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NOTE

POWERS OF ADMINISTRATIVE AGENCIES REGULATING THE HEALING ARTS — DO THEY INCLUDE THE POWER TO REQUIRE A PHYSICAL OR PSYCHIATRIC EXAMINATION?

INTRODUCTION

Requiring practitioners of the healing arts to be licensed has long been held to be a reasonable exercise of the police powers granted to the states.¹ The rationale for sustaining such licensing statutes is that these professions have a direct bearing on the public health, safety, and welfare. Regulating the healing arts serves as an important means of protecting the public from unscrupulous and unqualified practitioners.² What is not clear is the means by which the administrative agencies can determine whether a particular applicant is duly qualified—mentally and physically, as well as educationally—to practice in that particular field.

The traditional test of an applicant’s fitness has been a written examination to ascertain whether the individual has a sufficient grasp of the field from an educational standpoint. Within the recent past, however, boards regulating the practice of the healing arts professions in several states have expanded their inquiries to encompass areas other than educational qualification,³ attempting to employ the devices of mental and physical


³ Hake v. Arkansas State Medical Bd., 237 Ark. 506, 374 S.W.2d 173 (1964); Dixon v. Riley, 515 P.2d 1139 (Colo. Ct. App.), cert. denied by the Colorado Supreme Court,
examinations to enable them to determine the mental and physical fitness of the applicant to practice in that profession. Appellate courts in these states have handed down substantially different opinions concerning the validity of this exercise of authority.

The purpose of this note is to analyze these examination requirements in light of the recognized purposes and powers of administrative agencies. Such an analysis necessarily includes a consideration of the statutory source of administrative power. Review of these principles leads to the conclusion that the power to require examinations, if adequately limited, is an appropriate administrative function. On this basis, guidelines for defining and limiting the power are advanced.

A review of the case law underscores the lack of uniformity in the courts' approaches to agencies' attempts to require a physical or mental examination. Recently, the Colorado Court of Appeals upheld an order of the Board of Optometric Examiners requiring psychiatric and physical examinations as a prerequisite to reinstatement of the practitioner's license, holding that the order did not constitute final agency action and was therefore not subject to judicial review. The Arkansas Supreme Court took a different approach, holding that revocation of a physician's license on grounds of mental and emotional incompetency would be upheld if the action were supported by "competent evidence." The Arkansas court's comment regarding expert testimony clearly implies the need for a physical or psychiatric examination as a basis for the revocation. In Florida, however, a dental board's order requiring a psychiatric examination was vacated as "arbitrary, unreasonable and a gross abuse of power."

The question of a practitioner's physical or mental competence has also been raised in Arizona and Washington, although

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6 Id. at 510, 374 S.W.2d at 176.


8 Batty v. Arizona State Dental Bd., 57 Ariz. 239, 112 P.2d 870 (1941).

the question of the legitimacy of an administrative order requiring an examination to establish such competence was not directly confronted. In *Batty v. Arizona State Dental Board*, Dr. Batty's license to practice dentistry had been revoked because of, *inter alia*, his previous history of pulmonary tuberculosis. Although the revocation was sustained on those other grounds, the court held that since the disease was inactive at the time of the proceedings, it was not grounds for revocation. The court did, however, state that "one who has an active case of pulmonary tuberculosis is not physically qualified to practice dentistry . . . ." This raises the question of how to determine physical competence if the practitioner/applicant refuses to undergo voluntary testing and if the board lacks the power to require such an examination.

The Washington case concerned the mental competence of a physician who had previously been adjudicated mentally ill. After entry of a court order declaring Dr. Hubbard to be competent, the Washington State Medical Disciplinary Board notified Hubbard that a hearing would be held to determine the status of his medical license. Hubbard appealed the subsequent revocation of his license, claiming that the "declaration of competence" had restored his qualifications to practice medicine. The Washington Supreme Court disagreed, noting that

> the Oregon court [which declared Hubbard to be mentally competent] could not, nor did it attempt to, determine appellant's competency to engage in the practice of medicine and surgery. This is a question which, of necessity, requires the judgment of experts.

The court advised Hubbard that he could apply to the board for reinstatement of his license and produce evidence of his mental competency to resume the practice of medicine. The onus of dispelling the presumption of incompetence was clearly placed on the practitioner. Because there is no real distinction between requiring the practitioner to submit proof of his mental or physical ability and permitting the board to require such proof before reinstatement of a license, it seems reasonable to assume that the Washington courts would uphold an agency's requirement of a physical or mental examination.

