Healing Arts Fiscal Year 1985

Source of Complaint	Number	Percent
Patient or Individual	89	46.9
Licensee	23	12.1
Other Government Agency	17	8.9
Professional Organization	14	7.4
Health Care Employer	11	5.8
Board of Healing Arts	11	5.8
Drug Enforcement Agency Report	7	3.7
Anonymous	5	2.6
Other	13	6.8
Total	190	100.0

As the table shows, nearly 47 percent of the complaints were made by patients or individuals, while 18 percent were made by licensees and health care employers. About four percent of the complaints were generated by Drug Enforcement Agency reports submitted periodically to the Board. These reports contain information about prescription drug purchases and sales, which the Board can use to identify licensees who may be misusing or overprescribing medication.

Although Licensees and Hospitals Are Reporting More Frequently, Board Officials Do Not Believe They Are Reporting in All Cases Required by Law

To determine whether sources of complaints to the Board changed as a result of the reporting requirements adopted in 1983, the auditors reviewed the Board's complaint records for fiscal years 1983 and 1984, and compared the results with the figures given above for fiscal year 1985. A completely reliable comparison between the three years was not possible, because the records for 1983 and 1984 were maintained informally and may not be as complete as the formal complaint log begun in fiscal year 1985. However, the figures indicate that there was an increase in the number of complaints received from licensees and hospitals after the reporting requirements went into effect. The Board

recorded nine complaints from licensees and hospitals in fiscal year 1983 (2.4 percent of the total), 12 (9.2 percent) in fiscal year 1984, and 34 (17.9 percent) in fiscal year 1985.

$15 MILLION VERDICT AGAINST DOCTOR AND HOSPITAL

A Board attorney told the auditors that the Board of Healing Arts first learned of this case in November 1984 when the press reported a $15 million verdict against a doctor and a hospital. The doctor had ordered an anesthetic for a pregnant woman in 1979, which the woman alleged had caused brain damage to her infant. According to the Board attorney, nearly $12 million of the awarded amount was against the hospital and this amount is still under appeal. The verdict included $6.2 million in actual damages and $8.8 million in punitive damages. As of July 1985, the Board 's investigation is still in an early stage and the doctor continues to practice.

The Board attorney did not know why the Board was not notified of the incident for five years. The attorney stated that trial testimony showed a doctor in the same corporate practice was aware of the problem, but did not report any information to the hospital, the Board, or the child's parents. Under legislation passed in 1983, a doctor's alleged medical negligence must be reported to the Board by any licensee who has knowledge of a violation of the Healing Arts Act. This legislation, along with the requirement for malpractice petitions to go to the Board, should help keep the Board informed of potential malpractice cases on a more timely basis.

Although there seems to have been some improvement in reporting by licensees and hospitals, most members of the Board of Healing Arts do not believe they are receiving full information from these sources. On a questionnaire provided by the auditors, nine of 12 responding Board members said they did not think the Board was receiving reports from licensees and hospitals about "all licensees who may be incompetent or impaired in their practice of the healing arts." In addition, the Board's general counsel has indicated in testimony to the Special Committee on Medical Malpractice that reporting by licensees and hospitals has been "at best low and in some instances nonexistent." The general counsel attributed this partly to fear that the licensee or hospital may be sued after making a report to the Board, although State law clearly grants immunity to persons reporting in good faith.

Malpractice Petitions Have Apparently Been Sent to the Board as Required by Law, but the Board Does Not Have a Complete List

Since July 1, 1983, the Insurance Department has been required by law to furnish to the Board of Healing Arts a copy of each malpractice petition filed with the Insurance Department. These petitions are filed on behalf of plaintiffs who may become eligible for payment from the Health Care Stabilization Fund. Malpractice petitions can be an important source of information to the Board because they deal with potentially serious cases of alleged negligence. In addition, they may alert the Board to violations that otherwise would not be reported. According to records supplied by the Insurance Department, a total of 374 petitions were sent to the Board during fiscal years 1984 and 1985.

When the auditors compared the Insurance Department's records with a list of petitions received by the Board of Healing Arts, they found that 36

petitions were missing from the Board's list. The reason for this discrepancy was not ascertainable, as there was no pattern to explain which petitions were not on the Board's list. Board staff indicated they would obtain copies of the missing petitions from the Insurance Department.

Kansas' Reporting Requirements Are Less Stringent than Those Recommended by the Federation of State Medical Boards

The auditors compared the recommendations in the Federation's 1985 publication, A Guide to the Essentials of a Modern Medical Practice Act, with the Kansas Healing Arts Act. That comparison is shown in the accompanying box. The major difference between the two is that the Federation guide would require the reporting of any information which appears to show that a licensee "is or may be medically incompetent, guilty of unprofessional conduct, or mentally or physically unable to engage safely in the practice of medicine." The Healing Arts Act only requires reporting "knowledge" that a licensee "has committed any act...which is a ground for the revocation, suspension, or limitation of a license." Thus, Kansas law appears to require reporting to the Board of Healing Arts only for clearcut violations rather than suspected or possible violations.

Comparison of the Kansas Healing Arts Act to Guidelines of the Federation of State Medical Boards

Healing Arts Act	Federation Guide
1. Requires licensees to report when another licensee has committed an act which is a ground for revoking, suspending, or limiting a license.	1. Requires licensees to report when another licensee is or may be medically incompetent, guilty of unprofessional conduct, or mentally or physically impaired.
2. Requires health care employers (such as hospitals) to report when their medical staffs find that a licensee has committed an act which is a ground for revoking, suspending, or limiting a license.	2. Requires health care employers to report when a licensee is or may be medically incompetent, guilty of unprofessional conduct, or mentally or physically impaired.
3. Requires health care employers to report when a licensee's practice privileges have been terminated, suspended, or restricted.	3. Requires health care institutions to report when a licensee's practice privileges have been terminated, suspended, or restricted, or when any licensee voluntarily surrenders practice privileges while under investigation by the institution.
4. Requires reports only from licensees and health care employers. Other statutes require reports from the Insurance Department and the Board of Pharmacy in certain instances.	4. Requires reports from all health care institutions, licensees, state agencies, law enforcement agencies, and courts, as well as the state medical association.
5. Provides no specific penalties for failure to report, other than disciplinary action by the Board or conviction of a misdemeanor for violating the Act.	5. Recommends specific penalties for failure to report.
6. Grants immunity from civil damages to persons and organizations reporting in good faith.	6. Grants immunity from civil damages to persons and organizations reporting in good faith.

Further limitations in the Kansas Act affect the reporting requirements for organizations (like hospitals) that employ licensees. These organizations are

not required to report unless they make a finding that the Healing Arts Act has been violated. Legislation introduced late in the 1985 session would have required health care organizations to report "information" as well as findings that a licensee has committed a punishable act, but no action was taken on the bill.

Under Kansas law, the Board of Pharmacy is required to report to the Board of Healing Arts if it finds evidence that a licensee of the Board has abused controlled substances. As the boxed comparison on page six shows, the Federation guide extends reporting requirements to all state agencies, courts, law enforcement agencies, and health care institutions, as well as the state medical association and its components. The guide also recommends that health care institutions be required to report licensees who voluntarily resign or accept limitation of their staff privileges while under formal or informal investigation by the institution. The Kansas Healing Arts Act has no such requirement.

PROBLEMS PERSIST FOR FIVE YEARS BEFORE BOARD IS INFORMED

In 1979, a hospital learned that one of its staff members was not responding to calls, had falsified entries on patient charts, and had failed to see patients admitted to special care units on a timely basis. A review committee at the hospital found that:

1. The nursing staff had difficulty locating the doctor
2. The doctor did not respond to calls
3. The doctor did not see patients daily
4. The doctor had falsified records
5. The doctor admitted critically ill patients, but did not see them within a specified period.

Following the review, the hospital instituted a six-month plan to monitor the doctor's actions. In 1983, the hospital records noted similar problems and the hospital again decided to monitor the doctor.

In April 1985, a critically ill patient suffered respiratory arrest, but was revived through emergency treatment. Her chart showed she had not been seen by the doctor for three days, though a later entry indicated that the doctor had seen her the day before the emergency. Another incident reported that same month involved a staff resident taking over a case in which impaired breathing could have been fatal without that intervention.

In May 1985 the doctor's privileges were suspended for 90 days by the hospital's executive committee. In compliance with the reporting laws established in fiscal year 1983, the hospital then notified the Board that this doctor's privileges had been suspended. However, during the previous five years, the Board had received no information about the doctor's shortcomings. The hospital was not required to report to the Board until it had taken formal action to limit the doctor's practice privileges, or found that the doctor had violated the Healing Arts Act. The doctor is currently under review for disciplinary action by the Board.

To ensure compliance with compulsory reporting requirements, the Federation guide recommends adopting specific penalties for demonstrated failure to report. Under the Healing Arts Act, persons who fail to report when required are subject to revocation, suspension, or limitation of their licenses, as well as conviction of a misdemeanor for violating the Act, but there is no

specific penalty for failing to report. In addition, the Healing Arts Act provides no specific penalty for organizations that fail to report.

In keeping with the Federation guide, the State of Florida's Medical Practices Act allows its Board of Medical Examiners to levy fines up to $1,000 against any organization which fails to comply with compulsory reporting requirements. Under the Healing Arts Act, organizations can be penalized only by penalizing individuals on their staffs. For this reason, the Board of Healing Arts may not have the means necessary to enforce compulsory reporting requirements for medical organizations and hospitals.

Conclusion

The number of complaints received by the Board of Healing Arts from licensees and health care employers increased after reporting requirements were added to the Healing Arts Act in 1983. The auditors' findings show that about 18 percent of the complaints received by the Board in fiscal year 1985 came from these sources. However, members and staff of the Board do not believe they are receiving reports from licensees and health care employers in all cases where reporting is required. In addition, the reporting requirements of the Healing Arts Act are less stringent than those recommended by the Federation of State Medical Boards. Under the Healing Arts Act, possible or suspected violations of the Act do not have to be reported, and health care organizations cannot be penalized for failing to report. For these reasons, current procedures do not appear to be adequate to ensure that all possible violations of the Healing Arts Act are reported to the Board.

Recommendations

1. To ensure that the Board of Healing Arts receives information about all possible violations of the Healing Arts Act, the Special Committee on Medical Malpractice should consider the following:

   a. amending K.S.A. 65-28,121 to require hospital medical staffs to report to the Board of Healing Arts whenever they receive information that a licensee may have committed an act which is or may be a ground for disciplinary action by the Board, and to report whenever licensees voluntarily surrender or limit their hospital privileges while under formal or informal investigation by the hospital.

   b. amending K.S.A. 65-28,122 to require licensees of the Board to report whenever they receive information that

another licensee may have committed an act which is or may be a ground for disciplinary action by the Board.

c. amending the Healing Arts Act to provide specific penalties, such as fines, for organizations or licensees that fail to report to the Board when required by law to do so.

d. establishing requirements for other State agencies, law enforcement agencies, and medical associations to report to the Board of Healing Arts concerning licensees who may be incompetent, impaired, or otherwise in violation of the Healing Arts Act.

2. To ensure that all licensees and organizations are fully aware of their legal obligations, the Board of Healing Arts should take steps necessary to publicize any changes in the reporting requirements contained in the Healing Arts Act.

3. To ensure that all malpractice petitions filed with the Insurance Department have been received, the Board of Healing Arts should establish procedures for periodically checking its list of petitions against the records of the Insurance Department.

How Effective is the Board in Protecting the Public Against Unprofessional, Improper, or Unqualified Practice of the Healing Arts?

The main purpose of the Healing Arts Act is to protect the public against unprofessional, improper, unauthorized and unqualified practice of the healing arts and from unprofessional conduct by persons licensed to practice under the Act. As the agency established to administer the Act, the Board of Healing Arts has several areas of responsibility for protecting the public. The Board's primary activities for protecting the public include receiving, investigating, and resolving complaints against doctors, as well as taking disciplinary action against doctors who have violated the Act. Because these activities are central to the Board's efforts in protecting the public, the auditors focused their attention in these areas.

