

SECRETARY OF STATE

ADMINISTRATIVE LAW DIVISION

FILED

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: West Virginia Board of Osteopathy TITLE NUMBER: 24

RULE TYPE: Legislative; CITE AUTHORITY §30-14

AMENDMENT TO AN EXISTING RULE: YES___ NO x

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 6

TITLE OF RULE BEING PROPOSED: Disciplinary and Complaint Procedures

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON July 31, 2000 AT 4:30 p.m.. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS.

Thomas L. Gilligan, D.O.
Secretary
West Virginia Board of Osteopathy

334 Penco Road

Weirton WV 26062

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.

Cheryl D. Schuch
Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

\$4.80

SUMMARY OF PROPOSED RULE, 24-6

The disciplinary and complaint procedures for osteopathic physicians, osteopathic physician assistants and trainees are being proposed as Series 6 as provided by HB4062, passed February 15, 2000.

The Facts and Circumstances Requiring Rule 24-6

HB 4062 was passed in the legislative 2000 session, requiring the duty of boards to investigate and resolve complaints. We have proposed to move our disciplinary and complaint procedures from Series 1 to a separate rule Series 6.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Disciplinary and and Complaint Procedures

Type of Rule: X Legislative Interpretive Procedural

Agency West Virginia Board of Osteopathy

Address 334 Penco Road

Weirton WV 26062

1. Effect of Proposed Rule NONE

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
<u>ESTIMATED TOTAL COST</u>	\$	\$	\$	\$	\$
PERSONAL SERVICES					
CURRENT EXPENSE					
REPAIRS & ALTERNATIONS					
EQUIPMENT					
OTHER					

2. Explanation of above estimates:

No increase

3. Objectives of these rules:

To fulfill HB 4062, passed in Legislative 2000 session

Rule Title: Disciplinary and Complaint Procedures

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.

Not aware that there will be any impact.

C. Economic Impact on Citizens/Public at Large.

None

Date: June 28, 2000

Signature of Agency Head or Authorized Representative

Chaf N Scharb

**TITLE 24
LEGISLATIVE RULE
BOARD OF OSTEOPATHY**

**SERIES 6
DISCIPLINARY AND COMPLAINT PROCEDURES**

§24-6-1. General.

1.1. Scope. -- This rule specifies a procedure for the investigation and resolution of complaints against osteopathic physicians, osteopathic physician assistants and osteopathic medical graduates.

1.2. Authority. -- W. Va. Code §§30-14-1 et seq. and 30-1-1 et seq.

1.3. Filing Date. --

1.4. Effective Date. --

§24-6-2. Application.

This rule applies to all licensed osteopathic physicians, osteopathic physician assistants and osteopathic medical graduates.

§24-6-3. Definitions.

The following words and phrases as used in this rule have the following meanings, unless the context otherwise requires:

3.1. "Applicant" means any person making application for an original or renewal license or a temporary permit pursuant to W. Va. Code §30-14-1 *et seq.*

3.2. "Board" means the West Virginia Board of Osteopathy.

3.3. "License" means a license issued by the Board pursuant to W. Va. Code §30-14-1 *et seq.*

3.4. "Training permit" means an educational training permit for trainees issued by the Board pursuant to W.Va. Code §30-14-1 *et seq.*

3.5. "Osteopathic physician" means a person who practices medicine. Osteopathic physician assistants are defined in W. Va. Code §30-14A.1. "Trainee" means a person who is an osteopathic medical graduate in training who holds an educational training permit.

3.5.1. "Licensee" means osteopathic physician, osteopathic physician assistant or trainee.

3.6. "Investigator" means a person who has been hired by the Board to investigate complaints or follow-up on past or current agreements against osteopathic physicians, osteopathic physician assistants and trainees.

§24-6-4. Denial, Probation, Limitation, Discipline, Suspension or Revocation of Licenses or Training Permits

4.1. The Board may deny an application for license, place a licensee on probation, limit or restrict a license, suspend a license or revoke any license issued by the Board, upon satisfactory proof that a licensee has been convicted of a felony or is, in his or her professional capacity, engaged in conduct, practices or acts constituting professional negligence or a willful departure from accepted standards of professional conduct in violation of W. Va. Code §30-14-1 *et seq.* or the rules of the Board.

4.2. 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 W. Va. Code §§30-14-3 or 30-14A-1 or rules of the Board, the Board may take any one or more of the following actions:

- 4.2.1. Refuse to grant a license to an applicant;
- 4.2.2. Administer a public reprimand;
- 4.2.3. Suspend, limit or restrict any license for a definite period, not to exceed five (5) years;
- 4.2.4. Require any licensee to participate in a program of education prescribed by the Board;
- 4.2.5. Revoke any license;
- 4.2.6. Require the licensee to submit to care, counseling or treatment by physicians or other professional persons.
- 4.2.7. Assess a civil fine of between \$1,000 and \$10,000 and/or assess cost of the Board's investigation and administrative proceedings against the licensee;
- 4.2.8. Require him or her to practice under the direction or supervision of another practitioner; or
- 4.2.9. Require the licensee to provide a period of free public or charitable service.

