

Acupuncture Licensing and the Patient Protection
and Affordable Care Act: An Opportunity for
Greater Access to Alternative Medicine in
America's Changing Healthcare System

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I. INTRODUCTION

Over the past few decades, interest and demand for alternative medicine increased and continues to increase today.¹ Alternative medicine, including acupuncture, can no longer be considered a fleeting trend in the United States.² The Patient Protection and Affordable Care Act (PPACA) generated more discussion of the scope of alternative medical practice because it addressed important aspects of the practice and regulation of alternative medicine.³ Although the PPACA affects the way states regulate alternative medicine, states may define practitioners' scopes of practice through licensing and the state essential benefits plan.⁴ States currently take different approaches to acupuncture regulation.⁵ The majority of states require licensing under the National Certification Commission for Acupuncture and Oriental Medicine's (NCCAOM) licensing board, while a

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1. Peter J. Van Hemel, *A Way Out of the Maze: Federal Agency Preemption of State Licensing and Regulation of Complementary and Alternative Medicine*, 27 AM. J.L. & MED. 329, 329 (2001).

2. *Id.*

3. Ankita Rao, *Affordable Care Act Boosts Status of Alternative Medicine – At Least On Paper*, Kaiser Health News (July 26, 2013), available at <http://www.kaiserhealthnews.org/stories/2013/july/26/alternative-medicine-boosted-from-health-law-on-paper.aspx>.

4. *Id.*

5. Van Hemel, *supra* note 1, at 334.

minority of states does not have a state licensing boards at all.⁶

Implementation of licensing boards using the NCCAOM in the six states⁷ that do not currently have a licensing board as well as adherence to the legislative spirit of the PPACA's approach to alternative medicine may encourage increased access and legitimization of acupuncture and other alternative medicines in the United States. California is a model of a successful licensure program and legislature that encourages the growth of alternative treatment availability. This article will first give an overview of alternative medicine, followed by a discussion of the current state of acupuncture regulations, demonstrated by the legislative and medical trajectories of acupuncture over the past few decades, including resistance from physician organizations and governmental agencies. Subsequently, this article will discuss the implications of the PPACA for acupuncture and alternative medicine and the opportunity the PPACA creates for states to embrace alternative treatments. Finally, this article will contend that acupuncture licensing boards in every state and adherence to the legislative spirit of the PPACA would be a positive step for access and choice of treatment, citing California as a model for successful state facilitation of growth in access to alternative medicine.

II. UNDERSTANDING ALTERNATIVE MEDICINE

Alternative treatments, or complementary and alternative medicine (CAM), encompass a variety of practices outside mainstream medicine.⁸ These treatments are called complementary because they have not

6. NCCAOM, 2013 NCCAOM JOB ANALYSIS; NUMBER OF ACUPUNCTURISTS PROVIDED BY STATE LICENSING BOARDS (2013), available at <http://www.nccaom.org/regulatory-affairs/state-licensure-map> (2013).

7. *States that Recognize NCCAOM Certification or Examination for Licensure*, NAT'L CERTIFICATION COMM'N FOR ACUPUNCTURE & ORIENTAL MED., <http://www.nccaom.org/regulatory-affairs/state-licensure-map> (last visited Dec. 7, 2013). (Alabama, North Dakota, Kansas, Oklahoma, South Dakota, Wyoming).

8. Van Hemel, *supra* note 1, at 330.

conventionally been a part of health care in the United States.⁹ In contrast to traditional or allopathic medicine, which is based on scientifically researched treatments, alternative medicine takes a holistic approach integrating concepts of balance, energy, biology and other factors.¹⁰ Alternative medical providers are a growing proportion of the healthcare field.¹¹ This growth is due to increased consumer demand for alternative care services.¹² Consumer demand in health care is driven by a variety of factors including personal and cultural treatment preferences, greater accessibility, and lower cost.¹³ Many patients choose alternative care because they want to take a more holistic approach to their health rather than treating illness with more conventional medical interventions.¹⁴

Alternative medicine offers quality treatment;¹⁵ alternative providers face proportionally fewer malpractice suits than physicians,¹⁶ and a significant number of scientific studies attest to the effectiveness and safety of alternative treatment.¹⁷ Alternative treatments, particularly acupuncture, which has been part of the Eastern tradition of medical treatment for 2,500 years, is often at least as time tested as conventional physician practices.¹⁸

Acupuncture is a traditional Chinese medicine.¹⁹ The word acupuncture literally means to puncture with a needle and involves insertion of thin needles through the patient's skin on specific points along the meridians, or

9. *Id.*

10. *Id.* at 331

11. Lori B. Andrews, *The Shadow Health Care System: Regulation of Alternative Health Care Providers*, 32 HOUS. L. REV. 1273, 1274 (1996)

12. *Id.*

13. *Id.* at 1276.

