

MEDICAL BOARD OF CALIFORNIA

## **ACUPUNCTURE COMMITTEE**

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### **MEMORANDUM**

**TO:** All Recipients

**FROM:** Marilyn Nielsen  
Executive Officer

**DATE:** November 1995

**SUBJECT:** SCOPE OF PRACTICE LEGAL OPINION NO. 93-11

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At your request, the Acupuncture Committee is pleased to provide Legal Opinion 93-11 attached hereto.

This legal opinion was adopted by the Committee as a "reference" document and is subject to change based upon changes in the profession and expert testimony. When questions arise concerning whether a particular technique falls within the procedures enumerated in the Acupuncture Licensure Act, the matter is referred to acupuncturists selected by the Acupuncture Committee as expert consultants.

STATE OF CALIFORNIA

**MEMORANDUM**

To: Executive Officer  
Acupuncture Committee

Date: December 14, 1993  
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From: Department of Consumer Affairs  
Legal Office

Legal Op. No. 93-11

Subject: Scope of Practice

The Acupuncture Committee (committee) has requested an opinion as to what methods of treatment/does acupuncture, as defined in the Acupuncture Licensure Act (Business and Professions Code section 4925 et seq<sup>1</sup> - hereinafter referred to as "Act") encompass.

Specific reference is made to whether the following treatments or modalities fall within the statutory definition of acupuncture:

1. Stimulation of acupuncture points with needles, electroacupuncture, cupping, and moxibustion.
2. Oriental mas sage, accupressure, breathing techniques, exercise, and nutrition.
3. Drugless substances and herbs.
4. Homeopathy.
5. Herbal medicines.
6. Diagnosis.
7. Ordering lab tests and x-rays.
8. New devices.
9. Stimulation of acupuncture points by ultrasound devices, cold lasers, and magnets.
10. Heat and cold therapy.
11. Baths and hydrotherapy.
12. Naturopathy

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<sup>1</sup> All section references are to that Code unless otherwise indicated.

## CONCLUSION

The acupuncture scope of practice is defined by the treatment modalities which are specifically enumerated in sections 4927(e) and 4937(b). In addition, an acupuncturist may use treatment modalities which are not prohibited by other laws.<sup>2</sup>

## ANALYSIS

### Background

A review of the legislative history of acupuncture in California provides a helpful background to the question posed. Acupuncture as a healing art was first formally recognized by California in 1975 (SB 86 - Stats. 1975, Ch. 975). Acupuncture was defined as being limited to treatment that involved the insertion of needles into the body to prevent or modify the perception of pain or to normalize physiological functions. In addition, an acupuncturist could perform acupuncture on a patient only after there had been a prior diagnosis or referral from a licensed physician, dentist, podiatrist or chiropractor.

In 1979 (AB 1391 - Stats. 1979, Ch. 488), the Legislature eliminated the requirement that an acupuncturist obtain a diagnosis or referral from a physician, dentist, podiatrist or chiropractor prior to the performing acupuncture on a patient.

In 1980 (AB 3040 - Stats. 1980, Ch. 1313), the Legislature expanded the definition of acupuncture to include: (1) techniques of electroacupuncture, cupping and moxibustion; (2) the use of oriental massage, breathing techniques, exercise or nutrition; and (3) the use of drugless substances and herbs as dietary supplements.

In 1987 (SB 1544, Stats. 1987, Ch. 1190), the Legislature authorized acupuncturists to perform or prescribe the use of acupressure.

Section 4926 which was enacted with the 1980 legislation articulates the legislative intent of the Act. It provides as follows:

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<sup>2</sup> This opinion supersedes the opinion previously rendered by this office on August 3, 1993.

“In its concern with the need to eliminate the fundamental causes of illness, not simply to remove symptoms, and with the need to treat the whole person, the Legislature intends to establish in this article, a framework for the practice of the art and science of oriental medicine through acupuncture.

The purpose of this article is to encourage the more effective utilization of the skills of acupuncturists by California citizens desiring a holistic approach to health and to remove the existing legal constraints which are an unnecessary hindrance to the more effective provision of health care services. Also, as it effects the public health, safety, and welfare, there is a necessity that individuals practicing acupuncture be subject to regulation and control as a primary health care profession.”

#### Statutory Definition

The scope of practice for an acupuncturist is set forth in subdivision (e) of section 4927 and section 4937. They provide as follows:

“4927. (e) ‘Acupuncture’ means the stimulation of a certain-point or points on or near the surface of the body by the insertion of needles to prevent or modify the perception of pain or to normalize physiological functions, including pain control, for the treatment of certain diseases or dysfunctions of the body and includes the techniques of electroacupuncture, cupping, and moxibustion.”