Although the purpose of occupational regulation is to protect the public, studies have shown that regulatory agencies may become sympathetic to--or even dominated by--the industries they regulate. To determine whether the Board of Healing Arts has used its regulatory authority to effectively protect the public interest, the auditors first reviewed the Board's procedures for handling complaints. To obtain first-hand information on how complaints are handled, the auditors reviewed several samples of complaints filed in fiscal years 1984 and 1985. In addition, they examined in detail the disciplinary actions taken by the Board over the past two years, and reviewed other case files of doctors who had a history of serious problems.

In general, the auditors found that while the Board has performed well in some areas, a number of its procedures have not served to protect the public. The Board's handling of complaints can be improved, its recordkeeping system does not allow tracking of disciplinary problems over time, and the disciplinary actions taken do not always go far enough to protect the public interest. These and other findings are discussed in the sections that follow.

The Most Common Type of Complaint Was Improper Patient Care

During fiscal years 1984 and 1985, the Board received and logged 336 complaints. The number of complaints received in fiscal year 1984 is approximate, because the Board did not formally log all complaints until fiscal year 1985.

The Board receives complaints of many different types, including allegations of substandard patient care, improper handling of prescription drugs, and excessive charges. The table below shows the types of complaints received in fiscal years 1984 and 1985.

Types of Complaints Received by the Board of Healing Arts Fiscal Years 1984 and 1985

Type of Complaint	Number	Percent
Patient Care	113	33.6
Handling of Prescription Drugs	48	14.3
Charges and Billing Practices	48	14.3
Professional Conduct or Ethics	39	11.6
Licensure and Scope of Practice	19	5.7
Hospital Privileges	17	5.1
Advertising Practices	16	4.7
Criminal Charge or Conviction	13	3.9
Impaired Physician	7	2.1
Unspecified or Unclear	16	4.7
Total	336	100.0

As the table shows, about 34 percent of all complaints related to patient care provided by doctors. Other common types of complaints related to handling of prescription drugs, charges and billing practices, and professional conduct.

During fiscal years 1984 and 1985, most of the complaints received by the Board concerned medical doctors. This is not surprising, because more than 80 percent of the active doctors in Kansas are M.D.'s. The table on the following page shows the number of active doctors in each major branch of the healing arts, and the number of complaints logged against each group.

	Number of Active Doctors in Kansas, 1984	Percent of Total Active Doctors in Kansas, 1984	Number of Complaints, FY 1984-85	Percent of Total Complaints, FY 1984-85
Medical Doctors	3,212	82.6	211	67.4
Osteopaths	196	5.1	49	15.7
Chiropractors	480	12.3	53	16.9
Total	3,888	100.0	313	100.0

The table shows that complaints received by the Board were in approximately the same percentage as the percentage of active doctors in the State. The percentage of complaints against medical doctors was lower than their percentage of total doctors, while the percentage of complaints against osteopaths and chiropractors was higher than their percentage of all doctors active in Kansas. The Board's procedures for handling these complaints are discussed in the next section.

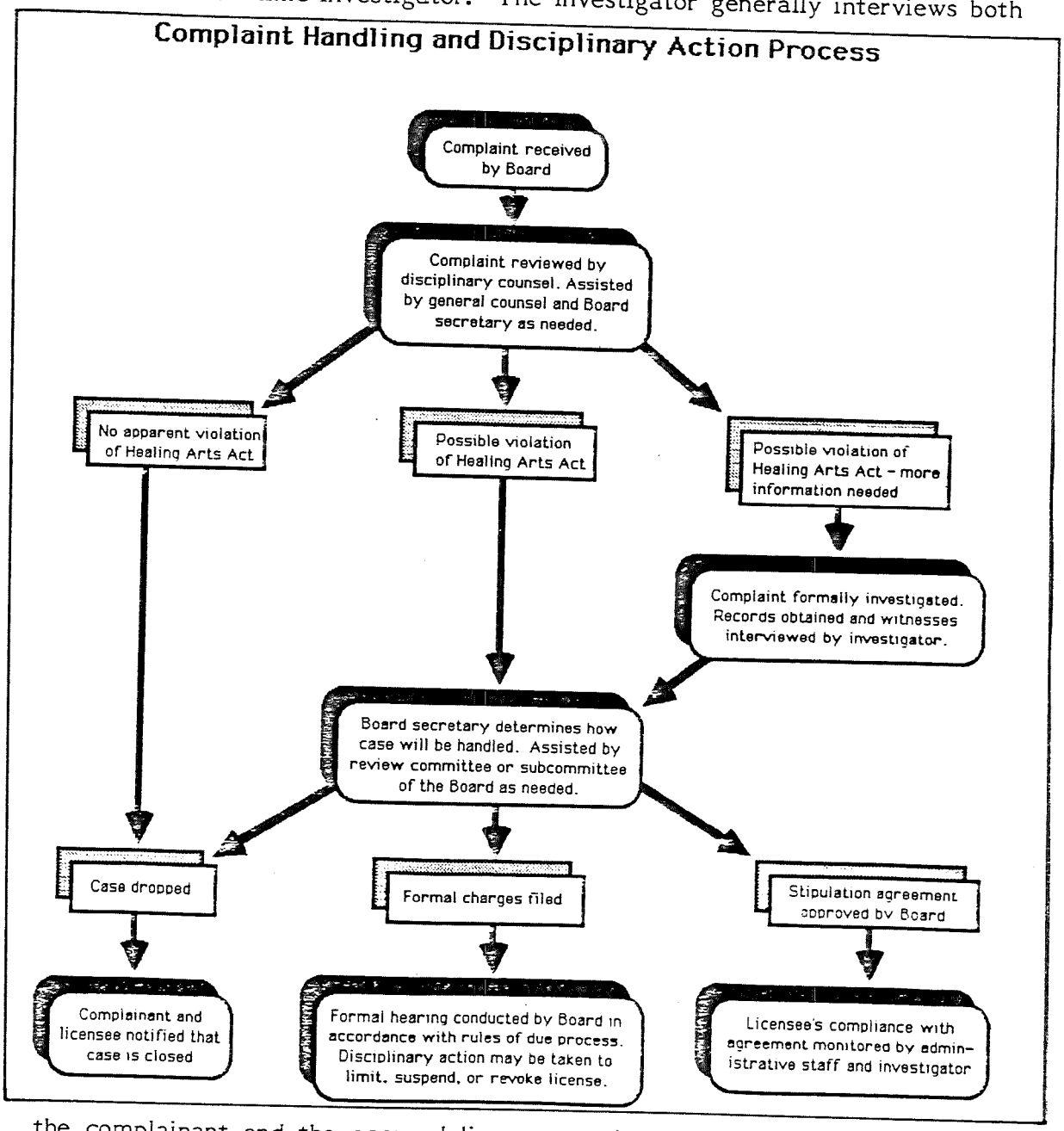
The Board Has Established Procedures for Responding to Complaints About Doctors

The primary responsibility for receiving and responding to complaints lies with the Board's disciplinary counsel. Under K.S.A. 1984 Supp. 65-2840a, the disciplinary counsel has "the duty to investigate or cause to be investigated all matters involving professional incompetency, unprofessional conduct or any other matter which may result in revocation, suspension or limitation of a license."

To screen out frivolous cases, the disciplinary counsel initially responds to all complaints from the general public by mailing a formal complaint form to the complaining party. If this form is completed and returned, the complaint is formally recorded in the Board's complaint log. Complaints received from entities such as hospitals, State agencies and professional organizations are generally recorded in the log without a formal complaint form. In some cases, the disciplinary counsel may record a complaint based upon information received from various outside sources, such as newspaper articles and law enforcement reports.

The complete process for handling complaints is summarized on the following page. Once a complaint has been formally recorded, the disciplinary counsel reviews the information provided to determine whether a possible violation of the Healing Arts Act has taken place. In making this determination, the disciplinary counsel may consult with the Board's general counsel and the secretary of the Board. Complaints that are clearly outside the Board's jurisdiction are closed at this stage, and the complaining party is notified. Sometimes the complaining party is referred to another organization, such as a medical society or consumer protection agency.

If more information is needed to evaluate a complaint, it is assigned to the Board's full-time investigator. The investigator generally interviews both



the complainant and the accused licensee, and obtains copies of all medical records and other documents pertinent to the case. When this information has been compiled, the investigator files a written report with the disciplinary counsel.

At this stage, the secretary of the Board determines whether there is ground for the Board to take formal disciplinary action against the licensee. Although the role of the secretary in conducting disciplinary actions is not formally defined by statute or regulation, the Administrative Procedures Act (which took effect July 1, 1985) allows the Board to designate a chief presiding officer with the power to convene hearings and initiate disciplinary actions

against licensees. The secretary has not been designated as the Board's presiding officer, but the general counsel has indicated that the secretary will probably act in this capacity for the immediate future.

In determining how to resolve a case, the secretary may obtain medical advice regarding the standards of practice within the licensee's branch of the healing arts. For this purpose, the Board maintains a three-person review committee for each of the three main branches of the healing arts--medicine and surgery, osteophatic medicine and surgery, and chiropractic. Depending on the outcome of this review process, the secretary either dismisses the case, files formal charges, or negotiates a stipulation agreement. Stipulation agreements generally allow the licensee to continue practicing within certain restictions that may limit the scope of practice, or require the licensee to take specific coursework, or require an impaired physician to refrain from use of alcohol or drugs.

DOCTOR ADDICTED TO COCAINE

In March 1985 the federal Drug Enforcement Agency reported that since November 1984, a doctor had been purchasing large amounts of cocaine from the pharmacy rated third-highest in the nation for sales of cocaine. An investigation revealed that during the past year this doctor purchased more than 250 30cc bottles of 10 percent cocaine. The pharmacist providing the cocaine said that the doctor had been purchasing it since 1982, and that he was the only physician who purchased cocaine at that pharmacy.

The doctor explained to the Board's investigator and to a review committee that the drug was needed in his practice. However, when confronted by the Board secretary and attorneys in June 1985, he admitted that he was using the cocaine himself. After his admittance to the Menninger Foundation for four days, the doctor was allowed to return to his practice for two weeks to close it down. On July 1, 1985, the Board secretary sent a letter to the doctor requiring him to refrain from the practice of medicine and surgery. Eight days later, when asked by the auditors, the Board's general counsel said that the doctor was still practicing.

The auditors were told that this doctor entered the Menninger Foundation's in-patient drug program on July 15, 1985. Following successful treatment, the Board may enter into a formal agreement with the doctor that he will use no more cocaine or similar drugs, and that he will participate in an outpatient drug program. After consulting with Menninger Foundation officials, the Board's general counsel plans to recommend an agreement to keep the doctor's name confidential as long as the terms are followed. The Board would have an opportunity to vote on this proposal at a public meeting.

If a stipulation agreement is proposed, it must be approved by a majority vote of the full Board. If charges are filed, the Board must conduct a formal hearing at which the licensee may present a defense to the charges. In either case, the Board's action may result in the limitation, suspension, or revocation of the license. Once formal action has been taken by the Board, the complaint is considered closed. However, in cases where stipulations are signed, the Board continues to monitor the licensee's compliance with the agreement, and may take further disciplinary action if necessary.

To determine how effective the Board has been in handling complaints, the auditors reviewed two groups of case files with different characteristics. From the Board's complaint logs for fiscal years 1984 and 1985, the auditors reviewed a random sample of complaints filed against licensees who had fewer than three complaints filed against them. The auditors also reviewed all of the

complaints against licensees who had three or more complaints filed against them during the two fiscal years. The results of these reviews are discussed in the next two sections.

A Random Sample of Complaints Showed That Most Cases are Closed Administratively with Findings That No Violations Occurred

The auditors randomly selected 25 files of complaints submitted to the Board of Healing Arts during fiscal years 1984 and 1985. Fifteen of the cases reviewed had been closed by the Board and 10 cases remained open.

Of the 25 files reviewed, the auditors found that 20 complaints were filed against medical doctors, one complaint was filed against an osteopath, and four were filed against chiropractors. As the following table shows, complaints most often related to improper patient care and drug prescription practices.

Types of Complaints in Random Complaint Sample

Type of Complaint	Number
Patient Care	9
Handling of Prescription Drugs	6
Professional Conduct or Ethics	4
Charges and Billing Practices	3
Hospital Privileges Suspended	2
Other	1
Total Complaints in Sample	25

The auditors' review of the 15 complaint cases closed by the Board showed that these complaints took an average of 3.2 months to resolve. However, the time varied from less than two weeks to more than 16 months. Most of these cases were closed by the Board's administrative staff with findings that no violations of the Healing Arts Act had occurred. Two of the cases were resolved between the licensee and the complainant outside of any Board initiated action. Three cases resulted in disciplinary action; two licensees signed stipulations that specified practices would be changed and a third licensee agreed to alter his practice.