14. *Id.* at 1280.

15. *Id.* at 1283.

16. *Id.* at 1281.

17. *Id.* at 1283-84.

18. WHO, ACUPUNCTURE: REVIEW AND ANALYSIS OF REPORTS ON CONTROLLED CLINICAL TRIALS 1 (2003), available at <http://apps.who.int/medicinedocs/pdf/s4926e/s4926e.pdf>.

19. Acupuncture Definition, MAYO CLINIC (Jan. 25, 2012), <http://www.mayoclinic.com/health/acupuncture/MY00946>.

pathways, for energy flow.²⁰ In the traditional Eastern view, acupuncturists believe that when these needles are inserted, the patient's energy flow will achieve balance.²¹ Many Western practitioners view the acupuncture points as stimulation points for the nerve, muscle, and connective tissue, which increase blood flow and boost activity of natural painkillers.²² Acupuncture is used primarily to relieve pain;²³ however, it can be used as a treatment for several conditions including hypertension, depression, and rheumatoid arthritis.²⁴ Some question acupuncture's efficacy, suggesting that it only works through the placebo effect, but scientific evidence attests to the success of acupuncture treatment.²⁵ A study in the Archives of Internal Medicine used a sham acupuncture placebo control group to demonstrate that the patients who received actual acupuncture treatment enjoyed greater relief of chronic pain than the control group patients.²⁶

Some theorize that acupuncture, along with other alternative medicines, became more prevalent in the United States because the modern lifestyle is sedentary and often includes consumption of unhealthy foods.²⁷ Many people are more open to holistic approaches that address the health concerns that go along with the modern lifestyle.²⁸ Alternative medicine practitioners emphasize embracing and encouraging the body's natural ability to restore itself by supporting, instead of inhibiting, its healing

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. WHO, *supra* note 18, at 23-24.

25. *Id.* at 31.

26. Andrew J. Vickers et al., *Acupuncture for Chronic Pain: Individual Patient Data Meta-analysis*, 172 ARCH. INTERN. MED. 1444, 1444 (2012).

27. Phil Veneziano, *Acupuncture in the U.S. and the Hospital of the Future*, HUFFINGTON POST HEALTHY LIVING BLOG (June 6, 2012, 5:49 PM), http://www.huffingtonpost.com/phil-veneziano-ms-lac/acupuncture-_b_1572036.html.

28. *Id.*

abilities.²⁹ Openness to this approach makes alternative medicine an increasingly popular choice among consumers.³⁰ In the healthcare system, it is important to consider different viable approaches to health rather than remaining restricted to one manner of treatment, and to make those approaches available to patients if they have been proven effective.³¹ Many patients are seeking alternative treatment options and finding them effective, and the healthcare system can best serve those patients by making alternative medicine more accessible.³²

III. LEGISLATIVE BACKGROUND AND REGULATION

While acupuncture and other alternative medicines continue to gain popularity in the United States, these practices must navigate a medical field with stringent definitions of medical practice.³³ Mainstream medical organizations and practitioners have resisted the growth of alternative medicine, citing concerns that some alternative medicines may be harmful to uninformed patients.³⁴ The American Medical Association lobbies for state legislatures to restrict recognized medicine to mainstream techniques.³⁵ Case law has not always been favorable toward alternative medicine either.³⁶ In *Pinkus v. MacMahon*, the New Jersey Supreme Court convicted the defendant store proprietor of violating medical practice law when he told customers what and what not to eat after they described their ailments to him.³⁷ Decisions such as that in *Pinkus* gave courts the opportunity to define medical practice and demonstrate the necessity for

29. Rao, *supra* note 3.

30. *See Id.* (citing an increased interest in alternative medicine).

31. *See Id.* (stating that holistic treatments are an effective choice for some patients).

32. *See Id.*

33. Van Hemel, *supra* note 1, at 332.

34. *Id.* at 338.

35. *Id.*

36. *See Id.* at 335-336 (noting Supreme Court recognition of a state's power to mandate licensure of medical practitioners).