4.2.10. In addition to and in conjunction with the foregoing 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 thereof and place the physician on probation, which probation may be vacated upon noncompliance with such reasonable terms as the Board may impose. In its discretion, the Board may restore and reissue a license to practice osteopathic

medicine issued under the W. Va. Code §30-14A-1, et seq., or any antecedent law, and as a condition of reinstatement, it may impose any disciplinary or corrective measure provided for in this rule or in the W. Va. Code §30-14A-1, et seq.

4.3. 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.

4.3.1. Conditions for probation: Upon reaching the conclusion that a licensee to practice osteopathic medicine should be placed on probation, the Board may impose any one or more of the following conditions:

a. 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 shall then report back to the Board at its regularly scheduled meeting on the progress of the licensee;

b. The Board may cause the probationary licensee to appear before the Board at such intervals as the Board may determine in 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;

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

d. 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;

e. 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;

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

g. 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;

h. 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 then 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

I. 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.

§ 24-6-5. Disposition of Reports and Complaints.

5.1. Any person, medical peer review committee, firm, corporation, member of the Board, or public officer may make a complaint to the Board which charges an osteopathic physician, osteopathic physician assistant, trainee, or applicant with a violation of W. Va. Code §30-14-1 *et seq.* or of the rules of the Board. The Board will 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:

5.1.1. The name and address of the individual(s), against whom the complaint is lodged;

5.1.2. The date of care;

5.1.3. The name(s) of any person(s) who may have treated the patient after the alleged incident; and,

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

5.1.5. A signed medical records release authorization form that has been notarized and signed by the patient, power of attorney, or legal guardian of the patient when appropriate.

5.2. 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 or W.Va. Code §30-3-14(b) may result in the initiation of its own complaint by the board.

5.2.1. The Board shall prepare and mail copies of this section (§24-6-5) to the State Osteopathic Society, State District Academies, West Virginia School of Osteopathic Medicine, and each hospital in the state of West Virginia.

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

5.2.3. Any information regarding a complaint may be sent by the Board to the licensee concerned for his or her written comment and he or she shall submit a written reply within twenty (20) days, or waive the right to do so.

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

5.2.5. Any individual or any medical entity having reason to believe that the conduct of a licensee amounts to professional malpractice or professional incompetence shall be encouraged to report the information to the Board.

5.2.6. The chief executive officer of every hospital shall within sixty (60) days after the 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 osteopathic licensee 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 the action is taken any other formal disciplinary action taken against any licensee 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. This does not apply to any temporary suspension for failure to maintain records on a timely basis or for failure to attend staff or section meetings.

5.2.7. Any professional society in this State comprised primarily of physicians or physician assistants, 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 such action.

5.2.8. Every insurer providing professional liability insurance to a licensee in this State shall submit to the Board the following information within thirty (30) days from any judgment, dismissal or settlement of a civil action involving the insured: The date of any judgment, dismissal or settlement; whether any appeal has been taken on the judgment, and, if so, by which party; the amount of any settlement or judgment against the insured; and such other information within the knowledge of the insurer as the Board requires. The Board shall mail a copy of this section to every known insurer in the state which has sold or may hereafter sell, professional liability insurance to any licensee licensed in this State.

5.2.9. Within thirty (30) days after the conviction of a person known to be a licensee 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 of the convicting court. The abstract shall include the name and address of the licensee or

applicant, the nature of the offense committed and the final judgment and sentence of the court. The Board shall mail a copy of this section to every circuit clerk in the state.

5.2.10. Information received by the Board under the provisions of W. Va. Code §30-3-14(c) and this subsection 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 physician licensed in this State, and the information may be submitted into evidence notwithstanding its prior use in any administrative civil or criminal hearing involving the applicant or licensee.

5.3. All communications with the Board charging a licensee 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.

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

5.5. An individual making a complaint should receive one of the following acknowledgments:

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

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

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

5.6. 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.

5.7. After receipt and review of a complaint, unless the complaint is determined to fall within the provisions of Section 5.5.2 of this rule the Board 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 review of complaints and any view or investigation thereof may, at the discretion of the Board, be assigned to a committee of the Board.

5.8. A complaint against an individual must 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 W. Va. Code §30-3-14(c) or subsections 6.1 or 6.2 of this rule.

5.9. The Board may issue subpoenas and subpoena duces tecum as required to complete its investigation and may utilize an investigator(s) to conduct whatever investigations are necessary to determine the truth and validity, or lack thereof, of complaints. In the event the Board initiates its own complaint, it may utilize subpoenas,

subpoenas duces tecum and its investigators as it determines necessary to gather facts and evidence.