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10 *57 Ariz. 239, 112 P.2d 870 (1941).*
11 *Id. at 252, 112 P.2d at 876.*
12 *Hubbard v. Washington State Medical Disciplinary Bd., 55 Wash. 2d 546, 348 P.2d 981 (1960).*
13 *Id. at 553, 348 P.2d at 985-86.*
The above cases point out the confusion surrounding the scope of the licensing powers of an administrative agency regulating the healing arts professions. The validity of the delegation of administrative power, the language of the particular statute creating the administrative agency and defining its powers, and principles of statutory construction to be used in the interpretation and application of the organic statute are all factors which must be considered in resolving this confusion.

I. DELEGATION OF POWER TO ADMINISTRATIVE AGENCIES

A. Legitimacy and Appropriateness of Regulation

Courts have long recognized the vital and legitimate interest of the state in maintaining high standards for practitioners of the healing arts. These professions, so directly related to the public health, safety, and general welfare, require regulation by experts. The U.S. Supreme Court recognized the necessity of regulation of the health professions in Barsky v. Board of Regents, observing that "a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. The state's discretion in that field naturally extends to the regulation of all professions concerned with health." The justification for such regulation has generally been the need for protection of the public from persons who are unqualified to practice the healing arts professions. In Semler v. Oregon State Board of Dental Examiners the U.S. Supreme Court specifically stated that the healing arts professions are subject to particularly high standards of conduct and qualifications because of the public interests involved.

Just as the courts have recognized the need for regulation of the healing arts professions by the state, they have also readily acknowledged the impossibility of meeting this need by relying...
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solely upon the legislative bodies of the states. The degree of familiarity with the profession required for effective and just reg-

ulation exceeds that of most legislators. The responsibility for licensing has therefore been delegated to administrative agencies com-
posed of practitioners in each particular field. This delegation of power received the approval of the U.S. Supreme Court as early as 1923. Its decision in Douglas v. Noble leaves no room for doubt about the appropriateness of the delegation of the li-

censing power to an administrative agency. Supreme courts in Minnesota and New York have also expressed their approval of this manner of regulation.

Having established that the regulation of the healing arts professions properly lay with administrative agencies, the courts’ attention necessarily became focused on the extent of the powers delegated to these boards. Recognizing the principle that the power to grant a license necessarily implies the power to condition, courts have not hesitated to uphold the agencies’ actions denying or revoking licenses, even in the face of the petitioners’ contention that denial or suspension of a license constitutes a punishment—which the agency lacks authority to impose.

The Supreme Court later stated that the scope of an agency’s powers included investigation of an applicant on the initiative of the board members. Although the case considers the powers of a state bar association rather than those of a healing arts board, the language used by the court clearly encompasses any licensing activity:

21 261 U.S. 165 (1923).
22 State ex rel. Powell v. State Medical Examining Bd., 32 Minn. 324, 20 N.W. 238 (1884).
24 Doyle v. Continental Ins. Co., 94 U.S. 535, 540 (1876); State ex rel. Minces v. Schoenig, 72 Minn. 528, 75 N.W. 711 (1898).
26 Cases cited note 25 supra.
Where . . . the State may withhold a privilege available only to those possessing the requisite qualifications, it is of no constitutional significance whether the State's interrogation of an applicant on matters relevant to these qualifications . . . is prompted by information which it already has about him from other sources, or arises merely from [the state's] good faith belief in the need for exploratory or testing questioning of the applicant. 28

Although the case is obviously concerned with oral investigations by the board, the same principle should apply when the board is seeking information about an applicant's qualifications which cannot be obtained through mere questioning. If there is a legitimate question about the applicant's qualifications, the board should be entitled to pursue the matter to its satisfaction.

B. **Enabling Legislation**

Any discussion of administrative agencies and their powers must deal with the statutes which create the agency and which define and limit its powers. The provisions of the statutes establishing the healing arts regulatory agencies vary greatly—not only from jurisdiction to jurisdiction, but also within any given jurisdiction as to each individual agency. Before examining representative statutes, 2 a brief review of case law dealing with legislation purporting to delegate authority to administrative agencies and of general principles of statutory construction is in order.

