STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| FLORIDA MEDICAL ASSOCIATION, INC., | ) | |
| Petitioner, | ) | |
| and | ) | |
| THE FLORIDA ACADEMY OF PHYSICIANS ASSISTANTS, | ) | |
| Intervenor, | ) | |
| vs. | ) | Case No. 00-4737RX |
| DEPARTMENT OF HEALTH, BOARD OF ACUPUNCTURE, | ) | |
| Respondent, | ) | |
| and | ) | |
| FLORIDA STATE ORIENTAL MEDICAL ASSOCIATION, | ) | |
| Intervenor. | ) | |

FINAL ORDER

This cause was scheduled for hearing upon the stipulated date of May 10, 2001, but on May 3, 2001, the parties filed a Joint Prehearing Stipulation, agreeing to present the case without a hearing.

## APPEARANCES

For Petitioner Florida Medical Association, Inc:

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For Respondent Board of Acupuncture:

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For Intervenor Florida Academy of Physicians Assistants:

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For Intervenor Florida State Oriental Medical Association:

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## STATEMENT OF THE ISSUES

(1) Whether the Florida Medical Association, Inc. and Florida Association of Physicians Assistants have standing to initiate this challenge to an existing rule. (See Section 120.56(3), Florida Statutes.)

(2) Whether Rule 64B1-3.001(6), Florida Administrative Code, constitutes an invalid exercise of delegated legislative authority because it exceeds the Board of Acupuncture's

rulemaking authority contained in Section 457.104, Florida Statutes. (See Section 120.52(8)(b), Florida Statutes).

(3) Whether Rule 64B1-3.001(6), Florida Administrative Code, constitutes an invalid exercise of delegated legislative authority because it enlarges, modifies, or contravenes the provisions of Section 457.102, Florida Statutes. (See Section 120.52(8)(c), Florida Statutes).

PRELIMINARY STATEMENT

On November 21, 2000, Petitioner, Florida Medical Association, Inc. (FMA) filed a Petition seeking to have existing Rule 64B1-3.001, Florida Administrative Code, declared an invalid exercise of delegated legislative authority by the Board of Acupuncture.

On November 29, 2000, the case was assigned to the undersigned. Petitions to Intervene by the Florida Academy of Physicians Assistants (FAPA), on behalf of Petitioner, and by the Florida State Oriental Medical Association (FSOMA), and by Terry Brant, on behalf of the Board of Acupuncture (Board) were granted. Thereafter, Terry Brant withdrew as an intervenor.

After consolidation with Florida Medical Ass'n. Inc., et al. v. Dept. of Health, Bd. of Acupuncture, et al., DOAH Case No. 01-0025RP, later bifurcation from that case, and the granting of several Motions for Continuance, final hearing was scheduled for May 10, 2001, but on May 3, 2001, the parties

filed a Joint Prehearing Stipulation in which they limited the rule challenge to Rule 64B1-3.001(6), Florida Administrative Code; stipulated to limited facts; and agreed that the case did not require a hearing. By a May 10, 2001, Order, the final hearing was cancelled, and June 29, 2001, was set for the filing of proposed final orders.

FAPA adopted Petitioner's Proposed Final Order. All other parties respectively filed Proposed Final Orders. All proposals have been considered.

## FINDINGS OF FACT

1. It was stipulated that Petitioner FMA is organized and maintained for the benefit of approximately 16,000 licensed allopathic and osteopathic Florida physicians. FMA's standing in this proceeding has always been at issue. The foregoing stipulation encompasses all of the factual allegations about the Petitioner contained in the Petition.

2. It was stipulated that there is only one Respondent, the Board of Acupuncture, created by the Florida Legislature and placed within the Florida Department of Health. It is axiomatic that the Respondent has standing herein.

3. There were no stipulations as to the standing of either Intervenor, and both the Board and FSOMA have asserted in their respective Proposed Final Orders that FAPA, as well as FMA, is without standing to bring this rule challenge. However, no

party has contested the veracity of the factual statements concerning standing in either Petition to Intervene, and no party opposed intervention. The Petitions to Intervene of FAPA and FSOMA were granted, subject to proving-up standing at hearing. Even stipulations as to standing do not preclude consideration of standing as a matter of law. Florida Medical Ass'n., Inc., et al. v. Dept. of Health, Florida Bd. of Nursing, et al., DOAH Case No. 99-5337RP (Final Order March 13, 2000), per curiam affirmed Bd. of Nursing, et al. v. Florida Medical Ass'n. Inc., ___So. 2d ___ (Fla. 1st DCA 2001). Therefore, under these circumstances, and applying that case, the Intervenors' factual allegations for purposes of standing may be taken as true for findings of fact, but each Intervenor's status still depends upon that of the respective party upon whose behalf each Intervenor entered this case.