Complaint Resolution	Number of Complaints
Closed administratively by the Board	10
Resolved without Board action	2
Disciplinary action taken by the Board	3
Total	15

In reviewing the three cases which resulted in some form of disciplinary action, the auditors questioned whether the Board's actions appeared to be in the best interest of the general public. The actions taken in these cases can be summarized as follows:

Cases 1 and 2. The Board's review committee found no probable cause to revoke, suspend, or limit the practitioner's license in one case where a chiropractor used and sold "harmonic crystals" to treat persons affected by agent orange or dioxin poisoning, and in another case where a chiropractor used herbal poultices to treat breast cancer. In both cases, the Board reached an agreement stating the licensee would cease the use of these practices until the treatments were proven to be effective.

Case 3. The Board entered into a stipulation agreement with a medical doctor, prohibiting the doctor from prescribing amphetamines or similar substances. Six months later, when the Board's investigator discovered the doctor was still prescribing these drugs, the Board's executive secretary wrote the doctor a letter reminding him of the requirements of the stipulation. A later review by the investigator showed that the doctor had stopped the prescriptions.

The Board Does Not Handle Multiple Complaints Against Doctors Differently Than Other Complaints

To determine whether licensees with multiple complaints were given greater attention by the Board, the auditors reviewed the complaint files of all licensees with three or more complaints filed against them during fiscal years 1984 and 1985. This group consisted of 13 licensees with a total of 42 complaints. Six of the licensees were medical doctors and seven were chiropractors. There were no osteopaths in the group.

The types of complaints included in the auditors' sample are shown in the table below:

Types of Complaints in Multiple Complaint Sample

Type of Complaint	Number
Charges and Billing Practices	18
Patient Care	10
Professional Conduct or Ethics	8
Handling of Prescription Drugs	3
Advertising Practices	1
Criminal Conviction	1
Licensure and Scope of Practice	1
Total Complaints in Sample	42

Most complaints in this sample have received consideration beyond the screening stage, but none has resulted in disciplinary action by the Board. Of the 42 complaints in the sample, the auditors found that 26 (61 percent) had either been formally investigated, submitted to a review committee, or submitted to a subcommittee of the Board. The auditors compared these figures with the sample of complaints selected randomly, and found that only eleven (44 percent) of the 25 complaints in that sample received consideration beyond the screening stage.

Despite the greater level of attention given to multiple complaints by the Board, none of the 42 complaints has yet resulted in disciplinary action being

taken. Most of the closed complaints were dropped by the Board's administrative staff after being screened or formally investigated. Four chiropractic cases were dropped after review by the chiropractic members of the Board, and six complaints were considered by review committees and found to have no probable cause. Complaints were generally dropped because there was insufficient evidence of a violation of the Healing Arts Act. The amount of time taken to resolve complaints ranged from one to 14 months, with 3.3 months being the average.

The Board has no procedure for handling multiple complaints differently than other complaints. According to the Board's attorneys, all complaints are handled according to their individual merits, on a case-by-case basis. The past complaints against a licensee may be reviewed by the Board's staff, and this may influence how much attention is given to subsequent complaints. However, the Board has no formal policy or procedure for using licensees' complaint history in allocating resources or resolving cases. In some cases, several complaints against a licensee may be consolidated during the investigation and review process, but each complaint is usually resolved independently.

The Board's recordkeeping system does not allow tracking of licensees' disciplinary problems over time. In reviewing files in this sample, the auditors found that the Board maintains records on past complaints and disciplinary actions, but does not maintain summary records to show the history of complaints, malpractice petitions, criminal convictions, impairments, and disciplinary actions against individual licensees.

The Board's disciplinary counsel indicated that he obtains licensees' past complaint histories by reviewing the Board's files each time a new complaint is received. However, the auditors found that files for a single licensee were often stored in three separate offices, and there was no index to indicate how many files had been created or what they contained. In addition, the contents of individual files were not maintained in chronological sequence. In some cases, the auditors found records for three or more separate complaints mixed together in licensees' file folders with no apparent organization. Given these conditions, the auditors found it difficult to determine the disposition and current status of some complaints in the sample.

HIGH NUMBER OF COMPLAINTS DOES NOT ALWAYS MEAN DANGER TO THE PUBLIC

According to the Board's attorneys, licensees with large numbers of complaints are not necessarily the most dangerous or most worthy of the Board's attention. The licensee with the largest number of complaints in the auditors' sample was a chiropractor who had six complaints filed against him during fiscal years 1984 and 1985. All six complaints involved allegations or questions concerning the licensee's charging practices.

Generally, the Board assigns a low priority to such complaints because they do not involve an immediate threat to public safety. However, in this case the Board had already received five similar complaints (prior to fiscal year 1984) which had not yet been investigated. In response to the apparent pattern of problems with the licensee, the Board initiated investigations into these five complaints, plus four of the six complaints in the auditors' sample. None of these investigations have resulted in disciplinary action against the licensee. Although the Board's attorneys say they find the licensee's charging practices questionable, they have thus far found no clear evidence of a violation of the Healing Arts Act. As of July 1985, only one complaint remained open and under investigation by the Board: the other complaints had been closed.

Most complaints in this sample did not appear to involve serious danger to the public. As shown in the table on page 15, 19 (45 percent) of the 42 complaints in the sample involved charging or advertising practices. While these complaints may be of concern to the patients involved, they do not generally present a danger to public health or safety.

The remaining 23 complaints related to patient care, conduct and ethics, prescribing of drugs, licensure, and criminal charges. The auditors found that the degree of seriousness of these complaints differed widely from case to case. For example, the complaints regarding conduct and ethics ranged from rude behavior toward patients to allegations of sexual harrassment and rape, while the complaints concerning patient care ranged from improper treatment of scabies to misdiagnosis of Alzheimer's disease. The auditors found few examples of the more serious type of complaint. Only two of the 13 licensees in the sample appeared to show repeated instances of serious complaints. These two licensees are profiled below.

BOARD PROCEDURAL ERRORS CAUSE LENGTHY DELAY

One of the Board's primary concerns is to ensure that licensees being reviewed for disciplinary action receive due process of the law. According to the Board's general counsel, this concern has arisen largely as a result of mistakes made by the Board in handling a disciplinary action in July 1980. The subject of this action was a medical doctor accused of overprescibing amphetamines. The Board convened a hearing panel which found that the licensee had used poor judgment in his prescribing practices, and ordered that he not prescribe drugs for one year in lieu of having his license revoked.

The licensee appealed to the district court, which returned the case for a new hearing. According to the court, due process was denied the licensee because he was not given "a full and fair hearing....as guaranteed by the 5th and 14th Amendments." Before further action could be taken, the licensee filed suit against the Board in federal court. Eventually, the case reached the U.S. Supreme Court, which found in favor of the Board. Throughout these proceedings, which lasted more than four years, the Board continued to receive numerous complaints about the licensee's prescribing practices, but no action was initiated for fear of jeopardizing the Board's legal position. These complaints are now being investigated by the Board's disciplinary counsel.

BOARD SOMETIMES CANNOT TAKE ACTION WITHOUT CREDIBLE WITNESSES

In some instances, the Board's investigative and enforcement efforts are hampered by a lack of cooperative and credible witnesses. In one such case, a psychiatrist had a history of complaints regarding sexual misconduct with female patients. In October 1980, the Board received a complaint from one of the licensee's former patients alleging sexual harrassment and exploitation. Because the complainant was willing to testify before the Board, formal charges were filed and a formal hearing was conducted in June 1981. In his defense, the licensee stated that the complainant's accusations were fantasies symptomatic of her mental problems. Due to the complainant's lack of credibility, the Board found the licensee had not violated the Healing Arts Act.

In November 1983, the Board received a complaint of sexual harrassment regarding another former patient of this licensee. In this case, the complaint originated with the patient's current psychiatrist because the patient was reluctant to make an accusation. In December 1983, after the patient alleged she was raped by the licensee, she filled out a formal complaint. Although the case was referred to the local police, the complainant refused to testify against the licensee. The complainant's psychiatrist indicated that he believed the complainant, but neither the police nor the Board was able to proceed without her cooperation. Due to lack of evidence, the case was dropped.

These findings indicate that the number of complaints alone is not an accurate indicator of a licensee's potential danger to the public, or a valid criterion for allocating the Board's investigative resources. Because there is wide variance in the seriousness of complaints, each licensee's complaints must be evaluated individually (in light of that doctor's history) to identify meaningful patterns.

The Board's Handling of Complaints Can Be Improved

The auditors' review of complaints received by the Board showed that some aspects are handled well by the Board, while other aspects had serious shortcomings. For example, the complaint cases reviewed by the auditors were generally closed within four months, although some cases remained open for much longer periods.

In reviewing case files, the auditors found that the Board and its attorneys had been very thorough in providing due process to licensees under disciplinary review. Although the Board's thoroughness and caution made the disciplinary action process more lengthy, it reduced the chance of procedural errors that might have resulted in even greater delays and further litigation, such as described in the first profile on page 17.

Fieldwork by the Board's investigator appeared to be both thorough and timely. Most investigations were conducted within a matter of days, and the investigator filed detailed and complete reports of the investigations. The Board has also developed effective procedures for following up on disciplinary actions.

In contrast to these positive aspects, previous sections of this report have shown that the Board's case files are not well organized and do not allow each licensee's disciplinary history to be tracked over time. Better recordkeeping would allow the Board to quickly evaluate which new complaints should be investigated or given priority. Furthermore, the Board has not used malpractice petitions to generate investigations of licensees who may have been negligent in their medical practice.

The Board has not made full use of malpractice petitions received from the Insurance Department. One of the statutory duties of the disciplinary counsel is to investigate licensees who have allegedly committed gross negligence or repeated instances of ordinary negligence. Although the Board has been receiving copies of malpractice petitions from the Insurance Department since the new reporting law went into effect in July 1983, the Board has not yet developed a system for using malpractice petitions to generate investigations and disciplinary actions. In reviewing the Board's correspondence files, the auditors found that the disciplinary counsel has been working on a plan to screen and prioritize malpractice petitions since November 1984.

The Board's Disciplinary Actions Do Not Always Go Far Enough to Protect the Public Interest

As part of their effort to determine whether the Board has been effective in protecting the public interest, the auditors reviewed the disciplinary actions

taken in recent years. Disciplinary actions taken by the Board included license revocation or suspension, stipulation agreements, and informal admonishments. Taken together, the annual number of disciplinary actions has generally increased during the past five years.

Fiscal Year	Total Number of Disciplinary Actions
1981	12
1982	14
1983	7
1984	24
1985	20

According to the Federation of State Medical Boards, Kansas ranked 17th in the number of disciplinary actions per thousand doctors in 1984. However, this ranking is not necessarily indicative of a board's effectiveness in protecting the public. Therefore, the auditors looked closely at the types of disciplinary actions taken during the last two fiscal years.

The Board took disciplinary action against less than 14 percent of the doctors who had complaints lodged against them. In fiscal year 1984 and 1985, a total of 44 disciplinary actions were taken against 35 doctors (23 medical doctors, 9 osteopaths, and 3 chiropractors). These 35 doctors represent less than 14 percent of the 262 doctors who had complaints filed against them during the two-year period, and less than one percent of all active doctors in Kansas.

Nearly all of the disciplinary actions taken were in the form of stipulation agreements. Of the 44 disciplinary actions taken in fiscal years 1984 and 1985, 35 (80 percent) were stipulations, which generally allowed the licensee to continue practicing under certain mutually agreed restrictions, and three (7 percent) were informal admonishments, which allowed the licensee to continue practicing without any restrictions. Only six actions (13 percent) resulted in the loss of the licensee's ability to practice. These actions included four surrenders of license (which the Board categorized as revocations) and two suspension orders by the Board. In reviewing case files, the auditors found that the more stringent penalties were usually applied when less severe punishment had already been attempted unsuccessfully. This may indicate a reluctance on the part of the Board to use the stronger penalties available.

Most of the disciplinary actions taken against doctors related to overprescription of drugs or excessive use of alcohol or drugs. The table on the next page shows the reasons for disciplinary action taken against doctors during fiscal years 1984 and 1985.

