

MINUTES OF THE SENATE HEALTH CARE STRATEGIES COMMITTEE

The meeting was called to order by Chairperson Susan Wagle at 1:30 P.M. on March 18, 2008 in Room 136-N of the Capitol.

Committee members absent: Senator Phil Journey- excused

Committee staff present: Ms. Emalene Correll, Kansas Legislative Research Department
Mrs. Terri Weber, Kansas Legislative Research Department
Ms. Nobuko Folmsbee, Revisor of Statutes Office
Ms. Renae Jefferies, Revisor of Statutes Office
Ms. Margaret Cianciarulo, Committee Secretary

Conferees appearing before the committee: Mr. Larry Buening, Executive Director,
Kansas Board of Healing Arts
Mr. Jerry Slaughter, Executive Director,
Kansas Medical Society

Other in attendance: Please see attached Guest List

Handouts

Tupon calling the meeting the order, the Chair stating that yesterday the Committee asked KHPA for an opinion on **SCR1618** for yesterday's hearing and before the Committee is a revised copy of Dr. Nielsen's testimony signed and neutral, so we might go back one more time and ask. The Chair said she would call Dr. Nielsen and ask her opinion of the bill. A copy of the revised testimony is (Attachment 1) attached hereto and incorporated into the Minutes by reference.

Hearing on **HB2620** - an act concurring the State Board of Healing Arts, relating to a non-disciplinary resolution; fingerprinting and criminal history records checks.

The Chair then said that yesterday the Committee heard the overview from staff on **HB2620** and today they would be having a hearing on the bill but will not be working it today. She then called on the first of two proponent conferees, Mr. Larry Buening, Executive Director, Kansas Board of Healing Arts, who stated that this bill originated at the Special Committee on Judiciary following discussions with the Board on how it had addressed or intended to address recommendations identified in the Legislative Post Audit Report issued October 2006, with the Board adopting Policy Statement No.07-02 indicating the Board's intention to pursue legislation to allow alternatives to discipline. He also gave a history of the three Sections of the bill, then stated as of January 22, 2007, 34 state medical boards have the authority to do criminal background checks, with 28 of these requiring fingerprints and a national FBI check, however, Kansas is one of the six states that is limited only to have the authority to do a state background check - K.S.A. 65-2839 a ©. He indicated that this statute is not broad enough to meet FBI requirements for statutory authorization requirements by Federal law in order for the criminal background check to be performed by that organization. And lastly, he said the Board held a special meeting to discuss legislative issues, specifically **HB2620**, with the KMS presenting their amendments and after discussing and modifications, an agreement was reached where the Board approved the recommended amendments that will be presented by KMS. A copy of Mr. Buening's testimony and attachment are (Attachment 2) attached hereto and incorporated into the Minutes by reference.

The Chair asked for questions from the Committee of Mr. Buening, which came from Senators Barnett, Wagle, and Brungardt including:

- clarification, you are not currently authorized to take fingerprints?
- clarification, do you run everyone through a background check?

CONTINUATION SHEET

MINUTES OF THE Senate Health Care Strategies Committee at 1:30 P.M. on March 18, 2008 in Room 136-N of the Capitol.

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- the field of information would be much more valuable if it had to do violations by the licensee in their field practice in other jurisdictions, do you now have that information?

- part of it talks about standard of care, now we are talking about criminal backgrounds?

The Chair then called on Mr. Jerry Slaughter, Executive Director, Kansas Medical Society (KMS), who stated that they would be offering some additional amendments to address issues that have been raised by this committee during hearings on the Board's conduct of certain investigations in recent months:

- regarding the Committee's concern regarding the Board's inability to act until a pattern of substandard conduct occurs, KMS's amendment would authorize the Board to take either a non-disciplinary resolution approach or, in those rare instances that are more egregious, the Board could formally discipline a licensee on a single occasion that if continued would reasonably be expected to prosecute professional incompetency or unprofessional conduct.

The Chair then recognized Senator Schmidt who asked Mr. Slaughter:

- are you saying that if a physician is sued for malpractice that under this amendment you have offered, the Board would have every right to take your license away with one malpractice case before the malpractice is adjudicated?

- it could not be on the filing of the case?

- in response to Mr. Slaughter saying if this was fairly egregious, this would give them the ability to look further and possibly take action, the question was asked, does the Board not have that now?

- unless it was gross negligence, they would have to have cases filed for the same thing?

- in the cases where a physician settles out of court because they consider it a nuisance, then their license could be in jeopardy with that?

- in response to Mr. Slaughter saying they were hopeful that the Board will be prudent about this and not overreact and Kansas would be in the vast minority of the states to allow action after one single occasion, the response was, "but that is almost speculation that something else is going to disastrously happen from one mistake."

As there was no further questions or discussion. Mr. Slaughter continued his testimony.

- regarding the Committee's concerns about improper sexual contact with patients, and other conduct which exploits the physician-patient relationship, KMS suggested two amendments that they felt, are designed to strengthen certain provisions of K.S.A. 65-2837 and were adapted recommendations from the *Report of the special Committee on Professional Conduct and Ethics* (2000) of the Federation of State Medical Boards

- in (b) (16) they added language addressing sexual boundary issues relating to patient surrogates.

- in (b)(33) their amendment addresses exploitative conduct which violates physician-patient relationship

The third amendment addresses concerns raised regarding the Board not currently having on staff, a trained medical professional to assist with the evaluation/assessment of complaints and conduct, or to assist with timely communications with complaints. KMS is suggesting an amendment, found at K.S.A. 65-2878, that will give the Board the authority to contract with one or more physicians, chiropractors, or other professionals as needed.

CONTINUATION SHEET

MINUTES OF THE Senate Health Care Strategies Committee at 1:30 P.M. on March 18, 2008 in Room 136-N of the Capitol.

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- the final amendment, in Section 3, relating to the list of graduated sanctions being developed by the Board to assist with achieving consistency in its disciplinary actions, stating while KMS does not oppose the development of the sanctions grid, they would oppose requiring the Board to be bound by a rigid sanctions grid when it decides cases.

Mr Slaughter completed his testimony by stating:

- the Board receives no taxpayer support.

- licensees of the Board fully fund agency operations but over the past several years, and most recently in FY 2005, the legislature has swept over \$1 million of the Board's funds into the state general fund, which are dollars which were not available for the additional staff requested by the Board to upgrade its investigatory and disciplinary staffs.

- strongly urges the legislature to repay the swept funds to the Board to mitigate the increase in licensure fees that is a virtual certainty to continue to fund agency operations at current levels.

A copy of Mr. Slaughter's testimony and proposed amendments are (Attachment 3) attached hereto and incorporated into the Minutes by reference.

The Chair thanked Mr. Slaughter for taking the time to follow the hearings, paying attention to all of the testimony, offering positive solutions and networking with the Board. She then asked for questions from the Committee which came from Senators Barnett, Schmidt, Palmer, and Wagle including:

- re: 6528-78, to contract with one or more persons who are licensed to practice, could the Board do that now or does it require a statute?

- as we heard testimony, part of the problem was that the legislature had swept funds and the Board did not have the resources, are these reactions a result of the need for change in legislation or is part of what is being proposed related to what Mr. Slaughter just described (funds not there adequately to staff and investigate these cases)?

- concerns with 6528-36 regarding testimony stating as long as the Board is made up of peers, you would have some level of comfort with this. The testimony was given previously that suggested that the Board be made up of all consumers and no medical professionals, so would it be possible to place something in this amendment that says as long as the Board is made up of medical professionals?

- is there a statute where there is a time line?

-do you get a chance to look at the policy statement 07-02 and does this address some of these concerns?

Adjournment

As it was going on Senate session time, neutral testimony regarding some transparency issues and the way they address it in Colorado had not yet been given, and written testimony had not been presented. The Chair asked if all of the conferees could return next Monday, March 25, 2008. to continue the hearing. The Chair then recognized Senator Palmer who asked as a result of this hearing, if Monday, Mr. Buening could provide recommendations he might have regarding their staff, ex. how they might be more efficient? The meeting was adjourned. The time was 2:35 p.m.

The next meeting is scheduled for March 25, 2008.



March 17, 2008

The Honorable Susan Wagle
Chairperson, Senate Health Care Strategies
Statehouse Room 221 East
Topeka Kansas 66612

Re: Testimony on Senate Concurrent Resolution 1618

Dear Senator Wagle:

Today the Kansas Health Policy Authority is offering neutral testimony on Senate Concurrent Resolution 1618. As the leading state agency on health, health care, and health policy, KHPA is committed to ensuring Kansans have access to quality, affordable, and sustainable health care. The current trends related to health care are alarming with our health care system growing at a rate much faster than the rest of the economy. Total health expenditures in the United States doubled between 1990 and 2004, reaching \$6,280 per capita in 2004. In 2006 health care expenditures accounted for 16.5 % of the Gross Domestic Product, far outpacing any other country and estimates indicate that the United States will devote 20% of GDP to health care by 2015. These ever escalating health care costs are a primary factor contributing to the growing number of adults and children lacking health insurance in our state. Currently some 300,000 Kansans are uninsured, resulting in costly delays in accessing needed health care services.

The current health care system in Kansas faces many challenges. The health system is inefficient and fragmented and the health status of many Kansans is at risk. Fundamental transformation of our underlying health system is required to address the staggering rise in health care costs and chronic disease as well as the underinvestment in the coordination of health care. The incidence of chronic disease is escalating across the nation and the costs for treating the illnesses and disabilities of those individuals account for more than 70% of total medical care costs, including nearly 80% of Medicaid expenditures. A fundamental change in our skewed health care system must occur with increased focus both on the prevention of chronic disease as well as implementation of more effective disease management strategies.

We must explore new solutions to solving the cost, quality, and access issues facing the citizens of our state. Serious consideration must be given to investigating new ways of delivering and financing health care in Kansas so that we obtain value for the health care dollars.

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State Employee Health
Benefits and Plan Purchasing
Phone: 785-368-6361
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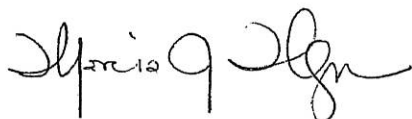
State Self Insurance Fund:
Phone: 785-296-2364
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Senate Health Care Strategies
Committee
Date: March 18, 2008
Attachment 1

The Honorable Susan Wagle
Testimony on Senate Concurrent Resolution 1618
Page Two

Health care is delivered locally and states need to have the flexibility to develop health care policy that ensures better value for the dollars spent. The federal government, however, must facilitate the process as states endeavor to correct the flaws in our fragmented health system, improve access to the full array of health services, and control costs.

Sincerely,

A handwritten signature in black ink, appearing to read "Marcia Nielsen". The signature is fluid and cursive, with the first name "Marcia" written in a larger, more prominent script than the last name "Nielsen".

Marcia Nielsen, PhD., MPH
Executive Director

cc: Senate Health Care Strategies Committee Members



KATHLEEN SEBELIUS
GOVERNOR

STATE BOARD OF HEALING ARTS

LAWRENCE T. BUENING, JR.
EXECUTIVE DIRECTOR

TO: Senate Committee on Health Care Strategies

FROM: Lawrence T. Buening, Jr.
Executive Director

DATE: March 18, 2008

RE: Testimony on H.B. 2620, as amended

Thank you for the opportunity to appear before you on behalf of the State Board of Healing Arts in support of House Bill No. 2620, as it was amended in the House. This bill originated at the Special Committee on Judiciary following discussions with the Board on how it had addressed or intended to address recommendations identified in the Legislative Post Audit Report issued October 2006. One recommendation had been to investigate all allegations of substandard care at the time the allegation is received rather than waiting for a pattern to develop and to notify the licensee when an investigation reveals a problem, even if no formal action can be taken at that time. The amendments added by the House incorporate two other recommendations made by the Post Audit Report.

Section 1 of the bill provides the Board with authority to enter into a non-disciplinary resolution even if there may not be grounds for formal disciplinary action. In the past, Board staff conducted an investigation into all allegations of practice below the standard of care, even if the licensee had no other prior complaints. To use our resources more efficiently, this practice was changed in 2005 so that investigations of such practice were commenced only when there were multiple allegations of substandard practice. This policy was consistent with the statutory definition of "professional incompetence", appearing at K.S.A. 65-2837(a). That definition requires a finding of repeated instances of ordinary negligence, or a single act of gross negligence. A single act of practice below the standard of care, by itself, is not a ground for disciplinary action. Single allegations of misconduct other than standard of care are investigated and may result in disciplinary action.

The Board has spent considerable time studying the recommendations made by the Legislative Post Audit Report. After careful consideration, the Board adopted Policy Statement No. 07-02, a copy of which is attached. That statement indicates the Board's intention to pursue legislation to allow alternatives to discipline. House Bill 2620 contains the language the Board approved to authorize the use of investigation results in a non-disciplinary manner, and to work with the licensee to improve professional practice. This might include additional education or monitoring.

Senate Health Care Strategies
Committee

Date: March 18, 2008

Attachment 2

BOARD MEMBERS: BETTY McBRIDE, Public Member, PRESIDENT, Columbus - VINTON K. ARNETT, D.C., VICE PRESIDENT, Hays - MICHAEL J. BEEZLEY, M.D., Lenexa
MYRA J. CHRISTOPHER, Public Member, Fairway - RAY N. CONLEY, D.C., Overland Park - GARY L. COUNSELMAN, D.C., Topeka - FRANK K. GALBRAITH, D.P.M., Wichita
MERLE J. "BOO" HODGES, M.D., Salina - SUE ICE, Public Member, Newton - M. MYRON LEINWETTER, D.O., Rossville - MARK A. McCUNE, M.D., Overland Park - CAROLINA M. SORIA, D.O., Wichita
ROGER D. WARREN, M.D., Hanover - NANCY J. WELSH, M.D., Topeka - RONALD N. WHITMER, D.O., Ellsworth

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Section 1 is also consistent with recent trends in establishing continued professional competence. Currently, continuing education is required for license renewal, and is commonly considered a measure of professional competence. However, other means of establishing professional competence are being developed that include long-term plans for directed education, re-examination and demonstration of practical skills.

Section 2 contains identical language as S.B. No. 81 that was passed by the Senate last session with a vote of 40-0. SB. No. 81 is in the House Health and Human Services and has been used as a vehicle to address legislative issues raised by the Health Policy Authority. S.B. No. 81 was requested by the Board and introduced through Public Health and Welfare in response to the October 2006 Legislative Post Audit Report that stated as follows:

“To ensure that the Board has all recommended information pertaining to applicant coming from other states-both professional and personal-Board staff should re-introduce a bill this session which would require applicants to be fingerprinted at a law-enforcement center, and allow the Board to submit those prints to the KBI and FBI for a background check.”

As of January 22, 2007, 34 state medical boards have the authority to do criminal background checks, with 28 of these requiring fingerprints and a national FBI check. Kansas is one of the six states that have the authority to do a state background check--K.S.A. 65-2839a(c). This statute is not broad enough to meet the FBI requirements for statutory authorization requirement by Federal law in order for the criminal background check to be performed by that organization.

Section 3 was also added by the House and requires the Board to adopt rules and regulations that contain a formal list of graduated sanctions for violations of the Healing Arts Act. This provision is practically identical to one of the recommendations made in the October 2006 Legislative Post Audit Report and is supported by the Board. The Board has discussed this recommendation at length on several occasions. Guidelines that have been adopted in other states have been obtained. A Board Committee has been established to study this issue. The Committee has met on October 10, 2007 and January 22, 2008, and is currently reviewing information that has been provided by staff. The Committee is scheduled to meet again on Friday, April 4. It is expected that draft guidelines may be ready for consideration by the Board as a whole at its meeting in June. Therefore, proposed rules and regulations should be ready for the commencement of the adoption process by the time H.B. No. 2620, if enacted, becomes effective.

Yesterday, the Board held a special meeting to discuss legislative issues. Specifically, the Board discussed H.B. No. 2620, as it was amended by the House, and approved the bill as it was passed by the House. Mr. Slaughter and Mr. Morin from the Kansas Medical Society attended the special meeting and presented amendments to K.S.A. 65-2836(b), K.S.A. 65-2837(b)(16) and (33) and a new subsection (e) to K.S.A. 65-2878. After discussing the proposed amendments, an agreement was reached on these amendments and the Board approved the recommended amendments that will be presented by the Kansas Medical Society.

Thank you for the opportunity to appear before you and I would be happy to respond to any questions.

KANSAS STATE BOARD OF HEALING ARTS

POLICY STATEMENT NO. 07-02

Subject: Allegations of practice below the standard of care
Date: October 20, 2007

WHEREAS:

The healing arts act grants authority to the Board, its agents and employees to investigate matters of professional incompetency. The act defines professional incompetency at K.S.A. 2006 Supp. 65-2837(a) as follows:

"Professional incompetency" means:

(1) One or more instances involving failure to adhere to the applicable standard of care to a degree which constitutes gross negligence, as determined by the board.

(2) Repeated instances involving failure to adhere to the applicable standard of care to a degree which constitutes ordinary negligence, as determined by the board.

(3) A pattern of practice or other behavior which demonstrates a manifest incapacity or incompetence to practice medicine.

Similar definitions of professional incompetency apply to other professions the Board regulates.

Investigating allegations of practice below the standard of care includes, at a minimum, gathering pertinent patient records, communicating with the licensees involved and obtaining their statements, and presenting the records to a peer review committee.

The Board determines that alleged practice below the standard of care described in written complaints from the public, including other health care professionals, and reports of adverse findings from medical care facilities or peer review organizations warrant investigation without waiting for repeated instances or a pattern of practice to develop.

The Board projects that investigating all allegations of practice below the standard of care described in written complaints from the public, including other health care professionals, and reports of adverse findings from medical care facilities or peer review organizations would increase the number of cases opened each fiscal year by approximately 60. Investigation of these additional cases will require the addition of one FTE special investigator and the expenditure of approximately \$15,000 per year to obtain medical records.

IT IS, THEREFORE, DECLARED THE POLICY OF THE BOARD THAT:

1. All alleged practice below the standard of care described in written complaints from the public, including other health care professionals, and reports of


adverse findings from medical care facilities or peer review organizations, should be investigated without regard to prior complaints against the involved licensee.