4. Therefore, with regard to the status of FAPA, it is found that:

> FAPA is organized and maintained for the benefit of the licensed Florida physicians assistants who compromise [sic] its membership and has as one of its primary functions to represent the interests of its members before various governmental entities of the State of Florida, including the Department of Health and its boards. (FAPA Petition to Intervene)

5. Therefore, with regard to the status of FSOMA, it is found that:

> FSOMA is a Florida nonprofit corporation comprised of over one-third of the doctors of oriental medicine and licensed acupuncturists under the regulatory aegis of the Board of Acupuncture, State of Florida Department of Health, Chapter 457, F.S., with a mission to represent the acupuncture and oriental medicine practitioner interests of its members in judicial administrative, legislative and other proceedings. (FSOMA Petition to Intervene)

6. Existing Rule 64B1-3.001(6), Florida Administrative Code, was promulgated by the Board of Acupuncture.

7. The challenged rule provides:

> (6) Acupuncture physician means any person certified as provided in this Chapter to practice acupuncture as a primary health care provider.

8. The rule was adopted on August 13, 1984. It was most recently amended on February 27, 1992.

9. The "authority" cited by the Board for the challenged rule is Section 457.104, Florida Statutes.

10. The Board cites the "law implemented" for the challenged rule as Section 457.102, Florida Statutes.

11. Section 457.104, Florida Statutes, currently provides:

> The board has authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement provisions of this chapter conferring duties upon it.

12. Section 457.102, Florida Statutes, currently provides:

> (1) "Acupuncture" means a form of primary health care, based on traditional Chinese medical concepts and modern oriental medical

techniques, that employs acupuncture diagnosis and treatment, as well as adjunctive therapies and diagnostic techniques, for the promotion, maintenance, and restoration of health and the prevention of disease. Acupuncture shall include, but not be limited to, the insertion of acupuncture needles and the application of moxibustion to specific areas of the human body and the use of electroacupuncture, Qi Gong, oriental massage, herbal therapy, dietary guidelines, and other adjunctive therapies, as defined by board rule.

(2) "Acupuncturist" means any person licensed as provided in this chapter to practice acupuncture as a primary health care provider.

(3) "Board" means the Board of Acupuncture.

(4) "License" means the document of authorization issued by the department for a person to engage in the practice of acupuncture.

(5) "Department" means the Department of Health.

(6) "Oriental medicine" means the use of acupuncture, electroacupuncture, Qi Gong, oriental massage, herbal therapy, dietary guidelines, and other adjunctive therapies.

(7) "Prescriptive rights" means the prescription, administration, and use of needles and devices, restricted devices, and prescription devices that are used in the practice of acupuncture and oriental medicine. (Emphasis supplied)

13. Section 457.116(1)(b), Florida Statutes, provides:

(1) A person may not:

(b) Use, in connection with his or her name or place of business, any title or

> description of services which incorporates the words "acupuncture," "acupuncturist," "certified acupuncturist," "licensed acupuncturist," "oriental medical practitioner"; the letters "L.Ac.," "R.Ac.," "A.P.," or "D.O.M."; or any other words, letters, abbreviations, or insignia indicating or implying that he or she practices acupuncture unless he or she is a holder of a valid license issued pursuant to ss. 457.101-457.118; (Emphasis supplied)

14. It was stipulated that witnesses for the Respondent Board of Acupuncture would testify that "A.P." as employed in Section 457.116 (1) (b), Florida Statutes, means "acupuncture physician."[1]

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction of this cause and the parties hereto, pursuant to Section 120.56(3), Florida Statutes.

16. Petitioner FMA's Proposed Final Order asserts as grounds for its "substantial interest," and thus for its "standing" (see Section 120.56, Florida Statutes), that "use of the term, 'acupuncture physician' may lead patients of medical (and presumably osteopathic) doctors (e.g. allopathic and osteopathic physicians are the terms used in the Florida Statutes) to believe that an acupuncturist is a professional licensed as a physician by the State of Florida"; that "misuse of the term 'physician' will lead the public to believe that when they visit an acupuncturist they are being treated by a

health care provider who has obtained a level of training and experience that licensees of the Board of Acupuncture have not obtained"; and that "FMA has an interest in "assuring that patients are not misled into believing that they are being treated by a licensed Florida physician" and an interest in ensuring that use of the title "physician" by others would not "diminish the additional time and capital expended by allopathic (and presumably osteopathic) physicians in acquiring this additional training and in meeting the requirements for licensure under their (respective professional) practice Act(s)." (Material in parentheses has been inferred by the undersigned.) FAPA adopts this reasoning.