“4937. An acupuncturist's license authorizes the holder thereof:

(a) To engage in the practice of acupuncture.

(b) To perform or prescribe the use of oriental massage, acupressure, breathing techniques, exercise, or nutrition, including the incorporation of drugless substances and herbs as dietary supplements to promote health. Nothing in this section prohibits any person who does not possess an acupuncturist's license or another license as a healing arts practitioner from performing, or prescribing the use of, oriental massage, breathing techniques, exercises, or nutrition to promote health, so long as those activities are not performed or prescribed in connection with the practice of acupuncture.”

The 1980 Act was enacted to establish a framework for the practice of oriental medicine through acupuncture and to regulate acupuncturist as a primary health care profession.

Acupuncture makes up one area of the larger body of knowledge and philosophy of oriental medicine. The legislative intent language contained in section 4926 makes it clear that the Act is intended to govern only that aspect of oriental medicine which deals with acupuncture. Accordingly, an acupuncturist is authorized to practice only those procedures enumerated in section 4927(e) and 4937 rather than the full range of procedures and treatments traditionally associated with oriental medicine.

The codification of legislative intent found in section 4926 references the need to regulate and control acupuncturist as a “primary health care profession.” A primary health care professional will possess the ability to diagnose, prescribe and administer treatments. Although an acupuncturist is authorized to practice all three phrase of the healing arts (i.e., diagnose, prescribe, and administer treatment), the acupuncturist is limited by the statute as to the types of treatments which he or she can prescribe and administer. Thus, while acupuncturists are considered to be primary health care professionals, there are statutory limitations upon their Ability to prescribe and the nature of treatments which they are allowed to administer.<sup>3</sup>

#### Statutory Limitations On Practice

Our analysis starts from the fundamental premise found in section 2052 which establishes parameters for healing arts professionals who are tot physicians. Section 2052 makes it illegal generally

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<sup>3</sup> Under California’s workers’ compensation laws, acupuncturists are considered to be physicians. Labor Code section 3209.3(a) defines “physician” as including an acupuncturist “licensed by California state law and (practicing) within the scope of their practice as defined by California state law.” The inclusion of acupuncturists within the physician definition found in Labor Code section 3209.3 is for the purpose of defining that term as it is used in California’s workers’ compensation laws. The Labor Code does not define the scope of practice for an acupuncturist. The scope of practice for an acupuncturist is defined 'by reference to California state law (i.e., the Act). The inclusion of acupuncturists within the Labor Code definition of “physician” does not change or expand the scope of practice for an acupuncturist from how it is defined in the Act.

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for anyone to engage in the practice of medicine without being licensed as a physician “or without being authorized to perform such act[s] pursuant to a certificate obtained in accordance with other provision of law... “

In addition, section 2061 provides that nothing in the Medical Practice Act shall be construed as limiting the practice of other persons licensed “under any other provisions of law relating to the healing arts when such person is engaged in his or her authorized practice.”

Thus, to the extent that non-physician healing arts professionals are authorized to engaged in practice of medicine, they are limited in their practice of medicine by the laws under which they are licensed. The practice of acupuncture constitutes a form of medicine inasmuch as the treatment modalities enumerated in the Act are for the purpose of “normal[izing] physiological functions”, treating "certain diseases or dysfunctions of the body", or "promot[ing] health.”

However, section 2052 will operate to limit an acupuncturist’s ability to prescribe or administer treatments which seek to correct a disease or dysfunction of the body to only those modalities which are referenced specifically in the Act.

#### Stimulation of Acupuncture Points Needling, Electroacupuncture, Cupping, and Moxibustion

Section 4927(e) defines acupuncture as the stimulation of points on the body to address pain or to normalize physiological functions by the insertion of needles, and includes the techniques of electroacupuncture, cupping and moxibustion.

The stimulation of points by needles consists of the insertion of needles of various shapes and sizes into specific points of the body. These needles may be withdrawn immediately left in situ for some time, or rotated a number of times, depending upon the nature of the ailment.

The stimulation of acupuncture points by electroacupuncture employs battery-powered instruments that generate alternating current to stimulate acupuncture points through metal needles, rubber electrodes, or by direct contact with a metal probe to produce therapeutic effects.

The stimulation of acupuncture points-by cupping is a therapy involving vacuum suction to stimulate acupuncture points. Specifically, a vacuum is created in the cup by either heating the air in the cup or by a vacuum pump. The cup is quickly

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applied to the body surface creating a suction contact causing local vasodilation and mechanical expansion of the underlying tissue which stimulates the acupuncture points under the cup region.