1. **Standards for Legislative Delegation**

The question which arises most frequently in regard to the delegation of the authority to regulate the healing arts professions relates to the specificity of standards which the legislature must include in the enabling statute to define the board's powers. It is well settled that the legislature may not grant the authority without providing sufficient guidelines; 20 however, there has been much litigation seeking to define what constitutes "sufficient" guidelines.

In **Bennett v. Indiana State Board of Registration and Exam-**

28 Id. at 90.
The Indiana Supreme Court upheld an organic statute which gave the board the power to define unprofessional conduct, observing that it is unrealistic to expect the legislature to "forbid specifically all improper practices likely to arise. Of necessity, details of its plan must be left to the board. The statute fixes the standards upon which the board may act." Many other courts have taken this same stance.

However, there are jurisdictions which carefully enforce the requirement of specific standards in legislation establishing agencies which regulate the healing arts professions. A Florida statute established guidelines to be used by the State Board of Examiners in Psychology in granting certificates to applicants. The applicant was required, inter alia, to pass a written and/or oral examination on psychology, and to hold a doctor of philosophy degree with a major in psychology from a board-approved university. Nevertheless, the Florida Supreme Court declared the statute unconstitutional because of the legislative failure to define the field of the examination and to provide standards to guide the board in its approval of a university. Recognizing that agencies may make rules within statutorily prescribed limits, the court found such a lack of those limits as to invalidate the statute.

Sixty years prior to the Florida decision, the Kentucky Court of Appeals struck down that part of a statute granting authority to revoke a license for unprofessional conduct because it contained inadequate standards to guide the practitioner in his conduct.

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[2] Id. at 683, 7 N.E.2d at 981.
[7] Id. at 71. Contra, Savelli v. Board of Medical Examiners, 229 Cal. App. 2d 124, 40 Cal. Rptr. 171, cert. denied, 380 U.S. 934 (1964) (absence of legislative criteria for approval of a school by the board of medical examiners does not constitute a violation of the delegation doctrine).

The statute does not prescribe the manner by which a physician may regulate his conduct. It does not advise him in advance what act or acts may be
The California Supreme Court took similar action in *Hewitt v. Board of Medical Examiners*. The California statute authorized revocation of a medical license for professional or moral unfitness. The court cited *Matthews v. Murphy* in finding the statute too vague and without sufficient standards to guide a physician's conduct.

Both the California and the Kentucky courts placed heavy emphasis upon the proprietary aspects of a license, stressing that denial or suspension resulted in depriving the licensee of his livelihood. Except for a brief comment on the need to protect the public from incompetence (which need both courts seemed to indicate was met by the very existence of the licensing requirements), the decisions appeared to be more concerned with the wasted expense and educational efforts of the holder of a revoked license than with public health, safety, and welfare. Many courts, however, have specifically stated that a license to practice the healing arts is not property to which the holder has an absolute, unqualified right, nor is the taking of a license punishment. Both acts, the licensing and denial or revocation of a license, are intended to benefit and protect the public.

Davis in his *Administrative Law Treatise* disapproved of such highly specific legislative standards, preferring instead the more valuable tool of judicial review as a restriction on the unchecked exercise of administrative discretion. To insist that the legislature specify the standards as carefully as the previously discussed cases seem to require is to ignore a principal reason for the creation of administrative agencies: to obtain the advantages of the "special knowledge and special skills which characterize the administrative process at its best."

It is submitted that the approach of the Indiana Supreme Court in *Bennett v. Indiana State Board of Registration and Examination in Optometry* and that of the U.S. Supreme Court in

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*Id.* at 752, 63 S.W. at 786.

148 Cal. 590, 84 P. 39 (1906).  
23 Ky. L. Rptr. 750, 63 S.W. 785 (Ky. Ct. App. 1901).  
See cases cited note 25 supra.  
211 Ind. 687, 7 N.E.2d 977 (1937).
American Trucking Associations, Inc. v. United States is most realistic. It is impractical to expect the legislative body to define specifically every act which would constitute "unprofessional conduct." Most legislators would probably be quite unfamiliar with the intricacies of the healing arts professions and would therefore be unable to compile a complete or adequate listing of those acts which might constitute unprofessional conduct. The vague standard of avoiding the "appearance of impropriety" has been accepted by the legal profession, and it would seem that an overt act of unprofessional conduct is even more definite than the appearance of impropriety.