17. Petitioners further assert that the challenged rule is invalid, pursuant to Section 120.56(3), Florida Statutes, because only the Legislature may promulgate the definition set forth in the challenged rule; because Section 457.102, Florida Statutes, is a list of definitions, and no rulemaking authority was contained in the statute at the time the rule was promulgated; and because Section 457.104, Florida Statutes, provides the Board authority only to adopt rules to "implement provisions of this chapter conferring duties upon it" and there were no duties conferred in Section 457.102, Florida Statutes, at the time the rule was promulgated.[2]

18. Petitioner has the obligation to go forward and the burden to prove the invalidity of an existing rule. However, before the merits of validity vel non of the challenged rule may be addressed, the threshold of "standing" must be crossed.

19. Standing of Respondent is axiomatic. (See Finding of Fact 2.) Standing of FSOMA is clearly established, in that all of its membership is affected by the rule and subject to discipline by the Board. (See Finding of Fact 5.)

20. In examining FMA's and FAPA's "standing" herein, there is no issue concerning their statuses as professional associations. The law is well-settled that duly-constituted professional associations are "persons" who may challenge existing and proposed rules. What is at issue is whether these professional associations have standing in relationship to the rule challenged.

21. "Acupuncture" is a form of primary health care as broadly described within Section 457.102 (1), Florida Statutes, and subject to and "as defined by board rule."

22. Section 457.102(2), Florida Statutes, defines an "acupuncturist" as a person licensed as provided in Chapter 457, Florida Statutes, to practice acupuncture as a primary health care provider.

23. Section 457.118, Florida Statutes, prohibits Chapter 457, Florida Statutes, which relates to and governs the practice

of acupuncture, from being construed so as to expand or limit the scope of any health care professional licensed under either Chapter 458 or Chapter 459, Florida Statutes, "as such scope of practice is defined by statute or rule."

24. "Physician assistants" are governed by Chapters 458 and 459, Florida Statutes. Sections 458.347 and 459.022, Florida Statutes.

25. Allopathic physicians, be they called by the public, "allopathic physicians," "medical physicians," "medical doctors," or just "physicians," are licensed under, and governed by, Chapter 458, Florida Statutes. Despite FMA's Proposed Final Order referring to both allopathic and osteopathic physicians as "doctors,"[3] Chapter 458, Florida Statutes, only recognizes the term "physicians." Section 458.305(4), Florida Statutes. Allopathic physicians are regulated by the Board of Medicine. Sections 458.305(1) and (4) and 458.307, Florida Statutes. Chapter 458, Florida Statutes, exempts them from regulation by any other professional statutory scheme, including but not limited to the Board of Acupuncture; Chapter 457, Florida Statutes; and rules promulgated thereunder. Section 458.303, Florida Statutes.

26. Osteopathic physicians, apparently never called anything other than "osteopathic physicians," by both the public and Chapter 459, Florida Statutes, are licensed under, and

governed by, Chapter 459, Florida Statutes. They are regulated by the Board of Osteopathic Medicine. Sections 459.003(1) and (4) and 459.004, Florida Statutes. That statutory scheme exempts them from regulation by any other professional statutory scheme, including but not limited to the Board of Acupuncture; Chapter 457, Florida Statutes; and rules promulgated thereunder. Section 459.002, Florida Statutes.

27. No licensed Florida "physician," defined at Section 458.305(4), Florida Statutes, as one governed by that Chapter and the Board of Medicine, is governed by the challenged rule. No licensed Florida "osteopathic physician," defined at Section 459.003(4), Florida Statutes, is governed by the challenged rule. No "physician's assistant," permitted at Sections 458.347 and 459.022, Florida Statutes, is governed by the challenged rule; and no stipulated member of FMA is governed by the challenged rule.

28. Although it was stipulated that FMA is organized and maintained for the benefit of member allopaths and osteopaths, there is no evidence to the effect that either profession, as defined and regulated by Chapters 458 or 459, Florida Statutes, respectively, is in any way impacted-upon by Rule 64B1-3.001(6), Florida Administrative Code. There also is no evidence that physicians assistants, be they members of FAPA or not, are impacted by the rule. Indeed, these professions are insulated

from any direct imposition of the rule by Chapters 457, 458, and 459, Florida Statutes.

