State of Arizona
Board of Chiropractic Examiners

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June 23, 2010

Debra Davenport
Auditor General
2910 N. 44th St., #410
Phoenix, AZ 85018

Dear Ms. Davenport,

Please find attached the Board's response to the agency sunset audit. The Board appreciates the dialogue with your staff during this process. The Board hopes that any additional comments or opportunity taken to clarify the Board's position or provide explanation is accepted in the same spirit as the explanation and clarification noted in the Audit Report.

Response to recommendations:

1.1 (A) The Board should revise its complaint opening policy to guide staff on what actions should be taken if a complaint involves an unlicensed chiropractor.

The finding of the Auditor General is not agreed to, but a different method of dealing with the recommendation will be implemented.

This recommendation appears to be a simple matter of semantics. The audit staff has agreed that the Board must investigate the unlicensed practice of chiropractic in order to establish a cause to seek an injunction. The Board believes that it is consistent in law and action with other Board's in this matter. The investigation of the unlicensed practice of chiropractic is the same as that of an investigation of a licensed chiropractor. The party is informed of the allegation of unlicensed practice and given the opportunity to respond. Board staff identifies the information required in order to determine if the allegation is true. Upon completion of the investigation, the matter is forwarded to the Board for its review. The Board will accommodate the recommendation of the Auditor General by designating the investigation of an unlicensed person who is not an applicant as a "non-jurisdictional" complaint. The investigation process will remain the same as that of a jurisdictional complaint.

In addition, the Board will include actions related to unlicensed practice in its adverse actions report and direct staff to provide that information to the Board after the Board determines whether the allegation either has or has not been substantiated by the investigation.

(B) The Board should eliminate the authority to not open a complaint based on the complainant's intent, such as the intent to intimidate or harass a public official.

The finding of the Auditor General is agreed to and the audit recommendation will be implemented.

1.2 To improve its investigation process, the Board should limit the amount and type of records requested in its subpoenas where possible. The Board policy should be modified to provide guidance to staff on how to subpoena appropriate information.

The finding of the Auditor General is agreed to and a different method of dealing with the finding will be implemented.

The Board's policy for subpoenas has been structured to prevent perceptions or allegations of inconsistency in the investigation process. However, the Board will, when possible, limit the request for documents to the current period of treatment, unless the complaint indicates a broader spectrum of concern. The Board will also limit requests for x-rays and sign-in sheets when applicable. The Board will authorize the executive director to use her judgment when issuing subpoenas. If the executive director encounters situations in which she requires additional guidance, she will submit that request to the Board. In addition, the Board views all subpoenas with the complaint during its initial review. If the Board becomes concerned that additional instruction is required, it will respond at that time. To date, Board staff has developed templates of subpoenas for the levels of investigation indicated above.

Clarification:

Board staff has also researched this matter by speaking with staff of eight other boards and obtaining copies of their subpoenas. We found that the structure and scope of Chiropractic Board subpoenas are consistent with those Boards, except in one case in which it is typical for a patient to see the doctor for one day only. Such short periods of treatment are not common to most health professions, and certainly not common to the chiropractic profession. We have found that the audit staff's lack of familiarity with chiropractic and chiropractic record keeping, as well as their lack of understanding of the relationship between the treatment record and the billing record makes it difficult to successfully arrive at a consensus on this matter.

The audit report expresses the opinion that limitations on subpoenas save time and money. Actually, the delay caused by insufficient collection of documents requires both the doctor and the Board to expend additional resources for staff time, equipment, supplies and postage to issue and comply with multiple subpoenas. In addition to cost, insufficient collection of documentation requiring that additional subpoenas be issued is contrary to the Auditor's expectation that the Board conclude cases within 180 days. The investigation is delayed

each time that the Board is required to issue an additional subpoena in order to give the doctor sufficient time to respond.