The stimulation of acupuncture points by moxibustion involves the application of heat to acupuncture points by burning moxa, a compound of wormwood. It involves either the direct application of a burning moxa to the skin or the indirect application of the heat without direct contact of the moxa to the skin to produce heat penetration and permeation of the skin and muscle at an acupuncture point or acupuncture meridian..

The definition of acupuncture found in section 4927 focuses on two elements: (1) the purpose or reason for its administration (i.e., to address pain or to normalize physiological functions) and (2) the means by which that is to be achieved (i.e., needling, electroacupuncture, cupping and moxibustion). The aforementioned modalities for stimulating acupuncture points are specifically enumerated.-within the statutory definition of acupuncture (i.e., section 4927(e))and may be performed lawfully by an acupuncturist if the use of these modalities are not intended to stimulate acupuncture points, the modality would not fall within the statutory definition.

It is noted that there are proponents of the position that electroacupuncture includes the use of electrical assessment and diagnostic devices which evaluate the human energy field, (e.g., Voll machine, point locators). Electrical assessment devices \* are not directed at stimulating acupuncture points, and as such, would not fall within the statutory definition of electroacupuncture.

It-is also noted that the Senate Committee on Health and Welfare staff analysis of AB 3040 characterized the expanded definition of acupuncture as it related to electroacupuncture as follows:

“AB 3040 extends the definition of acupuncture to include the techniques of (1) electro-acupuncture - stimulation of an acupuncture point with pulsed d-c current to develop manual or wave forms to produce different therapeutic effects; ...”

Accordingly, it seems clear that both the statutory language and the understanding of the legislature regarding the definition of electroacupuncture was that it be limited to the electrical stimulation of acupuncture points and did not include the use of diagnostic devices which evaluate the human energy field.

Oriental Massage, Acupressure,  
Breathing Techniques, Exercise and Nutrition

Section 4937(b) authorizes an acupuncturist “to perform or prescribe the use of oriental massage, acupressure, breathing techniques, exercise, or nutrition, including the incorporation of drugless substances and herbs as dietary supplements to promote health.” The statute does not require that these modalities be performed in conjunction with the stimulation of acupuncture points.

Oriental massage consists of various techniques but are generally characterized by the kneading, or rubbing of the surface of the body to achieve a therapeutic object.

Acupressure is based upon a theory similar to acupuncture except that it stimulates acupuncture points by the application of pressure rather than needling.

Breathing techniques as they relate to oriental medicine involves instructing patients in breathing exercises appropriate to their condition. At its basic level, breathing techniques focus on training the patient to breathe properly with the diaphragm. More advanced approaches involve body movements combined with directed breath to certain areas of the body to affect healing or alleviate pain.

Exercise as it relates to oriental medicine involves various theories relating to beneficial exercise strategies.

Nutrition as it relates to oriental medicine is based upon a dietary system which holds that basic flavors have special relationship to the internal organs.

The foregoing modalities are specifically enumerated in the Act

(i.e., section. 4937 (b)),as modalities or treatments which may be administered by an acupuncturist. Therefore, these modalities may be lawfully performed by an acupuncturist.

It is noted that section.4937(b) also authorizes an unlicensed person to perform or prescribe the use of oriental massage, breathing techniques, exercises, or nutrition to promote health provided these therapies are not performed or prescribed in connection with the practice of acupuncture.

As a matter of statutory interpretation, it will be presumed that the Legislature intended repeated use of identical words or

phrases within a single statute to be consistent in their meaning. In re Mark K. (1984) 205 Cal. Rptr.393, 399.

With the exception of acupressure, the enumeration of modalities specified in section 4937 are identical for both acupuncturists and unlicensed persons. Where identical terms are used to describe the modalities authorized to be employed by an acupuncturist or an unlicensed person, the definition of these modalities must be consistent as between these two groups.

While both an acupuncturist and- an unlicensed person may perform, or prescribe oriental massage, breathing techniques, exercise, or nutrition, including the incorporation of drugless substances and herbs-as dietary supplements to promote health, only an acupuncturist may perform or prescribe such treatments in connection with the practice of acupuncture.

#### Drugless Substances and Herbs

We have concluded that an acupuncturist may prescribe nutritional advice which includes the use of drugless substances and herbs. However, a question is posed concerning what is a drugless substance or herb which may be prescribed by an acupuncturist. Drugless substances and herbs generally consist of plants and vegetative material, but may include some mineral and animal products. Herbal remedies can consist of single or-multiple ingredients.

Section 4937(b) authorizes an acupuncturist to prescribe “drugless substances and herbs as dietary supplements to promote health.” The authorization to prescribe drugless substances and herbs focuses upon two particulars: (1) they must be used as dietary supplements, and (2) they must be drugless.