2. Investigation should include gathering pertinent patient records, communicating with the licensees involved and obtaining their statements, interviewing other witnesses as staff determine is appropriate, and presenting the records to a peer review committee, except that Board staff may terminate an investigation when there is discovery of credible and persuasive evidence establishing that a complaint lacks merit or was made in bad faith.

3. The Board will continue to pursue legislative authority for alternative means of concluding investigations suggesting practice below the standard of care but not establishing grounds to initiate disciplinary action.

4. The Board will dedicate appropriate resources, and will seek sufficient legislative appropriations of staff and expenditure limitations to implement this policy.

ADOPTED THIS 20th Day of October, 2007.



Betty McBride
President



PERFORMANCE AUDIT REPORT

**Board of Healing Arts: Reviewing Issues
Related to Complaint Investigations, Background
Investigations, and Composition of the Board**

**A Report to the Legislative Post Audit Committee
By the Legislative Division of Post Audit
State of Kansas
October 2006**

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 \$10 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.

We conduct our audit work in accordance with applicable government auditing standards set forth by the U.S. Government Accountability Office. These standards pertain to the auditor's professional qualifications, the quality of the audit work, and the characteristics of professional and meaningful reports. The standards also have been endorsed by the American Institute of Certified Public Accountants and 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. Copies of all completed performance audits are available from the Division's office.

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Barbara J. Hinton, Legislative Post Auditor

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LEGISLATURE OF KANSAS
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October 10, 2006

To: Members, Legislative Post Audit Committee

Senator Les Donovan, Chair
Senator Anthony Hensley
Senator Nick Jordan
Senator Derek Schmidt
Senator Chris Steineger

Representative John Edmonds, Vice-Chair
Representative Tom Burroughs
Representative Peggy Mast
Representative Bill McCreary
Representative Tom Sawyer

This report contains the findings, conclusions, and recommendations from our completed performance audit, *Board of Healing Arts: Reviewing Issues Related to Complaint Investigations, Background Investigations, and Composition of the Board.*

The report includes several recommendations for the Board and its staff, including: assigning sufficient staff to screen complaints; investigating all allegations of substandard patient care; reviewing caseload status more frequently; immediately reviewing all cases that have been open for long periods; and developing written policies in several areas. We also recommend the Board continue pursuing the ability to obtain fingerprints from applicants. Finally, we recommend that the Legislative Post Audit Committee or other committee request an interim study of how best to provide oversight with representation for all professions the Board regulates.

We would be happy to discuss the findings presented in this report with any legislative committees, individual legislators, or other State officials. These findings are supported by a wealth of data, not all of which could be included in this report because of space considerations. These data may allow us to answer additional questions about the audit findings or to further clarify the issues raised in the report.

Barbara J. Hinton
Legislative Post Auditor

Get the Big Picture

Read these Sections and Features:

1. **Executive Summary** - an overview of the questions we asked and the answers we found.
2. **Conclusion and Recommendations** - are referenced in the Executive Summary and appear in a box after each question in the report.
3. **Agency Response** - also referenced in the Executive Summary and is the last Appendix.

Helpful Tools for Getting to the Detail

- In most cases, an “**At a Glance**” description of the agency or department appears within the first few pages of the main report.
- **Side Headings** point out key issues and findings.
- **Charts/Tables** may be found throughout the report, and help provide a picture of what we found.
- **Narrative text boxes** can highlight interesting information, or provide detailed examples of problems we found.
- **Appendices** may include additional supporting documentation, along with the audit **Scope Statement** and **Agency Response(s)**.

EXECUTIVE SUMMARY
LEGISLATIVE DIVISION OF POST AUDIT

Overview of the Kansas Board of Healing Arts

The Board's mission is to protect the public from incompetent practice, unprofessional conduct, and other proscribed behavior by individuals from the 14 health care professions it regulates.

The 15-member Board licenses 14 health care professions. *The Board was established in 1957. Over the years new professions have been added to the Board's oversight, including physical therapists and physician assistants. The Board has no oversight or regulatory authority over clinics, hospitals, or other health-care facilities, although it has standards for offices at which surgical procedures are performed. The Board's members are appointed by the Governor and include 12 doctors and 3 members of the public.* page 3

Board staff are responsible for licensing professionals and responding to complaints. *Nearly all the Board's 32 staff are assigned to either the licensing or legal sections.* page 3

The Board has established a complaint-handling system with multiple levels of review. *The Board has established guidelines regarding which complaints will be investigated. Complaints that are assigned for investigation are given a priority level. Complaints that don't lead to an investigation are maintained in the licensee's file for possible consideration in the future. The Board has set guidelines for how long different segments of a case should take, and has a multi-step process for cases needing disciplinary action. Board staff track and monitor the results of disciplinary orders, and rely on third-party oversight as well.* page 4

Question 1: Does the Board of Healing Arts Conduct Timely and Thorough Investigations of Complaints It Receives, and Take Timely and Appropriate Actions To Correct Regulatory Violations It Finds?

The Board's complaint-handling system has some elements of a good system. *Best practices for a complaint-handling system can be summarized into three main categories: receipt/screening, investigation, and enforcement/discipline. The Board's practices address many of these, such as having written guidelines and multiple levels of review. However, we also identified problems.* page 9

We identified significant weaknesses relating to intake and screening of complaints. *Within a regulatory environment, there's an expectation that complaints alleging violations of laws, regulations, or requirements—including substandard care or practice—would be* page 10

investigated to determine what action needs to be taken. However, the Board's policy is not to investigate allegations of poor patient care until there's a historical pattern, which is defined as three complaints in three years. Board staff said they didn't have enough resources to investigate all complaints, and their policy is consistent with State law that allows the Board to take disciplinary action only when there's an established pattern of conduct.

We had concerns with 4 of the 30 complaints we reviewed that were screened out without being investigated. These included one complaint alleging the patient underwent surgery for a double hernia, but the doctor only repaired one because she "forgot" about the other one. The second hernia was repaired the next day.

We also noted that only one staff member was assigned to review and screen complaints, and about one third of the complaints we reviewed weren't screened within the Board's two-week time frame. Those that took longer ranged from 15 days to 161 days.

Board staff have inadequate processes for tracking and monitoring the progress of complaint investigations, and of investigated complaints that are referred on to the Board's Review Committee. For the 30 closed cases we reviewed, Board staff appeared to have thoroughly investigated those cases, all but two of the investigations we reviewed met the Board's time lines, and disciplinary decisions appeared to be reasonable.

.....page 13

In all, the Board had 533 open cases at the time of the audit, 75 of which (14%) had been open longer than three years. We randomly selected 3 of those 75 cases for review, and identified significant problems with two of them. Both had been investigated and referred on to the Board's Review Committee, which reviews the information gathered during the investigation and makes a recommendation to the Board's Disciplinary Panel. In one of those cases, the Committee concluded that the doctor involved hadn't met the standard of care in treating eight patients. In both cases, Board staff failed to obtain expert opinions which had been recommended, and the cases have languished for years without any further action. Both doctors continued to be licensed to practice.

Question 1 Conclusionpage 18

Question 1 Recommendationspage 19

Question 2: Does the Board of Healing Arts Conduct Background Investigations That Would Enable It to Know Whether a Potential Licensee Has Had Malpractice or Negligence Problems in Another Jurisdiction Before Being License in Kansas?

Although it has no formal policies and procedures for doing so, the Board obtains generally adequate background information about most out-of-State applicants. page 21
We compared the Board's practices to those recommended by the Federation of State Medical Board's. In practice, the Board requests appropriate information from applicants, but it doesn't verify as much of that information as it could for chiropractors and podiatrists. Although criminal background checks are a recommended practice, the Board currently isn't authorized to conduct FBI checks, and it doesn't conduct KBI checks on applicants even though it has statutory authority to do so.

Staff followed agency practices for background checks, and given the available information, made reasonable recommendations for licensing out-of-State applicants. page 24
Although about one-third of applicants self-reported some type of past disciplinary issue, it appeared to us that Board staff reviewed sufficient information and were justified in recommending licensure. There's no way the Board can ensure it's aware of all adverse information that might be available about an applicant. In the last three years, the Board has licensed only one medical doctor whose license had been revoked by another state.

Question 2 Conclusion page 26

Question 2 Recommendations page 26

Question 3: Does the Board's Composition Give Fair Representation To All Healing Arts Practices, and If Not, What Could Be Done To Address any Deficiencies?

The Board's composition hasn't changed in 20 years, though many allied health professions have been added to its regulatory authority. page 27
The Board is made up of 5 medical doctors, 3 chiropractors, 3 osteopaths, 1 podiatrist, and 3 public members. The current Board composition has been in place since 1986. Seven additional professions have been added to the Board's oversight since then— including physical therapists and physician assistants—making a total of fourteen regulated professions. Ten of the 14 regulated health-care professions don't have a seat on the Board. State law created advisory councils for 9 of those 10 professions.

Opinions about the Board's current composition are mixed. page 28
Current Board members generally are satisfied with the Board's composition. However, many professions without a Board seat think the Board doesn't adequately address their issues.

Other states' setups for medical licensure boards vary greatly.page 29
While we saw no real pattern as to which professions are regulated, the number of professions regulated, or the number of members on a board, board make-up in other states typically was limited to doctors and members of the public. The 14 professions regulated by Kansas' Board of Healing Arts are overseen by many different boards in the surrounding states.

For most other regulated professions in Kansas, State law has provided for direct representation on the regulatory board. Options for increasing representation of the professions regulated by the Board of Healing Arts include broadening membership on the current Board, and creating one or more additional boards. Those options would require statutory change.

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APPENDIX A: Scope Statement page 34

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APPENDIX D: Agency Response page 39

This audit was conducted by Chris Clarke, Lisa Hoopes, Felany Opiso-Williams, and Molly Coplen. Cindy Lash was the audit manager. If you need any additional information about the audit's findings, please contact Chris at the Division's offices. Our address is: Legislative Division of Post Audit, 800 SW Jackson Street, Suite 1200, Topeka, Kansas 66612. You also may call us at (785) 296-3792, or contact us via the Internet at LPA@lpa.state.ks.us.

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Board of Healing Arts: Reviewing Issues Related to Complaint Investigations, Background Investigations, and Composition of the Board

The role of the Board of Healing Arts is to protect the public by ensuring that only those people who meet and maintain certain qualifications, competency levels, and standards of professional conduct are allowed to engage in the health care professions it regulates. The 15-member Board, appointed by the Governor, licenses 14 professions, including doctors, physician assistants, physical therapists, respiratory therapists, radiologic technologists, and athletic trainers.

Legislative concerns have been raised that the Board's complaint investigations are not thorough and timely, and about the Board taking insufficient follow-up action to ensure that complaints are addressed. Legislators also have expressed an interest in knowing whether the background checks the Board conducts before granting doctors a license to practice in Kansas are sufficient to protect the public from doctors who may have had malpractice or negligence problems in other jurisdictions. This performance audit answers the following questions:

- 1. Does the Board of Healing Arts conduct timely and thorough investigations of complaints it receives, and take timely and appropriate actions to correct regulatory violations it finds?**
- 2. Does the Board of Healing Arts conduct background investigations that would enable it to know whether a potential licensee has had malpractice or negligence problems in another jurisdiction before being licensed in Kansas?**
- 3. Does the composition of the Board give fair representation to all healing arts practices, and if not, what could be done to address any deficiencies?**

To answer these questions, we identified best practices for investigating complaints, enforcing regulations and standards, and conducting background investigations, and reviewed documentation and interviewed staff to compare the Board's practices to them. We reviewed a sample of complaints and investigations to assess the timeliness and thoroughness of the Board's actions, as well as the reasonableness of the Board's

decisions. We also reviewed a sample of the license applications for doctors who have practiced in other states to assess the completeness and thoroughness of the background investigation process, and to assess the reasonableness of the Board's decision to grant a license. We collected comparative information from other states regarding disciplinary Board actions against doctors. We asked a national data repository to provide us a list of people who had received a new license in Kansas since 2003 despite having a prior revocation in another state. Finally, we interviewed Board members and professional associations to find out whether the views and interests of all regulated professions are adequately represented on the Board.

A copy of the scope statement for this audit approved by the Legislative Post Audit Committee is included in *Appendix A*.

In conducting this audit, we followed all applicable auditing standards set forth by the U.S. Government Accountability Office. Our file review included complaints investigated and heard, complaints not investigated, and applications from out-of-State doctors. We relied on physical documentation for investigated complaints and out-of-State application background investigations. On the other hand, we used the agency's computer system to review un-investigated complaints, conducted limited testing of that data, and found them reliable. We selected our sample from lists and summary reports of applications and complaint cases provided by Board staff. We can't know how accurate these data are, but we also conducted limited testing of that data and found them reliable. Nonetheless, the information presented in this report should be viewed as an indicator, and not as absolute fact. It is unlikely, however, that it is so grossly or systematically inaccurate as to affect our findings and conclusions.

Overview of the Kansas Board of Healing Arts

The Board's mission is to protect the public by ensuring that practitioners in the 14 health care professions it regulates meet and maintain certain qualifications. The Board tries to protect the public from incompetent practice, unprofessional conduct, and other proscribed behavior by these individuals.

The 15-Member Board Licenses 14 Health Care Professions

The Board has regulated some of these professions for years, but others are newer. For example, radiologic technologists weren't required to be regulated until July 1, 2005. **Figure OV-1** shows the professions the Board regulates and the number of licensees in each. The Board has no oversight or regulatory authority over clinics, hospitals, or other health-care facilities, although it has standards for offices at which surgical procedures are performed.

Figure OV-1 Professions Regulated by the Board of Healing Arts, and Number of Licensees, Fiscal Year 2006			
Profession	Number of Licensees	Profession	Number of Licensees
Medical Doctor	9,424	Osteopathic Doctor	899
Radiologic Technologist	2,559	Physician Assistant	683
Physical Therapist	1,798	Occupational Therapist Assistant	308
Respiratory Therapist	1,510	Athletic Trainer	286
Occupational Therapist	1,150	Podiatric Doctor	134
Chiropractic Doctor	1,041	Naturopathic Doctor	17
Physical Therapist Assistant	1,012	Contact Lens Distributors	4
Total			20,825
Source: Board of Healing Arts			

The Board's members are appointed by the Governor, and include three public members and 12 doctors—5 medical, 3 osteopathic, 3 chiropractic, and 1 podiatric. The Board was created in 1957 when the Healing Arts Act was passed, and its composition has changed gradually, with the latest change in 1986. Advisory councils represent the professions that don't have a Board seat, and advise the Board on topics relevant to their areas.

Board Staff Are Responsible for Licensing Professionals And Responding to Complaints

The agency is divided into four sections: administration, licensure, legal, and information technology. Nearly all the agency's 32 staff are assigned to either the licensure or legal sections.

- Licensure. Seven analysts and three administrative staff issue new and renewal licenses to applicants who meet requirements. Licenses are valid for one year.
- Legal. The 18 staff in this section includes eight investigators (representing 7.5 FTE), a complaint coordinator, five attorneys, two legal assistants, and other administrative staff. Among other things, they handle all complaint investigations, present options for Board action against practitioners who have violated the Act (which can range from fines to a license revocation), and handle all legal prosecutions.

Board staff indicated that investigators' caseloads range from 33 to 84 open cases. Each investigator was assigned an average of 43 new

cases last year. Five investigators live in the Topeka area, while the other three live and work from their homes to cover the Kansas City area, the Emporia/Wichita area, and southeast Kansas. All but one of the investigators have a law enforcement background.

- Administration and Information Technology. The agency has five administrative positions and two information technology positions.

More information about the Board can be found in the At-A-Glance box on page eight.

The Board Has Established a Complaint-Handling System With Multiple Levels of Review

The Board’s complaint-handling process is shown in **Figure OV-2** at right, and is described briefly below.

The Board of Healing Arts considers all “adverse information” it receives about a licensed professional to be a complaint. During fiscal year 2006, the agency received nearly 2,600 pieces of information that it labeled as complaints. **Figure OV-3** shows the sources of these complaints, and numbers of each:

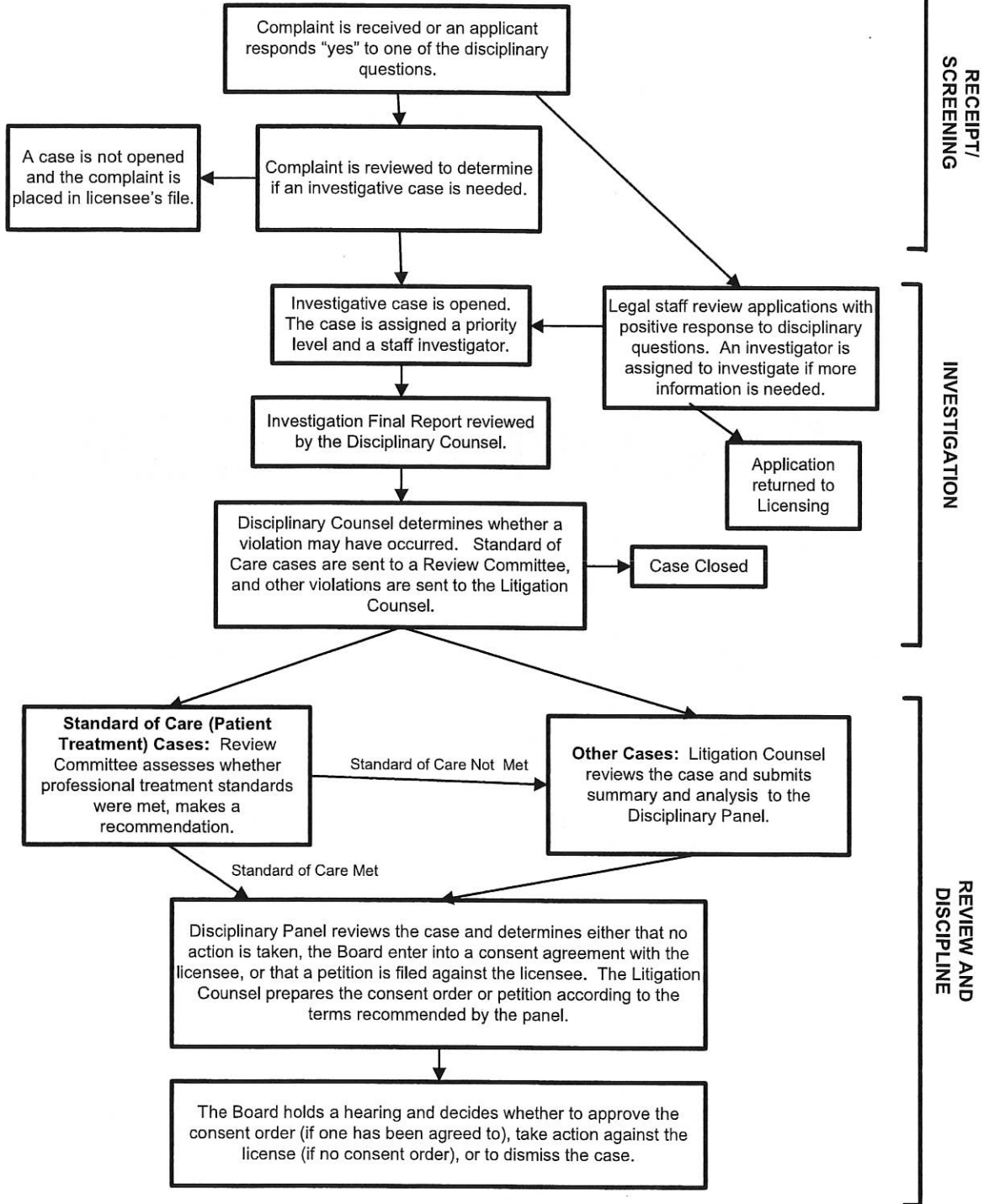
Figure OV-3 Sources and Number of Complaints Received Fiscal Year 2006	
Complaint Source	# of Complaints Received
Malpractice petitions received from Health Care Stabilization Fund	668
General public/patients filing a complaint form, calling or e-mailing	580
National reports from organizations that track disciplinary actions	300
Hospitals submitting an adverse findings report	79
Other, such as information self-reported by a doctor on the license application	960
Total	2,587
Source: Kansas Board of Healing Arts complaint database.	