2. Principles of Statutory Construction

Rules of statutory construction have established that an administrative agency has the implied power to formulate rules and regulations, even when such power has not been expressly delegated.

In Kee v. Baber, the Texas Supreme Court upheld the validity of a regulation which exemplifies this practice of filling in the details of the power expressly granted. An optometrist whose license had been revoked for failure to comply with the regulation, a compilation of specific procedures to be followed in the practice of optometry, sought a declaration of the regulation's invalidity. Finding a relationship between failure to follow standard procedures and incompetence, the court determined that the regulation was a proper attempt to implement the provisions of the enabling statute.

One principle of statutory construction which has frequently been invoked to limit the administrative agency's power is *expressio unius est exclusio alterius*. Courts in Colorado, Con-
necticut, Indiana, and Texas have relied on the expressio unius principle in reversing agency action deemed to be outside the scope of the agency's authority. However, the U.S. Supreme Court and several state supreme courts have been more cautious in their application of this rule.

Other state courts have consistently emphasized that statutory construction is to be used as a means of ascertaining legislative intent. That intent, when ascertained, takes precedence over any principles of statutory construction. A decision of the Kansas Supreme Court provides an excellent model for resolving the

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52 The Indiana Supreme Court reversed the revocation of a teacher's license on the grounds that
[[It is generally accepted doctrine that where a statute or ordinance authorizes the revocation of a license for causes enumerated, such license cannot be revoked upon any ground other than one of the causes specified.
Stone v. Fritts, 169 Ind. 361, 367, 82 N.E. 792, 795 (1907).
53 Carp v. Texas State Bd. of Examiners in Optometry, 401 S.W.2d 639 (Tex. Civ. App. 1966). The court determined that the legislature, in setting out 10 specific grounds for the refusal or cancellation of a license, expressed its intention to exclude all others.
54 American Trucking Ass'ns, Inc. v. United States, 344 U.S. 298 (1953). [W]e might agree with appellants' contentions [that the rules promulgated by the ICC were outside of the express or implied delegation of power to control certain aspects of the trucking industry] if we thought it a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. But no great acquaintance with practical affairs is required to know that such prescience, either in fact or in the minds of Congress, does not exist. . . . Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created, for it is the fond hope of their authors that they bring to their work the expert's familiarity with industry conditions which members of the delegating legislatures cannot be expected to possess.
Id. at 309-10 (citations omitted). The language of this decision echoes an earlier English case, Lowe v. Dorling & Son, [1906] 2 K.B. 772, in which the court noted:
The failure to make the 'expressio' complete very often arises from accident, very often from the fact that it never struck the draftsmen that the thing supposed to be included needed specific mention of any kind.
Id. at 785.
56 Dickey v. Raisin Proration Zone No. 1, 24 Cal. 2d 796, 151 P.2d 505 (1944) (principles of statutory construction have no application where they would vary a clear expression of legislative intent in a matter of vital concern to the state); Cabell v. Cottage Grove, 170 Ore. 256, 130 P.2d 1013 (1942). "Expressio unius est exclusio alterius is a general rule of construction of statutes (citations omitted). It is to be applied with caution and merely as an auxiliary rule to determine the legislative intention." Id. at 281, 130 P.2d at 1023.
application of principles of statutory construction with the sometimes conflicting construction of legislative intent. The relevant statute in effect at that time made no mention of malpractice as grounds for revocation of a physician's license. The trial court reversed the state board's revocation of a license on the basis that application of *expressio unius est exclusio alterius* necessarily excluded malpractice as grounds for the revocation. In reversing the trial court, the Supreme Court of Kansas addressed the relationship between the principles of statutory construction and legislative intent, noting that the purpose of statutory construction is the discovery and effectuation of legislative intent. Since the intent of the healing arts act was clear—the protection of the public from incompetent practitioners—the principle of statutory construction on which the trial court had relied was not only unnecessary but indeed defeated the very purpose of the statute.

Obviously, the extent to which a state has committed itself to the *expressio unius* rule and the weight which the state attaches to legislative intent will be vitally important in resolving the question of whether an administrative agency can justify an examination requirement.

II. REPRESENTATIVE STATUTES

Statutes which regulate the healing arts professions can generally be grouped into two categories—those which specifically grant or clearly imply mental or physical incompetence as grounds for revocation, suspension, or denial of a license, and those which fail to mention either as a ground for such disciplinary action. Representative statutes have been selected, and a discussion of the feasibility of the examination requirement in the context of each of the statutory types follows.