A drugless substance, as the term implies, is a substance without drugs. Conversely, a drug or a substance containing drugs, would not be a drugless substance. An acupuncturist has no authority to administer or prescribe drugs. Thus, to the extent that a substance is a drug or contains drugs, an acupuncturist would not be permitted to prescribe or administer such a substance.

Health and Safety Code section 26010 of the Sherman Food, Drug and Cosmetic Law defines “drugs,” as (1) articles recognized-in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, (hereafter referred to collectively as an “official Compendium”) or any supplement of any of them; (2) articles intended for use in the diagnosis, cure, mitigation, treatment,

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or prevention of disease in human beings or any other animal; (3) articles, other than food, intended to affect the structure or any function of the body of man or other animal; and (4) articles intended for use as a component of any such specified articles.

Under the first category of Health and Safety Code section 26022, a literal reading would make it appear that if a substance is recognized in an official compendium, it will be considered a drug. However, we have learned from FDB that the inclusion of a substance in an official compendium does not in and of itself cause the substance to be deemed a drug. The FDB relying upon a Federal District Court case (*United States of America v. An ARTICLE OF DRUG* (1975) 414 F. Supp. 660) has concluded that in order for a substance to be considered a drug under subdivision (a) of Health and Safety Code section 26010, the substance must be identified as "United States Pharmacopoeia" (hereafter "U. S. P."), "National Formulary" (hereafter "N.F.") or other named compendium. A substance which utilizes the label designation U.S.P. or the like is making a claim that it complies with the uniform standards of strengths and purity description of the named compendium. Labeling a substance with the U.S.P., N.F., or the like designation, is prima facie evidence that the substance is a drug calling upon the opposing party to come forward with contrary evidence. When such a claim is made and the substance is intended for medicinal use, it will be considered to be a drug. An example is water. Water described as "water U.S.P." would carry the presumption that it is a drug. Conversely, water which is not described using the U.S.P. designation or is not intended for medicinal purposes would not be considered a drug. Thus, the mere inclusion of a substance in an official compendium will not necessarily cause it to be deemed a drug. A determination of whether a substance is considered to be a drug will rest upon whether the substance is described as U.S.P. and the like or its intended use.

The second category of Health and Safety Code section 26022 refers to the intended use of the substance in the diagnosis, cure, treatment, mitigation or prevention of disease. Thus, any herb or substance which is put to a prophylactic, therapeutic, or medicinal purpose in the diagnosis, cure, treatment, mitigation or prevention of disease is a drug. Herbs and substances used in such a manner must therefore be considered a drug.

The third category of Health and Safety Code section 26022 specifically excludes food products and classifies other articles intended to affect the structure or function of the body of man as drugs. Therefore, herbs and substances which do not come

within the food classification and whose intended use is to affect the function and structure of the body of man are drugs.

The fourth category includes those articles intended for use as a component of any article specified in the foregoing provisions.

The intended use of a substance is the controlling element. The courts have held that "the use of a substance determines its classification. If a substance is used for medicinal purposes, it is a drug. [citation omitted] Any substance used as a medicine or in the composition of medicines for internal medicinal use may be classified as a drug. [citations omitted] *Downing v. California State Board of Pharmacy* (1948) 85 Cal. App.2d 30, 34..

The distinguishing feature between herbs and substances as food supplements and herbs and substances as drugs is the intended use of the herb or other substance. An acupuncturist would be permitted to prescribe herbs and substances which are intended to be used as dietary foods or food supplements, or as nutrients for dietary uses or to supplement or to fortify the ordinary or usual diet. However, an acupuncturist would not be permitted to prescribe herbs or substances for medicinal or therapeutic purposes because they would then be considered to be drugs, and, as such would fall outside of the parameters of being a "drugless substance."

Thus, the intended use of the substance will be the controlling element in determining whether the substance is a drug or food supplement. An acupuncturist is permitted to prescribe herbs and substances which are intended to be used as dietary foods or food supplements, or a nutrients for dietary uses or to supplement or to fortify the ordinary or usual diet. However, an acupuncturist would not be permitted to prescribe herbs or substances intended for medicinal purposes because they would then be considered to be drugs, and, as such would fall outside the parameters of being a "drugless substance."

#### Homeopathy

Homeopathy is defined in the Attorney's Dictionary of Medicine at page H-110 as

"A system of treating diseases by the use of small doses of medicine which in large doses produce in a healthy person the same symptoms as the disease treated. In other words, the medicine used to treat a given disease in the one that

would produce the same symptoms as the disease if given in large amounts to a healthy individual.”