5.10. To facilitate disposition of a complaint, the Board may 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 fifteen (15) days' notice of the conference, which notice shall include a statement of the issues to be informally discussed. Statements made at a conference may not be introduced at any hearing on the merits without the consent of all parties to the hearing. No prejudice shall attach for failure to attend a conference pursuant to a request.

5.11. If the Board or committee determines that a complaint complies substantially with subsection 5.8 of this rule and that it relates to matters set forth in W. Va. Code §30-3-14(c) or subsections 6.1 or 6.2 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 or committee shall attach a copy of the complaint to the order for response or shall describe the acts alleged in the complaint. A respondent may answer either personally or through his or her attorney, but the answer must address the substantive allegations set forth in the complaint or order.

5.12. Upon receipt of the respondent's answer or at any point in the course of investigation or inquiry into a complaint, the Board or 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 to dismiss the complaint. The committee shall retain a file of all complaints and shall review this file periodically.

5.13. 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, 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 physician in question or other involved parties, a report of which shall be placed in the investigative file.

5.14. If a respondent fails to answer within the thirty (30) day period or if the Board or 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 Board or committee shall recommend that there be a finding of probable cause to believe there is a violation of the law or this rule.

5.15. Upon receipt of a licensee's or applicant's comments in response to a complaint, the Board shall promptly send a copy of the same, including any supporting documentation, to the complainant.

5.16. The Board shall review the documentation related to the complaint 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

subpoenas duces tecum and its investigators as it determines necessary to gather facts and evidence.

5.10. To facilitate disposition of a complaint, the Board may 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 fifteen (15) days' notice of the conference, which notice shall include a statement of the issues to be informally discussed. Statements made at a conference may not be introduced at any hearing on the merits without the consent of all parties to the hearing. No prejudice shall attach for failure to attend a conference pursuant to a request.

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5.12. Upon receipt of the respondent's answer or at any point in the course of investigation or inquiry into a complaint, the Board or 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 to dismiss the complaint. The committee shall retain a file of all complaints and shall review this file periodically.

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5.15. Upon receipt of a licensee's or applicant's comments in response to a complaint, the Board shall promptly send a copy of the same, including any supporting documentation, to the complainant.

5.16. The Board shall review the documentation related to the complaint 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 such informal action as it determines a complaint warrants.

5.17. The Board may suspend or refuse to renew a license pending a hearing if the health, safety or welfare of the public necessitates such summary action. The Board shall provide a hearing on the necessity for the summary action within fifteen (15) days after the suspension. The Board shall render its decision within five (5) days of the conclusion of a hearing under this section.

5.18. The Board shall maintain a permanent file on each physician licensed or otherwise lawfully practicing in this State and of all persons applying to be licensed. This file shall include an individual historical record of each physician, which shall include all reports and information furnished to the Board pursuant to applicable law. In the event an investigative or complaint file is opened, a record shall be made thereof. The Board shall provide a licensee written notice of the substance of any record placed in his or her historical file, and the licensee will be permitted thirty (30) days in which to file a written statement regarding the record; the statement shall always accompany that part of the record in contention. A licensee may examine his or her historical file during regular office hours of the Board or may designate his or her attorney to do so. A request for photocopies of his or her historical file may be made by a licensee and it shall be processed by the Board on the basis of staff availability, and the cost of the request shall be paid by the requesting licensee. Requests for matters relating to an ongoing investigation shall be handled at the discretion of the Board. All matters in an historical file are strictly confidential, except as exempted by W. Va. Code §30-3-9. Except for information enumerated in W. Va. Code §30-3-9(f), any matter in an historical file which is not involved in a proceeding for a hearing regarding the licensee concerned within two (2) years from its placement into such file may be expunged from the file at the discretion of the Board. If the investigative or complaint file is closed on the basis that the individual licensee concerned is not guilty of any misconduct or wrongdoing, the Board shall remove all matters relating to that investigation from his or her historical file.

5.19. A licensee 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. The physician shall maintain a medical record for each patient which is adequate to enable the physician to provide proper diagnosis and treatment. The physician must maintain a patient's medical record for a minimum period of three (3) years from the date of the last patient encounter and in a manner which permits the former patient or a successor licensee access to them within the terms of this rule and as set forth in W. Va. Code §16-29-1 et seq.

§24-6-6. Appeals.

6.1. Any applicant who has had his or her application for a license denied by order of the Board may appeal the order within thirty (30) days of that action in accordance with the contested case hearing procedures set forth in 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 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.

6.2. Any licensee practicing 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 such 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 issues a license, permit 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.

§24-6-7. Severability.

7.1. If any provision of this rule or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect the provisions or application of this rule which can be given effect without the invalid provisions or application and to this end the provisions of this rule are declared to be severable.