Agency policy is for staff to review complaints within two weeks of receipt to assess whether the Board has jurisdiction, and whether an investigation should occur.

The Board has established guidelines regarding which complaints will be investigated. The standard is, “If everything the complaint alleges is assumed to be true, when considering the licensee’s entire history with the Board, are there grounds for discipline?” Typical allegations that will be assigned for investigation include:

- self-reported issues on an application for licensure (these are sent to the legal department for investigation and review) See **Appendix C** for more information

**Figure OV-2
Board of Healing Arts' Process for Reviewing Complaints,
Investigating Them, and Ordering Corrective Action**



Source: LPA analysis of Board process.

- a complaint that is the third allegation of substandard patient care, which constitutes a “pattern” of misconduct as defined by the Board
- any allegation of gross negligence, which is defined as wanton or willful misconduct
- a single allegation of unprofessional conduct, such as sexual misconduct with a patient, chemical impairment, surrender of license in another state, or felony conviction

An administrative assistant reads all incoming complaints. If any are “emergencies,” they are flagged and priority review. The rest are passed to the attorney responsible for reviewing and screening complaints and assigning them to investigators, as needed.

In fiscal year 2006, about 350 new cases were assigned to investigators for further review and potential disciplinary action.

Complaints that are assigned for investigation are given a priority level. The Board has four priority levels as defined in *Figure OV-4* below:

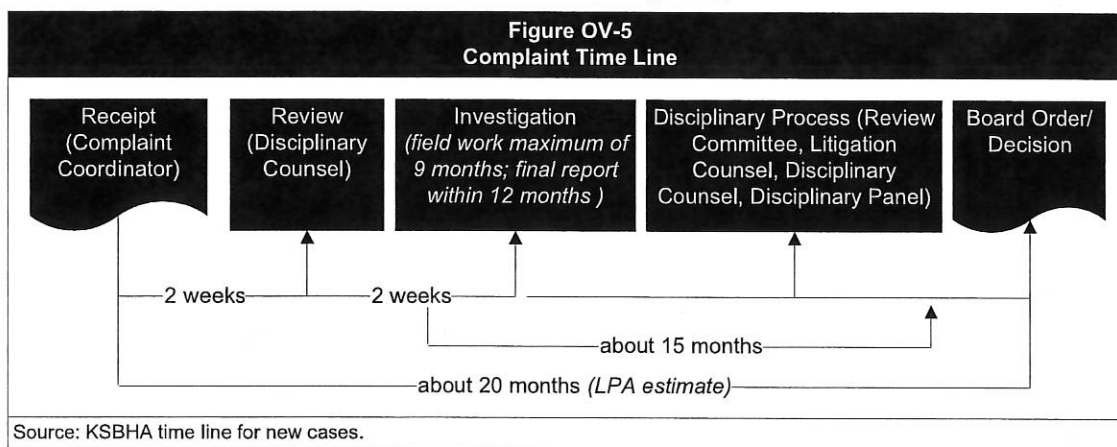
Figure OV-4 Priority Level Descriptions	
Level	Description
4	Emergency: likelihood of posing an imminent threat of harm to the patient or other person if the behavior continues, and is a violation of law; practicing without a license; felony or misdemeanor that requires immediate investigation to preserve evidence
3	Priority: serious violation of the Healing Arts Act that is likely to result in harm to a patient or other person; felony or misdemeanor that requires timely investigation
2	Important: a violation of the Healing Arts Act that could result in harm to a patient or other person; violation of a registration requirement or other law; adverse action has been taken by another authority
1	Other: Other cases
Source: Kansas Board of Healing Arts	

Complaints that don’t lead to an investigation are maintained in the licensees’ file for possible consideration in the future. Future complaints may be combined with the current complaint to establish a pattern of misconduct that would be the basis for opening an investigation.

The Board has set guidelines for how long different segments of a case should take. We reviewed these guidelines and estimate the Board’s total time line for resolving complaints to be about 20 months from the time the complaint was received to the time the case was closed by Board or staff action. *Figure OV-5* shows a case progression time line for non-emergency complaints.

The Board has a multi-step process for cases needing disciplinary action. These are described on the next page.

- **Review Committee:** The Board has separate peer review committees for each licensed profession. Committee members are volunteers, not Board members. These committees review the entire investigation file for cases involving improper care or treatment of a patient, and determine if an acceptable level of patient care was met.
- **Disciplinary Panel:** This panel, made up of 4-5 Board members, reviews patient care cases and all other cases. The Disciplinary Panel can either recommend the case be closed without further action, or recommend disciplinary action.



Board actions include suspending, limiting or revoking a license, requiring licensees to be supervised, requiring licensees to enter counseling or treatment programs and be monitored for 1-5 years, or publicly censuring or fining a licensee.

Board staff track and monitor the results of disciplinary orders, and rely on third party oversight as well. Staff have set up a system to track who was under monitoring status, fines assessed and payments received, and the like. Staff also rely on hospitals to report on doctors who practice in their facilities, and other doctors to report on their peers.

Kansas Board of Healing Arts AT A GLANCE

Authority: The Board of Healing Arts regulates 14 health care professions. The Board licenses medical, osteopathic, chiropractic, and podiatric doctors as well as physician assistants, physical therapists, occupational therapists and assistants, respiratory therapists, radiologic technologists, and athletic trainers. The Board registers naturopathic doctors and dispensers not already licensed as optometrists who mail contact lenses to patients. The Board also certifies physical therapist assistants. The medical, osteopathic, and chiropractic professions are regulated under the Healing Arts Act, Chapter 65, Article 28. The podiatry, physician assistant, physical therapy, occupational therapy, respiratory therapy, naturopathic doctor, radiologic technologist, athletic training, and contact lens prescription release acts are found under Chapter 65, Articles 20, 28a, 29, 54, 55, 72, 73, 69, and 49, respectively.

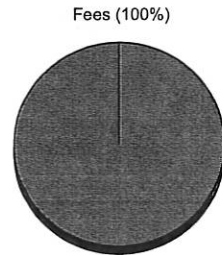
Staffing: The Board has 32 full-time-equivalent positions.

Budget: The Board is financed entirely by licensure, registration, and annual renewal fees.

FY 2006 Expenditures

<u>Type</u>	<u>Amount</u>	<u>% of Total</u>
Salary and Wages	\$1,614,231	64%
Contractual Services	\$834,878	33%
Commodities	\$41,163	2%
Capital Outlay	\$33,932	1%
Other	\$50	0%
Total Expenses:	\$2,524,254	100%

Sources for Funding for Expenditures



Total Funding: \$2,524,254

Source: *The Governor's Budget Report*, Vol. 2, FY 2003.

Question 1: Does The Board of Healing Arts Conduct Timely and Thorough Investigations of Complaints It Receives, and Take Timely and Appropriate Actions To Correct Regulatory Violations It Finds?

ANSWER IN BRIEF: *We identified best practices for a complaint-handling system and noted the Board has some elements of a good system. However, we identified significant weaknesses relating to intake and screening of complaints. These include the fact that by policy, Board staff don't investigate all allegations of substandard patient care. Further, only one staff member is assigned to review and screen complaints, and about one-third of the complaints we sampled weren't reviewed in a timely manner. We also had concerns with monitoring and timeliness of investigations conducted by Board staff. Staff don't adequately track the progress of investigations. We did note the investigations themselves appeared to be thorough and reasonable. Disciplinary decisions seemed reasonable in many closed cases, but two open cases raised questions about whether the public is being adequately protected. The facts of these two cases indicate a significant weakness of the Board's system that is intended to protect the public.*

We Identified Best Practices for a Complaint-Handling System

We identified the elements of a good complaint-handling system that are applicable to any regulatory program from a National State Auditors Association publication. These are summarized into the following general categories:

- **Receipt/Screening:** Establish a method of receiving complaints that makes it easy for the public to submit a complaint— either formally or informally. Collect enough information to take appropriate action. Screen out complaints that have no merit on their face or that the agency has no jurisdiction over. Identify those complaints needing action, and prioritize them and assign them out for investigation. Have guidelines for how quickly complaints need action and how quickly complaints should be handled. Have procedures for maintaining confidentiality. Track and oversee complaints to ensure that they are not slipping through the cracks.
- **Investigation:** Investigate complaints as needed to determine whether a problem exists and how serious it is. Have standard criteria for types of violations and how serious they are. Provide training to investigators, and require them to periodically disclose any biases they may have. Conduct investigations in a timely, efficient manner, and document the results of the investigation. Provide notice to both the complainant and the licensee about the results. Track the investigations, violations found, and results. Maintain a record for future investigators so Board staff are aware of a licensee's history.
- **Discipline/Enforcement:** Have a graduated and equitable list of sanctions that specifies the number or severity of violations that trigger each level of sanction. Have a process for appeals. Take appropriate, consistent and timely enforcement actions. Follow-up as needed.

Track and oversee enforcement actions to ensure they are being addressed. Maintain a record of enforcement actions, and ensure disciplinary action information is available to the public.

The Board's complaint-handling system has some elements of a good system. These can be summarized as follows:

- treating every adverse piece of information from any source as a complaint ensures that all types and forms of allegations are reviewed and screened
- having guidelines and statutes identify violations helps ensure that staff have a sound basis for evaluating complaints
- having guidelines for timeliness of investigation and case wrap-up helps ensure that cases progress along the process and don't stall
- having multiple levels of review helps ensure decisions are reasonable and just

Despite these, we identified a number of significant problems with specific policies and activities during the course of our fieldwork.

For our fieldwork, we reviewed::

- 30 complaints that were screened out, and not assigned for investigation
- 30 complaints that were assigned for investigation
- 3 cases that have been open more than three years

These are described in the sections that follow.

***We Identified
Significant Weaknesses
Relating to Intake and
Screening of Complaints***

These weaknesses concern decisions about which allegations to investigate, the number of staff assigned to review complaint information, and the timeliness of the complaint-screening process.

Under current policy, Board staff don't investigate all allegations of substandard patient care. Within a regulatory environment, there's a general expectation that complaints alleging violations of laws, regulations, or requirements—including substandard care or practice—would be investigated to determine whether they can be substantiated and what action, if any, needs to be taken.

However, under Board policy adopted in June, 2005 single allegations of substandard patient care normally will not be investigated. (Such allegations can include poor treatment or failure to perform necessary tests.) Under that policy, allegations of substandard patient care are not investigated until there's a historical pattern, which Board staff defines as the third complaint in three years. At that time, all three complaints are then assigned to be investigated.

The Board's staff told us that in the past all complaints of substandard patient care were investigated, but that the policy was changed in June 2005 for two primary reasons:

- the Board had too few resources to adequately investigate all the complaints it received. According to Board staff, because investigators had such large caseloads in the past, they weren't able to adequately investigate the complaints assigned to them, and they had large backlogs of unresolved cases. Opening fewer investigations was seen as a way to reduce caseloads.
- staff based their policy on the statutory requirement that says the Board can take disciplinary action against a licensee only when there are "repeated instances" or a "pattern of practice" that is substandard. According to the Board's Disciplinary Counsel, investigating only the first allegation of substandard patient care would yield no disciplinary action, even if substantiated, which would be a waste of limited investigative resources.

While it may be administratively efficient for Board staff to wait for a pattern of substandard care complaints before they investigate, that practice creates several problems. The most serious problem is that an extended delay makes it less likely complaints will be substantiated, even if they are true. That's because the more time that passes between an incident and an investigation, the greater the likelihood witnesses won't be able to be located or will have forgotten relevant information, documentation will have been discarded, and so on. In addition, because licensees normally aren't told a complaint has been filed against them until an investigation is assigned, they may be unaware of potentially problematic behavior.

Of the 30 complaints that weren't investigated, four that were "first-time" allegations of substandard patient care concerned us, as did two other complaints didn't follow normal practice.

Our sample of 60 complaints included 30 that were screened out without being assigned for investigation. Four of these cases alleged substandard patient care and were screened out because they were the first instance. These four patient cases are summarized below:

- one complaint alleged the patient felt pain during the entire colonoscopy, because her daily medications had counteracted the sedation medicine, and the doctor was aware of her daily medications
- one complaint alleged the patient went to the doctor complaining of possibly infected ears, throat and sinuses, but the doctor couldn't find the right equipment and performed no examination, nor did the doctor refer the patient elsewhere.
- one complaint alleged the patient was not told that during surgery to remove a cyst the doctor also removed a nerve
- one complaint alleged the patient underwent surgery for a double hernia, but the doctor only repaired one because she "forgot" about the other one. The second hernia was repaired the next day.

In two additional cases, the Board's decision not to open an investigation seemed contrary to its normal practice. These cases didn't allege substandard patient care, so no pattern was needed. Rather, Board staff had discretion to open an investigation on the basis of the complaint itself. These cases are summarized below:

- One complaint came from a former employee describing a chiropractor who used aggressive marketing to convince patients and their spouses that they needed services, pressured patients to pay cash, and only billed insurance using codes that insurance would pay. This new complaint is very similar to another complaint against this chiropractor that the Board investigated in 2003 involving marketing, medical records and billing issues. In that case, the Board wrote the chiropractor a letter with several recommendations.

Because this second complaint alleges very similar behavior, we think Board staff should have investigated.

- Another complaint was handwritten and wasn't legible. Staff decided to close it because the licensee had a clean history with the Board and because the alleged incident occurred three years before the complaint was made. We think staff should have tried to contact the complainant to either request a typed version of the complaint or to discuss the nature of the complaint. We saw several instances in other cases where Board staff contacted the complainant for more information, but that didn't happen here. Instead, staff failed to clarify the nature of the complaint and filed the illegible complaint in the licensee's file. Because it's illegible and staff don't know the true nature of the complaint, it can't be used in the future to establish a "pattern."

Only one staff member is assigned to review and screen complaints. We identified two risk areas by having only one person assigned to this task, as described below:

- If that staff member is on vacation or sick leave, or simply is too busy with other responsibilities, it can lead to delays in reviewing complaints or starting investigations.
- This staff person is solely responsible for deciding whether a complaint is worth investigating or not, and has a lot of discretion. No one else reviews her decisions to make sure they are reasonable.

Only about two-thirds of the complaints we sampled were reviewed and screened in a timely manner. The Board's policy is to review and screen complaints within two weeks of receipt. We reviewed 60 complaints received during December 2004 through June 2006 to see whether the Board was meeting that time frame.

The Board met its standard for only 68% of those complaints. For the 19 complaints that didn't meet the two-week standard, the median

Figure 1-1 Timeliness of Complaint Review	
Length of Time From Receipt to Initial Review of Complaint	Number (%) of Complaints Reviewed
2 weeks or less (meets agency policy)	41 (68%)
3 weeks	9 (15%)
More than 3 weeks	10 (17%)
Median number of days from receipt to initial review of complaint for those that took longer than 2 weeks	23 calendar days
Range for those that took longer than 2 weeks	15-161 calendar days
Source: LPA analysis of Board of Healing Arts complaint database and files.	

was 23 calendar days, and the range was 15-161 days. *Figure 1-1* shows the length of time taken to initially review and screen the 60 complaints in our sample.

Board staff told us that because of other duties that require immediate attention, the staff person assigned to review and screen complaints can't always get to them in a timely manner. No one else reviews complaints, so if that staff person is out, things sit. Further, complaints don't come in evenly throughout the year. During license renewal periods the Board gets a lot of "complaints," as all yes answers to disciplinary questions on the application are deemed a complaint. Further, the Health Care Stabilization Fund malpractice reports come only once a month.

We Have Concerns With Monitoring and Timeliness, But Not with Thoroughness of Investigations

Our review included 30 complaints that had been investigated and closed. All investigations had been completed by the time of our review.

Staff appear to have thoroughly investigated the complaints. In reviewing files, we noted that in all cases investigators requested necessary documents and interviewed individuals to gather relevant information. Further, both the 22 cases assigned to investigators, and the eight reviewed by legal staff in-house appeared to have sufficient documentation, which included subpoenaed papers and interview summaries. The box on the next page describes some typical investigations we reviewed.

