

**WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION**

Form #3

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AUG 30 12 15 PM '00

OFFICE OF THE WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: BOARD OF ACUPUNCTURE TITLE NUMBER: 32

CITE AUTHORITY: WVa Code §§ 30-36-7 and 30-36-18

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 32 CRS 7

TITLE OF RULE BEING AMENDED: DISCIPLINARY AND COMPLAINT
PROCEDURES FOR ACUPUNCTURISTS

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

Darrell E. Samples MD, OMID

Authorized Signature

\$5.60

□
APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: DISCIPLINARY AND COMPLAINT PROCEDURES
FOR ACUPUNCTURISTS

Type of Rule: Legislative Interpretive Procedural

Agency: BOARD OF ACUPUNCTURE

Address: P.O. BOX 252

HUNTINGTON W/Va 25707-0252

1. Effect of Proposed rule: N.A.

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST					
PERSONAL SERVICES					
CURRENT EXPENSE					
REPAIRS & ALTERATIONS					
EQUIPMENT					
OTHER					

2. Explanation of Above Estimates: N.A.

3. Objectives of These Rules: ESTABLISH PROCEDURES FOR DISCIPLINARY AND COMPLAINTS AGAINST ACUPUNCTURISTS

Rule Title: DISCIPLINARY AND COMPLAINT PROCEDURES
FOR ACUPUNCTURISTS

4. Explanation of Overall Economic Impact of Proposed Rule:

A. Economic Impact on State Government: NONE

B. Economic Impact on Political Subdivisions; Specific Industries; Specific Groups of Citizens: NONE

C. Economic Impact on Citizens/Public at Large. NONE

Date: August 29, 2000

Signature of Agency Head or Authorized Representative:

Darrell E. Samples, ND, OMD

drdsamples@aol.com

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: August 29, 2000

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) BOARD OF ACUPUNCTURE

P.O. Box 252, HUNTINGTON WVa 25707-0252

LEGISLATIVE RULE TITLE: DISCIPLINARY AND COMPLAINT

PROCEDURES FOR ACUPUNCTURISTS

1. Authorizing statute(s) citation WVa Code §§ 30-36-7 and 30-36-18
HB 4062 (2000)

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:
JUNE 30, 2000

b. What other notice, including advertising, did you give of the hearing?
Copies mailed to all ^{W.Va.} license holders, professional liability insurers, state professional association officers, national association officers

c. Date of Public Hearing(s) or Public Comment Period ended:
July 31, 2000

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached _____ No comments received X

- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

August 30, 2000

- f. Name, title, address and **phone/fax/e-mail numbers** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

DARRELL E. SAMPLES, ND, OMD - SECRETARY

BOARD OF ACUPUNCTURE, P.O. Box 252, HUNTINGTON,

WVa 25707-0252 / 304 529-9355 / 304 529-3710^{FAX}

304 529-4558 voice / drd samples @ aol.com

- g. **IF DIFFERENT FROM ITEM 'f'**, please give Name, title, address and phone number(s) of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

b. Date of hearing or comment period:

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

d. Attach findings and determinations and reasons:

Attached

32 CRS 7

This rule establishes the procedures for disciplinary and complaints against practitioners before the Board of Acupuncture.

32 CRS 7

This rule is being promulgated pursuant to requirements of Legislative intent found in the W. Va. Code § 30-36-18 and in HB4062 (2000).

FILED

TITLE 32
LEGISLATIVE RULE Aug 30 12 16 PM '00
BOARD OF ACUPUNCTURE

SERIES 7
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE
DISCIPLINARY AND COMPLAINT PROCEDURES FOR ACUPUNCTURISTS

§32-7-1. General.

1.1. Scope. -- This rule establishes the due process procedure for disciplinary and complaint procedures for the Board. The Board is charged with these duties in W. Va. Code §30-36-18.

1.2. Authority. -- W. Va. Code §§30-36-7 and 30-36-18.

1.3. Filing Date. -- May 21, 1999.

1.4. Effective Date. -- May 21, 1999.

§32-7-2. Application.

This legislative rule applies to all licensed acupuncturists, student acupuncturists, and acupuncture trainees.