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Recognizing that the practice of the healing arts is a privilege granted by legislative authority and is not a natural right of individuals, it is deemed necessary as a matter of policy in the interests of public health, safety, and welfare, to provide laws and provisions . . . to the end that the public shall be properly protected against unprofessional, improper, unauthorized and unqualified practice of the healing arts and from unprofessional conduct by persons licensed to practice under this act.
A. Statutes Requiring Physical or Mental Capacity

The first general classification of statutes includes those statutes authorizing revocation, suspension, or denial of a license to practice any of the healing arts due to physical or mental incompetency. These statutes may do so either expressly or impliedly.

1. Express Authorization

In the Arizona statutes, one portion of the chapter regarding regulation of professions and occupations sets forth the requirements for obtaining a medical license. The applicant is specifically required to establish his physical and mental competence.60 One section in this chapter61 sets forth the procedure for challenging a physician's physical, mental, or medical competence. It authorizes the board to commence an investigation on its own report or that of any physician or medical society. The board may set up either an informal interview or a formal hearing and may require mental, physical, and/or medical competence examinations. A finding by the board that the physician is mentally or physically unable to practice medicine safely or is medically incompetent is sufficient to sustain an order suspending or revoking his license—permanently, temporarily, or conditionally.

There can be no doubt that a board operating under such an enabling statute has the power to require these examinations at any stage of the proceeding—whether the applicant is submitting his initial application, applying for renewal of the license, or is the holder of an unexpired license which is being challenged. The only area left to the discretion of the Arizona Board of Medical

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60 ARIZ. REV. STAT. ANN. § 32-1423 (West Supp. 1974-75) provides:
To procure a regular license to practice medicine . . . an applicant . . . shall submit evidence satisfactory to the board that he meets each of the following requirements:

(5) That he is physically and mentally able safely to engage in the practice of medicine and submits to such physical examination, mental evaluation and interview or any combination thereof, as the board may deem proper to determine the same.

The board may require the submission of such credentials or other proof, written and oral, and make such investigation as it deems necessary adequately to advise itself with respect to an applicant's ability to meet any of the foregoing requirements.

61 Id. § 32-1451.
Examiners is the determination of the circumstances or behavior on the part of the applicant or licensee which would justify the examinations, since time and expense considerations preclude examination of every applicant. The statute does grant the board absolute discretion in requiring these examinations, but caution must be exercised to prevent abuse of this discretion. For example, if the board were to require the examination of all minority applicants but few, if any, white male applicants, it would invite charges of discrimination. This potential problem is common to each type of statute and can be eliminated only by regulations specifying the bases for the examination requirements.

2. Implied Authorization

The second type of statute, impliedly authorizing revocation, suspension, or denial of licenses for physical or mental incompetency, is exemplified by a New Jersey statute. The general authorization for disciplinary action on physical or mental grounds is present, but the procedures and specific grants of authority to require examinations are not. The statute authorizes disciplinary action both on the basis of an “adjudication of insanity” and on the basis of a “determination of incapacity.” While the former basis requires court action, confusion could arise because the latter basis does not specify the source of the determination.

In view of the generally accepted principle that administrative agencies have the implied authority to promulgate regulations which are necessary to implement their express powers, an examination requirement should be justifiable under such a statute. The statute clearly authorizes disciplinary proceedings against the licensee for physical or mental incompetence. A decision by the board to take action against the licensee without benefit of an expert’s opinion constitutes a gross abuse of discre-

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The State Board of Medical Examiners] may refuse to grant or may suspend or revoke a license or the registration of a certificate or diploma to practice medicine and surgery or chiropractic . . . upon proof to the satisfaction of the board that the holder of such license (a) has been adjudicated insane, or . . . (d) has been determined to be physically or mentally incapacitated . . . .