Board staff don't adequately track the progress of investigations. Each investigation file has a form at the front to record significant dates and activities. However, these forms weren't routinely

Examples of Investigation Activities

- **Nature of Complaint:** The complainant alleged a doctor had sexually abused his girlfriend's daughter.

Investigation Activities: The investigator talked with SRS officials who were reviewing the case, interviewed several people and subpoenaed and reviewed the child's medical records.

- **Nature of Complaint:** The complaint alleged a doctor failed to disclose in his application that he was being investigated by the US Postal Inspector for pornography.

Investigation Activities: The investigator talked with the Postal Inspector several times to determine the nature of their investigation, and discuss the case progress. The investigator also had the doctor explain his failure to reveal this information on the application.

- **Nature of Complaint:** The applicant answered "yes" to five disciplinary questions on the application. As noted earlier, "yes" answers are considered a complaint. Her application disclosed that she has a history of substance abuse, and had a license restriction in another state.

Legal staff activities: Legal staff reviewed the information the applicant submitted. This included orders from the other state's board documenting their findings regarding her substance abuse, positive test results, and documenting the monitoring that state required of the applicant.

completed. In addition, they're filed in each individual licensee's file, making it difficult for a reviewer to efficiently or systematically review the status of more than one case at a time. When the Board started using a new software program in July of 2005, recording the same information electronically was mandated. Electronic controls were also put in place to ensure investigators' final reports aren't accepted unless they provide all significant dates. However, the reviewer can't know whether investigators record this information routinely and in a timely manner because she hasn't yet been able to generate electronic reports she can use to efficiently and systematically review the progress of all investigations.

Although, the supervisor conducts an annual review of all cases assigned to each investigator (as many as 80 cases), this doesn't provide timely feedback, which increases the risk of not identifying cases where progress has slowed unnecessarily, or that have been forgotten and not worked. Although the supervisor reportedly has day-to-day contact with investigators and gives them direction, without a monitoring system, it's virtually impossible to have a complete view of each case, as well as a broad view of all the cases the investigators are working.

Further, Board members only receive overall caseload information such as the number of open cases and the number of cases per investigator once a year in the budget document. This information doesn't include how old the cases are. Throughout the year, staff provide updates on particular cases or issues at Board meetings, but summary caseload data isn't covered.

All but two investigations we reviewed met the Board's timelines. The Board's timeline for investigation field work is 6-9 months, but investigators may turn in their final reports up to 12 months after the start of investigation. In our sample review, 20 of 22 investigations (91%) were completed well within the Board's 12-month timeframe, with an average timeline of five months. We measured the investigation timeliness from the date the decision was made to investigate, to the date the investigator's report was turned in. The two cases that weren't investigated on a timely basis are described below:

- One investigation took about 15 months. The complaint was a 'yes' to a disciplinary question on his license renewal form. First, legal staff received documents from a national data bank and

hospital reports about the doctor's loss of clinical privileges. Then the investigator requested patient records, risk management reports from two hospitals, and records from the doctor's psychiatrist.

- One investigation took about 23 months. The complaint wasn't initially reviewed and screened until almost two months after it was received, and the investigation didn't start until more than a year after it was assigned. The complaint alleged the doctor was seeing patients while his license was suspended. The investigator requested and reviewed the doctor's insurance claims to an out-of-State insurance company, and compared the doctor's treatment records to his billing information.

Board policies don't call for investigators to disclose potential impairments. Best practices suggest that investigators should be required to periodically disclose any actual or perceived impairments they may have in impartially carrying out their duties. This would include any conflicts of interest, relationships with the party being investigated, and the like. The Board's Executive Director agreed that such a policy was a good idea, and said he would draft such a policy for the Board's consideration.

This section discusses the results of our review of 30 completed cases, and three cases that had been open more than three years.

Disciplinary Decisions Seemed Reasonable In Many Closed Cases, But Two Open Cases Raise Questions About Whether the Public Was Being Adequately Protected

Outcomes for the 30 completed cases we reviewed seemed reasonable. We reviewed the cases to determine if the final outcome, whether or not it involved disciplinary action, seemed reasonable on its face, based on the facts available. Of the 30 closed cases, 16 were recommended for Board disciplinary action, and 14 were administratively closed by Board staff.

Figure 1-2 shows the actions taken by the Board on the 16 cases recommended for disciplinary action. In these cases, as well as the cases closed administratively by staff, the decisions and actions

seemed reasonable to us. The box on the next page describes some of the cases that received disciplinary action.

Progress halted years ago for two of three open cases we reviewed because staff failed to act. In reviewing the Board's list of 533 open cases, we noted that 75 cases (14%) had been open three or more years. We randomly selected three of these older cases to see why they remained open, and found situations

Figure 1-2 Disciplinary Actions Taken for Cases Reviewed	
Disciplinary Action (could be more than one per case)	Number of Times Taken (16 cases reviewed)
Participation in a monitoring program	8
Public censure or fine	6
Limitation on area of practice	4
Continuing education requirement	2
Revocation or suspension of license	2
No action taken	1
Source: LPA review of Kansas Board of Healing Arts investigative cases.	

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of great concern in two of them. The third case had not been administratively closed even though it was recommended for closure almost two years ago. The two cases we are concerned about are summarized below:

Case #1: The case was assigned a priority level 3 (serious violation) when it was opened in April 2002. The complaint involved the death of a patient two days after a plastic surgery operation. The complaint alleged that after one night in the hospital the patient was released to go home. At the time of her release she was still receiving oxygen and was given a prescription for pain medication. The patient died the day after being released from the hospital. The autopsy report identified the cause of death as accidental, due to a combined drug overdose.

After the investigation was complete, the case was reviewed by one of the Board's Review Committees. The Committee recommended in December 2002 that the case be further reviewed by an expert in plastic surgery to determine if the standard of care had been met. Board staff failed to follow-up on that request, no further action has been taken, and the case remains open. This doctor's license expired in June 2006.

Examples of Cases With Disciplinary Action

We reviewed the cases to determine if the action taken by the Board, be it disciplinary or closing of a case, seemed reasonable on its face, based on the facts known. Because the Board has no formal sanctioning grid or guidelines to compare to, we had to rely on a reasonable-man standard when reviewing these cases. Further, our sample didn't yield enough similar cases to compare consistency of the Board's actions from case to case. To determine if the Board's action was reasonable, we reviewed documentary evidence in the case files.

- The licensee was convicted of driving under the influence. Board staff reviewed law enforcement records from the county sheriff's office and treatment records from Addiction Specialists of Kansas. The Disciplinary Panel recommended the licensee participate in a monitoring program for two years, which was approved by the Board.
- An applicant currently licensed in another state with certain restrictions on his license disclosed to Kansas a prior suspension of that license for sexual misconduct. The Disciplinary Panel recommended the application be denied. After an administrative hearing, the Board chose to issue a license, with restrictions similar to those placed on his license by the other state. These included participating in a monitoring program and requiring a chaperone in the room when examining female patients. Although the applicant had a prior suspension, the other state license is current. The Board put similar restrictions on the applicant's Kansas license.
- A hospital report showed the licensee was terminated for falsifying the start and end times of breathing treatments administered to patients. The Disciplinary Panel recommended, and the Board approved, public censure and a \$500 fine for the licensee.
- A hospital adverse finding report showed the licensee's clinical privileges had been revoked in relation to keeping patients in the hospital despite their requests for out-patient care, and failure to honor patients' families' "do not resuscitate" orders. The Disciplinary Panel recommended the licensee enter into an agreement, the terms of which included public censure, completion of an ethics course, and a psychiatric evaluation.

Case #2: This case was assigned a priority level 4 (emergency) when it was opened in October 1998. A very detailed complaint was received from a doctor who claimed another doctor in the same hospital was performing unnecessary surgeries and that many surgeries were performed at a level below the accepted standard of care. The complaint also alleged that the hospital's review committee was dysfunctional due to local politics, and that committee had not reported any of these cases.

A thorough investigation found evidence to indicate the patient care allegations were true. A Board Review Committee concluded the standard of care wasn't met on eight patients involved in the complaint. This case was recommended for expert review in March 2001, but staff failed to follow-up on that request and no further action was taken on this case. Since March 2001 four more complaints have been received regarding this doctor and investigated. One of these resulted in a Review Committee recommendation that the standard of care was not met, and that case is also pending expert review. Our sample case remained open with no expert review for more than 5 years, during the time when Board staff were investigating other complaints on this doctor. When we asked Board staff about our sample case, they indicated that they will arrange for an expert to review the case. This licensee is currently licensed.

These two cases represent a significant weakness of the system that is intended to protect the public. We only looked at three open cases, but all three sat for years with no action. In two of the cases, the licensee retained an active license for years after an investigation showed problems. One doctor was found by a peer-review committee to have practiced below the standard of care for eight patients back in March 2001. Since that time nothing has happened on the case and the doctor remains licensed.

We can't know what would have happened if these cases had received the expert review called for – they might subsequently have been closed, or the Board might have taken action against one of the licensees. Either way, this represents a serious problem: complaints alleging substandard care were made to the Board of Healing Arts, those complaints were investigated, they were recommended for expert review, and then, instead of coming before the Board for consideration, the cases languished, while the doctors in question remained licensed.

We identified four other issues related to the Board's disciplinary process. In our review of case files and of the Board's system in general, we noted the following:

- The Board's disciplinary process has several built-in delays. Recommendations of the Disciplinary Panel are sent to the full Board, which typically meets every two months. Its meetings are normally held in the opposite months of the Disciplinary Panel, ensuring at least a one-month delay. In addition, other events could lengthen the time it

takes a case to be presented to the Board. For example, an administrative hearing may be held before the Board reviews the case, or the licensee may spend time negotiating the terms of a consent order agreement with the Disciplinary Panel.

In our sample of cases, the average length of time from Disciplinary Panel recommendation for discipline to Board action was a little more than two months, with a range of five days to seven months. The cases that took longer generally had requirements the licensee had to complete before the Board took action, such as a psychiatric evaluation or enrolling in an addiction program.

- The Board doesn't have a graduated and equitable list of sanctions nor does it specify the number and severity of violations that should trigger a sanction. These are considered to be best practices by the National State Auditor's Association for all regulatory programs. Board staff responded that they don't agree that a formal sanctioning grid is practical for all types of cases. Board members have discussed and rejected the development of a "range" of potential disciplinary measures for each violation. Rather, staff think all relevant factors should be considered in determining the sanction, including aggravating and mitigating circumstances. Board staff described their practice as "progressive discipline."
- A consumer advocacy organization ranked Kansas 31st nationally in number of serious disciplinary actions. However, the source data used for this comparison has a number of disclaimers saying how it shouldn't be used to compare one state to another, so we didn't pursue this area.
- Staff told us the Kansas Board prefers to take a remedial rather than a punitive approach when it appears that doing so best serves the public interests. They said Board members prefer to impose the least restrictive remedy necessary to protect the public. According to Board staff, this approach preserves the public's access to health care.

CONCLUSION

As part of its efforts to protect the public from incompetent or unprofessional doctors, the Board of Healing Arts responds to about 2,500 complaints against licensees each year. While it appeared the complaint investigations we reviewed were thorough and the disciplinary actions we reviewed were reasonable, we have concerns about what isn't being done. In our minds, the staff policy of not investigating complaints of substandard patient care until a pattern of those complaints is amassed, the number of cases that have been open for two or more years, and the two open cases representing potentially very serious situations raise questions about whether the public is being adequately protected.

RECOMMENDATIONS

1. To help ensure that complaints are dealt with in a timely and appropriate manner when they are received, Board management should do the following:
 - a. assign sufficient staff resources to review and screen complaints so that the agency standard of reviewing complaints within two weeks is met
 - b. periodically review a sample of the complaints screened out (not assigned for investigation) by the disciplinary counsel to ensure that those decisions were reasonable
2. To help ensure that instances of substandard patient care have the best chance of being verified and corrected, Board management should do the following:
 - a. investigate allegations of substandard patient care when they are received, rather than waiting for a pattern of such complaints to develop
 - b. notify the licensee when an investigation reveals a problem exists, even if no formal action can be taken at that time
 - c. request additional resources if current staff resources are not sufficient to handle the increased workload that would result from this change
3. To help ensure that investigations proceed in an efficient and timely manner, Board management should do the following:
 - a. move from annual review of investigation status to a quarterly review
 - b. pursue the ability to generate electronic reports to provide management a way to systematically review all investigations.
4. To help ensure that adequate and timely action is taken on all cases, and that licensees receive timely resolution of complaints against them, Board management should do the following:
 - a. develop a system to actively and regularly track the progress of all open cases
 - b. institute an immediate review of all open cases, beginning with the oldest cases, to see what action needs to be taken to appropriately resolve them.
5. To help ensure that investigators are unbiased and impartial, the Board should require them to periodically disclose any

actual or perceived impairments. This is a recognized best practice for a regulatory program's complaint investigators.

6. To help ensure that enforcement actions or discipline ordered by the Board is consistent and equitable, the Board should adopt a formal list of graduated sanctions. This should include guidance regarding the number and severity of violations that could trigger each sanction. This is a recognized best practice for regulatory programs.

Question 2: Does the Board Conduct Background Investigations That Would Enable It To Know Whether Physicians Applying for Licensure Have Had Malpractice or Negligence Problems in Other Jurisdictions Before Being Licensed in Kansas?

ANSWER IN BRIEF:

This question focuses only on the four professions considered to be “physicians” according to Board staff: medical doctors, chiropractors, podiatrists and osteopaths. The Board obtains generally thorough background information from all applicants, and independently verifies much of that information for medical doctors and osteopaths, although it only recently began to collect national data on malpractice payments. Board staff don’t verify all they could for chiropractors, and have chosen not to obtain national malpractice reports for chiropractors and podiatrists.

Finally, the Board isn’t authorized to conduct FBI criminal history checks, which is the only way to obtain criminal history data for out-of-State applicants. For the applicant files we reviewed, the Board followed its process for checking backgrounds, and made reasonable decisions on licensing out-of-State applicants. In the last three years, the Board has licensed only one doctor whose license had been revoked in another state. That state had set aside the revocation and instead put the doctor on probation about two years before the doctor applied to Kansas, and the Board knew of all this when granting a Kansas license.

Although It Has No Formal Policies and Procedures for Doing So, The Board Obtains Generally Adequate Background Information About Most Out-of-State Applicants

This question is focused on background investigations for out-of-State applicants, however the practices the Board follows are the same regardless of where the applicant is from. Typically, Kansas’s applying for a license will be new doctors, while out-of-State applicants might be either new or experienced doctors.

The Federation of State Medical Boards has identified recommended practices for conducting background checks for medical licensure. We concluded that following these practices should identify significant problems with malpractice, negligence, or other areas of concern during the application process. According to those recommendations:

the applicant should:

- provide a list of other jurisdictions where he or she has been licensed
- identify any jurisdictions where he or she has been denied or surrendered a license
- report all sanctions, judgments, awards, and convictions
- be physically and mentally capable
- not have been found guilty of conduct that would be grounds for disciplinary action
- pass a criminal background check

the medical licensure board should:

- verify the applicants' credentials with national and professional databases and other 3rd party sources

The Board has no written policies or procedures for conducting background investigations. This is a problem because written procedures and assignment of duties help reduce errors, misunderstandings, omitted procedures, duplicative efforts, and the like. Written policies and procedures also help ensure that all applicants are treated consistently, and that records are properly maintained.

Board licensing clerks have a checklist showing all the items that must be received for an application to be complete (such as transcripts, reports from the appropriate professional association and from all states where the doctor has previously been licensed, and documentation of disciplinary issues), but there is no written guidance on what to do with this information, how to interpret it, when it must be passed to the supervisor or Executive Director for review, and so on.

In practice, the Board requests appropriate information from applicants, but doesn't verify as much of that information as it could. The information requested directly from applicants is consistent with the information suggested by the Federation of State Medical Boards, with the exception of passing a criminal background check. For example, the Board asks applicants to provide a list of other jurisdictions where they have been licensed, to identify any jurisdictions where they have been denied or surrendered a license, and to report all sanctions, judgments, awards, and convictions.

As *Figure 2-1* shows, the Board independently verifies a great deal of the information provided by medical and osteopathic doctors, but verifies far less of the information provided by chiropractors and podiatrists. We found that information on chiropractors is readily available from the Federation of Chiropractic Licensing Boards, which has an "Official Actions Database" with information about education, states of licensure, board actions, and federal sanctions. Board staff told us they were aware this database was being developed, but were not aware it was available for use.

In addition, the Board has not made it a priority to verify malpractice payments made on behalf of applicants. Although the National Practitioner Databank has compiled this information for medical doctors and osteopaths for 16 years, the Board only

**Figure 2-1
Information Checked by the Board of Healing Arts
For Physicians Applying for a License in Kansas**

Type of Information Reviewed:	Medical Doctors	Osteopaths	Chiropractors	Podiatrists
American Medical Association / American Osteopathic Association / American Podiatric Medicine Association reports showing:				
Education	X	X		X
States of Licensure	X	X		n/a
Federal Sanctions	X	X		n/a
Federation of State Medical Boards' / Federation of Podiatric Medicine Boards' Disciplinary Data	X	X		X
Reports received directly from other state licensing agencies verifying license status and discipline	X	X	X	X
Self-reported responses by the applicant to 21 disciplinary questions on the application	X	X	X	X
National databases of malpractice reports (The Board just began doing this in June)	X	X		
n/a - not included in Association report Source: Board staff and LPA review of the above listed documents				

began to request it in June 2006 because staff think it may now have sufficient information. Board staff have chosen not to pursue similar information for chiropractors and podiatrists from another databank which has been in existence for nine years. Staff said they have accessed the information on an ad hoc basis for legal purposes, but found the information is not always reliable, and not all applicants are in the database.

Although criminal background checks are a recommended practice, the Board currently can't conduct FBI checks, and it doesn't conduct KBI checks on applicants. According to the Federation of State Medical Boards, 27 state medical boards are authorized to conduct criminal background checks – 19 can check federal and state criminal records, while eight can check only state criminal records. Kansas is one of the eight states that has statutory authority to conduct State-level criminal background checks. However, the Board doesn't have the authority to collect fingerprints, which the FBI must have to conduct a national background search.