Acupuncturists are authorized to prescribe and administer treatments to “normalize physiological functions” or “to promote health.” However, acupuncturists are limited by the law as to the types of treatment which they may utilize in treating their patients. Specifically, acupuncturists are not permitted to administer or prescribe drugs.

Section 4937(b) authorizes acupuncturists to prescribe “drugless substances ... as dietary supplements.” As previously discussed, Health and Safety Code section 26010 defines “drugs.” as including (1) substances recognized in one of the official compendiums, including the official Homeopathic Pharmacopoeia of the United States or (2) substances intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in human beings.

Under the first category of Health and Safety Code section 26010, if a homeopathic preparation is recognized in one of the official compendiums, it will be considered to be a drug.

If the homeopathic preparation is not recognized in one of the official compendiums, it will still be considered to be a drug under Health and Safety Code section 26010 if it is administered or prescribed with the intent to cure, treat, mitigate or prevent a disease. As referenced above, homeopathy is a “system, of treating diseases” through the use of homeopathic preparations. Homeopathic preparations are used for therapeutic or medicinal purposes. Accordingly, even if a homeopathic preparation were not found in one of the official compendiums, such preparations would still be considered to be a drug because of its intended use. Since a homeopathic preparation is considered a drug, it cannot be considered to be a drugless substance and an acupuncturist would not be permitted to administer or prescribe a homeopathic preparation. Since acupuncturists are not allowed to administer or prescribe homeopathic preparations and the use of homeopathic preparations is fundamental to the practice of homeopathy, we conclude that the practice of homeopathy is not within the acupuncture scope of practice.

#### Herbal Medicines

The term “herbal medicine” implies that herbs are being used for medicinal purposes. We have previously reviewed an acupuncturist’s ability to use drugless substances and herbs and concluded that such substances may be used by an acupuncturists only if they are drugless and used as dietary supplements. The

conclusion reached there is applicable to herbal medicines. Once an herb is considered a drug, it is no longer a drugless substance and cannot be prescribed by an acupuncturist.

#### Diagnosis

Diagnosis is not specifically authorized under the Act. However, a review of the legislative history of the Act shows that former section 2155 required an acupuncturist to obtain a prior diagnosis or referral from a physician before providing acupuncture to a patient. Under former section 2155, it was clear that an acupuncturist was required to act as a subordinate to a physician and was precluded from making an independent diagnosis of a patient's condition.

Section 2155 was repealed by Statutes of 1979, Chapter 488, effective January 1, 1980. Although, under current law, an acupuncturist is not specifically authorized to diagnose a patient's condition prior to rendering treatment, logic compels us to conclude that the Legislature in repealing former section 2155 has authorized acupuncturist to diagnose a patient's condition prior to providing any treatment.

#### Ordering Lab Tests and X-Rays

With respect to the authority of an acupuncturist to order lab tests, we examine section 1242 which is contained in Chapter 3 of Division 2 of the Business and Professions Code and relates to clinical laboratory technology.

section 1242 provides in relevant part that:

"Any person duly licensed under the provisions of this chapter to perform tests called for in a clinical laboratory may perform skin tests for specific diseases, arterial puncture, venipuncture, or skin puncture for purposes of withdrawing blood or for test purposes as defined by regulations established by the department and upon specific authorization from any person in accordance with the authority granted under any provision of law relating to the healing arts.... (Emphasis added.)

The Attorney General's office has concluded that the proper test of which healing arts professionals are included in the underlined portion of section 1242 quoted above "is not whether the licentiate may, himself, perform venipuncture or skin puncture but whether the test performed by the clinical laboratory will be of any aid to him in the proper practice of his profession." 19 Cal. Atty. Gen. Ops. 201,203. In a more recent opinion the Attorney General's Office held that "(u)nder section

1242 a clinical laboratory may only perform skin tests, venipuncture, etc, for a healing arts licentiate where the need for the testing falls within the scope of the licentiate's practice and the results can be utilized within it." The opinion went on further to provide that [s]imply put, a professional may not order (authorize) clinical laboratory tests pursuant to section 1242 if the results cannot be used within the proper scope of licensed practice." 66 Cal. Atty. Gen. Ops. 302,308

We have previously concluded that a licensed acupuncturist is legally authorized to diagnose a patient's condition prior to treatment. Thus, the use of blood and laboratory tests to assist an acupuncturist in making a diagnosis would be consistent with his or her scope. of practice. In addition the use of blood or laboratory tests to corroborate or to monitor an acupuncture treatment plan would also be consistent with the scope practice of an acupuncturist. Accordingly, it is our opinion that an acupuncturist is legally authorized to order blood and laboratory tests.