§32-7-3. Definitions.

3.1. West Virginia Acupuncture Practice Act. -- W. Va. Code §30-36-1 et seq.

3.2. Adjudicatory hearing. -- A formal administrative hearing before the Board or a designated hearing examiner, conducted to determine the truth and validity of complaints filed against a licensee. An adjudicatory hearing may result in disciplinary action including, but not limited to, suspension or revocation of a licensee's license, reprimand, fine, censure or other limitation, including probation, on a licensee's practice.

3.3. Crimes involving moral turpitude. -- Those crimes which have dishonesty as a

fundamental and necessary element; including, but not limited to, crimes involving theft, embezzlement, false swearing, perjury, fraud or misrepresentation.

3.4. Probation. -- Imposing conditions and requirements upon a licensee for a period of time that the Board, in its discretion, determines to be justified under any provision of law. A licensee placed on probation may continue to practice subject to limitations imposed by the Board, including the requirements that the licensee appear before the Board, or an officer or agent of the Board, at times and places designated by the Board. A licensee may be placed on probation without a previous or concurrent suspension or revocation of his or her license.

§32-7-4. Causes for Denial, Probation, Limitation, Discipline, Suspension or Revocation of Licenses of Acupuncturists.

4.1. The Board may deny an application for license, place a license on probation, suspend a license, limit or restrict a license or revoke any license issued by the Board, upon satisfactory proof that the licensee has:

4.1.1. Knowingly made, or presented or caused to be made or presented, any false, fraudulent or forged statement, writing, certificate, diploma or other material in connection with an application for a license;

4.1.2. Been or is involved in fraud, forgery, deception, collusion or conspiracy in connection with an examination for a license;

4.1.3. Become addicted to a controlled

substance;

4.1.4. Become a chronic or persistent alcoholic;

4.1.5. Engaged in dishonorable, unethical or unprofessional conduct of a character likely to deceive, defraud or harm the public or member of the public;

4.1.6. Willfully violated a confidential communication;

4.1.7. Had his or her license to practice acupuncture or oriental medicine in any other state, territory, jurisdiction or foreign nation revoked, suspended, restricted or limited, or otherwise acted against, or has been subjected to any other disciplinary action by the licensing authority thereof, or has been denied licensure in any other state, territory, jurisdiction, or foreign nation;

4.1.8. Been or is unable to practice acupuncture or oriental medicine with reasonable skill and safety to patients by reason of illness, drunkenness, excessive use of alcohol, drugs, chemicals or any other type of material, or by any reason of any physical or mental abnormality;

4.1.9. Demonstrated a lack of professional competence to practice acupuncture or oriental medicine with a reasonable degree of skill and safety for patients. In this connection, the Board may consider repeated acts of an acupuncturist indicating his or her failure to properly treat a patient and may require the acupuncturist to submit to inquiries or examinations, written or oral, by members of the Board, by its agent, or designee, as the Board considers necessary to determine the professional qualifications of the licensee;

4.1.10. Engaged in unprofessional conduct, including, but not limited to, any departure from, or failure to conform to, the standards of acceptable and prevailing oriental medical practice, or the ethics of the oriental

medical profession, or unprofessional conduct as presented in the Board's rule, Code of Ethics for Licensed Acupuncturist, 32 CRS 10 of the Boards Rules, irrespective of whether or not a patient is injured by the conduct, or has committed any act contrary to honesty, justice or good morals, whether the act is committed in the course of his or her practice or otherwise and whether committed within or without this State;

4.1.11. Been convicted of or found guilty of a crime in any jurisdiction which directly relates to the practice of acupuncture or oriental medicine or to the ability to practice acupuncture or oriental medicine. Any plea of nolo contendere will be considered conviction for the purposes of this rule;

4.1.12. Advertised, practiced or attempted to practice under a name other than his or her own;

4.1.13. Failed to report to the Board any person whom the licensee knows is in violation of this rule or of provisions of the West Virginia Acupuncture Practice Act;

4.1.14. Aided, assisted, procured or advised any unlicensed person to practice oriental medicine contrary to this rule or the West Virginia Acupuncture Practice Act;