Agency officials said they don't run a KBI check on applicants because it seems unfair to conduct a criminal background checks on applicants who are Kansans, when they can't conduct a similarly focused check on applicants from another state. While it may be preferable to have thorough criminal background checks on all applicants, the inability to do so doesn't seem like a good reason not to conduct the criminal background checks authorized by statute.

The Board has pursued authorization for fingerprints; for example, it requested introduction of a bill in 2006 allowing it to require applicants to be fingerprinted, which would have made FBI background searches possible. That bill did not pass. Even within the Board, there are differences of opinion on fingerprinting. A Board committee reviewing the issue cited a number of arguments against criminal background checks, including cost, delays in the application process, expectation of few positive results, and the likelihood that health care providers might perceive being fingerprinted as demeaning.

Staff Followed Agency Practices for Background Checks, and Given the Available Information, Made Reasonable Recommendations For Licensing Out-of-State Applicants

We reviewed the Board’s background checks for a sample of 44 out-of-State doctors who applied for a license in Kansas between December 2004 and June 2006. For each applicant we reviewed files and found the following:

- the Board’s checklist for background review had been completed, and all required documentation, including reports from other states where the applicant had been licensed, had been received
- all “yes” answers to disciplinary questions on the application (which indicate some type of past problem) were appropriately pursued by staff, and the subsequent decision on whether to recommend the applicant for licensure appeared to be reasonable. **Appendix C** contains the full list of 21 disciplinary questions.

Although about one-third of applicants reported some type of past disciplinary issue, it appeared to us that Board staff reviewed sufficient information and were justified in recommending licensure. Fifteen of the 44 applicants we reviewed (34%) answered yes to one or more disciplinary questions, and their applications were further evaluated by Board staff. The questions they most frequently answered “yes” to include:

# of “yes” Responses	Question
9	Have you ever been a defendant in a legal action involving professional liability (Malpractice) or had a professional liability claim paid in your behalf or paid such a claim yourself?
4	Have you ever been arrested, fined, charged with or convicted of a crime, indicted, imprisoned or placed on probation?

Positive responses to these questions could indicate problems that might cause the Board to deny or limit a license, but our review showed that the actual behavior documented didn’t rise to that level, and often wasn’t related to medical knowledge or experience. Some of the events reported include:

- an arrest for shoplifting 35 years before the application
- indecent exposure (a college prank)
- a cattle-branding offense
- failure to appear for an auto emission offense
- the clinic where the doctor was a resident was a defendant in a lawsuit. The plaintiff received \$2.4 million.
- the doctor was a defendant in a lawsuit involving a medication error resulting in the patient's death. The lawsuit was dismissed with prejudice, which means it can't be re-filed.
- the doctor was involved in four malpractice cases. One was dismissed and three were withdrawn.

There's no way the Board can ensure it's aware of all adverse information that might be available about an applicant. The Board asks applicants to self-report negative incidents through a variety of questions on the application form. But it has no assurance that all incidents have been reported. If the behavior resulted in a medical licensing board in another state taking disciplinary action, or in a malpractice award to a plaintiff, that information will have been independently reported to the Board of Healing Arts. However, the Board has no way to know if applicants have fully disclosed behaviors that didn't result in official action against a license, or arrests and convictions in other states. Within the limits of a reasonable background investigation, licensing agencies must focus on information that's already collected, compiled, or readily available.

In the last three years, the Board has licensed only one medical doctor whose license had been revoked by another state. One of the concerns behind this audit was whether the Board was licensing doctors whose license had been revoked elsewhere, either knowingly or because they hadn't identified the revocation.

We asked the Federation of State Medical Boards, a national not-for-profit organization which maintains a physician data center, including disciplinary histories, to run the list of doctors licensed in Kansas since June 2003 against their database. The Federation has data only on medical doctors and osteopaths. Although we have no way to verify the accuracy of this data, we reviewed the Federation's methodology and it seemed sound.

The Federation identified one doctor licensed in Kansas since June 2003 who had a license previously revoked by another state. Because of alcoholism, this doctor had surrendered his medical license in Colorado in 1993, which automatically caused a review of his license status in New York. Officials there chose to revoke his license in 1993. The doctor then participated in the Monitored Treatment Program in New Mexico from 1993 to 1999 with restrictions on his New Mexico license. He completed the program, and those

restrictions were removed in 1999, making his New Mexico license fully active. The State of Maryland licensed him in 2000. The State of New York set aside the revocation in January 2002 but put him on a 3-year probation with restrictions on his license. The doctor applied for a license in Kansas in October 2003.

The application file showed that Board staff in Kansas were aware of the previous New York revocation – the doctor self-reported it, and the Federation report of the doctor’s disciplinary history also identified the revocation. Staff recommended the application be approved because the alcoholism issues had been addressed, and the doctor subsequently had been practicing in New Mexico for almost 10 years with no reported problems with alcohol. The Kansas application was approved in April 2004.

CONCLUSION

Although the Board conducts thorough background checks of medical and osteopathic doctors who have been licensed in another state before applying to Kansas, the Board could do more to check and verify information about chiropractors and podiatrists. The application requirements include proof of residency completion, answers to a series of professional conduct questions, and verifications from other states and organizations detailing issues the doctor has had in the past. Based on the application requirements, the Board should know all past actions taken against a doctor by a licensing authority, and any malpractice claims made against a doctor. In the last three years, only one doctor who was previously revoked by another state subsequently applied to Kansas. The Board can’t be positive of an applicant’s criminal history because it doesn’t have the authority to do FBI criminal background checks.

RECOMMENDATIONS

1. To ensure that the Board has all recommended information pertaining to applicants coming from other states– both professional and personal– Board staff should re-introduce a bill this session which would require applicants to be fingerprinted at a law-enforcement center, and allow the Board to submit those prints to the KBI and FBI for a background check.
2. The Board should continue to pursue readily available information on podiatrists and chiropractors applying for licensure in Kansas.
3. To ensure that all applicants are treated consistently, that records are maintained properly, and that errors and duplicative efforts are reduced, the Board should develop written policies and procedures for conducting background investigations of both in-State and out-of-State applicants.

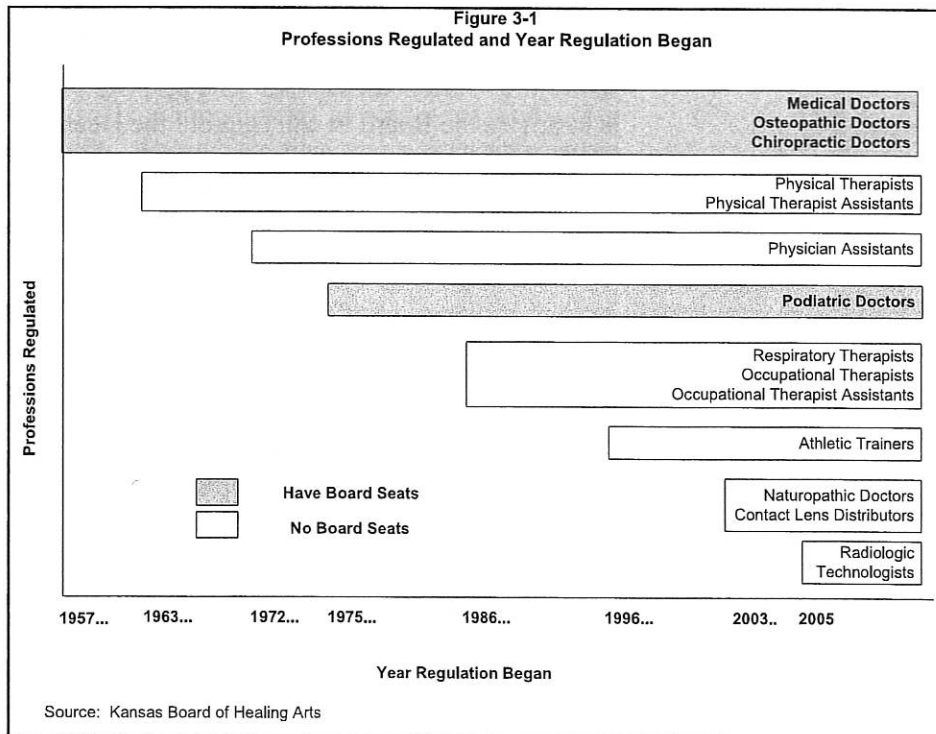
Question 3: Does the Board's Composition Give Fair Representation To All Healing Arts Practices, and If Not, What Could Be Done To Address any Deficiencies?

ANSWER IN BRIEF: *The Board's composition hasn't changed in 20 years, even though many allied health professions have come under its regulatory authority since then. Ten of the 14 professions it regulates don't have a seat on the Board; all but one of these professions have an advisory council. Professionals not represented on the Board have mixed views about the fairness of the Board's composition. We looked at other states for options on how to set up the Board. While we saw no patterns as to which professions were regulated, the number of professions regulated, or the number of members on a board, board make-up typically was limited to doctors and the public. Possible options include breaking into one or more smaller boards or proportional representation, but any changes would require a change in State law. These and other findings are described in the sections that follow.*

The Board's Composition Hasn't Changed in 20 Years, Though Many Allied Health Professions Have Been Added To Its Regulatory Authority

Created by statute in 1957, the Board originally consisted of 11 members—5 medical doctors, 3 chiropractic doctors, and 3 osteopathic doctors. Since then, four positions have been added—a podiatric doctor and three public members.

The structure has been in place since 1986. Seven additional professions, mainly in allied health fields, have come under the Board's regulatory authority since then. **Figure 3-1** shows when the Board began licensing various professions.



Ten of the 14 regulated health-care professions don't have a seat on the Board. All non-public-member Board seats are assigned to doctors. These professions account for about 55% of all licensees. *Figure 3-2* shows the percent of total licenses held by each profession.

Figure 3-2
Board Composition Compared with Percentage of Total Licensees
2006

Profession	Number of Licensees	# of Board Seats	% of Total Licenses	% of Non-Public Board Seats
Medical Doctors	9,424	5	45%	42%
Radiologic Technologists	2,559		12%	
Physical Therapists	1,798		9%	
Respiratory Therapists	1,510		7%	
Occupational Therapists	1,150		6%	
Chiropractic Doctors	1,041	3	5%	25%
Physical Therapist Assistants	1,012		5%	
Osteopathic Doctors	899	3	4%	25%
Physician Assistants	683		3%	
Occupational Therapist Assistants	308		2%	
Athletic Trainers	286		1%	
Podiatric Doctors	134	1	1%	8%
Naturopathic Doctors	17		<1%	
Contact Lens Distributors	4		<1%	
Total	20,825	12	100%	100%

Source: Board of Healing Arts

State law created advisory councils for 9 of the 10 professions without a seat on the Board. The purpose of these advisory councils is to advise the Board in carrying out the Healing Arts Act. Not all professions have a seat on these councils. Physical therapist assistants and occupational therapist assistants have no seat on the physical therapy or occupational therapy councils. Further, contact lens distributors don't have an advisory council.

State law also provides for peer review committees to review complaints alleging violations of the standard of care in a profession. For professions without Board seats, the advisory council acts as the peer review committee. Professions with board seats also have their own review committees for complaints involving the standard of care provided.

Opinions About the Board's Current Composition Are Mixed

We interviewed all current Board members, as well as officials from each association representing a profession without a Board seat, to get their opinions on the following topics:

- the fairness of the composition of the Board
- the adequacy of representation for all professions regulated
- suggestions for improving representation of the professions

Current Board members generally are satisfied with the Board's composition. All 15 members thought the Board effectively represented all the professions regulated. Members said they thought the advisory councils were effective and valuable to the Board, and that Board addressed the interests of all licensees.

Only a few of the current Board members had suggestions for changing the Board's structure, as follows:

- **Continue to limit Board seats to doctors, but make them in proportion to the number of licensees.** This would increase the number of medical doctors and decrease the number of chiropractors, osteopaths, and podiatrists on the Board.
- **Create and rotate an "allied health" Board seat between a number of professions,** such as respiratory therapists, physical therapists, and occupational therapists.
- **Create a separate board for each profession.**

Many professions without a seat on the Board think the Board doesn't adequately address their issues. Officials of the State-level associations representing these professions generally agreed that advisory councils are effective and meet the purpose they were created for—advising the Board. However, representatives from six of the nine professions said their interests weren't being adequately addressed by the Board.

Seven of the nine professions made suggestions for changing the Board, including:

- **Create an additional board for one or two of the allied health professions**
- **Create a seat on the Board for each profession licensed.**
- **Appoint Board members who are open to the idea of alternative medicine.**

***Other States' Setups
For Medical Licensure
Boards Vary Greatly***

We looked at the medical regulatory boards in nearby states to see if they had responsibility for as many professions as the Kansas Board of Healing Arts, and the number of regulated professions that had seats on the board. We also obtained this information from the Federation of State Medical Boards, a national not-for-profit organization representing 70 medical boards.

While we saw no real pattern as to which professions are regulated, the number of professions regulated, or the number of members on a board, board make-up in other states typically was limited to doctors and the public. Of Kansas' five neighboring states, only Missouri and Oklahoma had a similar number of regulated professions as Kansas, but they don't regulate the same professions. There also was no clear pattern to the grouping of professions under the medical boards. The list below shows the variety of professions that are regulated by one or more medical licensing boards across the nation.

Professions Regulated by State Medical Boards	
Across the states, a great variety of professions are regulated by the medical boards that also licenses medical doctors:	
Acupuncturist	Naturopath *
Allopathic physician (MD)	Nurse anesthetist
Anesthetist assistant	Nurse midwife
Athletic trainer *	Nutritionist
Audiologist	Occupational therapist *
Biological lab director	Occupational therapist assistant *
Cardiovascular invasive specialist	Optometrist
Chiropractor *	Osteopathic Physician (DO) *
Clinical perfusionist	Physical therapist *
Cosmetic therapist	Physical therapist assistant *
Dental hygienist	Physician assistant *
Dietician	Perfusionist
Electrologist	Podiatrist *
Emergency Medical Technician	Registered nurse
Hearing aid dispenser	Radiologic technologist *
Massage therapist	Radiological technician limited
Medical residents *	Respiratory therapist *
Medical physicist	Speech language pathologist
Medical assistant	Speech language pathologist assistant
Mobile intensive care	Surgical assistant
* Licensed by the Kansas Board of Healing Arts	
Source: Federation of State Medical Boards	

No matter which—or how many—professions the neighboring states regulated, all five limited membership on the board to doctors (medical doctors, osteopathic doctors, chiropractic doctors, or podiatric doctors) and representatives of the public. *Figure 3-3* summarizes information about the boards in those states.

Figure 3-3 Comparison of Neighboring States' Medical Regulatory Boards				
State	Number of Professions Regulated	Number of Licensees Regulated	Professions Represented on the Board	% of Licensees that Professions with Board Seats Account For
Kansas	14	20,825	4	55%
Oklahoma	13	15,985	1	52%
Missouri	12	30,438	2	68%
Nebraska	4	7,452	2	91%
Colorado	3	18,845	2	91%
Iowa	3	9,908	2	99%
Source: LPA review of medical regulatory boards from other states.				

The 14 professions regulated by Kansas' Board of Healing Arts are overseen by many different boards in the surrounding states.

For example, in both Nebraska and Iowa, regulation of these 14 professions is spread among eight different boards. Other examples of differences:

- all the nearby states have stand-alone boards for both chiropractors and podiatrists, and three of the five have a stand-alone board for physical therapists
- not all professions regulated in Kansas are regulated in the other states (typically radiologic technologists, and naturopathic doctors)
- some nearby states regulate other professions under the Healing Arts umbrella, such as dieticians, acupuncturists, and speech language pathologists

Appendix B shows the 14 professions regulated by Kansas' Board of Healing Arts and whether they are regulated in other states, and if so, by what oversight board.

For most other regulated professions in Kansas, State law has provided for direct representation on the regulatory board.

Some regulated professions (including accountants, barbers, hearing aid dispensers, and optometrists) have stand-alone boards, which typically are made up of members of the regulated profession and the public.

But many other professions are licensed by multi-profession boards that provide a board seat for most, if not all, of the professions. This information is summarized in *Figure 3-4* on the next page.

Options for increasing representation of the professions regulated by the Board of Healing Arts include broadening membership on the current Board and creating one or more additional boards. Those options, which would require statutory changes, are discussed below:

Broadening membership of the existing Board. Adding seats to the Board for non-doctor professions, or changing the mix of existing board seats, would allow for an increase in representation of the professions regulated. Some ways this might be done:

- allowing one seat for each profession regulated
- adding seats to the current Board for each of the other professions
- adding an "allied health" seat that would be rotated through the professions
- making Board membership proportional to the number of licensees regulated

**Figure 3-4
Membership of Other Regulatory Boards in Kansas**

Board	Professions Regulated	Professional Board Membership
Behavioral Sciences Regulatory Board	psychologists social workers professional counselors marriage and family therapists alcohol & drug abuse counselors	3 psychologists 2 social workers 1 professional counselor 1 marriage & family therapist
Board of Cosmetology	Practitioners in: cosmetology nail technology esthetics electrology tattoo body piercing cosmetology instruction	3 cosmetologists 1 tattoo artist OR body piercer 1 owner of a training facility 1 owner of a licensed school
Board of Nursing	registered nurses practical nurses mental health technicians advance registered nurse practitioners nurse anesthetists	6 registered nurses 2 licensed practical nurses 1 mental health technician
Board of Technical Professions	engineers architects land surveyors geologists landscape architects	4 engineers 3 architects 2 land surveyors 1 geologist 1 landscape architect
Dental Board	dentists dental hygienists	6 dentists 2 dental hygienists
Source: Governor's Budget Report, Fiscal Year 2007		

However, these actions could create an excessively large Board. They also wouldn't be consistent with national patterns for medical boards—most of the 70 boards that regulate medical or osteopathic doctors don't have anyone other than doctors and members of the public on their boards.