Finally, the Board would like to refer to Pima County Superior Court Case No. 2 CA-CV 2009-0083. The licensee petitioned the Court to revoke or modify a Board subpoena based on his assertion that the complaint did not allege a violation of the Chiropractic Practice Act. The Court noted that the Board is permitted on its own motion or on receipt of a complaint....[to] "investigate any information that appears to show that a doctor of chiropractic is or may be in violation of this chapter or board rules." § 32-924(B). Courts must therefore give "wide berth" when reviewing the validity of an investigation conducted by the Board. *Carrington v. Ariz. Corp. Comm'n,* 199 Ariz. 303, paragraph 8, 18 P. 3d 97, 99 (App.2000), *quoting Polaris Int'l Metals Corp. v. Ariz. Corp. Comm'n,* 133 Ariz. 500, 506, 652, P.2d 1023, 1029 (1982). Based on the allegations in C.F.'s complaint ----the Board became concerned that the licensee had engaged in a number of actions that could be grounds for disciplinary action and initiated this investigation. The Boards concern was neither arbitrary nor capricious, and we cannot say its initiation of an investigation based on the information presented to it was an abuse of discretion. *See Lathrop,* 182 Ariz. At 177, 894 P. 2d at 720. The court therefore did not err in refusing to revoke or modify the subpoena". This is offered as a demonstration that the intent of the law regarding the scope of a subpoena is not intended to narrow the reasonable scope of an investigation.
(See attached Auditor General Reply, Item #1)

1.3 (A) The Board should review a licensee's complaint and disciplinary history information only after it has substantiated the allegations in a new complaint.

The finding of the Auditor General is agreed to and will be implemented.

The Board will establish a policy as recommended. The policy will direct staff to provide information to the Board on a licensee's history of complaints, advisory letters, non-disciplinary orders and disciplinary orders only at the time that the Board finds that allegations are true but before the Board determines what action it will take.

Clarification:

There are some cases in which the Board believes a review of history would be appropriate. The Board believes these cases would be appropriate because the Board is not reviewing the history to determine whether or not a new complaint is true. First, an assistant attorney general for the Office of the Auditor General has confirmed that if the licensee or the licensee's legal representative introduces the subject of any complaint or disciplinary history, the Board may then review the complaint or order at that time to confirm that the statements are based in fact. Additionally, the Board feels that it should be able to take into account a licensee's history of remediation when considering a new complaint, because the history of remediation may adequately address any concerns. Finally, the Board may need to consider whether the allegations in a new complaint have already been adjudicated in a prior matter. (See attached Auditor General Reply, Item #2)

Because the report appears to indicate that the Board discusses a licensee's complaint and disciplinary history as a normal course of action, it appears appropriate for the Board to clarify the actual practice. The Board members are provided a brief when they review a complaint investigation. The brief provides a summary of the complaint, the doctor's response, the investigative findings and the doctor's public record profile. The public record includes the doctor's history of dismissed complaints, advisory letters and/or orders. The Board does not discuss the public record for each case, it is simply provided as part of the summary. The purpose of including the doctor's public record is not intended to influence the determination as to whether the current allegations are true. The recent passage of HB2545 A.R.S. § 32-3213, which states that a licensee's record of complaints, advisory letters and disciplinary or non-disciplinary orders is available to the regulatory board at all times supports that the inclusion of the public record in the summary has been appropriate. That being said, the Board understands that while its practice has been appropriate, the audit recommendation is a best practice option that the Board will adopt.

(B) The Board should establish a policy that complainants are not permitted to withdraw complaints alleging statute or rule violations, and instruct staff to send any complaints that have been investigated to the Board for adjudication.

The finding of the Auditor General is agreed to and will be implemented. The policy will prohibit withdrawal of a complaint once it has been submitted to the office, regardless of whether a file had been opened.

Clarification:

Although the Board will adopt the auditor's recommendation, it is not in agreement that the Board's practice for allowing withdrawals has been inappropriate or inconsistent. The practice has been that staff would honor a complainant's request to withdraw a complaint if the investigation had not established a probable violation of law at the time the request was made. If staff had become aware of evidence of a violation, the investigation would proceed. Staff is not aware of any law that prevents a person from withdrawing a complaint. In one case, the investigation had progressed enough to establish evidence of a possible violation of law. The request for withdrawal was declined. The investigation in the matter was concluded, and had found only minor record keeping errors. The matter went before the Board, but was pended at the request of the licensee's attorney. The reason given was that the complainant was filing a malpractice suit and it was requested that the Board delay its review until the civil matter was concluded. Shortly after, the complainant withdrew her complaint. Because there were no substantive findings from the investigation, the request was honored. The third case is consistent with the second. The investigation found no violation of law. The complainant withdrew the complaint, and with no evidence of violations, the request was honored. Although the Board believes that the requests for withdrawals were consistently addressed, it also recognizes that a best practice may be to remove the option to allow a complainant to withdraw a complaint.
(See attached Auditor General Reply, Item #3)

1.4 (A) The Board should consider developing guidelines to help it ensure that it provides consistent and appropriate discipline.