Reasons for Disciplinary Action Against Doctors	Number of Doctors
Handling of Prescription Drugs	15
Impaired Physician	8
Licensure and Scope of Practice	4
Patient Care	3
Professional Conduct or Ethics	2
Criminal Charge or Conviction	2
Advertising Practices	1
Total	35

The auditors found that 23 (66 percent) of these 35 doctors had either overprescribed drugs or had been impaired by use of alochol or drugs. The Board's attorneys indicated that, in these types of cases, violations of the Healing Arts Act can often be proven by documented drug records or by observed instances of impairment due to alochol or drugs. In such cases, violations are generally easier to prove than in cases of alleged medical negligence.

A sample of disciplinary actions showed that most seemed to adequately protect the public, but nearly a third of the cases did not appear to fully protect the public interest. The auditors reviewed the files of 19 of the 35 doctors disciplined during the past two years. In 13 of these cases sampled, they found that the cases were generally resolved so that the public was protected from incompetent or improper practice of the healing arts. In the remaining six of the 19 cases sampled, the auditors found that one or more aspects of each case could have been improved to better protect the public. These six cases are discussed in the following paragraphs.

In two of these cases, the Board was unable to take strong disciplinary action (although some Board members apparently wanted to do so) because review committees recommended informal admonishment of the licensees. (Under the law prior to July 1, 1985, the Board had to accept these recommendations.) One of these doctors was convicted of mail fraud for aiding "patients" to make unfounded injury claims against insurance companies. The other doctor was informally admonished for not maintaining any malpractice insurance for at least seven years, although he certified to the Board that he had the necessary coverage. This doctor has one malpractice suit pending, which could possibly result in a judgment that the doctor would be unable to pay.

In another case related to insurance coverage, the Board noted that a licensee's malpractice insurance did not appear to comply with the limits required by Kansas law. Although the Board did write a letter to the licensee and attempted to notify the Insurance Department, twelve months passed without any change in the coverage. As of mid-July 1985, the licensee had still not demonstrated compliance with the insurance law. While this is not a violation of the Healing Arts Act, the Board is required by law to notify the Attorney General of any licensee who is practicing in Kansas without the required insurance coverage. The Board has not given such notice, so the licensee has been allowed to continue his practice.

In three other cases in the sample, the auditors found that the Board appeared to have been lenient in dealing with the licensees' violations of the Healing Arts Act. In all three cases, the doctors have been allowed to continue their practices while the Board has attempted to get them to change practices that had created problems for the past 1-4 years. These doctors entered into stipulation agreements regarding their problems--overprescribing diet pills, overprescribing scheduled drugs, and chronic alcoholism. The stipulation agreements allowed them to continue practicing under restrictions set by the Board. Stronger disciplinary actions, such as revocation or suspension of a license, are considered to be a last resort, as indicated by this quote from the Board's letter to the doctor who had violated two stipulations regarding use of alcohol:

> "The Board simply felt that it had given you every chance to show that you would refrain from the use of alcohol. It decided that it could no longer be lenient and thus, concluded that an indefinite suspension was its only viable choice."

The sample of disciplinary actions also showed that follow-up by the Board was generally sufficient to determine whether stipulation agreements were being followed. After disciplinary action is taken by the Board, the Board's attorneys and its investigator monitor the licensee to ensure that the licensee is in compliance with any stipulation agreement or any stronger orders. Licensees practicing under stipulation agreements were monitored according to a regular schedule, including random drug screens and other tests for licensees with drug and alcohol impairment. Further investigation, such as reviewing prescription records and other medical records, was also conducted as needed.

The 19 doctors in this sample did not have a history of malpractice actions against them. Only one doctor in this group had a petition filed against him in the past two years. Because these doctors did not seem to be the most dangerous in terms of past malpractice, the auditors also reviewed three other active files of doctors who have been sued for malpractice but not disciplined by the Board. These cases are included in the profiles in this section of the report.

The one doctor in the sample who had a malpractice petition filed recently did not have any malpractice liability insurance at the time. This case led the auditors to look at the system for monitoring doctors' malpractice insurance coverage.

Current procedures are not adequate to ensure that all doctors have malpractice liability insurance as required by law. Kansas law places duties on the Insurance Department and the Board of Healing Arts to assist each other in maintaining compliance with malpractice insurance requirements. In two cases profiled on page 22, the auditors found that licensees had been able to practice without proper insurance coverage for long periods of time. When they were detected it was because they became involved in malpractice cases or failed to complete insurance information when applying for renewal of license. In one of these cases, the licensee apparently was still practicing without adequate insurance one year after the Board learned of his status.

LICENSEES FAIL TO MAINTAIN REQUIRED MALPRACTICE INSURANCE

In two cases sampled by the auditors, Board licensees did not maintain malpractice liability insurance as required by Kansas law. In both cases, the licensees were originally brought to the Board's attention because of impairment—one from alcoholism, the other from drug abuse.

In the first case, the Board did not become aware that the doctor had no malpractice insurance until February 1985, after a lawsuit was filed against the doctor. The lawsuit alleged that the doctor failed to properly diagnose and treat a pregnant woman (now deceased) who had cancer. If this lawsuit is resolved in favor of the paintiff, the doctor may be unable to pay the amount of the judgment.

After the Board learned that this doctor had not maintained any malpractice insurance for at least seven years, a review committee recommended that the doctor be informally admonished. According to the disciplinary counsel, some Board members would have preferred stronger action but, under the law prior to July 1985, the Board had to accept the review committee's recommendation of informal admonishment.

In the second case, the Board learned in June 1984 that a doctor had insufficient liability insurance to meet the requirements of State law. In July 1984, the Board notified the doctor's insurance agency of the problem, but received no response until May 1985. As of July 1985, the licensee has still not demonstrated compliance with the insurance requirements, and the Board has neither taken disciplinary action nor notified the Attorney General as required by K.S.A. 40-3416.

These two cases indicate that the current system, as operated by the Board of Healing Arts and the Insurance Department, does not always assure that doctors are maintaining the required malpractice liability insurance.

These problems have occurred partly because there is no assurance that all active licensees of the Board are recorded in the compliance files at the Insurance Department. Although the Board requests licensees to identify their insurance carrier and policy number when applying for license renewal, the Board's informal attempts at providing this information to the Insurance Department have not been successful concerning all active doctors.

Even if a violation of the insurance requirements can be proven, the Board of Healing Arts cannot take disciplinary action unless the doctor used fraud to obtain the license. By itself, a licensee's failure to maintain the required malpractice insurance is not a violation of the Healing Arts Act, and is not a ground for disciplinary action. Under present law, the Board is required to report any such violation to the Attorney General so that the licensee can be prevented from practicing medicine without the required insurance.

Responsibility for managing the Board's disciplinary activity is not entirely clear. In reviewing the Board's disciplinary action process, the auditors noted that the responsibility for managing the Board's disciplinary activity is not clearly defined by statute or regulation. During the two-year period reviewed by the auditors, responsibility for the disciplinary action process was shared among the Board's secretary, general counsel and disciplinary counsel. During fiscal year 1985, review committees also shared responsibility for the process because their decisions could be legally binding upon the Board. Under the Administrative Procedures Act which went into effect July 1, 1985, review committees will become strictly advisory bodies. In addition, the Administra-

tive Procedures Act allows the Board to designate a presiding officer to manage its formal disciplinary activities. According to staff of the Board, this role will probably be filled by the secretary. However, no steps have been taken by the Board to formally define the secretary's new role.

HEALING ARTS BOARD TAKES NO ACTION AGAINST A SURGEON FOLLOWING EXTENSIVE REVIEW

A complaint was filed against a surgeon alleging that the need for surgery was misdiagnosed and that the surgeon's actions caused major problems for the patient. The Board then learned of several similar cases, some involving patients' deaths. The doctor was suspended by the hospital, then later reinstated under certain restrictions. The doctor appeared before the Board's hearing panel, which met several times and heard from numerous witnesses. The hearing panel found that the surgeon had relied on pathological reports, so no action was taken against the surgeon's license.

The doctor continued to do surgery at the hospital under the supervision of a monitoring committee with monthly reviews. After three years of monitoring the surgeon, the hospital committee issued its report and recommendations. Within two weeks after the report was completed, the doctor submitted a letter of resignation from the hospital medical staff.

In June 1985, the secretary for the Board wrote to another state--where the doctor has applied for licensure--indicating that the Board had considered this case and determined that the doctor had not violated the Healing Arts Act. Although Board counsel are still reviewing at least one case against this doctor, the other state was not informed of this because of confidentiality provisions in the Act.

Public representation on the Board of Healing Arts is less than half the national average of similar boards. The auditors obtained membership data for 60 boards that regulate doctors (medical doctors, osteopathic physicians, or both) in other states, and found that the average public representation for these boards was 16.3 percent. While 11 boards had no public members, eight had at least 30 percent public members. The Kansas Board of Healing Arts has only one public member (7.7 percent) on the 13-member Board.

The Board of Healing Arts has taken some steps to improve protection of the public. The Board has supported legislation to overcome some of the obstacles it encounters in protecting the public. One obstacle has been the difficulty involved in proving medical negligence against licensees. In the absence of clear standards, the Board must rely on costly expert witnesses to evaluate whether the quality of care in a given case was adequate. To overcome this difficulty, the Board has taken steps to incorporate specific medical standards into the law. For example, in 1984 the Board supported legislation requiring licensees to inform their patients about alternatives to breast surgery, and setting standards for ordering and dispensing amphetamines.

The Board has also taken some steps toward using malpractice petitions for identifying doctors who may be dangerous to the public or may have violated the Healing Arts Act. With the help of the Insurance Department, the

Board's disciplinary counsel has identified 14 licensees with four or more claims against the Health Care Stabilization Fund since its creation in 1976. The disciplinary counsel has indicated that these licensees will be investigated once the necessary records and closed claim reports have been obtained. The remaining licensees with malpractice claims will not be investigated until the Board has categorized and evaluated all of the petitions on file. The Board recently hired a law clerk to assist the attorneys with this process.

NUMEROUS LAWSUITS FOLLOWING BREAST SURGERIES

The Board initially received a complaint from an attorney in March 1983 that a doctor had unnecessarily performed a mastectomy with breast reconstruction. The complaint stated that the surgery was ineffective: the implants were too large, the breast sizes were unequal, corrective surgery by the doctor was unsuccessful, and the woman had to undergo further surgery by other doctors.

By June 1983, the Board was aware of seven malpractice lawsuits naming this doctor as the defendant, with a potential for at least 11 additional suits not yet filed. In September 1983, a doctor who reviewed these cases at the request of the Board reported that the doctor's technical judgment was questionable, that only a few biopsies were performed, that the mastectomy specimens did not indicate cancer, and that it is more common to delay or stage the reconstructive surgery. A second physician reviewed the cases for the Board in early 1984 and found that the doctor made poor patient selection, failed to record informed consent, and used questionable techniques. In May 1985, the general counsel for the Board recommended that the Board enter into an adversary hearing in regard to possible revocation, suspension, or limitation of the doctor's license. The doctor is still licensed to practice by the Board, although a Board attorney indicated that the doctor was no longer performing mastectomies. The Board attorney told the auditors that the doctor had performed a total of about 250 mastectomies.

This case provided the impetus for 1984 legislation requiring doctors to inform their patients of alternatives to breast surgery. The Board has prepared booklets summarizing the alternative treatments, and doctors must give this booklet to each patient for whom breast surgery is recommended.

In a memorandum to the Special Committee on Medical Malpractice, the Board's general counsel has made a number of other recommendations to improve the Board's ability to deal with malpractice. One of these recommendations is to allow the Board to assess fines against licensees who violate the Healing Arts Act, as proposed in 1985 Senate Bill 375. The general counsel also recommended that the Board's budget be increased to allow employment of investigators, law clerks, expert witnesses, and hearing officers.