Creating one or more additional boards. One possibility would be to create an Allied Health Board, which could encompass most of the professions that don't have a seat on the Healing Arts Board. Alternatively, some of the professions with large numbers of members and strong professional standards might be better served by their own boards. Potential disadvantages or concerns that would need to be addressed if one or more new boards were created:

- the cost of operating additional boards
- possible increases in licensing fees needed to maintain an adequate and responsive board
- determination of board membership and structure

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CONCLUSION

It appears to us that licensed professions regulated by the Board of Healing Arts don't have equal or proportional representation—many professions have no seat, podiatrists have a seat but have relatively few licensees, other licensees number in the thousands but don't have a seat. However, the current setup also attempts to alleviate any unfairness by having advisory councils and review committees for all professions. There are other ways to structure the Board and the professions it regulates, but our review showed there is no set standard for board composition and regulation. The Board of Healing Arts is unique among multi-profession boards in Kansas in that a majority of the professions it regulates don't have a seat on the Board. Three professions have been placed under the Board's regulation since 2003, and with the growth in medical services it's possible more professions will come under State regulation in the future. As a result, the Legislature will need to consider how best to provide oversight with representation for all professions the Board regulates.

RECOMMENDATION

1. The Legislative Post Audit Committee or another interested legislator or legislative committee should request that the issue of how best to provide oversight with representation for all professions the Board regulates be studied during the 2007 interim session.

APPENDIX A Scope Statement

This appendix contains the scope statement approved by the Legislative Post Audit Committee for this audit on January 30, 2006. The audit was requested by the House Health and Human Services Committee.

Board of Healing Arts: Reviewing Issues Related to Complaint Investigations, Background Investigations, and Composition of the Board

The role of the Board of Healing Arts is to protect the public by ensuring that only those people who meet and maintain certain qualifications, competency levels, and standards of professional conduct are allowed to engage in the health care professions it regulates. The Board licenses medical doctors, osteopaths, chiropractors, podiatrists, occupational therapists, physical therapists, naturopathic doctors, respiratory therapists, physician assistants, athletic trainers, and people not already licensed as an optometrist who dispense contact lenses to patients. The Board also certifies physical therapist assistants.

The Board consists of 15 members appointed by the Governor – 3 members of the public and 12 doctors from various specialties. The Board may censure a practitioner or revoke, suspend, or limit a license or registration if it finds the individual is engaged in improper conduct.

The Board is financed entirely by examination, licensure, registration, and annual renewal fees. During fiscal year 2003, the Board had a budget of just over \$2 million and 30 full-time-equivalent staff positions.

Recently, legislators have heard concerns about the Board's complaint investigation process not being timely and thorough, and about the Board taking insufficient follow-up action to ensure that complaints are addressed. Legislators also have expressed an interest in knowing whether the background checks the Board conducts prior to granting physicians a license to practice in Kansas are sufficient to protect the public from physicians who may have had malpractice or negligence problems in other jurisdictions. A performance audit of this topic would answer the following questions:

- 1. Does the Board of Healing Arts do timely and thorough investigations of complaints it receives, and take timely and appropriate actions to correct regulatory violations it finds?** To answer this question, we would interview officials from the Board of Healing Arts and review any written policies and procedures to determine what processes they follow for recording, investigating, and following up on complaints. We would compare those processes to best practices for complaint handling and investigation systems. For a sample of complaints the Board has received, we would review documentation to determine whether the complaint was recorded, investigated and followed-up in accordance with the Board's established procedures. We would look at the number of complaint investigations that the Board has open and how long they have been open. For any investigations that have been open for a long time we would determine why. We would review the statutes to

determine what remedies the Board has available to sanction those who violate the laws and the Board's regulations. We would compare the sanctions available in Kansas to those used in a sample of other states, and look for any national organizations for medical regulatory boards that might be able to provide information about good regulatory practice, and how the various states compare. For the cases in our sample, we would assess whether the actions the Board took to address the problem cited in the complaint appeared to be reasonable and adequate. We would conduct additional work in this area as needed.

2. **Does the Board of Healing Arts conduct background investigations that would enable it to know whether physicians applying for licensure have had malpractice or negligence problems in other jurisdictions before being licensed in Kansas?** To answer this question, we would interview Board officials and review written policies and procedures to determine what the Board does to check the background of physicians applying to practice in Kansas. Through a review of literature and discussions with people in Kansas and other states, we would determine what databases or other resources are available to medical licensing boards to check the backgrounds of physicians applying for a license to practice. We would assess the extent to which the Board of Healing Arts makes use of those types of databases or resources. For a sample of licensees, we would review documentation to determine whether background checks were conducted as called for by the Board's procedures. Through a review of complaints or other sources of information at the Board, we would attempt to determine how often Kansas may have licensed a physician who may have lost a license in another state because of malpractice or negligence. We would conduct additional work as needed.
3. **Does the composition of the Board give fair representation to all healing arts practices, and if not, what could be done to address any deficiencies?** To answer this question, we would determine whether the statutory composition of the Board provides representation for all professions it licenses. In addition, we would interview current Board members and review any practices to determine how they ensure that the views and interests of all professions are adequately represented in Board policy. For any professions that aren't specifically represented on the Board we would contact representatives from that profession to determine whether they think they are adequately represented by the current Board structure. Also we would contact a sample of other states and compare the composition of their boards to the composition of the Kansas Board of Healing Arts.

Estimated time to complete: 9-11 weeks

APPENDIX B

Professions Regulated by Kansas and Other State Medical Boards

During this audit, we compared the 14 professions regulated by the Kansas Board of Healing Arts with the number and types of professions regulated by the state medical boards in five surrounding states. This appendix provides information on that comparison analysis. The table on the next page shows the following:

- under which regulatory board those 14 professions are regulated in Colorado, Iowa, Missouri, Nebraska and Oklahoma
- which of the 14 professions aren't regulated in those other states
- other professions regulated by those states' medical licensing board

2-49

Appendix B
Professions Regulated By Kansas and Other State Medical Boards ^(a)

Profession	Kansas	Colorado	Iowa	Missouri	Nebraska	Oklahoma
Medical Doctors	medical board	medical board	medical board	medical board	medical board	medical board
Osteopathic Doctors	medical board	medical board	medical board	medical board	medical board	osteopathic board
Chiropractic Doctors	medical board	chiropractic board	chiropractic board	chiropractic board	chiropractic board	chiropractic board
Podiatric Doctors	medical board	podiatry board	podiatry board	podiatry board	podiatry board	podiatry board
Physician Assistants	medical board	medical board	physician assistant board	medical board	medical board	medical board
Respiratory Therapists	medical board	office of respiratory therapy licensure	respiratory care board	respiratory care board	respiratory care board	medical board
Occupational Therapists	medical board	<i>not regulated</i>	physical and occupational therapy board	occupational therapy board	occupational therapy board	medical board
Occupational Therapist Assistants	medical board	<i>not regulated</i>	physical and occupational therapy board	occupational therapy board	occupational therapy board	medical board
Physical Therapists	medical board	physical therapy licensure office	physical and occupational therapy board	medical board	physical therapy board	medical board
Physical Therapist Assistants	medical board	physical therapy licensure office	physical and occupational therapy board	medical board	physical therapy board	medical board
Athletic Trainers	medical board	<i>not regulated</i>	athletic training board	medical board	athletic training board	medical board
Radiologic Technologists	medical board	<i>not regulated</i>	radiologic health board	<i>not regulated</i>	radiologic board	<i>not regulated</i>
Naturopathic Doctors	medical board	<i>not regulated</i>	<i>not regulated</i>	<i>not regulated</i>	<i>not regulated</i>	<i>not regulated</i>
Contact Lens Distributors	medical board	<i>not regulated</i>	<i>not regulated</i>	<i>not regulated</i>	<i>not regulated</i>	<i>not regulated</i>

(a) Medical boards in the other listed states also regulate the following professions: acupuncturists, speech language pathologists and assistants, audiologists and assistants, perfusionists, anesthetist assistants, dieticians, electrologists, orthotists, prosthetists, and pedorthists.
Source: LPA analysis of state medical boards.

2-49

APPENDIX C

21 Disciplinary Questions Asked on Application for Licensure For Medical Doctors, Osteopaths, Chiropractors and Podiatrists

The Board of Healing Arts asks 21 Yes/No disciplinary questions on the application for the above listed professions. Documentation must be provided for all yes answers. The questions are as follows:

1. Have you ever been rejected for membership or notified by or requested to appear before any medical, osteopathic or chiropractic society?
2. Have you ever been denied the privilege of taking an examination administered by a licensing agency?
3. Have you ever been denied a license to practice the healing arts or other health care profession?
4. Have you ever been denied staff membership with any licensed hospital, nursing home, clinic or other hospital care facility?
5. Have you ever been warned, censured, disciplined, had admissions monitored, had privileges limited, had privileges suspended, been put on probation, or ever been requested to withdraw from any licensed hospital, nursing home, clinic or other hospital care facility in which you have trained, been a staff member, been a partner or held hospital privileges?
6. Have you ever been requested to resign, withdraw or otherwise terminate your position with a partnership, professional association, corporation, or other practice organization, either public or private?
7. Have you ever, for any reason, lost American Board certification?
8. Has any licensing disciplinary agency limited, restricted, suspended, or revoked a license you have held?
9. Have you ever voluntarily surrendered a license issued to you by a licensing or disciplinary agency?
10. Have you ever been notified or requested to appear before any licensing or disciplinary agency?
11. Have you ever been notified of any charges or complaints filed against you by any licensing or disciplinary agency?
12. Within the last 2 years have you used any alcohol, narcotic, barbiturate, other drug affecting the central nervous system, or other drug which may cause physical or psychological dependence, either to which you were addicted or upon which you were dependent?
13. Within the last 2 years have you been diagnosed or treated for any physical, emotional or mental illness or disease, including drug addiction or alcohol dependency, which limited your ability to practice the healing arts with reasonable skill and safety?
14. Within the last 2 years have you used controlled substances which were obtained illegally or which were not obtained pursuant to a valid prescription order or which were not taken following the direction of a licensed health care provider?
15. Have you ever engaged in the practice of the healing arts while any physical or mental disability, loss of motor skill or use of drugs or alcohol, impaired your ability to practice with reasonable skill and safety?
16. have you ever been denied a Drug Enforcement Administration (DEA) or state bureau of narcotics or controlled substances registration certificate or been called before or warned by any such agency or other lawful authority concerned with controlled substances?
17. Have you ever surrendered your state or federal controlled substances registration or had it restricted in any way?
18. have you ever been arrested, fined, charged with or convicted of a crime, indicted, imprisoned or placed on probation?
19. have you ever been a defendant in a legal action involving professional liability (Malpractice) or had a professional liability claim paid in your behalf or paid such a claim yourself?
20. have you ever been denied provider participation in any State Medicaid or Federal Medicare Programs?
21. Have you ever [been] terminated, sanctioned, penalized, or had to repay money to any State Medicaid or Federal Medicare Program?

APPENDIX D

Agency Response

On September 26th, we provided copies of the draft audit report to the Executive Director and President of the Board of Healing Arts. Their combined response is included as this Appendix.

During the draft review period, the Executive Director and staff pointed out a number of minor errors in the draft report related to the time taken to initially review and screen complaints, and our analysis of some cases. They also objected to comparisons we made between the Board and other health regulatory agencies, and with other states. We corrected the errors in the final report, and agreed that the comparisons were not very relevant. The changes we made had no effect on our findings or conclusions.

The agency concurred with many of the report's findings and recommendations. However, the agency disagreed with some recommendations, including those relating to investigating all complaints alleging substandard patient care and having a graduated list of sanctions for violators.

KANSAS BOARD OF HEALING ARTS

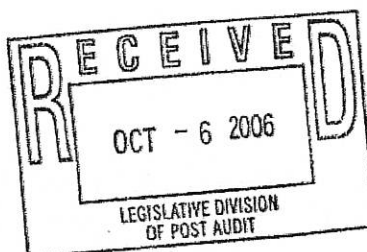
LAWRENCE T. BUENING, JR.
EXECUTIVE DIRECTOR



KATHLEEN SEBELIUS
GOVERNOR

October 6, 2006

Barbara J. Hinton, Legislative Post Auditor
Mercantile Bank Tower
800 SW Jackson St., Suite 1200
Topeka, KS 66612-2212



Dear Ms. Hinton:

This is the Board's response to the draft copy of the completed performance audit, *Board of Healing Arts: Reviewing Issues Related to Complaint Investigations, Background Investigations, and Composition of the Board* (referred to herein as "Report"). We received the first draft with your letter of September 26. We appreciate you allowing us a few additional days to prepare the response following receipt of the second draft on October 3.

The last regular meeting of the Board was held August 12 and its next meeting is scheduled for October 21. In your September 26 letter, you noted the required confidentiality of the report and indicated there may be concerns if the report was shared with all members of the Board prior to the Legislative Post Audit Committee meeting scheduled for October 17. Therefore, the responses contained in this letter are limited to the comments of staff and the review of those comments by the Board President earlier today. It will not be possible to fully respond to what actions the Board as a whole may implement and the manner of implementation in response to all of the recommendations contained in the audit report until the entire Board has had an opportunity to review and act on the Report.

We do not agree with all of the statements and conclusions contained in the Report and believe there should have been some further clarifications in certain areas. An example of further clarification that would have been helpful is the sentence on page three that the "Board has no oversight or regulatory authority over clinics...". While the Board does not regulate healthcare facilities, it does have jurisdiction over the individuals who provide services at clinics. Further, K.A.R. 100-25-2 became effective March 12, 2006 and sets forth standards for cleanliness and sanitation at every office where the healing

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arts is practiced. An example where we totally disagree is the references throughout the Report that there is a weakness in the fact that the Board staff does not investigate all allegations of substandard patient care. Rather than address each statement with which we disagree or believe further clarification is appropriate, we will discuss these in our responses to each of the recommendations.

Responses to Question 1 Recommendations. (Pages 19 and 20).

1. To help ensure that complaints are dealt with in a timely and appropriate manner when they are received, Board management should do the following:

a. assign sufficient staff resources to review and screen complaints so that the agency standard of reviewing complaints within two weeks is met.

We concur with the recommendation that sufficient staff should be assigned to review and screen complaints so that our goal of reviewing non-emergency complaints within two weeks of receipt is met. However, we also believe that further clarification is required to fully understand the current process. K.S.A. 65-2840a provides that the Board appoint a Disciplinary Counsel who has the "power and the duty" to investigate complaints. All complaints (by mail, telephone, or e-mail) are first screened by the Complaint Coordinator who is a Legal Assistant to the Disciplinary Counsel. At the time of this initial review, the complaint is scanned and becomes immediately available in the data base. Complaints that allege a potential emergency are immediately brought to the attention of the Disciplinary Counsel. In the absence of the Complaint Coordinator, a Senior Administrative Specialist or another Legal Assistant does the initial review and scans the complaint into the data base. The Complaint Coordinator knows the guidelines for opening a case for investigation. Therefore, in the absence of the Disciplinary Counsel, complaints alleging a potential emergency situation are brought to the attention of the Board's Litigation Counsel who has the authority to immediately initiate an investigation.

In its budget submission for FY08, the Board has requested an FTE position of Public Service Administrator I to provide assistance to the Disciplinary Counsel in the review of complaints. We will also conduct further inquiry to determine if there is a better method for reviewing complaints upon receipt so that our goal can be consistently met.

b. periodically review a sample of the complaints screened out (not assigned for investigation) by the Disciplinary Counsel to ensure that those decisions were reasonable.

We concur with the recommendation that there be quality control measures instituted to ensure that the decisions of the Disciplinary Counsel to either open or not open an investigation are reasonable. No decision has been made as to how this should be initiated. Board staff will develop various options to accomplish this and submit these to the Board for a decision.

2. To help ensure that instances of substandard patient care have the best chance of being verified and corrected, Board management should do the following:

a. investigate allegations of substandard patient care when they are received, rather than waiting for a pattern of such complaints to develop.

We disagree with this recommendation. As the Report states on page 4, Figure OV-3, the Board received almost 2600 complaints in FY06. Many of these involve allegations of conduct below the standard of care. Certainly, all of the 668 malpractice petitions received from the Health Care Stabilization Fund belong in this category. However, so do many of the complaints from the general public, national organizations, hospitals, and others that are self-reported. K.S.A. 65-2837(a) defines "professional incompetency" as repeated instances of ordinary neglect, one or more instances of gross neglect or a pattern of practice that demonstrates a manifest incompetence to practice. In the past, staff has attempted to investigate all allegations of conduct below the standard of care. However, this resulted in a substantial increase in the backlog of cases under investigation. Most providers can expect to be the subject of at least one medical malpractice claim at some time in their career. Not all bad outcomes are due to provider errors. Two-thirds of medical malpractice claims will be closed without any payment to the plaintiff and without any determination of negligence by the provider (Source: Physician Insurers Association of America). Of the remainder, a significant number will be settled for reasons other than provider error. The cost of defense may be a deciding factor whether to fight or settle regardless of the degree of negligence. The current Board policy, adopted in June 2005, attempts to strike a balance.

b. notify the licensee when an investigation reveals a problem exists, even if no formal action can be taken at that time.

We do not perceive this as a problem for a variety of reasons. Whenever the Board receives an adverse findings report from a hospital that does not result in the opening of an investigation, a letter is sent to the provider informing them that the report had been received and that no investigation will be undertaken unless a pattern develops. Providers are already informed when a malpractice suit is filed naming them as a defendant. Further, the providers are aware when a payment is made based on a malpractice claim. Under both the Kansas Administrative Procedure Act and the United States Constitution, notification that a "problem exists" may have significant legal implications. Any such notification must clearly explain that no findings have been made. Otherwise, the Board would have to conduct a hearing to provide appropriate due process to the licensee. This would greatly increase the number of hearings and substantially decrease the Board's ability to take meaningful and appropriate actions in those cases where such is required.

c. request additional resources if current staff resources are not sufficient to handle the increased workload that would result from this change.