The finding of the Auditor General is not agreed to, but a different method of dealing with the recommendation will be implemented.

The audit admittedly did not establish that the Board has been inconsistent in imposing disciplinary action. It noted one matter in which the Board issued a fine that was not consistent with other cases. In all other cases, action was consistent and appropriate. In addition, in 2008, the Office of the Ombudsman also conducted an investigation in which a sample of 20 files were reviewed for disciplinary actions taken between June 1, 2006 and June 1, 2007. The investigation found that the Board's actions were consistent. The Board also communicated with the Medical Board on this matter because it has disciplinary guidelines in law. The information received was that the guidelines are not useful.

Past Board members have informally looked to guidelines published by the Federation of Chiropractic Licensing Boards and those guidelines may be used as advisory by integrating them into orientation materials for new Board members. The guidelines indicated in the audit report will also be used to assist with orientation. The fact remains, however, that all cases before the Board must be considered on the specific facts at hand.

In most cases, the Board imposes discipline when multiple violations have occurred; making the application of preconceived actions cumbersome and impractical. The Board, however, has been successful in meeting consistency expectations by referring to its past actions and by establishing standard language that applies to all disciplinary orders when applicable. The Board has accomplished this by referring to staff for guidance with consistency concerning past actions. The Board will accommodate the Auditor's recommendation by formalizing that process as an "adverse action report" that will be available to Board members at the time they consider what action to take following a finding that violation(s) of law have occurred. Staff will also have language from past orders for similar violations available for the Board's consideration at that time.

(B) The Board should request the Legislature to amend its statutes to add a definition clarifying how it can use advisory letters.

The finding of the Auditor General is agreed to and the audit recommendation will be implemented.

(C) The Board should ensure its advisory letters clearly communicate the statutes violated, and/or licensee practices that caused the Board concern.

The finding of the Auditor is agreed to and the audit recommendations will be implemented.

When making a motion for an advisory letter, the Board will be clear as to whether the advisory letter is issued due to a violation of the Chiropractic Practice Act, and what statute or rule has been violated, or whether the advisory letter is merely issued to express a concern.

Sunset Factors

Time to complete investigations.

The Board is very concerned about the delay in completing investigations. Although the Board has implemented a number of practices to improve timeliness, the fact remains that the Board has insufficient staff (one investigator) to handle all investigations and to monitor licensees on suspension or probation for compliance. This will continue to be a challenge due to insufficient revenues. In addition, the Board no longer has sufficient funds to maintain a contract with the Office of the Attorney General. It can be anticipated that hearings will be delayed as a result. Given the above, the Board will continue to work toward improving timeliness, but the auditor's goal of 180 days for concluding cases is not feasible without legislative authority to increase fees to meet that expectation.

Please find listed below some of the steps taken to address timeframe concerns.

Formal Hearings: The timeframe to complete Formal Hearings from FY03 to FY08 range from 4.8 months to 24 months. The 24 months applied to FY05. The timeframe in FY04 had been 4.8 months. The Board has no control over how quickly the Office of the Attorney General prepares a case for hearing, but some resolutions can be instituted. A concern with timeliness in concluding Formal Hearings was raised during the last Sunset Audit. As a result, the Board was able to obtain statutory authority to increase fees to contract for dedicated time from the Office of the Attorney General. The average time to conclude a hearing improved somewhat before the poor performance in concluding hearings again came to the executive director's attention in FY05. The executive director found that the assistant attorney general assigned to the Board was not preparing for hearings because he reported he was putting all of his time toward negotiating consent agreements. As a result, negotiating and writing of consent agreements was assigned to the executive director, and the assistant attorney general's time was to be dedicated to timely conclusion of hearings. When hearings still fell outside of an acceptable timeframe, the Board requested a new assistant attorney general. The Board was then able to improve timeframes for hearings. It is the Board's goal to hold Formal Hearings within 3 months. The Board's current assistant attorney general's effort to accommodate this policy has been appreciated; however, the lack of financial resources combined with the Board's work load is anticipated to impact timeliness in the future.