The use of x-rays on human beings is governed by Health and Safety Code section 25660 et seq. It establishes standards of education, training and experience f or -persons who use x-rays on human beings. This body of law is silent concerning who may order x-rays. There is also no statute in the healing arts section of the Business and Professions Code which addresses this issue. The use of x-rays, like the use of laboratory and blood tests, involves the performance of services on a physical specimen leading to a physical evaluation of results in order to determine (i.e., diagnose) a physical or organic disturbance. We believe that the test developed by the Attorney General's office to determine who may order laboratory and/or blood tests would be an appropriate test to determine the ability of a healing arts professional to order x-rays. That is, a healing arts licentiate would be authorized to order x-rays if the results could be lawfully used within the proper scope of the licentiate's practice. We have concluded above that the making of a diagnosis by an acupuncturist would be consistent with his or her scope of practice. The use of x-rays, like blood and laboratory tests, are tools which could either assist an acupuncturist in the making of a diagnosis or corroborate or monitor a treatment plan. Accordingly, it is our opinion that an acupuncturist is legally authorized to order x- rays.

#### New Devices

The acupuncture profession utilizes various instruments to diagnose and treat patients. The use of some of these

instruments are subject to regulation as "new devices" by the Department of Health Services, Food and Drug Branch (FDB).

The FDB is authorized to enforce the Sherman Food, Drug and Cosmetic Law<sup>4</sup>. The Sherman Food, Drug and Cosmetic Law addresses, the advertising, manufacture, sale, labeling, distribution, and use of devices used in the healing arts. The FDB also has the ability to make determinations as to what devices are considered to be "new devices."

A new device is any device which is not generally recognized among experts as being safe, and effective for its intended use.<sup>5</sup> It is unlawful to sell, deliver, or give away any new device unless the new device has received approval from the appropriate state and federal , agencies<sup>6</sup> or the new device is used by experts qualified by scientific training and experience who are investigating the safety and effectiveness of the device in accordance with the requirements of state or federal law.<sup>7</sup>

Devices which are not generally recognized by the State as safe or effective for their intended purpose are defined as new devices and may not be clinically used on patients within this state.

A health care professional, including an acupuncturist, is prohibited by the Sherman Food, Drug and Cosmetic Law from using an instrument or device which is considered by FDB to be a "new device."

It is our understanding that the FDB has taken the position that the four devices which are specifically referenced in the Act (acupuncture needles, electroacupuncture, i.e., electrostimulation, moxa (in moxibustion), and cups (in cupping) are not considered to be new devices. The FDB's position is apparently based upon the statutory recognition of these particular modalities in the Act carries with it an implication that they are safe and effective.

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<sup>4</sup> Health and Safety Code section 26000 et seq.

<sup>5</sup> Health and Safety Code S 26 020

<sup>6</sup> Health and Safety Code S 26670

<sup>7</sup> Health and Safety Code S 26618 and 26679

The new devices issue poses a question of shared jurisdiction between the committee and FDB. The committee is authorized to make determinations as to whether an acupuncturist's use of a device falls within his or her scope of practice. Where an acupuncturist uses a device which is not within the acupuncture scope of practice, he or she could be disciplined for unprofessional conduct. Alternatively, FDB has jurisdiction over the use of new devices by an acupuncturist. That is to say, an acupuncturist who is lawfully engaged in the practice of acupuncture, may only use devices which are consistent with the Sherman Food, Drug and Cosmetic Law, i.e., safe and effective. An acupuncturist is subject to legal action by the FDB and disciplinary action by the committee if he or she uses a new device in a manner not authorized by law.

The new devices issues would occur typically in the use of various diagnostic instruments. Since we have previously concluded that an acupuncturist may diagnose a patient's condition, the use of diagnostic instruments is not a scope of practice question, but, rather, relates to whether or not the diagnostic instrument selected by the acupuncturist is safe and effective for its intended use. If a particular diagnostic instrument is not considered by the State or federal government to be safe and effective for its intended use, the instrument will be considered to be a new device. If the instrument is not being used in accordance with state or federal law, the acupuncturist is subject to legal action from FDB for violation of the Sherman, Food, Drug and Cosmetic Law.

The use of new devices as treatment modalities relates to an acupuncturist's scope of practice. To the extent that an acupuncturist utilizes a treatment modality that is a "new device" which is not specifically authorized by the Act and the use of the device constitutes the practice of medicine, the acupuncturist has exceeded the acupuncture scope of practice and would be subject to disciplinary action by the committee. In addition, the acupuncturist would be subject to legal action by FDB for using a new device.

#### Stimulation of Acupuncture Points By Ultrasound Devices, Cold Lasers, and Magnets

Acupuncture points may be stimulated by various methods, including the use of ultrasound devices, cold lasers and magnets.