To investigate every allegation of substandard patient care upon receipt, we estimate it would require us to double the number of investigators. During the audit, a detailed memo was provided setting forth the steps the Board has taken in the past to address the number of investigative cases and the length of time the cases have been open. The Board has repeatedly requested additional personnel to enable it to accomplish its mission and goals. These requests have been ongoing for the past 10 years and we will not reiterate them since they are already a matter of public record. In the budget submission for FY08, the Board has requested five additional FTE positions. Three of these would be FTE positions assigned to the legal section and would assist in the management of the current caseload based upon current policies. At this point, we have not had adequate time to analyze what would be sufficient resources should the Board implement your recommended policy of investigating each allegation of substandard patient care upon receipt.

3. To help ensure that investigations proceed in an efficient and timely manner, Board management should do the following:

a. move from annual review of investigation status to a quarterly review

We concur with this recommendation and will be studying this issue to determine the best way to accomplish a minimum of quarterly reviews of investigations.

b. pursue the ability to generate electronic reports to provide management a way to systematically review all investigations.

We also concur with this recommendation and are currently working with our IT personnel to develop additional reports. A number of electronic reports can now be produced that provide management with better information on investigations than what was available with the prior computer system. We intend to develop additional reports that will be meaningful to assist us in determining whether we are meeting the goals that have been established.

4. To help ensure that adequate and timely action is taken on all cases, and that licensees receive timely resolution of complaints against them, Board management should do the following:

a. develop a system to actively and regularly track the progress of all open cases

We concur with this recommendation. Several years ago, it was determined that the Board's computer system could not create the reports necessary to actively and regularly track the progress of all open investigative cases. Therefore, this was made a priority. After several years of going through the process of studying our needs, complying with all legislative requirements and obtaining the necessary legislative spending authority, a

new disciplinary tracking system was installed in July 2005. Since the installation of the new system, we can now use electronic data to check for recent activity on cases. We are continuing to work to produce reports that will provide management with adequate information to track open investigative cases. We can now produce reports that provide information on all new investigative cases and the dates at which various milestones have been completed.

In addition to the generation of electronic reports, we are considering the development of different methods to evaluate the productivity of each investigator. These methods may include a peer review system where one investigator reviews cases that have been assigned to another investigator and reports those results to the Disciplinary Counsel.

b. institute an immediate review of all open cases, beginning with the oldest cases, to see what action needs to be taken to appropriately resolve them.

We concur with this recommendation. We intend to have a system in place to conduct this review prior to the meeting of the Legislative Post Audit Committee on October 17.

5. To help ensure that investigators are unbiased and impartial, the Board should require them to periodically disclose any actual or perceived impairments. This is a recognized best practice for a regulatory program's complaint investigators.

We concur with this recommendation although neither the audit nor the Board has found that lack of requiring investigators to provide this information has caused any problems in the past. Currently, if an investigator has some sort of bias, for whatever reason, they have notified the Disciplinary Counsel of that fact. Investigators are in the classified service and are not required by statute to annually file a Statement of Substantial Interests Form.

We will develop a form similar to the Statement of Substantial Interests Form of the Kansas Governmental Ethics Commission to be completed by the investigators on an annual basis. Also, we will develop a method by which investigators formally report any actual or perceived impairments to their ability to conduct an impartial investigation immediately upon being assigned a new case.

6. To ensure that enforcement actions or discipline ordered by the Board is consistent and equitable, the Board should adopt a formal list of graduated sanctions. This should include guidance regarding the number and severity of violations that could trigger each sanction. This is a recognized best practice for medical boards' disciplinary processes.

We disagree that this is a best practice for medical boards. There may be some instances in which a list of graduated sanctions is appropriate. In fact, the Board has adopted a formula for assessing penalties for late renewals and for failure to document completion of required continuing education when audited. In all other cases, the Board considers all of the information that is available in each case. Research has been previously conducted

to determine the appropriateness of a formal list of graduated sanctions. Examples of disciplinary guidelines adopted by other states have been obtained and reviewed. Disciplinary guidelines may be useful only as a suggested course of action and should never be binding on the Board. Each case has individual facts and circumstances that distinguish it from other cases of the same nature. As opposed to the establishment of a formal list of graduated sanctions, it is more appropriate to consider all aggravating and mitigating factors specific to a case before determining the appropriate sanctions.

Although the Board has previously considered the adoption of a list of graduated sanctions, this recommendation will be submitted to the Board. To assist the Board when it considers this issue, a law clerk is conducting research into the past disciplinary actions of the Board and also into policies adopted by medical boards, other regulatory agencies, and the American Bar Association. Preliminary results of this research are that a formal list of graduated sanction is of little value. The guidelines almost invariably provide that the suggested sanctions for each violation be in the range from the minimum authorized by statute (admonition, private censure, reprimand, etc.) to the maximum (revocation).

RESPONSES TO QUESTION 2 RECOMMENDATIONS. (Page 26).

- 1. To ensure that the Board has all recommended information pertaining to applicants coming from other states-both professional and personal-Board staff should re-introduce a bill this session which would require applicants to be fingerprinted at a law-enforcement center, and allow the Board to submit those prints to the KBI and FBI for a background check.**

This recommendation will be presented to the Board for a determination. Requiring FBI background checks on applicants is a fairly new phenomenon in the credentialing of health care professionals. As recently as 2001, only seven states required fingerprints as part of criminal background checks for medical licensure. While we believe it is highly likely the Board will concur with this recommendation, that conclusion cannot be drawn until the Board has had an opportunity to make this determination. A year ago, the Board supported the introduction of a bill that would provide authorization to obtain a FBI/fingerprint background check on all applicants. S.B. No. 523 was introduced but was not enacted by the Legislature. Since the action of last year, the Board has had a joint meeting with the Nursing Board during which this was a primary topic of discussion. At its meeting October 21, the Board will be asked whether it wishes to again request introduction of a bill this Legislative Session and, if so, what should be included in its provisions.

- 2. The Board should continue to pursue readily available information on podiatrists and chiropractors applying for licensure in Kansas.**

Staff will request that applicants for podiatric and chiropractic licenses be required to self query the two national data bases that exist pursuant to federal law. Applicants for a license to practice medicine and surgery and osteopathic medicine and surgery are currently required to self query these national data bases known as NPDB and HIPDB.

When this policy was initiated, the Board did not specify that applicants for licensure as chiropractors and podiatrists should also be required to self query the NPDB/HIPDB data bases. The current cost of a self query is \$16. It has only been since 1996, that these data bases have received any information on medical malpractice payments and federal sanctions relating to chiropractors and podiatrists. The national data base maintained by the Federation of Chiropractic License Boards (CIN-BAD) appears to contain no information that is not in the NPDB/HIPDB data bases. However, further inquiry into this will be made to determine if accessing CIN-BAD would be appropriate.

3. To ensure that all applicants are treated consistently, that records are maintained properly, and that errors and duplicative efforts are reduced, the Board should develop written policies and procedures for conducting background investigations of both in-State and out-of-State applicants.

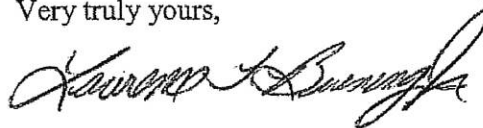
The audit reflected no problems that related to the consistent treatment, proper maintenance of records, and need to reduce errors and duplications relating to applicants. There were some statements on page 22 about the lack of written guidance on what to do with the information received by the licensing clerks. In addition to the written checklist utilized by the licensing clerks, the new licensing tracking system tracks all requirements and alerts that must be followed to complete an application. Once an application is complete, it is reviewed by the Licensing Administrator. Two adjoining states were contacted and both indicated that the training manual was either very minimal or that no training manual existed as their data base (like ours) provides the specific requirements that must be completed for each profession. However, we will review whether any improvements can be made in this area.

Responses to Question 3 Recommendations. (Page 33).

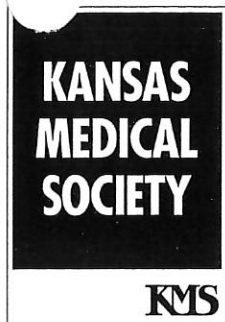
No recommendations are directed to the Board and, therefore, no responses are provided.

In conclusion, we wish to express our appreciation to you and your staff for your courtesy during the audit.

Very truly yours,



Lawrence T. Buening, Jr.
Executive Director



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To: Senate Health Care Strategies Committee

From: Jerry Slaughter
Executive Director

Date: March 18, 2008

Subject: HB 2620; Concerning the Board of Healing Arts Disciplinary Matters

The Kansas Medical Society appreciates the opportunity to appear in support of HB 2620. In addition to commenting on the substance of HB 2620 as it came to you from the House, we will be offering some additional amendments below to address issues that have been raised by this committee during hearings on the Board's conduct of certain investigations in recent months.

This bill was introduced by the Special Committee on Judiciary, which discussed the results of the Legislative Post Audit Report of October 2006 during this past interim. One of the recommendations made by Post Audit was that the Board should consider investigating all complaints of substandard care, not waiting for a pattern of such care to develop as is suggested by the current definitions of professional incompetency and unprofessional conduct found in KSA 65-2837. This bill would allow the Board to enter into non-disciplinary resolution of such matters that would be a less formal, and thereby faster, method of identifying problems and addressing them in order to prevent their reoccurrence. The bill was also amended in House committee to allow the Board to require fingerprinting and criminal background checks of licensees (Section 2). Finally, the House Committee of the Whole added an amendment (Section 3) to require the Board to adopt a graduated scale of sanctions for violations of the Healing Arts Act.

As this committee well knows, the Board has come under very pointed, and public, criticism for its handling of some cases in the past couple of years. The Board has acknowledged that in some instances it has not done enough to communicate on a timely basis with those who file complaints against licensees, and that the time required for handling of cases is often too long. The Board has also indicated that it is in the process of implementing several changes which should result in more rapid and improved processing of complaints, particularly those that are identified as more serious in nature. Many of the changes outlined by the Board were begun in response to the Post Audit

Senate Health Care Strategies
Committee
Date: March 18, 2008
Attachment 3

report, and others have been as a result of the inquiry and concern expressed by this committee in recent weeks.

As an organization that represents nearly 5,000 physicians who are licensed by the Board, we have a keen interest in the discussions about the Board's complaint handling processes and overall responsiveness to such matters. The vast majority of physicians in this state are hard working, competent practitioners who follow the rules and conduct themselves and their professional practices in a responsible, ethical manner. You have spent several weeks focusing on the unfortunate stories of a very few physicians who have not conducted themselves in that manner, and also the Board's handling of complaints against those individuals. The physicians of this state share your concerns, and want the Board to conduct its regulatory duties in a way that protects the public, yet is fair to licensees.

While it is well known to you, it is worth noting for the record that the Board receives no taxpayer support. Licensees of the Board fully fund agency operations through licensure fees, and the bulk of the Board's operating revenue is derived from fees paid by its physician licensees. Fully two-thirds of the Board's annual revenue - roughly \$2.0 million of the \$3.05 million total budget - is attributable to fees paid by physicians. Over the past several years, and most recently in FY 2005, the legislature has swept over \$1 million of the Board's funds into the state general fund. Those are dollars, paid by physicians and other licensees, which were not available for the additional staff requested by the Board to upgrade its investigatory and disciplinary staffs. We believe the Board could have avoided some of the problems it had in processing complaints if it had been able to add the staff that it requested for several years. We strongly urge the legislature to repay the swept funds to the Board to mitigate the increase in licensure fees that is a virtual certainty to continue to fund agency operations at current levels.

As to the substance of HB 2620, we support the concept (found in Section 1 of the bill) of allowing the Board to enter into a non-disciplinary resolution of complaints, even if the grounds for formal disciplinary action are not met. This process will allow the Board to identify, and more quickly address, potential problem areas before a pattern of substandard care or unprofessional conduct develops.

In order to address concerns raised by committee members earlier this session about the Board's inability to act until a pattern of substandard conduct occurs, we suggested a further amendment based on the concept approved by the House in HB 2620, which allows Board action in the case of substandard care or conduct on a single occasion. Our amendment would strengthen this concept, and allow the Board to respond more quickly in appropriate cases, including taking disciplinary action. Our amendment would authorize the Board to take either a non-disciplinary resolution approach, or in those rare instances that are more egregious, the Board could formally discipline a licensee. The proposed amendment, which amends KSA 65-2836, follows:

KSA 65-2836. Revocation, suspension, limitation or denial of licenses; censure of licensee; grounds; consent to submit to mental or physical examination or drug screen, or any combination thereof, implied. A licensee's license may be revoked, suspended or limited, or the licensee may be publicly or privately censured *or placed under probationary conditions*, or an application for a license or for reinstatement of a license may be denied upon a finding of the existence of any of the following grounds:

(a) The licensee has committed fraud or misrepresentation in applying for or securing an original, renewal or reinstated license.

(b) The licensee has committed an act of unprofessional or dishonorable conduct or professional incompetency. *Provided however, that the board may take appropriate disciplinary action or enter into a non-disciplinary resolution when a licensee has engaged in any conduct or professional practice on a single occasion that, if continued, would reasonably be expected to constitute professional incompetency or unprofessional conduct, as defined in KSA 65-2837.*

Additionally, to respond to concerns that arose during your hearings about improper sexual contact with patients, and other conduct which exploits the physician-patient relationship, we are suggesting two amendments designed to strengthen the certain provisions of KSA 65-2837 which define unprofessional conduct. We adapted these recommendations from the *Report of the Special Committee on Professional Conduct and Ethics* (2000) of the Federation of State Medical Boards. That report resulted in several changes to the FSMB *Guide to the Essentials of a Modern Medical Practice Act*, which much of our Healing Arts Act is based upon. In particular, we felt the current language addressing improper sexual conduct and related boundary issues found at KSA 65-2837 (b) (16) needed to be updated and strengthened. We adapted the recommendations found in the FSMB report to add language addressing sexual boundary issues relating to patient surrogates. Surrogates are those individuals closely involved in the patients' medical decision-making and care, and include spouses, partners, parents, guardians, and other individuals involved in medical decision-making on behalf of the patient.

The second amendment (at KSA 65-2837 (b) (33)) also arises from the FSMB report, and addresses exploitative conduct which violates the physician- patient relationship. The two amendments to KSA 65-2837 follow:

65-2837. Definitions. As used in K.S.A. 65-2836, and amendments thereto, and in this section:

(a) "Professional incompetency" means:

(1) One or more instances involving failure to adhere to the applicable standard of care to a degree which constitutes gross negligence, as determined by the board.

(2) Repeated instances involving failure to adhere to the applicable standard of care to a degree which constitutes ordinary negligence, as determined by the board.

(3) A pattern of practice or other behavior which demonstrates a manifest incapacity or incompetence to practice *the healing arts medicine*.

(b) "Unprofessional conduct" means:

(16) Commission of any act of sexual abuse, misconduct or ~~exploitation related to the licensee's professional practice.~~ other improper sexual contact with a patient, patient surrogates or key third parties, which exploits the licensee-patient relationship.

(33) Engaging in conduct which violates patient trust and exploits the licensee-patient relationship for personal gain.

Finally, we are suggesting a third amendment designed to address concerns raised during your earlier hearings. As was pointed out in the Post Audit report, the Board does not currently have on staff a trained medical professional to assist with the evaluation/assessment of complaints and conduct, or to assist with timely communicating with complainants. We have long believed that the process of evaluating complaints and identifying those that need rapid response would be improved if the Board had a physician or other licensed professional available to staff to assist with those efforts. In particular, we believe such person, or persons, could be invaluable in assessing clinical, professional practice and ethical conduct matters of licensees. To that end we are suggesting an amendment that will give the Board the authority to contract with one or more physicians, chiropractors, and other professionals as needed. The proposed amendment, found at KSA 65-2878 (e) follows:

65-2878. Executive director; appointment; confirmation by senate; employment of administrative assistant and other employees; representation of board by attorney appointed by attorney general.

New (e) The board may contract with one or more persons who are licensed to practice the healing arts in this state and who are not members of the board to provide such advice and assistance as necessary on licensure matters; review, investigation and disposition of complaints; clinical and patient care matters; and the ethical conduct and professional practices of licensees; or to perform other duties as assigned by the executive director or the board.

We believe the series of amendments proposed above will substantially address the issues that have been raised by this committee throughout this legislative session. In combination with the original provisions of HB 2620, as recommended by the Special Committee on Judiciary last interim, this legislation gives the Board the necessary tools to continue to improve its ability to promptly respond to complaints and to protect the public.

We would also like to comment on the amendments added to HB 2620 by the House as it relates to fingerprinting and criminal background checks (Section 2 of the bill) of licensees. While we don't oppose giving the Board the clear authority to require fingerprinting and background checks, we do have some questions about the breadth of the language which directs local and state law enforcement agencies to release records of convictions, expungements and arrests (nonconvictions) for juveniles, in particular. We

do not oppose the release of records of convictions and adjudications for adults, as that information is clearly relevant to licensure decisions being made by the Board. We would like to offer an amendment to Section 2 of the bill (page 2, lines 31-32) to address this issue as follows:

(b) Local and state law enforcement officers and agencies shall assist the state board of healing arts in taking and processing of fingerprints of applicants for and holders of any license, registration, permit or certificate and shall release all records of adult ~~and juvenile convictions, and~~ adjudications, ~~expungements and noneonvictions~~ to the state board of healing arts.

We have one final amendment to the bill, at Section 3, relating to the list of graduated sanctions being developed by the Board to assist it with achieving consistency in its disciplinary actions. Our concern with the amendment adopted by the House during floor debate is that it could be interpreted as requiring the Board to utilize the sanctions grid much like the sentencing grid for criminal violations. While we don't oppose the development of the sanctions grid (and are in fact participating in the Board's committee deliberations on the issue), we would oppose requiring the Board to be bound by a rigid sanctions grid when it decides cases. There are often mitigating and complicating factors relating to clinical or professional conduct which are not easily reducible to clear decisions that fit neatly into a sanctions grid. We believe that the public is best served by a Board of licensed professionals that use their best judgment, in view of all the facts, to determine appropriate discipline. Our proposed amendment to Section 3 of the bill follows:

Sec. 3. (a) The board shall adopt, ~~through rules and regulations,~~ a formal list of graduated sanctions for violations of the Kansas healing arts act which ~~shall specify the number and severity of violations~~ may be used by the board as a reference guide for the imposition of each level of sanction.