Consent Agreements: The executive director's s review of delays in concluding matters with consent agreements identified two primary causes. The first was that the licensee's defense

would wait until receipt of notice of the date of a Formal Hearing or Formal Interview before consideration of a consent agreement was requested. The result was that the Formal Hearing or Formal Interview would be delayed, and negotiations for a consent agreement would not even begin until the third month or longer. The second was that no timeframe was placed on the negotiation process, with some cases taking up to a year before an agreement was reached. To solve this problem, the Board instituted three policies. A licensee has twenty days following a matter being voted to Formal Hearing or Formal Interview in which to request consideration of a consent agreement. As per Board policy, a request for a consent agreement submitted after the Complaint and Notice of Hearing or the Invitation to Formal Interview has been served is not accommodated. The licensee is notified of these policies in writing at the time the matter is voted to Formal Interview or Formal Hearing. Finally, the Board will not delay a Formal Hearing or Formal Interview for a consent agreement. The current challenge to concluding a matter with a consent agreement within the three month target date is a lack of human resources to write the consent agreement. The executive director writes the consent agreements in addition to her other duties.

Investigations: In FY03, FY04 and FY06, staff was able to conclude the average investigation within four months. In FY05, staffing was insufficient to maintain that performance. Contract investigators were engaged to assist, and both the deputy director and the executive director worked nights and weekends to improve timelines, which was achieved in FY06. However, the board also received a record high of 178 new complaints filed in FY06 . The high number of complaints exceeded the Boards resource of one person to timely conclude investigations, and therefore, the timeframe went up. The executive director reviewed possible causes for the substantial increase in complaints. One of the explanations had to do with complaints coming from the insurance industry. Insurance complaints were submitted to the Department of Insurance, which then forwarded the complaint to the Board. In order to file a complaint with the Department of Insurance, the insurance company was required to file each patient file separately for the same doctor. As a result, the Board was getting multiple complaints filed against the same doctor with the same allegations in each complaint. The Board's resolution was to arrange a different structure for submission of complaints from participating insurance companies that compressed multiple patient files into one complaint, and limited the files reviewed to the minimum number needed to complete the investigation. Although this effort resulted in fewer complaints filed in following years, the backlog from the 178 FY06 complaints continued to impact timeliness for completion of investigations into FY08 and FY09. While the Board had used the resources of contracted chiropractors to conduct investigations requiring technical expertise to alleviate a work load exceeding the capacity of one person in the past, the Board no longer has sufficient funds to use that resource.

The executive director placed the requirement that timeframes to complete investigations be improved in performance expectations. A new structure was introduced as a result. The Board agenda had had a mix combining Board review of investigation files and Board review of Formal Interviews at each meeting. It takes one to two weeks to prepare files for a Board meeting. As a result, there were only two weeks a month to work on investigations. The new structure dictated that investigative files be reviewed by the Board every other month, rather than monthly, to

provided more time to work on investigations. The plan was successful and staff was able to improve timeframes for investigations. That plan was interrupted when the deputy director/investigator left his position, and the current hiring freeze caused a delay in hiring a replacement. The current deputy director reports that she believes she is now on target to achieve the goal to reduce timeframes.

Formal Interviews: The timeliness of Formal Interviews was impacted by some of the same circumstances that influenced timeliness for Formal Hearings and Investigations. Resolutions are also the same. Formal Interviews are generally held every other month, when the Board is not reviewing investigations. This allows for more Formal Interviews to be placed on the agenda, with great success. The backlog of Formal Interviews resulting from the FY06 filing of 178 complaints has been completely eliminated. The majority of Formal Interviews are now considered by the Board within three months, as per policy.

The extent to which the level of regulation exercised by the Board is appropriate and whether less or more stringent levels of regulation would be appropriate.