Ultrasound or diathermy devices apply ultrasonic energy at a frequency beyond 20 kilohertz and are intended to generate deep heat within body tissues.

A “cold laser” refers to a method of stimulating acupuncture points by the use of a low energy noninvasive laser.

Magnets are used to stimulate acupuncture points to alter the flow of energy through the region to which they are applied.

Section 4927 defines acupuncture as the stimulation of points by the (1) insertion of needles, (2) electroacupuncture, (3) cupping, and (3) moxibustion. In addition, an acupuncturist is authorized to stimulate points by the use of acupressure. The definition of acupuncture limits the stimulation of acupuncture points to the previously mentioned five modalities and for the purposes set forth in that section. The statutory definition is narrow. It does not include or authorize other modalities for stimulating acupuncture points. The Act does not grant acupuncturists any general authority to stimulate acupuncture points by any other methods or modalities. The stimulation of acupuncture points by ultrasound devices, cold lasers or magnets is not one of the modalities for stimulating acupuncture points which is recognized by the Act. Therefore, an acupuncturist would not be authorized by the Act to use these modalities to stimulate acupuncture points.

We note, however, that if a particular modality is not considered to be a “new device” and its use does not constitute the practice of medicine, an acupuncturist may be permitted to use the modality even if it is not recognized in the Act. With respect to the use of ultrasound devices, cold lasers and magnets, it would appear that an argument could be made that an acupuncturist may use magnets inasmuch as they are not considered to be a new device and are a noninvasive treatment which do not constitute the practice of medicine. This conclusion would not apply to ultrasound devices or cold lasers which are considered to be either a new device or are used in a manner which constitutes the practice of medicine.

#### Heat and Cold Therapy

The utilization of heat and cold pads, heat lamp, and infrared heat is not one of the modalities listed in sections 4927(e) or 4937.<sup>8</sup> (supra.)

Section 2620 defines the practice of physical therapy

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<sup>8</sup> It is noted that the use of heat is permitted by an acupuncturist to the extent that the heat is applied to stimulate an acupuncture point through moxibustion.

“2620. Physical therapy means the art and science of physical or corrective rehabilitation or of physical or corrective treatment of any bodily or mental condition of any person by the use of the physical, chemical, and other properties of heat, light, water, electricity, sound, massage, and active, passive, and resistive exercise, and shall include physical therapy evaluation, treatment planning, instruction and consultative services. The use of roentgen rays and radioactive materials, for diagnostic and therapeutic purposes, and the use of electricity for surgical purposes, including cauterization, are not authorized under the term ‘physical therapy’ as used in this chapter, and a licensed issued pursuant to this chapter does not authorize the diagnosis of disease.”

Section 2630 requires one to have a physical therapist's license in order to practice physical therapy. We note that the practice of physical therapy includes the modality of heat. However, the definition of physical therapy focuses on two elements: (1) the purpose or reason for its administration (i.e., “physical or corrective rehabilitation or physical or corrective treatment of any bodily or mental condition of any person”) and (2) the means by which that is to be achieved (i.e., “by the use of the physical, chemical, and other properties of heat, light, water, electricity, sound, massage and active, passive and resistive exercise”).

Thus, physical therapy encompasses certain procedures and modalities only when used in the course of certain activity. The California Attorney General's office has concluded that section 2630 prohibits the unlicensed use of physical, chemical and other properties of heat, light, water, electricity, sound, massage and active and resistive exercise only when they are used in conjunction with the physical or corrective rehabilitation or the physical or corrective treatment of any bodily or mental condition of any person.<sup>9</sup> If the properties of heat were not utilized in connection with physical or corrective rehabilitation or treatment they would not be deemed to be within the statutory definition of physical therapy.

It is our understanding that an acupuncturist may use heat through heat lamps, heat packs, ultrasound and diathermy devices. If heat is used for purposes of relaxing a patient or a particular area of the patient to facilitate the effectiveness of

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<sup>9</sup> 64 Cal. Atty. Gen. Ops. 470

needling either before or after treatment, such a use of heat would not be the purpose of physical or corrective treatment and could be performed lawfully by an acupuncturist. Similarly, an acupuncturist's use of heat to keep a patient warm while he or she is undergoing acupuncture treatment would be permissible.

However, the use of a heat source alone to address or correct a patient's ailment would fall within the scope of practice of physical therapy and could not be performed by an acupuncturist. In addition, the use of heat to stimulate acupuncture points, by a modality which is not enumerated in the Act would not be permitted.

With respect to the use of cold pads, while this modality is not included within the scope of practice for acupuncture, it is also not included within the physical therapy scope of practice. Our research has also failed to reveal its mention among the other healing arts professions. Accordingly, it would appear that any person, including an acupuncturist, may utilize cold pads.