To summarize, our proposed amendments (which are also attached to this testimony) are as follows:

- 1) KSA 65-2836 (a) and (b); relating to taking disciplinary action on the basis of a single act which, if continued, would reasonably be expected to constitute professional incompetency or unprofessional conduct;
- 2) KSA 65-2837 (b) (16) and new (33); relating to improper sexual conduct and exploitative conduct;
- 3) KSA 65-2878 new (e); relating to granting authority to the board to contract with physicians and other licensees to assist with complaints, clinical matters, and professional practices issues;
- 4) Section 2 (b) of HB 2620; relating to criminal background checks; and

5) Section 3 (a) of HB 2620; relating to the list of graduated sanctions being developed by the Board.

We want to express our appreciation to this committee for the concern it has shown in the operations of the Healing Arts Board throughout this session, particularly as it relates to the prompt handling of complaints. Your interest and persistence on this issue will result in a more responsive agency that serves the public, and the licensees it regulates, more effectively. Thank you for the opportunity to offer these comments.

Proposed Amendments to HB 2620 by the Kansas Medical Society

Amendment #1

65-2836. Revocation, suspension, limitation or denial of licenses; censure of licensee; grounds; consent to submit to mental or physical examination or drug screen, or any combination thereof, implied. A licensee's license may be revoked, suspended or limited, or the licensee may be publicly or privately censured **or placed under probationary conditions**, or an application for a license or for reinstatement of a license may be denied upon a finding of the existence of any of the following grounds:

(a) The licensee has committed fraud or misrepresentation in applying for or securing an original, renewal or reinstated license.

(b) The licensee has committed an act of unprofessional or dishonorable conduct or professional incompetency. **Provided however, that the board may take appropriate disciplinary action or enter into a non-disciplinary resolution when a licensee has engaged in any conduct or professional practice on a single occasion that, if continued, would reasonably be expected to constitute professional incompetency or unprofessional conduct, as defined in KSA 65-2837.**

(c) The licensee has been convicted of a felony or class A misdemeanor, whether or not related to the practice of the healing arts. The board shall revoke a licensee's license following conviction of a felony occurring after July 1, 2000, unless a 2/3 majority of the board members present and voting determine by clear and convincing evidence that such licensee will not pose a threat to the public in such person's capacity as a licensee and that such person has been sufficiently rehabilitated to warrant the public trust. In the case of a person who has been convicted of a felony and who applies for an original license or to reinstate a canceled license, the application for a license shall be denied unless a 2/3 majority of the board members present and voting on such application determine by clear and convincing evidence that such person will not pose a threat to the public in such person's capacity as a licensee and that such person has been sufficiently rehabilitated to warrant the public trust.

(d) The licensee has used fraudulent or false advertisements.

(e) The licensee is addicted to or has distributed intoxicating liquors or drugs for any other than lawful purposes.

(f) The licensee has willfully or repeatedly violated this act, the pharmacy act of the state of Kansas or the uniform controlled substances act, or any rules and regulations adopted pursuant thereto, or any rules and regulations of the secretary of health and environment which are relevant to the practice of the healing arts.

(g) The licensee has unlawfully invaded the field of practice of any branch of the healing arts in which the licensee is not licensed to practice.

(h) The licensee has engaged in the practice of the healing arts under a false or assumed name, or the impersonation of another practitioner. The provisions of this subsection relating to an assumed name shall not apply to licensees practicing under a professional corporation or other legal entity duly authorized to provide such professional services in the state of Kansas.

(i) The licensee has the inability to practice the healing arts with reasonable skill and safety to patients by reason of physical or mental illness, or condition or

use of alcohol, drugs or controlled substances. In determining whether or not such inability exists, the board, upon reasonable suspicion of such inability, shall have authority to compel a licensee to submit to mental or physical examination or drug screen, or any combination thereof, by such persons as the board may designate either in the course of an investigation or a disciplinary proceeding. To determine whether reasonable suspicion of such inability exists, the investigative information shall be presented to the board as a whole, to a review committee of professional peers of the licensee established pursuant to K.S.A. 65-2840c and amendments thereto or to a committee consisting of the officers of the board elected pursuant to K.S.A. 65-2818 and amendments thereto and the executive director appointed pursuant to K.S.A. 65-2878 and amendments thereto or to a presiding officer authorized pursuant to K.S.A. 77-514 and amendments thereto. The determination shall be made by a majority vote of the entity which reviewed the investigative information. Information submitted to the board as a whole or a review committee of peers or a committee of the officers and executive director of the board and all reports, findings and other records shall be confidential and not subject to discovery by or release to any person or entity. The licensee shall submit to the board a release of information authorizing the board to obtain a report of such examination or drug screen, or both. A person affected by this subsection shall be offered, at reasonable intervals, an opportunity to demonstrate that such person can resume the competent practice of the healing arts with reasonable skill and safety to patients. For the purpose of this subsection, every person licensed to practice the healing arts and who shall accept the privilege to practice the healing arts in this state by so practicing or by the making and filing of a renewal to practice the healing arts in this state shall be deemed to have consented to submit to a mental or physical examination or a drug screen, or any combination thereof, when directed in writing by the board and further to have waived all objections to the admissibility of the testimony, drug screen or examination report of the person conducting such examination or drug screen, or both, at any proceeding or hearing before the board on the ground that such testimony or examination or drug screen report constitutes a privileged communication. In any proceeding by the board pursuant to the provisions of this subsection, the record of such board proceedings involving the mental and physical examination or drug screen, or any combination thereof, shall not be used in any other administrative or judicial proceeding.

(j) The licensee has had a license to practice the healing arts revoked, suspended or limited, has been censured or has had other disciplinary action taken, or an application for a license denied, by the proper licensing authority of another state, territory, District of Columbia, or other country, a certified copy of the record of the action of the other jurisdiction being conclusive evidence thereof.

(k) The licensee has violated any lawful rule and regulation promulgated by the board or violated any lawful order or directive of the board previously entered by the board.

(l) The licensee has failed to report or reveal the knowledge required to be reported or revealed under K.S.A. 65-28,122 and amendments thereto.

(m) The licensee, if licensed to practice medicine and surgery, has failed to inform in writing a patient suffering from any form of abnormality of the breast tissue for which surgery is a recommended form of treatment, of alternative methods of treatment recognized by licensees of the same profession in the same or similar communities as being acceptable under like conditions and

circumstances.

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

(o) The licensee has been found to be mentally ill, disabled, not guilty by reason of insanity, not guilty because the licensee suffers from a mental disease or defect or incompetent to stand trial by a court of competent jurisdiction.

(p) The licensee has prescribed, sold, administered, distributed or given a controlled substance to any person for other than medically accepted or lawful purposes.

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

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

(s) Sanctions or disciplinary actions have been taken against the licensee by a peer review committee, health care facility, a governmental agency or department 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.

(t) 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.

(u) The licensee has surrendered a license or authorization to practice the healing arts in another state or jurisdiction, has surrendered the authority to utilize controlled substances issued by any state or federal agency, has agreed to a limitation to or restriction of privileges at any medical care facility 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 this section.

(v) The licensee has failed to report to the board surrender of the licensee's license or authorization to practice the healing arts in another state or jurisdiction or surrender of 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 this section.

(w) The licensee has an adverse judgment, award or settlement against the licensee resulting from a medical liability claim related to acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.

(x) The licensee has failed to report to the board any adverse judgment, settlement or award against the licensee resulting from a medical malpractice liability claim related to acts or conduct similar to acts or conduct which would constitute grounds for disciplinary action under this section.

(y) The licensee has failed to maintain a policy of professional liability insurance as required by K.S.A. 40-3402 or 40-3403a and amendments thereto.

(z) The licensee has failed to pay the premium surcharges as required by K.S.A. 40-3404 and amendments thereto.

(aa) The licensee has knowingly submitted any misleading, deceptive, untrue or fraudulent representation on a claim form, bill or statement.

(bb) The licensee as the responsible physician for a physician assistant has failed to adequately direct and supervise the physician assistant in accordance with the physician assistant licensure act or rules and regulations adopted under such act.

(cc) The licensee has assisted suicide in violation of K.S.A. 21-3406 as established by any of the following:

(A) A copy of the record of criminal conviction or plea of guilty for a felony in violation of K.S.A. 21-3406 and amendments thereto.

(B) A copy of the record of a judgment of contempt of court for violating an injunction issued under K.S.A. 2002 Supp. 60-4404 and amendments thereto.

(C) A copy of the record of a judgment assessing damages under K.S.A. 2002 Supp. 60-4405 and amendments thereto.

Amendment #2

65-2837. Definitions. As used in K.S.A. 65-2836, and amendments thereto, and in this section:

(a) "Professional incompetency" means:

(1) One or more instances involving failure to adhere to the applicable standard of care to a degree which constitutes gross negligence, as determined by the board.

(2) Repeated instances involving failure to adhere to the applicable standard of care to a degree which constitutes ordinary negligence, as determined by the board.

(3) A pattern of practice or other behavior which demonstrates a manifest incapacity or incompetence to practice **the healing arts medicine**.

(b) "Unprofessional conduct" means:

(1) Solicitation of professional patronage through the use of fraudulent or false advertisements, or profiting by the acts of those representing themselves to be agents of the licensee.

(2) Representing to a patient that a manifestly incurable disease, condition or injury can be permanently cured.

(3) Assisting in the care or treatment of a patient without the consent of the patient, the attending physician or the patient's legal representatives.

(4) The use of any letters, words, or terms, as an affix, on stationery, in advertisements, or otherwise indicating that such person is entitled to practice a branch of the healing arts for which such person is not licensed.

(5) Performing, procuring or aiding and abetting in the performance or procurement of a criminal abortion.

(6) Willful betrayal of confidential information.

(7) Advertising professional superiority or the performance of professional services in a superior manner.

(8) Advertising to guarantee any professional service or to perform any operation painlessly.

(9) Participating in any action as a staff member of a medical care facility which is designed to exclude or which results in the exclusion of any person licensed to practice medicine and surgery from the medical staff of a nonprofit medical care facility licensed in this state because of the branch of the healing

arts practiced by such person or without just cause.

(10) Failure to effectuate the declaration of a qualified patient as provided in subsection (a) of K.S.A. 65-28,107, and amendments thereto.

(11) Prescribing, ordering, dispensing, administering, selling, supplying or giving any amphetamines or sympathomimetic amines, except as authorized by K.S.A. 65-2837a, and amendments thereto.

(12) Conduct likely to deceive, defraud or harm the public.

(13) Making a false or misleading statement regarding the licensee's skill or the efficacy or value of the drug, treatment or remedy prescribed by the licensee or at the licensee's direction in the treatment of any disease or other condition of the body or mind.

(14) Aiding or abetting the practice of the healing arts by an unlicensed, incompetent or impaired person.

(15) Allowing another person or organization to use the licensee's license to practice the healing arts.

(16) Commission of any act of sexual abuse, misconduct or exploitation related to the licensee's professional practice. other improper sexual contact with a patient, patient surrogates or key third parties, which exploits the licensee-patient relationship.

(17) The use of any false, fraudulent or deceptive statement in any document connected with the practice of the healing arts including the intentional falsifying or fraudulent altering of a patient or medical care facility record.

(18) Obtaining any fee by fraud, deceit or misrepresentation.

(19) Directly or indirectly giving or receiving any fee, commission, rebate or other compensation for professional services not actually and personally rendered, other than through the legal functioning of lawful professional partnerships, corporations or associations.

(20) Failure to transfer patient records to another licensee when requested to do so by the subject patient or by such patient's legally designated representative.

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

(22) Charging an excessive fee for services rendered.

(23) Prescribing, dispensing, administering or distributing a prescription drug or substance, including a controlled substance, in an improper or inappropriate manner, or for other than a valid medical purpose, or not in the course of the licensee's professional practice.

(24) Repeated failure to practice healing arts with that level of care, skill and treatment which is recognized by a reasonably prudent similar practitioner as being acceptable under similar conditions and circumstances.

(25) Failure to keep written medical records which accurately describe the services rendered to the patient, including patient histories, pertinent findings, examination results and test results.

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

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

(28) Prescribing, dispensing, administering or distributing an anabolic steroid

or human growth hormone for other than a valid medical purpose. Bodybuilding, muscle enhancement or increasing muscle bulk or strength through the use of an anabolic steroid or human growth hormone by a person who is in good health is not a valid medical purpose.

(29) Referring a patient to a health care entity for services if the licensee has a significant investment interest in the health care entity, unless the licensee informs the patient in writing of such significant investment interest and that the patient may obtain such services elsewhere.

(30) Failing to properly supervise, direct or delegate acts which constitute the healing arts to persons who perform professional services pursuant to such licensee's direction, supervision, order, referral, delegation or practice protocols.

(31) Violating K.S.A. 65-6703 and amendments thereto.

(32) Charging, billing or otherwise soliciting payment from any patient, patient's representative or insurer for anatomic pathology services, if such services are not personally rendered by the licensee or under such licensee's direct supervision. As used in this subsection, "anatomic pathology services" means the gross or microscopic examination of histologic processing of human organ tissue or the examination of human cells from fluids, aspirates, washings, brushings or smears, including bloodbanking services, and subcellular or molecular pathology services, performed by or under the supervision of a person licensed to practice medicine and surgery or a clinical laboratory. Nothing in this subsection shall be construed to prohibit billing for anatomic pathology services by a hospital, or by a clinical laboratory when samples are transferred between clinical laboratories for the provision of anatomic pathology services.

(33) Engaging in conduct which violates patient trust and exploits the licensee-patient relationship for personal gain.

(c) "False advertisement" means any advertisement which is false, misleading or deceptive in a material respect. In determining whether any advertisement is misleading, there shall be taken into account not only representations made or suggested by statement, word, design, device, sound or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations made.

(d) "Advertisement" means all representations disseminated in any manner or by any means, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of professional services.

(e) "Licensee" for purposes of this section and K.S.A. 65-2836, and amendments thereto, shall mean all persons issued a license, permit or special permit pursuant to article 28 of chapter 65 of the Kansas Statutes Annotated.

(f) "License" for purposes of this section and K.S.A. 65-2836, and amendments thereto, shall mean any license, permit or special permit granted under article 28 of chapter 65 of the Kansas Statutes Annotated.

(g) "Health care entity" means any corporation, firm, partnership or other business entity which provides services for diagnosis or treatment of human health conditions and which is owned separately from a referring licensee's principle practice.

(h) "Significant investment interest" means ownership of at least 10% of the value of the firm, partnership or other business entity which owns or leases the health care entity, or ownership of at least 10% of the shares of stock of the corporation which owns or leases the health care entity.

Amendment #3

65-2878. Executive director; appointment; confirmation by senate; employment of administrative assistant and other employees; representation of board by attorney appointed by attorney general. (a) The board shall appoint an executive director, subject to confirmation by the senate as provided in K.S.A. 75-4315b and amendments thereto. The executive director shall be in the unclassified service under the Kansas civil service act and shall receive a salary fixed by the board and approved by the governor. The executive director shall not be a member of the board. Under the supervision of the board, the executive director shall be the chief administrative officer of the board and shall perform such duties as may be specified by the board and as may be required by law. The executive director shall be the custodian of the common seal of the board, the books and records of the board and shall keep minutes of all board proceedings.

(b) The board may employ an administrative assistant. The administrative assistant shall be in the unclassified service under the Kansas civil service act and shall receive a salary fixed by the board and approved by the governor. Under the supervision of the executive director, the administrative assistant shall assist the executive director in the performance of the duties of the executive director.

(c) The board may employ such clerical and other employees, who shall be in the classified service under the Kansas civil service act, as it considers necessary in order to administer and execute, under the supervision of the executive director, the provisions of this act or other statutes delegating duties and responsibilities to the board, except that any attorney employed by the board shall be in the unclassified service under the Kansas civil service act and shall receive a salary fixed by the board and approved by the governor.

(d) As necessary, the board shall be represented by an attorney appointed by the attorney general as provided by law, whose compensation shall be determined and paid by the board with the approval of the governor.

(e) The board may contract with one or more persons who are licensed to practice the healing arts in this state and who are not members of the board to provide such advice and assistance as necessary on licensure matters; review, investigation and disposition of complaints; clinical and patient care matters; and the ethical conduct and professional practices of licensees; or to perform other duties as assigned by the executive director or the board.

Amendment #4

HB 2620 as amended by HCW:

Sec. 2. (a) As part of an original application for or reinstatement of any license, registration, permit or certificate or in connection with any investigation of any holder of a license, registration, permit or certificate, the state board of healing arts may require a person to be fingerprinted and submit to a state and national criminal history record check. The fingerprints shall be used to identify the person and to determine whether the person has a record of criminal history in this state or other jurisdiction.

The state board of healing arts is authorized to submit the fingerprints to the Kansas bureau of investigation and the federal bureau of investigation for a state and

national criminal history record check. The state board of healing arts may use the information

obtained from fingerprinting and the criminal history for purposes of verifying the identification of the person and in the official determination of the qualifications and fitness of the person to be issued or to maintain a license, registration, permit or certificate.

(b) Local and state law enforcement officers and agencies shall assist the state board of healing arts in taking and processing of fingerprints of applicants for and holders of any license, registration, permit or certificate and shall release all records of adult ~~and juvenile~~ convictions **and** adjudications, ~~expungements and nonconvictions~~ to the state board of healing arts.

(c) The state board of healing arts may fix and collect a fee as may be required by the board in an amount necessary to reimburse the board for the cost of fingerprinting and the criminal history record check. Any moneys collected under this subsection shall be deposited in the state treasury and credited to the healing arts fee fund.

(d) This section shall be part of and supplemental to the Kansas healing arts act.

Amendment #5

Sec. 3. (a) The board shall adopt, ~~through rules and regulations~~, a formal list of graduated sanctions for violations of the Kansas healing arts act which ~~shall specify the number and severity of violations~~ **may be used by the board as a reference guide** for the imposition of each level of sanction.

(b) This section shall be part of and supplemental to the Kansas healing arts act.