Conclusion

The Board of Healing Arts has a difficult task in regulating the practice of the healing arts by doctors in Kansas. The auditors found that, in many cases, the Board has achieved the primary goal of protecting the public against unprofessional, improper, or unauthorized practice of the healing arts, while at the same time giving due process to the licensees under investigation. In other cases, the auditors found that the Board did not go far enough in its efforts to

protect the public interest. Significant problems were noted in several areas, including the following:

--the Board's recordkeeping system does not allow adequate tracking of disciplinary cases
--complaints most commonly relate to patient care problems, but most disciplinary actions relate to overprescription of drugs or impaired physicians
--malpractice petitions are not being used as intended to generate investigations of allegedly negligent doctors
--current procedures do not ensure that all doctors practicing in Kansas have the required malpractice liability insurance.

Recommendations

1. In considering complaints and in taking disciplinary actions against doctors who may have violated the Healing Arts Act, the Board should ensure that the public interest takes priority over the interests of the doctor or any other party.

2. The Board of Healing Arts should develop a recordkeeping system that allows tracking of licensees' disciplinary problems over time. Using this tracking system, the Board should evaluate each new complaint and malpractice petition in light of any past problems to determine what level of priority should be assigned to the case and what type of further action is appropriate.

3. To protect the public and minimize the number of future malpractice cases, the Board of Healing Arts should give high priority to investigating and taking disciplinary action against doctors who have had multiple malpractice petitions filed against them, or who have allegedly committed an act of gross negligence.

4. To assure that all doctors have liability insurance as required by State law:

   (a) The Board of Healing Arts and the Insurance Department should prepare a joint plan to assure that all active licensees of the Board are in compliance with liability insurance requirements of the Health Care Provider Insurance Availability Act. This plan should be submitted to the Special Committee on Medical Malpractice prior to the 1986 legislative session.

   (b) The Board of Healing Arts should seek legislation making it a violation of the Healing Arts Act for an active licensee to fail to comply with the liability insurance requirements of the Health Care Provider Insurance

Availability Act. Under this legislation, any failure to maintain the required insurance should be a ground for possible revocation, suspension, or limitation of a license.

5. To clarify the responsibility for supervising disciplinary activities, the Board of Healing Arts should formally designate the secretary of the Board as its presiding officer for proceedings conducted under the Administrative Procedures Act, and should define the secretary's role in deciding how disciplinary cases will be handled.

6. To give the Board of Healing Arts an additional tool for disciplining doctors who violate the Healing Arts Act, the Special Committee on Medical Malpractice should consider allowing the Board to levy fines against licensees who have violated the Act. These provisions are found in 1985 Senate Bill 375. Such fines should not be used as a substitute for revocation, suspension, or limitation of licenses as allowed by current law.

7. To ensure adequate representation of the public interest, the Special Committee on Medical Malpractice should consider legislation adding one or more public members to the Board of Healing Arts.

What is the Trend in the Balance of the Health Care Stabilization Fund?

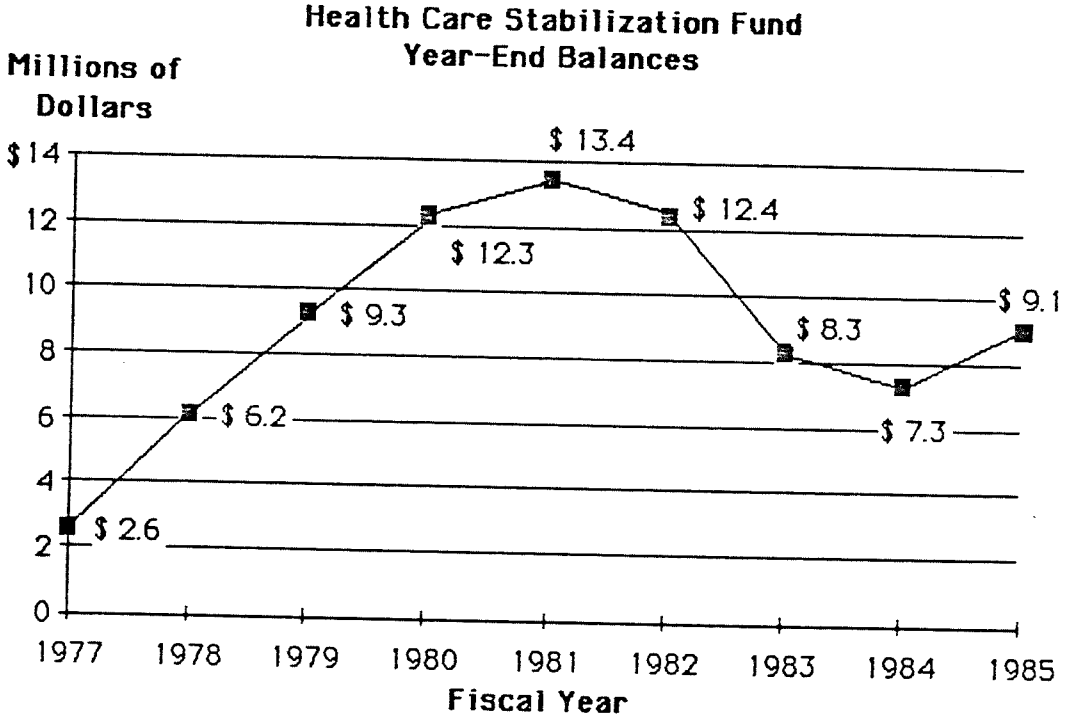
One of the concerns that prompted this audit relates to the solvency of the Health Care Stabilization Fund, which was established in 1976 to pay amounts due from any judgment or settlement in excess of the basic coverage liability each health care provider is required to carry. Before July 1984, each health care provider was required to carry basic insurance coverage of at least $100,000 per occurrence, subject to an annual aggregate of $300,000. In July 1984, the basic coverage requirements were raised to $200,000 per occurrence and $600,000 annual aggregate.

The Health Care Stabilization Fund is administered by the Insurance Department, under the procedures set forth in the Health Care Provider Insurance Availability Act (K.S.A. 40-3401, et seq.). The primary source of revenue for this Fund is the premium surcharge levied on each health care provider who has obtained basic coverage. The premium surcharge is set annually by the Insurance Commissioner, in an amount deemed sufficient to pay anticipated claims against the Fund. Another source of revenue is the interest income from investment of moneys in the Fund.

After Declining for Three Years, the Balance in the Health Care Stabilization Fund Increased Significantly in Fiscal Year 1985

To determine the trend in the balance of the Health Care Stabilization Fund, the auditors obtained data from the Insurance Department and verified

that data with the Kansas Annual Financial Reports. The chart below shows the total balance of the Fund at the end of each fiscal year.



The chart shows that the Fund's balance grew steadily in the initial years, reaching a peak of $13.4 million at the end of fiscal year 1981. In each of the next three years, the Fund paid out at least $1 million more than it took in each year, reducing the Fund balance to about $7.3 million at the end of fiscal year 1984. In 1985, the downward trend was reversed, as the balance closed at $9.1 million. The main reasons for these changes in the Fund's balance are discussed below.

The annual number of claims filed against the Fund has increased each year since fiscal year 1979. The following table shows the number of claims filed against the Fund each year, and the percentage increase per year.

Fiscal Year	Number of Claims	Percent Increase Per Year
1979	26	--
1980	82	215%
1981	100	22%
1982	124	24%
1983	156	26%
1984	179	15%
1985	230	28%

During the past five fiscal years, the annual number of claims against the Fund has nearly tripled, going from 82 claims in 1980 to 230 in 1985. According

to Insurance Department statistics, about 24 percent of past claims have resulted in awards being paid from the Fund.

The number of claim awards paid by the Fund has increased each year since fiscal year 1980, and the average amount per award has also risen sharply. The table below shows how the number and amounts of claim awards paid by the Fund have risen.

Fiscal Year	Total Number of Claim Awards	Total Amount of Awards	Average Amount Per Award
1980	0	$ -0-	$ -0-
1981	8	1,773,182	221,647
1982	24	3,060,126	127,505
1983	25	6,515,250	260,610
1984	34	10,456,454	307,542
1985	41	13,124,260	320,103

The table clearly shows that the total amount of awards paid by the Fund has increased by $3 million to $4 million each year during the past several years. If this trend continues, claim awards of $16 million to $18 million could be expected in fiscal year 1986.

Despite the significant increase in awards paid in 1981, 1982, and 1983, no premium surcharge was assessed during those years because of a statute directing the Commissioner of Insurance to maintain the Fund at an approximate balance of $10 million. The absence of a surcharge contributed to the decline of the Fund balance from $13.4 million in fiscal year 1981 to $8.3 million at the end of fiscal year 1983. (See the Fund balance graph on page 27.) Following repeal of the statute in 1983, the surcharge was reimposed in fiscal year 1984.

Reimposition of the premium surcharge has stopped the decline in the Fund balance. Premium surcharges are assessed as a percentage of the annual premium paid by each health care provider for the basic liability coverage required by law. Each doctor pays the surcharge along with the premium for basic coverage, then the insurer forwards the surcharge to the Insurance Department. The table below shows the surcharge assessment since the Fund was established.

Fiscal Year	Percent of Annual Premium for Basic Coverage
1977	45%
1978	45
1979	40
1980	15
1981	0
1982	0
1983	0
1984	50
1985	80
1986	110

The imposition of the 50 percent surcharge in fiscal year 1984 was not sufficient to stop the decline in the Fund balance, as expenditures exceeded receipts by about $1 million. However, in fiscal year 1985, the 80 percent surcharge enabled the Fund balance to grow by about $1.8 million. The 80 percent surcharge generated more than $15.2 million in fiscal year 1985.

The continuing increase in the surcharge, which is 110 percent for the current fiscal year, reflects the actuarial estimation of future payments to be made by the Health Care Stabilization Fund. The 110 percent surcharge is expected to produce more than $24 million for the Fund in fiscal year 1986. Actuarial estimates are for the surcharge to remain at about 100 percent for the next two years. These high surcharges, in conjunction with higher rates for basic coverage, have generated great concern in the medical and insurance industries. Although there is no easy solution to the problem of medical malpractice injuries and costs, close scrutiny of impaired and incompetent doctors by the Board of Healing Arts should help to minimize the number of malpractice actions in the long run.

APPENDIX A

Kansas Board of Healing Arts

Name	Position	City of Residence
James W. Bruno, M.D. (a)	Member	Garden City
James R. Croy, D.C.	Vice President	Junction City
F.J. Farmer, D.O. (a)	Member	Stafford
Helen Gilles, M.D. (a)	Member	Lawrence
Frederick J. Good, D.C.	Member	Benton
Cameron D. Knackstedt, D.O.	Member	Phillipsburg
Gordon E. Maxwell, M.D.	Member	Salina
Betty Jo McNett	President	Wichita
Forrest A. Pommerenke, M.D.	Member	DeSoto
Harold J. Sauder, D.P.M.	Member	Independence
Richard A. Uhlig, D.O.	Secretary	Herington
David Waxman, M.D.	Member	Lenexa
Rex A. Wright, D.C.	Member	Topeka
Edward J. Fitzgerald, M.D. (b)	Member	Wichita
John Hiebert, M.D. (b)	Member	Lawrence
John White, D.O. (b)	Member	Pittsburg

(a) Term expired June 1985
(b) Appointed July 1985

APPENDIX B

Agency Response
Board of Healing Arts

STATE OF KANSAS

BOARD OF HEALING ARTS

OFFICE OF
RICHARD A. UHLIG, SECRETARY
ELIZABETH W. CARLSON, EXECUTIVE SECRETARY
DONALD G. STROLE, GENERAL COUNSEL
503 KANSAS AVENUE, SUITE 500
TOPEKA, KANSAS 66603-3449
PHONE: (913) 296-7413

August 6, 1985

Meredith Williams
Legislative Post Audit
109 West 9th St., Suite 301
Mills Building
Topeka, KS 66612

RE: Post Audit Report
Healing Arts Board

Dear Mr. Williams:

Thank you very much for my copy of the recent audit report of the Healing Arts Board. The following paragraphs represent my informal personal response to the audit report. Enclosed is a formal response prepared by the Board's Staff with which I am in total agreement.

First of all I would like to congratulate the auditors involved and especially Mr. Green for what appears to be a very complete, fair and in-depth audit of the Healing Arts Board. The auditors were very courteous and friendly during the audit and went out of their way not to disrupt the work at the Healing Arts Board. I feel Mr. Green is very concerned with his work and showed a great concern for the Healing Arts Board and its problems. He was willing to listen to our problems and I think the results of the audit will help us solve some of the problems we are facing.