4.1.15. Failed to perform any statutory or legal obligation placed upon an acupuncturist;

4.1.16. Made or filed a report which the licensee knows to be false, intentionally or negligently failed to file a report or record required by state or federal law, willfully impeded or obstructed the filing or induced another person to do so. The reports or records will include only those which are signed in the capacity as a licensed acupuncturist;

4.1.17. Paid or received any commission, bonus, kickback or rebate, or engaged in any split-fee arrangement in any form whatsoever with an acupuncturist, organization, agency or person,

either directly or indirectly, for patients referred to providers of health care goods and services, including, but not limited to, hospitals, nursing homes, clinical laboratories, ambulatory surgical centers or pharmacies. The provisions of this subdivision will not be construed to prevent an acupuncturist from receiving a fee for professional consultation service;

4.1.18. Exercised influence within a patient-practitioner relationship for purposes of engaging a patient in sexual activity;

4.1.19. Made deceptive, untrue or fraudulent representations in the practice of oriental medicine or employed a trick or scheme in the practice of oriental medicine when the trick or scheme fails to conform to the generally prevailing standards of treatment in the oriental medical community;

4.1.20. Solicited patients, either personally or through an agent, through use of fraud, intimidation, undue influence, or by overreaching or vexatious conduct. A solicitation is any communication which directly or implicitly requests an immediate response from the recipient;

4.1.21. Failed to keep written records justifying the course of treatment of the patient, including, but not limited to, patient histories, examination results and test results and treatment rendered, if any;

4.1.22. Exercised influence on the patient or client in such a manner as to exploit the patient or client for the financial gain of the licensee or of a third party, which will include, but not be limited to, the promoting or selling of services, goods, appliances or materia medica and the promotion or advertising on any prescription form of a community pharmacy. For the purposes of this subdivision, it is legally presumed that the prescribing, dispensing, administering, mixing or otherwise preparing materia medica, including all controlled and non-controlled substances, inappropriately or in excessive or inappropriate

quantities, is not in the best interests of the patient and is not in the course of the acupuncturist or oriental medical practitioners professional practice, without regard to his or her intent;

4.1.23. Engaged in malpractice or failed to practice acupuncture or oriental medicine with that level of care, skill and treatment which are recognized by a reasonable, prudent, acupuncturist or an oriental medical practitioner engaged in the same or similar speciality as being acceptable under similar conditions and circumstances;

4.1.24. Performed any procedure or prescribed any therapy which, by the prevailing standards of oriental medical practice in the community, would constitute experimentation on a human subject, without first obtaining full, informed and written consent from the patient;

4.1.25. Practiced or offered to practice acupuncture beyond the scope permitted by the West Virginia Acupuncture Practice Act or accepted and performed professional responsibilities which the licensee knows or has reason to know he or she is not competent to perform;

4.1.26. Delegated professional responsibilities to a person whom the licensee knew or had reason to know was not qualified by training, experience or licensure to perform the responsibilities;

4.1.27. Violated or attempted to violate any law or lawfully promulgated rule of this State, or any other state, the Board, the United States or any other lawful authority (without regard to whether the violation is criminally punishable), which relates to or in part regulates the practice of acupuncture, when the licensee or applicant knows or should know that the action is in violation of the law, rule or regulation; or has violated a lawful order of the Board; or has failed to comply with a lawfully issued subpoena of the Board; or has violated an order of any court entered pursuant to any proceedings commenced by the Board;

4.1.28. Knowingly maintained a professional connection or association with any person who is in violation of the West Virginia Acupuncture Practice Act or the rules of the Board; or has knowingly aided, assisted, procured or advised any person to practice acupuncture or oriental medicine contrary to the West Virginia Acupuncture Practice Act or to the Rules of the Board; or knowingly performed any act which in any way aids, assists, procures, advises or encourages any unlicensed person or entity to practice acupuncture or oriental medicine; or have divided fees or agreed to divide fees received for professional services with any person, firm, association, corporation or other entity for bringing or referring a patient;

4.1.29. Offered, undertaken or agreed to cure or treat disease by a secret method, procedure, treatment or medicine; or has treated for any human condition, by a method, means, or procedure which the licensee has refused to divulge upon demand of the Board;

4.1.30. Engaged in false or deceptive advertising. "False or Deceptive Advertising" means a statement that includes a misrepresentation of fact, is likely to mislead or deceive because of a failure to disclose material facts, is intended or is likely to create false or unjustified expectations of favorable results or includes representations or implications that in reasonable probability will cause an ordinary prudent person to misunderstand or be deceived; or

4.1.31. Engaged in advertising that is not in the public interest. Advertising that is not in the public interest includes the following.