48 Id. § 45:9-16(a).

49 Id. § 45:9-16(d).

tion, as the Arkansas Supreme Court clearly indicated in *Hake v. Arkansas State Medical Board*.66

The Colorado State Board of Optometric Examiners was functioning under this type of statute when it entered its order requiring both a mental and a physical examination in the *Dixon*67 case. The relevant portion of that statute provided for suspension or revocation of the license of an optometrist for "continuing in the practice of optometry during any period of mental disability or while afflicted with a communicable, infectious, or contagious disease of such a serious nature as to render him a menace to patients."68 The Colorado Court of Appeals did not deal with the question of whether the statute granted the board the implied authority to require examinations of the licensees, instead declaring that because the board’s order did not constitute final agency action, it was not subject to judicial review.69 This position is unwise because it gives the administrative agencies almost unlimited power as long as they couch the examination requirement in terms of an "intermediate" decision rather than a final order. The statute appears to give the optometric board the implied power to condition reinstatement or renewal of a license on the submission of a satisfactory report from a physician or a psychiatrist. If the Colorado Court of Appeals was in fact approving such an exercise of power, it is unfortunate that the decision did not specifically indicate such approval.

B. Statutes without Requirements as to Physical or Mental Capacity

A more difficult situation is presented by statutes which neither make the applicant’s health a requirement for issuance of a license nor make physical or mental illness grounds for license suspension or revocation. The possibility of requiring a mental or physical examination under such a statute depends upon whether the statute includes a general statement of intent.

1. Statutes containing general statement of intent

When the statute has clearly set out the purpose for its pas-

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68 COLO. REV. STAT. ANN. § 102-1-16 (1963), now codified as Id. § 12-40-119(e)(1973).
sage, there may be sufficient grounds to conclude that the agency has the power to require physical and mental examinations. The Colorado statute creating the pharmacy board, for example, acknowledges that the licensing of pharmacists is a matter of public interest and concern which affects the public health, and requires that its provisions be liberally construed. An agency operating under such a statute may have the power to require physical and mental examinations despite the fact that nowhere in the act is there any language directly relating to physical or mental health. Where the legislature has stated that the intent is to protect the public and has urged a broad or liberal construction, the board should be allowed to require these examinations in the interest of insuring the abilities of the licensee. It would seem to be within the court's discretion to take judicial notice of the fact that to allow an individual afflicted with a physical or mental impairment to practice the healing arts is not in the best interests of the public health, safety, and welfare.

Yet, under a strict application of the expressio unius rule, when neither physical nor mental incapacity is a statutory basis for disciplinary action, both must be deemed to be specifically excluded. The decision of the U.S. Supreme Court in American Trucking Associations, Inc. v. United States, however, militates against a universal application of such a rule of statutory construction.

2. Statutes containing neither general health requirements nor a statement of legislative intent

Legislation similar to Hawaii's statute dealing with the licensing of physicians creates a situation in which mental or physical examinations will be extremely difficult to justify. No-
where in the statute is there any mention of a general public purpose or of legislative intent, nor is revocation, suspension, or denial of a physician's license on grounds of his health authorized. The qualifications for licensing concern United States citizenship, good moral character, and educational requirements. Revocation or suspension of a license may be based on a number of grounds, but only two have even an indirect bearing on the applicant's health: being habitually intemperate and habitually using any habit-forming drugs. A board attempting to require a physical examination of an applicant might seek to justify its order on the grounds that the power is necessarily implied because a physical examination may be necessary to establish habitual intemperance or drug addiction. However, application of the expressio unius principle would limit the examination to discovery of an alcohol- or drug-abuse problem, and would exclude the possibility of a psychiatric examination.

Because many courts have acknowledged that the purpose of the regulation of the healing arts professions is the protection of the public, the missing legislative declaration of purpose might be supplied through case law. If the public purpose statement can be thus supplied, an argument to the court in support of the exercise of the power to require physical or mental examinations would proceed as if the purpose were contained in the legislative declaration.

Davis was undoubtedly suggesting one way of dealing with problems resulting from an insufficient delegation of statutory power when he observed that "one major responsibility of every agency, too often neglected, is to watch for insufficiencies in the legislation it administers, and to make sufficient recommendations for changes, based upon an understanding of the details of administration." An administrative agency functioning under a statute such as Hawaii's should press for legislation sufficiently specific to allow the agency to require mental and physical tests to assure itself of the applicant's competence.

75 Id. § 453-4.
76 Id. § 453-8.
77 See note 2 supra and accompanying text.
III. POLICY CONSIDERATIONS

Although the power to require physical and psychiatric examinations of practitioners in the healing arts professions is highly desirable to ensure that only qualified individuals are licensed, granting this power without setting forth appropriate statutory guidelines invites abuses of discretion by the regulatory agencies. Judicial review of an order for a psychiatric or physical examination is, of course, one obvious and important means of protecting the practitioner, but the need for such review can be substantially curtailed by establishing realistic limits on the board’s power to require these examinations.