In general I agree with the analysis and recommendations concerning the reporting of cases to the Healing Arts Board. I think the Federation has some excellent guidelines and if these could be worked into legislation it would benefit the Board in its functions. As you are aware, the State Board of Healing Arts has little authority or power over hospitals, HMOs and other organizations in compelling them to report promptly to the Healing Arts Board. In the future I think the Board should report non-compliant organizations to their respective peer organizations such as the Kansas Hospital Association, the Joint Commission on Hospital Accreditation, or the Kansas Department of Health and Environment.

There is one area of the reporting law which I feel needs to be modified and that concerns impaired physicians. Experts in this area have reported to the Board that the problem of physician impairment by drugs and alcohol is quite pervasive in our society. Estimates have been made that possibly as high as 20% of practicing physicians are impaired either due to drugs or alcohol. Because of the new reporting law established in 1983, impaired physicians now fail to seek help through impaired physician organizations and other standard medical facilities for fear that they may be reported to the Healing Arts Board. Psychiatrists have informed the Board that physicians do quite well following in-patient care for impairment and they have a cure rate of approximately 85%. Physicians graduating from an in-patient treatment for impairment usually return to their practice as better physicians. The State Board of Healing Arts has the power and ability to force a physician to seek in-patient treatment once an impaired physician is found and the State Board has probable cause to believe he is impaired. However, under the current reporting laws most of the impaired physicians existing in the State of Kansas go unnoticed by the Healing Arts Board. Last year we held meetings concerning this problem and discussed it at length with the impaired physician organizations. The general concensus is the Board needs to modify its reporting law so impaired physicians who have had no difficulties with patient care or malpractice cases could enter into a program and seek treatment without fear of the Board revoking their license. We have several ideas concerning this problem and are planning on drafting legislation to implement them.

Concerning the effectiveness of the Board in protecting the public, I would like to mention one aspect of this problem which was not considered in your report and which many members of the Board feel is quite important. The Board has received complaints in the past and is aware of a number of Kansas citizens being treated by lay people and other types of therapists who are not licensees of the Board, i.e. reflexologists, health food store employees, vitamin companies, naturopaths, therapists of no particular title, medical technologists, midwives, etc. The Board has no power over these practitioners or therapists and when we believe they are practicing the healing arts illegally we report them to the prosecuting attorney in the county in which they reside. However, in the past we have felt prosecuting attorneys have taken little interest in these cases. I feel that if the scope of the Board could be broadened to somehow encompass these problems the public may be better protected.

On page 11 of the audit report there is a chart which shows the three divisions of the Healing Arts Board and the number of complaints lodged against each division in 1984. It is noted that the percentage of complaints against the osteopathic physicians and the chiropractic doctors are higher than their percentage of all doctors

active in Kansas. Concerning the chiropractic doctors in Kansas, a large number of their complaints relate to advertising and billing. There is a significant portion of the medical doctors in Kansas who are working in institutions, administrative positions and in teaching facilities which have a lower level of patient contact. Almost 100% of the osteopathic physicians in the State of Kansas are in general practice with a high level of patient contact. There are very few osteopathic physicians in the secondary specialties such as pathology, radiology and in subspecialty areas where there is lower patient contact.

The Board's physical facilities are quite limited and this has hampered our recordkeeping system to some extent. We are looking forward to a modern computer recordkeeping system in the near future and I think this will help the Board immensely with its recordkeeping problems.

Concerning the recommendations, I am in essential agreement with all of them and plan at the next Board meeting to carryout recommendation number 5 by asking the Healing Arts Board in the form of a motion to designate the Secretary of the Board as Chief Presiding Officer for proceedings conducted under the Administrative Procedures Act prior to the filing of formal disciplinary charges.

I personally feel that the audit of the Board will be most helpful not only to the legislature but to the Board itself. I feel the recommendations of the audit are quite appropriate and will help the Board function better in the future.

Very sincerely yours,

Richard A. Uhlig D.O.

Richard A. Uhlig, D.O.
Secretary of the Board

RAU/sl

Enc. - 1

STATE OF KANSAS

BOARD OF HEALING ARTS

OFFICE OF
RICHARD A. UHLIG, SECRETARY
ELIZABETH W. CARLSON, EXECUTIVE SECRETARY
DONALD G. STROLE, GENERAL COUNSEL
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RESPONSE OF THE BOARD OF HEALING ARTS TO THE LEGISLATIVE POST AUDIT REPORT

The Board in general has no disagreement with the history and the description of the Board as set out in pages 1-3 of the audit report. Also, the Board has no disagreement with the statistics on page 4 of the report. The profile on page 5 is essentially correct, and the Board feels that it typifies what occurs with many cases involving negligence at a hospital. The last sentence of the first paragraph on page 5, although correct, is not a complete account of the problem. State law does grant immunity to persons reporting to the Board. The major problem, however, is that no law can prevent a person from being sued and the State cannot grant immunity from liability under federal law. In the next few pages the audit report discusses various reporting laws of other states and the guidelines of the Federation of State Medical Boards. Essentially, the Board has no disagreement with the suggestions that the Federation of State Medical Board's guidelines be adopted by the legislature and that Senate Bill 374 introduced last session be passed which requires that hospitals or other health care organizations report information regarding violations of the Healing Arts Act to the Board instead of waiting until findings are made. The Board also supports any legislation which would allow either the Board or some other state agency to enforce by penalties the reporting laws that are enacted.

On pages 8 & 9 the report sets out several recommendations. As noted above, the Board supports recommendation (1) in its entirety. Even further, the Board would support legislation requiring licensees to report acts of negligence of other licensees or support staff of a hospital to the appropriate quality control program in that hospital. It is essential in order for the Board to be effective to have vigorous peer review conducted at hospitals. With regard to recommendation (2) on page 9 it should be noted that the Board has worked in the past with various private associations of health care providers to publicize the reporting laws which have been enacted. The Board will continue to work with these associations to publicize any new changes that may be enacted, as well as sending direct mail to our licensees to provide them the information (within the limits of our budget). With regard to recommendation (3), this audit has disclosed a problem the Board was not aware of. That is, that it had not received all petitions the Insurance Department was required to send to it. The Board is presently working with the Insurance Department to ensure that the Board has received all petitions.

HOW EFFECTIVE IS THE BOARD IN PROTECTING THE PUBLIC AGAINST UNPROFESSIONAL, IMPROPER OR UNQUALIFIED PRACTICE OF THE HEALING ARTS

At the outset it is important to point out the various changes that have occurred with the Board in the past three fiscal years, the years which the auditors have examined. In fiscal year 1983 the Board only had a part-time attorney and one investigator to do all the legal work, both disciplinary and licensing. In fiscal year 1984 the Board was authorized to hire a full-time attorney but still only had one investigator. In fiscal year 1985 a disciplinary counsel was added to the Board who was in charge of initially handling all complaints and investigation of those complaints. In addition a three-member review committee process was instituted. From this background it is easy to see that there has not been any continuity in the staff or the manner in which disciplinary cases were handled in the past three years. With the adoption of the Kansas Administrative Procedures Act, which went into effect July 1, 1985, the Board will be able to proceed on a fairly uniform basis. Hopefully, therefore, in the future there will be continuity in the way cases are handled.

In the first paragraph under this section on page 9, the report implies that the primary activity of the Board is to receive, investigate and resolve complaints against doctors. It should be noted that the Board's duty to protect the public also includes the licensing of doctors, adoption of rules and regulations and various legislative activities. Obviously, if vigorous procedures are instituted regarding licensing of individuals and sufficient standards are adopted regarding the practice of medicine, the public will be better protected than if the Board tries to take care of the problems after-the-fact by disciplining doctors. Certainly, a major part of the Board's activities include matters other than discipline.

In the first paragraph on page 10, the auditor's report indicates that the Board has performed well in some areas but that the auditors have various concerns that are mostly procedural or organizational in nature. The Board will attempt to address these concerns in turn.

On pages 10-13 the report set out procedures used by the Board to respond to complaints against doctors and gives statistics on the number and type of complaints received by the Board in the last two fiscal years. The Board is essentially in agreement with both the procedures and the statistics indicated in the report.

On page 13, a profile of a doctor addicted to cocaine is set out. Although most of the profile is correct, certain statements in it are not sufficiently complete. It is true that the Board allowed the doctor to return to his practice for two weeks to close it down. However, the inference should not be made that he was allowed to practice unconditionally. The Board sought to get the doctor to stop practicing as soon as possible. During this two week period, random urine screens were taken, the doctor was in an out-patient program, he was attending Cocaine Anonymous and the Board had closed down his ability to purchase cocaine from his usual sources. Thus, the Board believes that it had the problem sufficiently under control while the doctor was closing his practice down and transferring his patients to other doctors.

The Board has no disagreement with the statistics set out on page 14. However, further explanation needs to be given for the cases profiled at the top of page 15. In cases 1 and 2, the review committees, appointed pursuant to Senate Bill 507, found no probable cause and the Board was bound by those decisions. Even so, the Board was able to reach agreements with those licensees requiring them to cease and desist from the practices which caused concern. If the Board had not vigorously pursued these cases, given the decisions of the review committees, the licensees would have been able to continue the activities in question. In response to such cases, the legislature in this past session repealed that part of the statute which made the decisions of the review committees binding on the Board. Hopefully, this change will allow the Board to be more vigorous in its attempts to protect the public in the future. Case number 3 profiled on top of page 15 is a relatively unimportant case. The case involved an elderly doctor who was simply not up on the type of prescriptions that should be given and was probably being used by some obese people to obtain weight control drugs. It is important to note, however, that the doctor was prescribing a Schedule III amphetamine-like drug, not a Schedule II amphetamine. The Board signed a stipulation with this doctor in May of 1984 prohibiting him from prescribing Schedule II or III amphetamine or amphetamine-like drugs. However, the legislature in the past session had passed the bill allowing the prescribing of Schedule III amphetamine-like durgs for short term use. Pursuant to the adoption of this legislation, the Board sent out a flyer to all of its licensees indicating that Schedule II drugs could not be prescribed for obesity but that Schedule III or IV could for short term use. This was sent out with the renewal application in June of 1984. The doctor profiled in case 3 simply became confused upon receipt of this flyer and thought that his prior stipulation was now modified by the new law. In response, he proceeded to write a few Schedule III amphetamine-like drugs. It should be noted that this doctor was only seeing approximately 2-3 patients a day and that now he is retired from practice completely.

On page 15 and 16 the report makes assertions that the Board handles all complaints similarly and does not take into account the prior history of the doctor in evaluating the individual complaint. This assertion is simply not correct. The Board does have a formal procedure, albeit not a written procedure, for evaluating the past history of a doctor when a new complaint is received against that doctor. The Board has a coding system that is used to identify all licensees who have had a prior complaint filed against them. Accordingly, whenever a complaint is received the licensee's records are checked to see whether a prior complaint has been filed against that licensee. If the records indicate that a complaint has previously been filed, the prior cases are examined to determine whether a pattern exists or in general whether the licensee should be practicing given his or her history. Although each complaint is reviewed independently, it is not reviewed in a vacuum, and the Board always takes into account the history of the licensee in determining what action to take in the pending case. As mentioned before, prior to fiscal year 1984 the Board only had one part-time attorney. Accordingly, some of the recordkeeping was not as good as it should have been. However, when a full-time attorney was hired and a secretary was made responsible solely to that attorney, a much better system has developed. In most cases each file contains either minutes of a Board's actions on the complaint filed against the licensee or a letter to the licensee and the complainant which summarizes the disposition of the case. In addition, since July, 1983 a card index is maintained on all cases re-

ferred to the investigator and the investigator has a summary in his files of every case he has investigated.

In the future, at the close of each case the Board will summarize the case so that a system will be developed by which the prior history of each licensee can be examined quickly. Also, when the Board obtains its computer system, some kind of summary will be entered into the computer to allow the Board to retrieve this information on each licensee.

On pages 16-18 of the report, the auditors indicate that many of the cases involving three or more complaints against a licensee do not appear to involve serious danger to the public. This has generally been the view of the Board as well, although there have been exceptions. The profile on page 16 and the summary at the top of page 18 are essentially correct. On page 18, the text under the first heading suggests that the Board has handled the substantive aspects of complaints adequately, but that it has fallen down on procedural and organizational aspects of handling cases. As noted above, the Board feels that it has done a fair job on these aspects, but it will seek to improve these areas in the future.