4.1.31.1. Advertising that has the effect of intimidating or exerting undue pressure;

4.1.31.2. Advertising that uses testimonials;

4.1.31.3. Advertising which is false,

deceptive, misleading, sensational or flamboyant;

4.1.31.4. Advertising which guarantee's satisfaction or a cure;

4.1.31.5. Advertising which offers gratuitous services or discounts, the purpose of which is to deceive the public. This paragraph does not apply to advertising which contains an offer to negotiate fees, nor to advertising in conjunction with an established policy or program of free care for patients; and

4.1.31.6. Advertising which make claims of professional superiority which a licensee is unable to substantiate.

4.2. For the purposes of subdivision 4.1.5 of this rule, acts declared to constitute dishonorable, unethical or unprofessional conduct of a character likely to deceive, defraud or harm the public or any member thereof includes, but are not limited to;

4.2.1. Prescribing or dispensing any "Controlled Substance" as defined in Chapter 6A of the W. Va. Code.

4.2.2. Issuing or publishing in any manner whatsoever, representations in which grossly improbable or extravagant statements are made which have a tendency to deceive or defraud the public, or a member thereof, including, but not limited to:

4.2.2.1. Any representation in which the licensee claims that he or she is able to cure or treat manifestly incurable diseases, ailments or infirmities by any method, procedure, treatment or medicine which the licensee knows or has reason to know has little or no therapeutic value;

4.2.2.2. Represents or professes or holds himself or herself out as being able and willing to treat diseases, ailments or infirmities under a system or school of practice:

A. Other than that for which he

or she holds a degree or diploma from a school otherwise recognized by the Board; or

B. Which he or she professes to be self-taught, self-developed.

4.2.3. A serious act, or a pattern of acts committed during the course of an acupuncture practice which, under the attendant circumstances, would be considered to be gross incompetence, gross ignorance, gross negligence or malpractice, including the performance of any unnecessary service or procedure;

4.2.4. Conduct which is calculated to bring or has the effect of bringing the acupuncture or oriental medical profession into disrepute, including, but not limited to, any departure from or failure to conform to the standards of acceptable and prevailing oriental medical practice within the State;

4.2.5. Any charges or fees for any type of service rendered within forty-eight (48) hours of the initial visit, if the licensee advertises free service, free examination or free treatment;

4.2.6. Failing to meet the standard of practice in connection with any supervisory and/or collaborative agreement with any category of health practitioner licensed under Chapter 30 of the W. Va. Code;

4.2.7. Charging or collecting an excessive or unconscionable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

4.2.7.1. The time and effort required;

4.2.7.2. The novelty and difficulty of the procedure or treatment;

4.2.7.3. The skill required to perform the procedure or treatment properly;

4.2.7.4. Any requirements or conditions imposed by the patient or

circumstances;

4.2.7.5. The nature and length of the professional relationship with the patient;

4.2.7.6. The experience, reputation, and ability of the licensee; and

4.2.7.7. The nature of the circumstances under which the services are provided.

4.2.8. In any case where it is found that an excessive, unconscionable fee has been charged, in addition to any actions taken under the provisions of section 4.3 of this rule, the Board may require the licensee to reduce or pay back the fee.