These restrictions must speak to two general areas—limitation of the board’s discretion in ordering the examinations, and establishment of guidelines to be considered in evaluating the applicant’s mental and physical fitness.

A primary limitation on the examination requirement is its purpose, which is not to exclude persons whose social behavior does not conform to the norm, but only those whose deviations would substantially impair their ability to practice their chosen professions. Similarly, a physical handicap should not bar an applicant from practice of the healing arts professions unless a direct correlation between the handicap and the resulting incompetence of the practitioner can be proved. Unless the deviation from the norm, whether mental or physical, is related to the ability to perform, such a deviation should not justify requiring a physical or psychiatric examination as a prerequisite to the issuance or renewal of a license.

The board’s discretion to order examinations may also be limited procedurally. One procedural consideration is the question of what specific circumstances would be required to justify exercise of the examination prerogative. Certainly sworn complaints regarding aberrant or offensive behavior and evidence of the contracting of a communicable disease should constitute grounds for a required examination. In areas of concern where the need for an examination is less obvious, the board must move with extreme caution to forestall allegations of arbitrariness or of abuse of discretion. Explicit written standards compiled by the

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78 See Florida State Bd. of Dental Examiners v. Graham, 187 So. 2d 104 (Fla. Dist. Ct. App. 1966) (such complaints were the basis for the board’s action).
board could supply applicants or licensees required to submit to an examination with a basis for challenging that requirement, although it would be impossible to include in such a compilation every conceivable situation which would justify an examination. Discussions with professional organizations, individual practitioners, and other agencies regulating the healing arts—both within and without the state—would be of great assistance in drafting these standards.

A requirement that the board provide the examinee with a choice of board-approved examining physicians, rather than just one, is a second possible procedural limitation on the board’s authority. Furthermore, the examinee could be given the option of obtaining a report from a psychiatrist or physician of his own choosing to rebut the report of the board-approved examiner. Both these procedures would reduce the possibility of bias on the part of the examining physician.

A third possible procedural limitation on the board’s authority might be protection of the practitioner by an increased administrative burden of proof. If the board were required to prove its case for requiring the examination beyond a reasonable doubt instead of by a mere preponderance of the evidence, the licenses of those practitioners against whom the board had less than a clear-cut case would be spared.

The standards to guide the examiner in his evaluation may be more difficult to compile, but they are no less important. The board should at least be required to advise the examining physician of the alleged actions, misconduct, or other condition on which the examination requirement is based. The circumstances of a particular case might also justify presentation of a specific statement of the practitioner’s duties and responsibilities to the examiner to assist him in determining to what extent the alleged infirmities would interfere with the practitioner’s capabilities.

If a disability is discovered, the examiner’s report to the board should contain his evaluation of the possibilities of cure or rehabilitation of the subject practitioner. In the realm of physical problems, for example, a cataract which impairs the licensee’s vision is an obvious basis for suspending the license until the cataract has been removed and vision has been restored. But because it would be manifestly unjust permanently to revoke a license on the basis of a correctible impairment, the expert’s opin-
ion as to the remedies available to the incapacitated practitioner and a second examination at a later date to assess the degree of restoration are imperative.

The foregoing suggestions are to be considered as general guidelines designed primarily to call attention to the questions which must be considered in connection with the exercise of a necessary power of administrative agencies, but one which is subject to gross abuse of discretion. The author claims no degree of expertise in the practice of any of the healing arts professions and would readily concur with previously cited judicial opinions recognizing the particular qualifications of administrative agencies to supply greater details.

CONCLUSION

Neither the legitimacy of the state’s interest in the regulation of the healing arts professions nor the delegation of regulatory powers to an administrative agency is subject to challenge today. However, whether such regulatory powers include the power to require a physical or mental examination is open to question. The approaches which the state courts have taken to this problem are as varied as the final resolutions of the cases in which the matter has been presented. Although only those agencies functioning under an organic statute which specifically grants the power to require these examinations can be assured that such an examination order will be upheld, strong arguments can be made in support of the contention that such a power is necessarily implied in the other types of statutes discussed. Regardless of the type of statute involved, it is incumbent upon the agency seeking to exercise this power to draft rules and standards sufficiently specific to protect the interests of the applicants and practitioners who will be subject to this power.

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See note 20 supra and accompanying text.