In response to the assertion that the Board has not made full use of malpractice petitions, the Board notes that one petition against a licensee is not statutorily sufficient for the Board to take action against that licensee unless there is an allegation of gross negligence involved. Also, as has been brought to the attention of the legislature many times, a petition on its face does not provide sufficient information to identify those doctors on whom the Board should be conducting an investigation. Hopefully, with the passage of Senate Bill 267 this past session the Board's efforts in this area will improve.

On pages 19 and 20 of the report, the assertion is made that the Board has not always gone far enough in disciplining licensees. In response, the Board notes that our primary duty is to protect the public as quickly as possible. If we are able to do this by the use of a cease and desist order, consent order or a stipulation the Board feels that it has adequately performed its duty. This is especially true when one considers that seeking a revocation or suspension involves going through a long drawn-out hearing and appeal process, which may take as long as four or five years, during which time the doctor is able to practice. The case profiled on page 17 is indicative of the problems that occur when the Board is involved in a full-blown hearing and appeal process.

On page 20, statistics are profiled which indicate that the majority of the actions taken against licensees involved the handling of prescription drugs, impaired physicians and licensure and the scope of practice. Oddly, a distinction is made between these and the category of patient care. It seems to the Board that all three of these categories directly involve patient care, and in fact may involve a much greater number of patients than one malpractice case. An impaired physician could detrimentally affect every patient that he or she treats. Accordingly, it seems to the Board that it is sensible to seek out and attempt to prevent such persons from practicing. In addition, as noted in the last paragraph on page 20, it is generally easier to prove the cases of impairment or misprescribing of drugs than cases of alleged medical negligence. Medical negligence cases are extremely costly, quite complicated and time consuming. The Board often has trouble obtaining expert witnesses to review the records and testify. Therefore, medical

negligence cases are going to take longer to handle and it will be more difficult to take action against licensees.

At the top of page 21, the allegation is made that the Board has been lenient with licensees who violate the Healing Arts Act. There have been cases where the Board has entered into a stipulation with a doctor, monitored that doctor and discovered that the doctor has violated the stipulation. Whenever this occurs, as the quote at the top of page 21 indicates, the Board takes definitive action to prevent the licensee from practicing until it has assurance the doctor can practice safely and competently. In addition, as noted in the middle paragraphs on page 21, most of these cases do not involve doctors who have had past malpractice problems, but rather are cases where strict monitoring is appropriate with definitive action being taken if the stipulations are violated.

On pages 21 and 22, the report indicates a possible problem with doctors practicing without the requisite malpractice insurance. In an attempt to prevent this from happening, the Board for several years has obtained a compliance report from the Insurance Department which indicates those doctors who have complied with the Health Care Stabilization Act. Every year the staff of the Board goes through the renewal forms of the licensees which indicate whether the licensee has obtained the necessary insurance. They compare the renewal information with the compliance report and add to the compliance report the names of active licensees who should have the necessary insurance or who do not have sufficient policy limits. In the two cases profiled on page 22 the Board added these names to the compliance report, returned the compliance report to the Insurance Department and assumed that the Insurance Department would check their records to see whether they had obtained the requisite insurance and if not either bring these persons into compliance with the Act or inform us that they were not in compliance. It must be noted that the Board never obtains notification of insurance from the insurance companies, thus there is no way for the Board to know whether a person has been brought into compliance after the Insurance Department has been notified of noncompliance. The Board never received any information from the Insurance Deparment that the two persons profiled were not in compliance. Accordingly, the Board could only assume that they had been brought into complinace until subsequent information indicated that they had not. When the information was received, the Board took action to bring them into compliance. In one case, the doctor immediately obtained the necessary insurance. In the other case, because of some confusion as to whether he was a resident or a nonresident of Kansas, the doctor has not yet been brought into compliance but his Insurance Agent has assured us that he will be in the near future. A letter has been sent to this licensee informing him that he has until August 13, 1985 to bring himself into compliance. If he fails to do so, the Board intends to suspend him from practice.

In the future the Board intends to provide to the Insurance Department a list of all active licensees in the State of Kansas who are required to maintain the necessary insurance. Hopefully by doing this the Insurance Department will be able to compare that list with their compliance records and determine those active licensees who are not in compliance and report those to us, at which time we will take appropriate action.

At the bottom of pages 22 and 23, the report notes that there was some confusion as to who directs and supervises disciplinary action. As noted before, much of this confusion resulted from changes in legislation and staff in the past three years. With the adoption of the Administrative Procedures Act, which became effective July 1, 1985, much of this

confusion should be resolved. At its June meeting, the Board, without objection, accepted the recommendation of the general counsel that the Secretary be the presiding officer prior to the filing of formal disciplinary actions. In August, the Board should formally appoint the Secretary to this position. Thus, until a formal hearing begins and a hearing officer or panel is appointed, the Secretary will direct and supervise all activities regarding discipline. This should bring more consistency to the way investigations and complaints are handled, and it should make the disciplinary activities more efficient.

On page 23 a case is profiled regarding a licensee's alleged negligence. The Board held an extensive hearing on that case at the end of which the panel decided that the evidence was not sufficient to show that the doctor had violated the Healing Arts Act. Essentially, the evidence showed that the main person at fault was a pathologist who had made incorrect tissue reports to the surgeon in question. In addition, the evidence showed that the tissue committee at the hospital realized this but failed to inform the physician of the problem with the pathologist. In retropsect, perhaps more evidence could have been obtained and admitted into evidence which would have shown that the doctor was at fault. But at this point in time that is speculation.

The last paragraph of the profile indicates that the Board is presently investigating this doctor again but has not informed another state of this investigation. The reason the Board has not informed the other state is that the Board is statutorily prohibited from disclosing to anyone information on a pending investigation until formal disciplinary proceedings are initiated.

The Board in general has no objections to any of the recommendations made on pages 25 and 26, and would support any legislative changes necessary to implement them. In regard to recommendations 1 and 2 the Board feels that it is already using the procedures recommended but will attempt to improve these procedures to make them more effective. Most importantly, it should be noted that the Board intends to vigorously pursue doctors who commit repeated instances of ordinary negligence or one act of gross negligence, but in order to do that as the report notes in various places it is necessary for the Board to receive information as early as possible so that it can take action to protect the public before the malpractice occurs.

One final point needs to be made. At various places, including the first recommendation on page 25, the report suggests that the public interest should take precedence over all other interests and that the Board at times may have been too lenient on its licensees. While it is true that the public interest is most important, it is necessary to remember that that interest includes the duty of the State to treat a licensee fairly and to provide him or her all the due process rights to which he or she is entitled. Accordingly, in every case the Board must balance the duty to protect the public against the duty to provide complete due process to the licensee. Although on occasion the scales may be tipped too far one way or the other, it is essential not to lose sight of the fact that in each and every case these competing interests must be considered and weighed.

APPENDIX C

Agency Response
Insurance Department

STATE OF KANSAS

KANSAS
INSURANCE DEPARTMENT

420 S.W. 9th
Topeka 66612 913-296-3071

1-800-432-2484
Consumer Assistance
Division calls only

FLETCHER BELL
Commissioner

August 2, 1985

Mr. Meredith Williams
Legislative Post Auditor
Legislative Division of Post Audit
109 West 9th, Suite 301
Mills Building
Topeka, Kansas 66612

Dear Mr. Williams:

I have reviewed the draft performance audit regarding the Board of Healing Arts and the Health Care Stabilization Fund and have no suggested corrections.

I do, however, have one comment in regard to Recommendation 4(a) of the report.

In 1976, this Department prepared a procedural manual which we provided to the Board of Healing Arts. The manual was intended to provide a system to guarantee that Kansas health care providers maintain proper insurance coverage. The manual included a detailed explanation of the computer printouts furnished by this Department to the Board of Healing Arts. In 1979, when it became clear that coordination with the Board was inadequate, Mr. Hayes prepared a supplement to the procedural manual. A copy of the procedural manual and supplement are attached as Exhibit A.

We agree with and support your Recommendation 4(a) and a meeting between my staff and the staff of the Board of Healing Arts has already taken place. I am informed that this meeting was successful in reaching some initial plans for better coordination. In accordance with your directions, I have asked my staff to prepare a proposed plan based upon their meeting with the Board of Healing Arts. The completed plan will contain the details necessary to implement the agreement of our Department and the Board of Healing Arts.

It is hoped that the above is responsive to the concerns expressed in your performance audit. However, if you should have any further questions or comments, please do not hesitate to contact this office.

Very truly yours,

Fletcher Bell
Commissioner of Insurance

FB:ks
LE/2037

Legislative Division of Post Audit

109 West 9th, Suite 301
Mills Building
Topeka, Kansas 66612-1285
(913) 296-3792

January 28, 1986

Representative Joe Knopp
Chairman, House Judiciary Committee
Room 175-W, Statehouse
Topeka, KS 66612

Dear Representative Knopp:

Thank you for the opportunity to present the Board of Healing Arts audit report to the House Judiciary Committee yesterday. Some of the questions asked by you and other Committee members related to the total number of members on medical boards in other states, and the number of public members on those boards. The attached sheet summarizes the information we gathered last summer on boards in the other 49 states and the District of Columbia. The list shows 60 boards because some states have more than one board regulating medical doctors and osteopaths.

The total membership of these boards varies from 5 up to 25. The number of public members varies from 0 on 11 boards up to 7 on the medical board in California. In percentage terms, the number of public members ranges from 0 up to 40 percent. The averages for these 60 boards are 9.43 members and 1.53 public members, for an average public representation level of 16.3 percent. As you know, the Kansas Board of Healing Arts has one public member, or 7.7 percent of the 13-member Board.

If you or the Judiciary Committee members have any questions about this data or any other aspect of the report, please contact me.

Sincerely,

Ron Green

Ron Green
Senior Auditor

Attachment 2
House Judiciary
1/27/86

NUMBER OF PUBLIC MEMBERS ON STATE MEDICAL OR OSTEOPATHIC BOARDS

State	Type of Board	Number of Board Members	Number of Public Members	Percent Public Members
Alabama	Medical	15	0	0.0
Alaska	Medical	7	2	28.6
Arizona	Medical	12	2	16.7
Arizona	Osteopathic	5	1	20.0
Arkansas	Medical	11	2	18.2
California	Medical	19	7	36.8
California	Osteopathic	5	2	40.0
Colorado	Both	11	2	18.2
Connecticut	Medical	8	3	37.5
Delaware	Both	11	2	18.2
Dist. of Columbia	Medical	10	3	30.0
Florida	Medical	11	2	18.2
Florida	Osteopathic	7	2	28.6
Georgia	Both	12	1	8.3
Hawaii	Medical	9	2	22.2
Idaho	Both	7	0	0.0
Illinois	Both	12	0	0.0
Indiana	Both	7	1	14.3
Iowa	Both	8	2	25.0
Kentucky	Both	10	1	10.0
Louisiana	Medical	6	0	0.0
Maine	Medical	8	1	12.5
Maryland	Medical	20	4	20.0
Massachusetts	Medical	7	1	14.3
Michigan	Medical	14	3	21.4
Michigan	Osteopathic	6	2	33.3
Minnesota	Both	11	3	27.3
Mississippi	Medical	9	0	0.0
Missouri	Both	7	1	14.3
Montana	Both	8	2	25.0
Nebraska	Both	6	1	16.7
Nevada	Medical	6	2	33.3
New Hampshire	Medical	7	1	14.3
New Jersey	Both	15	2	13.3
New Mexico	Medical	6	1	16.7
New Mexico	Osteopathic	6	1	16.7
New York	Both	25	2	8.0
North Carolina	Medical	8	1	12.5
North Dakota	Medical	9	0	0.0
Ohio	Both	9	1	11.1
Oklahoma	Medical	8	1	12.5
Oklahoma	Osteopathic	8	1	12.5
Oregon	Both	9	1	11.1
Pennsylvania	Medical	9	2	22.2
Pennsylvania	Osteopathic	6	2	33.3
Rhode Island	Both	9	2	22.2
South Carolina	Both	9	0	0.0
South Dakota	Both	6	1	16.7
Tennessee	Medical	5	0	0.0
Tennessee	Osteopathic	5	0	0.0
Texas	Both	15	3	20.0
Utah	Medical	7	1	14.3
Vermont	Medical	9	2	22.2
Virginia	Both	14	0	0.0
Washington	Medical	15	2	13.3
Washington	Osteopathic	8	1	12.5
West Virginia	Medical	15	3	20.0
West Virginia	Osteopathic	5	2	40.0
Wisconsin	Both	9	2	22.2
Wyoming	Both	5	0	0.0
Total all Boards		**566**	**92**	**16.3**
Average all Boards		**9.43**	**1.53**	**16.3**