4.3. When the Board finds that any applicant is unqualified to be granted a license or finds that any licensee should be disciplined pursuant to the West Virginia Acupuncture Practice Act or rules of the Board, the Board may take anyone or more of the following actions:

4.3.1. Refuse to grant a license to an applicant;

4.3.2. Administer a public reprimand;

4.3.3. Suspend, limit or restrict any license for a definite period, not to exceed five (5) years;

4.3.4. Require any licensee to participate in a program of education prescribed by the Board;

4.3.5. Revoke any license;

4.3.6. Require the licensee to submit to care, counseling or treatment by physicians or other professional persons;

4.3.7. Assess a civil fine of between \$500 and \$10,000 and/or assess cost of the Board's investigation and administrative proceedings

against the licensee;

4.3.8. Require him or her to practice under the direction or supervision of another practitioner; or

4.3.9. Require the licensee to provide a period of free public or charitable service.

4.3.10. In addition to and in conjunction with these actions, the Board may make a finding adverse to the licensee or applicant, but withhold imposition of judgement and penalty, or it may impose the judgement and penalty but suspend enforcement of the penalty and place the acupuncturist on probation, which may be vacated upon the noncompliance with any terms imposed by the Board. In its discretion, the Board may restore and reissue a license under the West Virginia Acupuncture Practice Act, W. Va. Code §30-36-1 et. seq. , and as a condition it may impose any disciplinary or corrective measure provided for in this Rule or in the West Virginia Acupuncture Practice Act.

4.4. The Board has the authority to place a licensee in a probationary status and to apply varying conditions upon the licensee during the probationary period. Upon reaching the conclusion that a licensee to practice acupuncture should be placed on probation, the Board may impose anyone or more of the following conditions:

4.4.1. The Board may appoint one or more Board members to be responsible for having the probationary licensee report for interviews on a regular basis. These interviews may be set up on a periodic basis as determined by the Board and the appointed Board members will then report back to the Board at its regularly scheduled meeting on the progress of the licensee;

4.4.2. The Board may request the probationary licensee to appear before the Board at intervals determined by the Board order that the licensee may report on his or her progress. During these appearances by the probationary

licensee, the Board may ask the probationary licensee questions so as to observe his or her behavior and progress;

4.4.3. The Board may select a physician or request the probationary licensee to select a physician who will be approved by the Board and the physician shall submit periodic progress reports on the probationary licensee as directed by Board;

4.4.4. The Board may appoint a medical consultant whose responsibility is to handle interviews with the probationary licensee. The probationary licensee shall then report to the appointed medical consultant on a regular basis as determined by the Board, and the medical consultant shall report to the Board at intervals determined by the Board;

4.4.5. In cases of alcoholism and/or drug abuse, as a condition of probation, the Board may require that the probationary licensee submit periodic blood samples and/or urine drug screen samples;

4.4.6. The Board may require that the probationary licensee authorize his or her personal physician to submit to the Board, for review, the probationary licensee's medical history, both as to past medical history and any and all new medical history as may become available to the personal physician during the period of the probationary term;

4.4.7. The Board may require that the probationary licensee report all medications that he or she may be utilizing and that he or she make the reports to the Board, at intervals as directed by the Board from time to time;

4.4.8. The Board may require that prior to the termination of a probationary term, the probationary licensee appear at a regularly scheduled Board meeting and furnish the Board with information as it may request, and the Board may utilize subpoenas, subpoenas duces tecum and its investigators as it considers necessary to

gather facts and evidence to determine compliance by the probationary licensee with the terms of probation; and

4.4.9. In those situations where indicated, the Board may impose additional terms of probation, restriction, or revocation upon a licensee who has initially been placed on probation. The period of probation shall not exceed five (5) years from its initiation date.

§32-7-5. Appeal.

5.1. Any applicant for a license who has had his or her application denied by order of the Board may appeal the order within thirty (30) days of that action, in accordance with the contested case hearing procedure, W. Va. Code §29A-5-1 et seq., and rules of the Board: Provided, That the appeal shall not include cases in which the Board denies a license or certificate after an examination to test the knowledge or the ability of the applicant where the controversy concerns whether the examination was fair or whether the applicant passed the examination.

5.2. Any licensee practicing acupuncture and oriental medicine in this State, who has had his or her license denied, suspended, restricted, or revoked by order of the Board, may appeal the order within thirty (30) days of this action in accordance with the contested case hearing procedure, W. Va. Code §29A-5-1 et seq., and the rules of the Board: Provided, That the appeal shall not include cases in which the Board issues a license, permit or certificate after an examination to test the knowledge or the ability of the licensee where the controversy concerns whether the examination was fair or whether the licensee passed the examination.