The Board agrees that the current level of regulation exercised by the Board is appropriate for regulation of the chiropractic profession. However, the Board has observed a need to establish authority to regulate business entities offering chiropractic services that are not owned by and/or operated by a licensed health care professional. Traditionally, chiropractic practices were owned and operated by chiropractors. However, that trend is reversing. It is becoming common for unlicensed individuals to own and/or operate businesses offering chiropractic services. It is also becoming common for the those businesses to establish practices that violate the Chiropractic Practice Act, and place the health, welfare and safety of the consumer at risk. Without the authority to regulate such businesses, the Board's only option is to address the violations through the chiropractic employees. It is not a sufficient measure. The employee leaves the business, sometimes with discipline on their record, only to be replaced by another chiropractor who is put into the same position by the business owner to violate laws, or lose employment. In one case, the Board found that the unlicensed operator of a clinic has been receiving notices of complaints and subpoenas sent to licensees in her employ, keeping the information from the licensees, and submitting a reply to the subpoena with a forged signature of the licensees. In other cases, patient records are left in the possession of the unlicensed business owner when the licensee leaves employment. The patients are then unable to obtain their records to seek care from another provider.

Additional Comment

The recommendations of the Office of the Auditor General are established based on the explanation and clarification provided in the body of the report. The Board feels it is appropriate for it to comment on those observations that may have influenced the recommendations, and that

may not be consistent with the data or records of the Board. The comments are not intended as criticism of the report or audit staff. They are offered for purposes of clarification only.

As an initial observation, the Board finds that identification of an error during the audit has been extrapolated into an overall structural weakness of agency functions. An error may occasionally occur, which is true of any entity. However, occasional errors do not reflect an overall dysfunction. While this Board may strive for perfection, it is logical that some errors will occur.

On page 10, the report states that in three complaint investigations, the subpoenas were overly broad. Two of these cases have been responded to in the past, although on further review, it appears additional analysis of one of the cases is appropriate. In terms of the third complaint investigation, the Board has expressed its intention to limit subpoenas to the current period of treatment unless otherwise indicated. The Board is not in agreement on the audit analysis of the other two matters for the following reasons:

There appears to be some level of misperception that the purpose of an investigation is to prove that a doctor has violated a law. That is perhaps understandable if one is not experienced in and familiar with conducting health regulatory board investigations. In reality, it is never assumed that the allegations in a complaint are or are not true. Obtaining the investigative record is as important to disproving allegations as it is to proving allegations. A patient record is a large picture. Each part of the record, whether it is a day or section, is a piece of the puzzle that makes up the whole picture. Looking only at a limited piece of a record may inaccurately reflect that a doctor has violated a law, when another part of the record may demonstrate the opposite. Doctors generally follow a similar outline in creating records, but the law does not require any particular outline be used. It is not unusual to find the answer to a question scattered about in the record. When we conduct an investigation, we want it to be fair and impartial. The Board issues its subpoenas to that end. The subpoenas in the two cases in question were issued with the following analysis.

Case 1. The complainant alleged that he was told his co-pay was $36.00, but he learned from his insurance provider that the co-pay was actually $25.00. The allegation would fall under the Board's jurisdiction under A.R.S. 32-924(A)(5) and (23) and A.A.C. R4-7-902 (2). If the doctor billed the patient $11.00 more then the actual co-pay, it would substantiate a violation of law. However, a review of the patient treatment record may actually reflect that the additional $11.00 was for a separate service that was appropriately billed. Therefore, billing and treatment records were obtained.

Case 2. The complainant alleged that she was told her co-pay was $25 but it was actually only $10. She also alleged that the Doctor billed her for $1,300 before billing the insurance company and that the doctor stated it was because the insurance company does not always pay when billed. This raised the allegation of double billing. The complaint does allege violations of the Chiropractic Practice Act. The allegation that the patient was told her co-pay was $25 when it was actually $10 would fall under the Board's jurisdiction under A.R.S. 32-924(A)(5) and (23)

and A.A.C. R4-7-902 (2). The additional allegation that the patient and the insurance company were billed for the same services would fall under the above as well as ARS 32-924(5) and AAC R4-7- 902 (13). The billing and treatment records were obtained to determine what amount was actually billed and collected. The investigator would not assume the allegation to be true. The billing record was needed to determine the amount actually billed and collected. The rest of the record was needed to determine whether or not the patient was improperly billed for services also billed to the insurance company. Both billing and treatment records are needed to determine if both the patient and the insurance company were billed for the same services, or if the charges were for different services.