NUMBER OF PUBLIC MEMBERS ON STATE MEDICAL OR OSTEOPATHIC BOARDS

State	Type of Board	Number of Board Members	Number of Public Members	Percent Public Members
Alabama	Medical	15	0	0.0
Alaska	Medical	7	2	28.6
Arizona	Medical	12	2	16.7
Arizona	Osteopathic	5	1	20.0
Arkansas	Medical	11	2	18.2
California	Medical	19	7	36.8
California	Osteopathic	5	2	40.0
Colorado	Both	11	2	18.2
Connecticut	Medical	8	3	37.5
Delaware	Both	11	2	18.2
Dist. of Columbia	Medical	10	3	30.0
Florida	Medical	11	2	18.2
Florida	Osteopathic	7	2	28.6
Georgia	Both	12	1	8.3
Hawaii	Medical	9	2	22.2
Idaho	Both	7	0	0.0
Illinois	Both	12	0	0.0
Indiana	Both	7	1	14.3
Iowa	Both	8	2	25.0
Kentucky	Both	10	1	10.0
Louisiana	Medical	6	0	0.0
Maine	Medical	8	1	12.5
Maryland	Medical	20	4	20.0
Massachusetts	Medical	7	1	14.3
Michigan	Medical	14	3	21.4
Michigan	Osteopathic	6	2	33.3
Minnesota	Both	11	3	27.3
Mississippi	Medical	9	0	0.0
Missouri	Both	7	1	14.3
Montana	Both	8	2	25.0
Nebraska	Both	6	1	16.7
Nevada	Medical	6	2	33.3
New Hampshire	Medical	7	1	14.3
New Jersey	Both	15	2	13.3
New Mexico	Medical	6	1	16.7
New Mexico	Osteopathic	6	1	16.7
New York	Both	25	2	8.0
North Carolina	Medical	8	1	12.5
North Dakota	Medical	9	0	0.0
Ohio	Both	9	1	11.1
Oklahoma	Medical	8	1	12.5
Oklahoma	Osteopathic	8	1	12.5
Oregon	Both	9	1	11.1
Pennsylvania	Medical	9	2	22.2
Pennsylvania	Osteopathic	6	2	33.3
Rhode Island	Both	9	2	22.2
South Carolina	Both	9	0	0.0
South Dakota	Both	6	1	16.7
Tennessee	Medical	5	0	0.0
Tennessee	Osteopathic	5	0	0.0
Texas	Both	15	3	20.0
Utah	Medical	7	1	14.3
Vermont	Medical	9	2	22.2
Virginia	Both	14	0	0.0
Washington	Medical	15	2	13.3
Washington	Osteopathic	8	1	12.5
West Virginia	Medical	15	3	20.0
West Virginia	Osteopathic	5	2	40.0
Wisconsin	Both	9	2	22.2
Wyoming	Both	5	0	0.0
Total all Boards		**566**	**92**	**16.3**
Average all Boards		**9.43**	**1.53**	**16.3**

1/27

STATE OF KANSAS

BOARD OF HEALING ARTS

OFFICE OF
RICHARD A. UHLIG, D.O., SECRETARY
ELIZABETH W. CARLSON, EXECUTIVE SECRETARY
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TESTIMONY OF DONALD G. STROLE
GENERAL COUNSEL
STATE BOARD OF HEALING ARTS

Mr. Chairman and members of the committee. I am Don Strole, General Counsel for the State Board of Healing Arts.

There are several provisions of House Bill 2661 which directly affect the Board and which the Board believes will enable it to do a more effective job in preventing incompetent doctors from practicing in Kansas. At the outset it is important to decide where the Board's activities should be directed in its attempt to decrease malpractice. In that regard it is necessary to make a distinction between proposals which impact upon what I call the "back end" of the malpractice cycle and those which impact upon the "front end" of the cycle.

With that in mind, the most important sections of this bill from the Board's perspective are new section 2 and 3 on risk management and required reporting to the Board; section 4 on Impaired Physicians; new section 19 allowing the Board to impose significant fines against licensees who violate the Healing Arts Act, section 30 which adds two more public members to the Board; section 34 and 35 which strengthens the Board's disciplinary powers; and sections 39 and 40 which broaden the reporting requirements to the Board.

Attachment 3
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Of these, the provisions involving risk management and early reporting are the most significant, and, I believe have uniform support of all the interest groups. In addition, new section 19 allowing the Board to impose fines should deter some licensees from committing certain acts, especially where a profit motive is involved.

If rigorous peer review and risk management is performed at the local level with early reporting of problems to the Board, one would expect a significant reduction in the amount of malpractice committed. This in turn will hopefully result in a decrease in the number of suits filed, and thus, ultimately a reduction in premiums as well.

Although the Board supports the majority of the provisions mentioned above, there are two amendments which it would like to propose. Attached is a copy of a new section which we believe is necessary for the Board to adequately perform its duties. (Attachment A) It essentially gives the Board broad subpoena power to enable the Board to obtain the necessary records and information for it to adequately conduct its investigations and to take action against particular licensees. Although most persons are cooperative, there have been occasions where the Board's efforts to obtain information have been frustrated. In addition, many persons and institutions would feel more comfortable if they were providing information

pursuant to a subpoena as opposed to appearing to be voluntarily giving the information to the Board. Finally, given the confidentiality provisions in new section 5 and section 38 it is important that the subpoenas and the information obtained remain confidential, unless contested in district court. The present subpoena power is argueably public and thus is inconsistent with these provisions.

The second amendment (Attachment B) is an amendment to section 34. New subsection (r) is problematic to the Board, because it prohibits a doctor from prescribing or dispensing to either the licensee or to his or her family. The Board believes that these provisions are unfairly restrictive to the good practitioner because of a few bad doctors. If doctors are impaired themselves or if they are overprescribing to their families, we will become aware of that problem independently, especially through a program which I will outline shortly. The Board believes that there may be occasions especially in rural settings where the inability to prescribe or dispense to oneself or one's family member may cause severe hardship if not life threatening situations. Thus, the Board recommends that subsections (r)(2) and (3) be deleted from section 34 of the bill. The Board also requests that the eight provisions set out in Attachment C be added to the definition of "unprofessional conduct" in section 35.

In addition to the proposals in the bill the Board would like to inform the committee of several programs it intends to institute

which will impact upon the "front end" of the malpractice problem.

1. The Board intends to establish a committee consisting of trial lawyers and obstetricians to explore the idea of adopting minimum standards for the practice of obstetrics, especially with respect to high risk pregnancies and fetal monitoring. As you have heard before, a significant percentage of large judgements occur in this area. Thus, even a small reduction in suits may save millions of dollars.

2. The Board has established a committee to re-evaluate the entire area of continuing medical education to determine whether it can be made more effective. One possibility is to require CME's to be in the area of one's practice or in areas in which a problem has been identified. We may even require competency exams at regular intervals, to help identify problem areas, especially with those doctors about whom we may have questions of competency.

3. The Board also intends to work with hospitals to explore the idea of establishing specific protocol for experimental, unproven, innovative or controversial procedures.

We have had several major cases in which a physician was on the "cutting edge" of medical practice. Unfortunately, the physicians work was not performed under any controlled conditions and there were no concrete protocol established dictating the manner in which the procedures would be performed. Furthermore, there was

no systematic analysis or review of the results. It is critical that in the future such endeavors be performed under tightly controlled, systematic conditions.

4. Finally, the Board intends to implement a computer program prepared by the AMA called PADS. This program will enable the Board to profile all prescriptions of scheduled drugs by licensees of the Board. This should greatly reduce the investigative time spent on overprescribing cases.

Thank you for the opportunity to appear before you. I will be glad to respond to any questions.

DGS/pd

New Section_____

(a) In connection with the investigation by the board, 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 other medical care facility, if such documents, reports, records or evidence relate to medical competence, unprofessional conduct, or the mental or physical ability of a licensee safely to practice the healing arts.

(b) For the purpose of all investigations and proceedings conducted by the Board:

1. The board 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 a licensee safely to practice the healing arts. Within five days after the service of the 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 act, 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.

(2) Any person appearing before the board shall have the right to be represented by counsel.

(3) The district court, upon application by the board or by the person subpoened, shall have jurisdiction to issue an order:

(i) requiring such person to appear before the board or the duly authorized agent to produce evidence relating to the matter under investigation; or

(ii) revoking, limiting or modifying the subpoena if in the court's opinion the evidence demanded does not relate to unlawful practices covered by this act, is not relevant to the charge which is the subject matter of the hearing or investigation, or does not describe with sufficient particularity the evidence whose production is required.

(iii) Any failure to obey an order of the court may be punished by the court as contempt.

(c) Patient records, including clinical records, medical reports, laboratory statements and reports, any file, film, any other report or oral statement relating to diagnostic findings or treatment of patients, any information from which a patient or his family might be identified or information received and records kept by the board as a result of the investigation procedure outlined in this act shall not be available to the public.

(d) Nothing in this section or any other provision of law making communications between a physician and his patient a privileged communication shall apply to investigations or proceedings conducted pursuant to this act. The board and its employees, agents and representatives shall keep in confidence the names of any patients whose records are reviewed during the course of investigations and proceedings pursuant to this chapter.

shall not be effective until the standardized written summary provided for in this subsection ~~(o)~~ is developed and printed and made available by the board to persons licensed by the board to practice medicine and surgery.

(p) The licensee has cheated on or attempted to subvert the validity of the examination for a license.

(q) The licensee has been found to be mentally ill, disabled, not guilty by reason of insanity or incompetent to stand trial by a court of competent jurisdiction.

(r) The licensee has prescribed, sold, administered, distributed or given a controlled substance: (1) For other than medically accepted therapeutic purposes; ~~(2) to the licensee's self;~~ ~~(3)~~ to a member of the licensee's family; ~~or~~ (4) except as permitted by law, to a habitual user or addict.

(s) The licensee has violated a federal law or regulation relating to controlled substances.

(t) The licensee has failed to furnish the board, or its investigators or representatives, any information legally requested by the board.

(u) Sanctions or disciplinary actions have been taken against the licensee by a peer review committee, health care facility or a professional association or society for acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.

(v) The licensee has failed to report to the board any adverse action taken against the licensee by another state or licensing jurisdiction, a peer review body, a health care facility, a professional association or society, a governmental agency, by a law enforcement agency or a court for acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.

(w) The licensee has surrendered a license or authorization to practice the healing arts in another state or jurisdiction or has surrendered the licensee's membership on any professional staff or in any professional association or society while under investigation for acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under

Amendments to Section 35:

(21) performing tests, examinations or services which are unnecessary or have no legitimate medical purpose.

(22) excessively charging a patient for services rendered.

(23) prescribing, dispensing, administering, distributing a prescription drug or substance, including all controlled substances in an excessive, improper or inappropriate manner or quantity or not in the course of the physician's professional practice.

(24) repeated failure to practice medicine and surgery or chiropractic with that level of care, skill and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances.

(25) obtaining fees by use of fraud, misrepresentation, deceit, trickery or other illegal means.

(26) failing to keep written medical records justifying the course of treatment of the patient, including, but not limited to, patient histories, examination results, and test results.

(27) delegating professional responsibilities to a person when the licensee delegating such responsibilities knows or has reason to know that such person is not qualified by training, experience, or licensure to perform them.

(28) using experimental forms of therapy without proper informed patient consent or without conforming to generally accepted criteria, standard protocols, or without keeping detailed legible records, without having periodic analysis of the study and results reviewed by a committee or peers.

Amendment to Section 34:

(cc) The licensee has practiced in an area of medicine and surgery or has performed a procedure for which the licensee does not have sufficent training or experience.

New Section_____

The Board may issue a conditional license restricting the licensee to practice only in the area of medicine and surgery consistent with the postgraduate training of the licensee. The Board may also specify by rule and regulation the type and amount of postgraduate training necessary to practice in a particular area of medicine and surgery.