§32-7-6. Disposition of Reports and Complaints

6.1. Any person, medical peer review committee, firm, corporation, members of the Board or public officer may make a complaint to the Board which charges an acupuncturist with a

violation of the W. Va. Code §30-36-1 et seq., or of the Rules of the Board. The Board may provide a form for that purpose, but a complaint may be filed in any written form. In addition to describing the alleged violation which prompted the complaint, the complaint should contain the following:

6.1.1. The name and address of the individual against whom the complaint is lodged;

6.1.2. The date of care;

6.1.3. The name of individual who may have treated the patient after the alleged incident; and

6.1.4. The name of any health care institution in which the patient was an inpatient or outpatient after or during the alleged incident.

6.2. Reports submitted by a medical peer review committee, a physician, the chief executive officer of a hospital, a professional society, an insurer or any other person, in compliance with the provisions of W. Va. Code §30-3-14 (b) may result in the initiation of a complaint by the Board.

6.2.1. The Board may prepare forms for filing required reports and make them available upon request.

6.2.2. Any information regarding a complaint shall be sent by the Board to the practitioner concerned for his or her written comment and he or she will submit a written reply within fifteen (15) days, or waive the right to do so.

6.2.3. Any requests for comment sent to practitioners shall be considered properly served when sent to their last known address. It is the practitioner's responsibility to keep the Board informed of his or her appropriate current address.

6.2.4. Any individual or any medical entity having reason to believe that the conduct of a practitioner amounts to professional malpractice

or professional incompetence will be encouraged to report the information to the Board.

6.2.5. The chief executive officer of every hospital shall within sixty (60) days after completion of the hospital's formal disciplinary procedure, and also after the commencement of and again after the conclusion of any resulting legal action, report in writing to the Board the name of any acupuncture member of the medical staff practicing in the hospital whose hospital privileges have been revoked, restricted, reduced, or terminated for any cause, including resignation, together with all pertinent information relating to the action. The chief executive officer shall also report within sixty (60) days after action is taken any other formal disciplinary action taken against any acupuncturist by the hospital upon the recommendation of its medical staff relating to professional ethics, medical incompetence, medical malpractice, moral turpitude or drug or alcohol abuse. The provisions of this section do not apply to any temporary suspension for failure to maintain records on a timely basis or for failure to attend staff or section meetings.

6.2.6. Any professional society in this State comprised primarily of practitioners, which takes formal disciplinary action against a member relating to professional ethics, professional incompetence, professional malpractice, moral turpitude or drug or alcohol abuse, shall, within sixty (60) days of a final decision, report in writing to the Board the name of the member, together with all pertinent information relating to the action.

6.2.7. Every insurer providing professional liability insurance to a practitioner in this State shall submit to the Board the following information within thirty (30) days from any judgement, dismissal or settlement of a civil action involving the insured: The date of any judgement, dismissal or settlement; whether any appeal has been taken on the judgement, and if so, by which party; the amount of any settlement or judgement against the insured; and any other information within the knowledge of the insurer as the Board

required.

6.2.8. Within thirty (30) days after the conviction of a person known to be an acupuncture practitioner licensed or otherwise lawfully practicing in this state, or applying to be licensed, of a felony under the laws of this State, or of any crime under the laws of this State involving alcohol or drugs in any way, including any controlled substance under state or federal law, the clerk of the court of record in which the conviction was entered shall forward to the Board a certified true and correct abstract of record or the convicting court. The abstract shall include the name and address of the practitioner or applicant, the nature of the offense committed and the final judgement and sentence of the court.

6.2.9. Information received by the Board under the provisions of W. Va. Code §30-36-1 et. seq., and this rule may be used by the Board in its determination as to whether to deny an application for a license or to initiate disciplinary action against a practitioner licensed in this State, and information may be submitted into evidence notwithstanding its prior use in any administrative civil or criminal hearing involving the applicant or practitioner.

6.3. All communications with the Board charging a practitioner with violations are conditionally privileged and a person making a communication is privileged from liability based upon the communication unless the person makes the communication in bad faith or for a malicious reason.