37. *Pinkus v. MacMahon*, 29 A.2d 885, 886-87 (N.J. 1943)

licensing of nontraditional medical treatments lest their practitioners face legal repercussions.³⁸ States, like New Jersey, enacted practice of medicine statutes in an effort to ensure unlicensed practitioners were not able to hold themselves out as medical doctors to the detriment of the people who trusted them with their health, which subsequently created barriers for acupuncturists.³⁹ In *Andrews v. Ballard*, a Texas district court removed this barrier, holding that the constitutional right of privacy encompasses the decision to obtain acupuncture treatment and, therefore, the medical practice act limiting acupuncture to licensed physicians was unconstitutional.⁴⁰ The court's interpretation of the right to privacy was favorable for the acupuncturist defendant in *Andrews*, but, in order to achieve increased access to legitimate and quality acupuncture treatment, all states need to develop a licensing regime.⁴¹

The medical profession assures that standards of treatment and qualification are maintained through licensing requirements for healthcare providers.⁴² There are three categories of professional licensure: mandatory licensure, title licensure, and registration.⁴³ There are six states lacking licensure requirements for acupuncturists, in contrast to physicians of Western medicine who are subject to a rigid and difficult qualification and licensing regime in every state.⁴⁴

The majority of states have a mandatory licensing regime under the national standards set by the NCCAOM.⁴⁵ Established in 1982, the

38. *Id.*

39. *See Id.* (When there is no licensing board, it becomes difficult for acupuncturists to legitimize their practice).

40. *Andrews v. Ballard*, 498 Fed. Supp. 1038, 1051, 1057 (S.D. Tex. 1980)

41. *Andrews*, 498 F. Supp. at 1057; Van Hemel, *supra* note 1, at 332.

42. Van Hemel, *supra* note 1, at 333.

43. *Id.* at 333.

44. *Id.* at 332.

45. *History and Overview*, NAT'L CERTIFICATION COMM'N FOR ACUPUNCTURE & ORIENTAL MED., [hereinafter NCCAOM History], <http://www.nccaom.org/about/history> (last visited Sept. 29, 2013).

NCCAOM's mission is to establish, assess, and promote recognized standards of competence and safety in acupuncture.⁴⁶ The National Commission for Certifying Agencies (NCCA) accredits the NCCAOM's certification programs.⁴⁷ The NCCAOM provides supporting data to the Bureau of Labor and Statistics in order to create a job classification code for acupuncturists, which furthers government recognition of its certification program.⁴⁸ Since its foundation, the NCCAOM certified more than 21,000 acupuncture and oriental medicine practitioners.⁴⁹

The NCCAOM created an avenue for states to ensure that acupuncturists are properly licensed to the highest standard of practice.⁵⁰ If state legislatures without licensing boards enacted the NCCAOM licensing regime, each state would be able to achieve consistent quality, credibility, and greater access for their acupuncturists matching the rigidity of the licensing qualifications required for traditional Western physicians.⁵¹

IV. THE PPACA'S IMPLICATIONS FOR ACUPUNCTURE AND OTHER ALTERNATIVE MEDICINE

The PPACA contains sections that will impact the accessibility of alternative medicine.⁵² Section 2706, Non-discrimination in Health Care states, in part, that a group health plan and a health insurance issuer offering group or individual health insurance coverage cannot discriminate against healthcare providers is acting within the scope of that provider's license or

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *See Id.* ("NCCAA certification indicates to employers, patients, and peers that one has met national standards for safe and competent practice of acupuncture as defined by the profession.")

52. *Acupuncture and the Affordable Care Act*, OREGON COLLEGE OF ORIENTAL MEDICINE, <http://ocom.edu/index.php/News/affordablecareact.html> (last visited Sept. 29, 2013).

certification under applicable state licensing law.⁵³ The legislative goal of this section is to prohibit health insurance plans from discriminating against practitioners who are providing services within their state-defined scope of practice.⁵⁴ It will ensure that, in most cases, health plans cannot require that only a medical doctor perform acupuncture services, rather than a licensed acupuncturist.⁵⁵ Licensed acupuncturists will be reimbursed just as a medical doctor would for acupuncture services.⁵⁶ However, the section will not apply to acupuncture providers who are not licensed in the state where they practice.⁵⁷ This section of the PPACA will go into effect in 2014 and covers virtually all individual and group insurance market policies, although it is not clear whether it will apply to existing policies grandfathered in 2010.⁵⁸ This section will ideally promote access to acupuncture treatment in more health plans while maintaining high quality acupuncture.⁵⁹

The language of the PPACA Section 5101 is another important boon for legislative inclusion of alternative medicine in the United States' healthcare system.⁶⁰ Under federal law, the healthcare workforce was originally defined federally as Doctors of Medicine (M.D.s), Doctors of Osteopathic Medicine (D.O.s), and Allied Health Professionals.⁶¹ Section 5101 modifies the definition to include *all* licensed healthcare professionals.⁶²

53. Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, § 2706, 124 Stat. 119, (2010).