#### Baths and Hydrotherapy

The practice of physical therapy as defined by section 2620 includes the use of water. However, as discussed above, in determining whether one of the means enumerated in section 2620 constitutes the practice of physical therapy, we must also consider the purpose or reason for its administration. That is, in order for the use of water to be deemed to be the practice of physical therapy, it must be used for "physical or corrective rehabilitation or physical or corrective treatment of any bodily or mental condition of any person."

We believe that an acupuncturist is permitted to utilize baths and hydrotherapy (e.g., whirlpool) for purposes other than physical or corrective treatment of a patient. For example, an acupuncturist could recommend the use of baths and hydrotherapy for relaxation purposes.

#### Naturopathy

In Oosterveen v. Board of Medical Examiners (1952) 246 P.2d 136, the court considered the practice of naturopathy and concluded persons licensed as physicians and surgeons, osteopaths, chiropractors, or drugless practitioners may employ naturopathic methods. The Oosterveen court, supra. p. 139 at footnote 1, quoting from the trial court, defined naturopathy in part as follows:

“That Naturopathy is a mode of healing that attempts to restore and maintain health by the use of light, air, water, clay, heat, rest, diet, herbs, electricity, massage, Swedish movements, suggestive therapeutics, chiropractic, magnetism, physical and mental culture, and does not advocate the use of drugs and medicines, but does advocate the use of “dietary supplements” which said dietary supplements include all substances found in herbs, the earth and animal tissues, whether raw or refined, and it does not include the use of surgery or the penetration of the tissues; ...”

Recently in an opinion dated June 9, 1993 to the Senator Herschel Rosenthal, Legislative Counsel of California (hereafter “Legislative counsel”) opined that a licensed acupuncturist may use naturopathic techniques as part of his or her practice. Legislative counsel compared the functions that could be performed pursuant to the definition of naturopathy provided in Oosterveen, supra, at page 139, footnote 1, with the functions the may be performed by an acupuncturist pursuant to section 4937(b) and found them “similar in many respects. Both permit the use of massage (oriental massage and acupressure per Sec. 4937), herbs, drugless dietary supplements, diet (nutrition per Sec. 4937), exercise (swedish movements and physical culture per Sec. 4937).”

We would concur with Legislative counsel’s opinion that an acupuncturist may use naturopathic techniques as part of the practice of acupuncture, but only to the extent that acupuncture treatment modalities specified in sections 4927 or 4937 also constitute the practice of naturopathy or are not otherwise prohibited by other laws.. We do not believe, however, that an acupuncturist is authorized to practice naturopathic treatments which are not specifically authorized by the Act and are otherwise prohibited by other laws.

Our conclusion is based upon reasoning found in the Oosterveen decision that:

“...the regulatory acts [for physicians, chiropractors and osteopaths] have not prohibited the use by all licensed practitioners of the natural methods of healing commonly employed by naturopaths, in connection with and supplementary to other licensed methods of treatment. When we speak of the right to use the methods commonly employed by naturopaths we do not adopt the trial court’s definition of naturopathy in all respects. Some of the practices mentioned might in some circumstances be regard as the use

of drugs, or medicine, which, of course, is prohibited to chiropractors. (Oosterveen supra. at p. 142)

The Oosterveen court recognized that a chiropractor is not authorized to prescribe or administer drugs or medicines and that the use of some naturopathic methods, (e. g. , herbs) may constitute the use of drugs. As we have previously discussed in our analysis of an acupuncturist's use of herbs, herbs may be considered to be drugs. More importantly, however, the Oosterveen court did not conclude that duly licensed practitioners may employ all naturopathic methods. The court recognized that a licensed practitioner's ability to use naturopathic methods is based upon the practitioner's licensing law and other laws which may regulate the treatment method in question (e.g., heat, electricity, or magnetism).

Therefore, we conclude that an acupuncturist may use naturopathic methods to the extent that such methods also constitute the practice of acupuncture or are not prohibited by other laws. Specifically, an acupuncturist may administer or prescribe the following naturopathic treatments: light, air, clay, rest, diet, herbs, massage, and magnetism. An acupuncturist may administer naturopathic electricity only to the extent that it also constitutes electroacupuncture. Water and heat may be used by an acupuncturist in a manner which is consistent with our previous holding in this opinion (i.e., for purposes other than physical or corrective treatment of a patient). To the extent that Swedish movement and physical culture are exercise therapies, an acupuncturist could prescribe such treatments. An acupuncturist is not authorized to offer chiropractic services., We are unable to find a definition of suggestive therapies and mental culture and express no opinion on these subjects.

We trust that the foregoing is of assistance.

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