6.4. The Board shall maintain a complaint log which records the receipt of each complaint, its nature and its disposition.

6.5. The Board shall issue one of the following acknowledgments to an individual making a complaint:

6.5.1. That the matter will be reviewed by the Board;

6.5.2. That the complaint is outside the jurisdiction of the Board, with suggestions as to how the complainant might best obtain a resolution of his or her problem; or

6.5.3. That more information will be required in order to adequately review the individual complaint.

6.6. The Board shall maintain a separate investigative or complaint folder on each case reviewed, and each folder shall have a case number assigned to it.

6.7. After receipt and review of a complaint, unless the complaint is determined to fall within the provisions of subdivision 6.5.2. of this rule, the Board as a whole shall cause to be conducted any reasonable inquiry or investigation it considers necessary to determine the truth and validity of the allegations set forth in the complaint. The Board may assign the investigation to a committee of the Board.

6.8. A complaint against a practitioner or applicant shall allege that in his or her professional capacity he or she is acting in violation of the law, rules, or good and accepted medical practice and may be founded on any violation enumerated in the W. Va. Code §30-36-1 et. seq. or subsections 4.1 or 4.2 of this rule.

6.9. The Board, its executive director, hearing examiner or the committee, may issue subpoenas and subpoena duces tecum as required to complete the Board's investigation and may utilize Board investigator to conduct whatever investigations are necessary to determine the truth or validity of complaints.

6.10. To facilitate disposition of a complaint, the Board or the committee, shall request any person to attend an informal conference, or to appear at a regular meeting of the Board, at any time prior to the commencement of an adjudicatory proceeding. The Board or committee, shall give notice of the conference, which notice shall include a statement of issues to

be informally discussed. Statements made at a conference may not be introduced at any hearing on the merits without consent of all parties to the hearing. No prejudice shall attach for failure to attend a conference pursuant to a request.

6.11. If the Board or committee determines that a complaint complies substantially with subsection 6.8 of this rule and it relates to matters set forth in W. Va. Code §30-36-1 et. seq. or subsections 4.1 or 4.2 of this rule, it may request that the individual complained of (hereinafter referred to as the "Respondent") respond to the complaint within thirty (30) days. The Board may attach a copy of the complaint to the order for response or may describe the acts alleged in the complaint. A respondent may answer either personally or through his or her attorney, but the answer shall address the substantive allegations set forth in the complaint or order.

6.12. Upon receipt of the respondent's answer or at any point in the course of investigation or inquiry into a complaint, the committee may determine that there is not and will not be sufficient evidence to warrant further proceedings or that the complaint fails to allege misconduct for which a licensee may be sanctioned by the Board. In that event, the committee shall recommend to the Board that it dismiss the complaint. The committee shall retain a file of all complaints and shall review this file periodically.

6.13. At any point in its investigation of a complaint, the Board or complaint committee may assign the matter to one of its medical consultants for review. The report of the medical consultant shall contain a statement of the allegations, the facts, an analysis of the complaint and care provided, a brief description of the records reviewed and a recommendation and finding. The medical consultant shall, upon request, be afforded an opportunity to have an investigation interview with the practitioner in question or other involved parties, a report of which shall be placed in the investigative file.

6.14. If a respondent fails to answer within

the thirty (30) day period or if the committee determines that there is reason to believe that the acts alleged occurred and constitute a violation for which a respondent may be sanctioned by the Board, the committee shall recommend that there be a finding of probable cause to believe there is a violation of the law or this rule.

6.15. The Board shall review the recommendation of the committee and shall require an adjudicatory hearing if it determines that there is probable cause to believe that acts alleged occurred and may constitute a violation of any provision of law or this rule. The Board may take any informal action warranted by a complaint.

6.16. The Board may suspend or refuse to renew a license pending a hearing if the health and safety or welfare of the public necessitates the summary action. The Board shall provide a hearing on the necessity for the summary action within fifteen (15) days after the suspension.