54. OREGON COLLEGE OF ORIENTAL MEDICINE, *supra* note 52.

55. *Id.*

56. Bill Reddy, A Closer Look at the Affordable Care Act: How it Will Affect Your Practice, 14(10) ACUPUNCTURE TODAY (October, 2013), <http://www.acupuncturetoday.com/mpacms/at/article.php?id=32794>.

57. PPACA, *supra* note 53.

58. Reddy, *supra* note 56.

59. *Id.*

60. See OREGON COLLEGE OF ORIENTAL MEDICINE, *supra* note 52. (federal and state interpretation of the new language will be legally favorable for alternative practitioners).

61. Reddy, *supra* note 56.

62. *Id.*

This more inclusive language opens the door for officially encompassing of acupuncture and other licensed alternative medicine professionals in the health care system.⁶³ Both of the aforementioned PPACA sections have the potential to lead to an increase in the accessibility of acupuncture services and, therefore, an increase in the number of acupuncture patients.⁶⁴

Neither of these sections guarantees that individual states will enforce the inclusion of acupuncture.⁶⁵ Insurers may try to cap the number of visits, lower reimbursement rates, remove the service altogether, or use other strategies to limit the implementation of non-discrimination policies.⁶⁶ These sections of the PPACA allow group health plans, health insurers, or the individual state's Secretary of State to establish their own reimbursement rates for alternative services without federal intervention based on quality and performance measures.⁶⁷ Coverage of services offered by licensed alternative medical practitioners is another potential limiting factor to the increased accessibility of alternative medicine.⁶⁸ Some acupuncture services that can be rendered by an acupuncturist may not be covered under every insurance plan.⁶⁹ While these sections of the PPACA are intended to increase accessibility to alternative medicine, the language is not binding enough to exclude the possibility of insurers using strategies to limit implementation of its goals.⁷⁰ Alternative providers hope that states will act within the spirit the legislation was intended to provide greater

63. *Id.*

64. *See* OREGON COLLEGE OF ORIENTAL MEDICINE, *supra* note 52. (the non-discrimination clause has the potential to have far-reaching effects on acupuncture practice)

65. *Id.*

66. *Id.*

67. Reddy, *supra* note 56.

68. *requently Asked Questions about Section 2706*, INTEGRATIVE HEALTHCARE POLICY CONSORTIUM, <http://www.ihpc.org/section2706/section-2706-faqs-and-facts.shtml> (last visited September 29, 2013).

69. *Id.*

70. *Id.*

access to acupuncture.⁷¹

State licensing statutes governing acupuncture provide a framework in which acupuncture providers can operate in a quality, accessible scope of practice and avail themselves of the benefits of the PPACA.⁷² If the legislative spirit of the PPACA sections is manifested in the actions of state legislatures and insurers as it is in states like California, and states without licensing systems adopt the NCAOMM licensing system, practitioners will benefit from these PPACA sections and quality and access will increase to their fullest extent.⁷³

V. ACUPUNCTURE REGULATION IN CALIFORNIA: A MODEL FOR STATE LICENSING LAWS

California was one of the first states to license acupuncturists and also can be used as a state model of accessible acupuncture services.⁷⁴ There are over 10,000 licensed acupuncturists in California, more than in any other state.⁷⁵ A 1995 poll of the San Francisco Bay area found that, while thirty-one percent of respondents saw a physician in the past year, forty-one percent tried alternative treatments such as seeing a chiropractor, acupuncture, and biofeedback.⁷⁶ This statistic, along with other factors, demonstrates overwhelming acceptance of and access to alternative medicine in California.⁷⁷

71. *Id.*

72. *See Id.* (stating that the PPACA provides a unique opportunity to create affordable access to CAM providers for their patients).

73. *See Id.* (stating that making access to CAM providers difficult violates the letter and spirit of the nondiscrimination provision).

74. *See History*, STATE OF CAL. DEPT. OF CONSUMER AFFS. ACUPUNCTURE BOARD [*hereinafter* DEPT. OF CONSUMER AFFS.], *History*, http://www.acupuncture.ca.gov/about_us/history.shtml (last visited Sept. 29, 2013). (explaining how California ensure quality of treatment and have created an environment of growth for acupuncture practices).

75. NCCAOM, *supra* note 6.

76. Andrews, *supra* note 11, at 1274

77. *See generally* Andrews, *supra* note 11 (demonstrating that rather than representing a tiny adjunct to traditional health care, the services of alternative providers represent a major and growing proportion of health care as a whole).