Page 10 also comments on the subpoena's being misleading. The Board contends that the subpoenas are not misleading The Board's subpoenas are consistent with other health regulatory boards in providing legal reference for the board's authority to issue a subpoena and the licensee's rights. In general, Boards give the appropriate statutory reference, as does the Chiropractic Board. Licensees, as a regulated party, have the responsibility to be familiar with the Chiropractic Practice Act. They are provided with the laws with their application, and required to pass the jurisprudence examination. They are provided with any updates in laws by mail. Finally, the laws are available on the Board's web site. Subpoenas are consistent in providing statutory reference because a professional person who is provided with a statutory reference would reasonably be expected to look at the law. It has been the Board's experience that this is true. The audit report itself notes a doctor requested an amendment of a subpoena. The executive director regularly receives requests to amend or waive a subpoena, and an example given on page 3 of this response reflects a licensee challenging a subpoena in court.

Page 13, the audit report refers to complaints that were filed against one current Board member and two former Board members. The Board recognizes that the audit found that the matter was handled appropriate by the Board, and appreciates the considerable amount of time audit staff spent in their research. The Board did note that because the audit report dedicates a fairly substantial portion of that section describing the allegations, it may also be advisable to explain the conclusion as well. The complaints were not opened because the license who submitted them declined to provide the name or contact information for a witness to the complaint, and his complaint clarified he was not a witness himself. In addition, the licensee, although present, declined to speak to the Board to support his allegations.

Page 19 of the report indicates that expenses for professional and outside services increased about $20,000 in FY 2005 and remained elevated. While the report identifies some of the basis for increased expenses, it fails to identify two interagency contracts which comprised a significant portion of the costs. The Board had a contract with the Office of the Attorney General and with the Department of Administration for accounting services. Those represent significant costs, as well as costs that tend to increase each year as those agencies experience increases to their own expenses.

Page 20 of the report states that the Board authorized an increase in personnel expenses in 2005 and that the agencies expenses exceeded revenues those years, although the funds were available to cover the cost. The Board would like to clarify that in FY2005, the Board's expenses did not exceed revenues. Expenses were $444.8 and revenues were $441.9. The Auditors table reflects a different expense because it does not factor in administrative adjustments from bi-annual appropriations. In addition, the Board cut other expenses so that the increase did not increase the overall budget request, and the fees for license renewals were still $35.00 below the cap.

In closing, the Board appreciates this opportunity to respond to the audit report. The Board also expresses its appreciation for the observations and recommendations of the audit staff, and will most certainly apply them as we do any constructive criticism, as a goal toward continued improvement.

Sincerely,

Patrice Pritzl
Executive Director

AUDITOR GENERAL REPLY TO AGENCY RESPONSE

The following auditor comments are provided to address certain statements the Board of Chiropractic Examiners made related to Finding 1:

1. The Board refers to a Court of Appeals (Division 2) case, but according to the Court, this case does not create legal precedent. The Board's response indicates that the case demonstrates that the intent of the law regarding the scope of a subpoena is not to narrow the reasonable scope of an investigation. However, our report does not recommend narrowing the reasonable scope of an investigation, but rather that the Board limit where possible the amount and type of records requested in its subpoenas. (See page 3 of the Board's response.)

2. The Board's response refers to a statement made by an Assistant Attorney General for the Office of the Auditor General. However, as allowed by A.R.S. §41-192(E)(5), our Office has its own General Counsel, and does not make use of an Assistant Attorney General. (See page 3 of the Board's response.)

3. The Board's response suggests that staff are allowed to dispose of complaints based on the results of investigations. However, only the Board has authority to conclude on the results of investigations and resolve complaints. Therefore, regardless of whether staff investigations identify no or minor violations, according to A.R.S. §32-924(E) and (F), the Board is responsible for determining what actions to take such as dismissing a complaint, or issuing nondisciplinary or disciplinary action. (See page 4 of the Board's response.)