6.17. A practitioner shall respond within thirty (30) days to a written communication from the Board or its designee and shall make available to the Board any relevant and authorized records with respect to an inquiry or complaint about his or her professional conduct. The thirty (30) day period commences on the date the Board sends the communication by registered or certified mail with return receipt requested to his or her last known address.

ANALYSIS OF PROPOSED LEGISLATIVE RULES

Agency: Board of Acupuncture
Subject: Disciplinary and Complaint Procedures for Acupuncturists,
32CSR7
Counsel: Rita A. Pauley
Date: September 28, 2000

PERTINENT DATES

Filed for public comment: June 28, 2000
Public comment period ended: July 31, 2000
Filed following public comment period: August 30, 2000
Filed LRMRC: August 30, 2000
Filed as emergency:

Fiscal Impact: None

OFFICE OF THE CLERK OF THE HOUSE OF DELEGATES
SECRETARIAT OF STATE

OCT 6 4 01 PM '00

FILED

ABSTRACT

This rule was filed in response to the requirements of HB 4062 passed during the 2000 Legislative Session. The bill required all licensing boards authorized by West Virginia Code §30-1-1 et seq. to propose, for legislative approval, a rule or rules specifying the procedures for the investigation and resolution of all complaints against licensees. This mandate led to boards filing rules as legislative that were by statutory definition procedural.

As currently written, this proposed rule contains material that explains the types of conduct that may be grounds for discipline as well as the procedure for filing a complaint and conducting a hearing. Counsel has suggested that the procedural material be removed from the rule and refilled as a procedural rule. Once the procedural information is removed, there is no real need for the remainder of the rule. Therefore, no analysis is necessary.

AUTHORITY

Statutory authority: W.Va. Code, §30-1-8, which provides, in part, as follows:

... (h) On or before the first day of July, two thousand, every board referred to in this chapter shall propose rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code, which shall specify a procedure for the investigation and resolution of all complaints against persons licensed under this chapter.

ANALYSIS

I. HAS THE AGENCY EXCEEDED THE SCOPE OF ITS STATUTORY AUTHORITY IN APPROVING THE PROPOSED LEGISLATIVE RULE?

No

II. IS THE PROPOSED LEGISLATIVE RULE IN CONFORMITY WITH THE INTENT OF THE STATUTE WHICH THE RULE IS INTENDED TO IMPLEMENT, EXTEND, APPLY, INTERPRET OR MAKE SPECIFIC?

Yes

III. DOES THE PROPOSED LEGISLATIVE RULE CONFLICT WITH OTHER CODE PROVISIONS OR WITH ANY OTHER RULE ADOPTED BY THE SAME OR A DIFFERENT AGENCY?

Yes, West Virginia Code §29A-1-2(d) and (g) define "Legislative" and "Procedural" rules. A Legislative Rule is one which ". . . supplies a basis for the imposition of civil or criminal liability or grants or denies a specific benefit. Every rule which, when effective, is determinative on any issue affecting private rights, privileges or interests is a legislative rule.

A procedural rule "fixes rules of procedure, practice or evidence for dealings with or proceedings before an agency. . . .

Inherent statutory and regulatory conflicts are created by including material which is clearly procedural in an legislative rule.

IV. IS THE PROPOSED LEGISLATIVE RULE NECESSARY TO FULLY ACCOMPLISH THE OBJECTIVES OF THE STATUTE UNDER WHICH THE PROPOSED RULE WAS PROMULGATED?

No

V. IS THE PROPOSED LEGISLATIVE RULE REASONABLE, ESPECIALLY AS IT AFFECTS THE CONVENIENCE OF THE GENERAL PUBLIC OR OF PERSONS AFFECTED BY IT?

Yes

VI. CAN THE PROPOSED LEGISLATIVE RULE BE MADE LESS COMPLEX OR MORE READILY UNDERSTANDABLE BY THE GENERAL PUBLIC?

No

VII. WAS THE PROPOSED LEGISLATIVE RULE PROMULGATED IN COMPLIANCE WITH THE REQUIREMENTS OF CHAPTER 29A, ARTICLE 3 AND WITH ANY REQUIREMENTS IMPOSED BY ANY OTHER PROVISIONS OF THE CODE?

No

VIII. OTHER

Counsel has suggested technical modifications.