Although acupuncture licensing in California is not within the NCCAOM licensing structure, the California licensing board was formed before the NCCAOM and the increase in professional acupuncture licensing.⁷⁸ The Board of Medical Examiners of California began regulating acupuncture in 1972, putting California at the forefront of acupuncture regulation.⁷⁹ In 1975, the California legislature formed the Acupuncture Advisory Committee, which eventually became the Acupuncture Board.⁸⁰ In 1978, California established acupuncturists as primary health care providers by eliminating the requirement for prior diagnoses or referral by a doctor, dentist, podiatrist or chiropractor in order to get treatment from acupuncturists.⁸¹ The Acupuncture Board is now an autonomous licensing body with a fully developed examination system to ensure quality acupuncturists.⁸² The Acupuncture Board also has the power to adopt state regulations for acupuncture practitioners, pursuant to Title 16 of the California Code of Regulations, Chapter 13.7.⁸³

The California legislature recently proposed a bill regulating use of the title of doctor.⁸⁴ If passed, the bill would make it unprofessional conduct for an acupuncturist to use the title of doctor without indicating that he or she has the proper credentials and licensure to practice acupuncture.⁸⁵ It would serve to further legitimize licensed acupuncture practitioners.⁸⁶ Regulations like this also further integrate acupuncture into the healthcare

78. DEP'T OF CONSUMER AFFS., *supra* at note 74.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *California Proposes Legislation Regulating Acupuncturist's Use of Title "Doctor,"* CAMLAW <http://www.camlawblog.com/articles/new-regulation/california-proposes-legislation-regulating-acupuncturists-use-of-title-doctor/> (last visited Oct 27, 2013).

85. *Id.*

86. *See generally Id.* (claiming that the title "Doctor" is an important signifier for quality treatment in the medical field).

landscape of California.⁸⁷

Out of the three largest state employee health plans in California, two include acupuncture coverage.⁸⁸ Of the three largest small group plans, two provide coverage of acupuncture services including Kaiser HMO.⁸⁹ According to the PPACA, in 2014, all health plans offered in the individual and small group markets, exchange plans, and all state Medicaid plans will be required to offer a comprehensive package of items and health services known as Essential Health Benefits package.⁹⁰ The California legislature has introduced two bills defining the Essential Health Benefit package benchmark for the state that would establish Kaiser HMO as the benchmark health plan.⁹¹ If these bills pass, individual and small group market plans, plans within the California Health Benefit Exchange, and Medicaid plans will be required to cover acupuncture as Kaiser HMO does in its health plan.⁹² These bills were introduced in response to the PPACA requirements and, if passed, will make acupuncture an integrated and more easily accessible part of the new health care system.⁹³

California established a standard of acupuncture access, coverage, and quality that other states can draw from to form or improve patient care and provide more options to patients.⁹⁴ The PPACA offers an opportunity for states to incorporate alternative medicines further into the health care system promoting greater access as California demonstrates through its

87. *See generally Id.*

88. Supreme Court Decision Paves the Way for Acupuncture Parity, CAL. STATE ORIENTAL MED. ASS'N, [hereinafter CSOMA], <http://www.aaaomonline.org/?page=supremecourt> (last visited Sept. 28, 2013).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *See CSOMA supra* note 88.

recent proposed legislation.⁹⁵

VI. CONCLUSION

In order to establish access to quality acupuncture services throughout the United States, states must take initiative to regulate and license acupuncturists. This initiative will lend credibility and quality assurance to the practice as well as increased access through the PPACA.⁹⁶ There are acupuncturists in every state, but the licensing procedures in each state are not uniform or nonexistent.⁹⁷ For states that do not currently have licensing programs, adhering to the NCCAOM acupuncture licensing qualifications would create a solid, tested foundation to establish an effective licensing board.⁹⁸ Lack of licensing presents challenges in providing access through health insurance plans, specifically, the Essential Health Benefit package opportunity created by the PPACA.⁹⁹ On a federal level, the nondiscrimination clause of the PPACA is a positive step towards inclusiveness of acupuncture in the health care landscape, but it can only be effective if state legislatures also embrace licensing of acupuncture and other alternative medicines as California's has done effectively.¹⁰⁰ Access to health care is an essential right and more quality choices in our health care, including acupuncture, allow American citizens to maximize this right.

95. *See Id.* (stating that this ruling, coupled with legislation currently under consideration in the California legislature, will likely mean that the vast majority of California's 38 million residents will have a basic level of acupuncture coverage starting in 2014).

96. *See Id.*

97. Van Hemel *supra* note 1, at 334.

98. *See* NCCAOM, *supra* note 6.

99. *See* CSOMA *supra* note 88.

100. *Id.*