29. Although FMA asserts in its Proposed Final Order that "[w]ithout a doubt, allopathic physicians receive a higher level of training than do acupuncturists," no evidence to that effect was presented in this case, and no evidence was presented comparing the education, training, and experience of allopaths, osteopaths, physicians' assistants, and acupuncturists. However, comparison of Sections 457.105, 458.311-458.318, and 459.0055-459.008, Florida Statutes, clearly demonstrates that there are more stringent requirements for licensure of allopaths and osteopaths than for acupuncturists.

30. The evolution of the case law on standing must be examined with regard to FMA's and FAPA's relationship to this particular rule now challenged.

31. In Florida Medical Ass'n., Inc., et al. v. Dept. of Professional Regulation, Bd. of Optometry, et al., 426 So. 2d 1112 (Fla. 1st DCA 1983), a determination that FMA had standing was predicated on "economic injury" to physicians (particularly opthmologists) licensed under Chapter 458, Florida Statutes, by an Optometry Board rule permitting optometrists licensed under Chapter 463, Florida Statutes, to provide treatment involving prescription and use of "legend (or scheduled) drugs" to patients who otherwise would be required to obtain such

treatment from physicians. "Standing" then required a showing that (1) Petitioner would suffer injury in fact of sufficient immediacy to entitle it to hearing, and that (2) Petitioner's substantial injury was of the type or nature the proceeding was designed to protect in challenging the proposed rule. In short, the proposed rule had to be within the "zone of interest" of physicians licensed under other statutes in order for them to have standing. Therein, however, individual members of the petitioner professional association piggybacked the association regarding "the right to practice medicine as a valuable property right, protected by the due process clause." Although commenting that FMA had no legally recognized interest in being free from competition, that opinion deliberately left unanswered the question of whether or not a sufficient injury to support "standing" is shown by claims that the rule in question will have the effect of lessening the professional respect and esteem of physicians in the public eye. It also opened the door to consider the Constitution and other statutes beyond the several professional practice Acts when determining standing. The case, when tried on the merits, resulted in invalidation of the challenged Board of Optometry rule, and the appellate decision contains language, later receded from, to the effect that standing may be affected by the correctness of the challenger's position on the merits. Bd. of Optometry v. Florida Medical

Ass'n., Inc., et al., 463 So. 2d 1213 (Fla. 1st DCA 1985), pet. rev. denied 475 So. 2d 693 (Fla. 1985).

32. In the case at bar, it is hard to fathom how the income of allopaths, osteopaths, and physicians' assistants would be threatened by the challenged rule now. No showing was made that the nine years-old rule has had, or will have, injurious effect in fact or injury of immediacy, nor was it shown that any unasserted injury is of the type or nature which these proceedings are designed to protect. See Agrico Chemical Co. v. Dept. of Environmental Regulation, et al., 406 So. 2d 478 (Fla. 2nd DCA 1981).

33. In Bd. of Optometry v. Florida Soc. of Opthalmology, 538 So. 2d 878 (Fla. 1st DCA 1989), the First District Court of Appeal reversed a finding of standing it had declared existed in Florida Soc. of Opthalmology; Florida Medical Ass'n., Inc., et al v. Bd. of Optometry, 532 So. 2d 1279, (Fla. 1st DCA 1988). Reviewing some explicit and helpful findings of fact made by the hearing officer, the court specifically made a lack of standing determination against FMA's and the Society of Opthmology's assertion that they were "authorized to represent their patients' rights," thus rejecting a trend toward "Good Samaritan" standing on behalf of patients or the public at large by professional associations. The court also clearly ruled that it was legally insufficient to predicate standing solely upon

the basis of overlapping health care practices or a continuing general interest in the quality of care to the public and mutual patients. Rather, direct injury in fact or of sufficient immediacy and reality to petitioners had to be demonstrated. Moreover, because the challengers were not subject to the rule, they could not predicate standing on the notion that the application of the challenged rule would prevent or obstruct their own professional practices. The case also clearly held that standing is not predicated on a challenger's ability to prevail on the merits of the rule challenge, and foreshadowed the later holdings that mere economic interest or loss for the challenger as a result of the rule is insufficient to invoke standing in a rule challenge and that persons not subject to a rule have no standing to challenge that rule unless standing is somehow devolved from a statute providing "exclusive territory" to the challenger.[4]

34. Herein, except for the speculation that use of the term, "acupuncture physician" will "diminish (devalue) the additional (education, training, and experience,) time and capital expended by allopathic physicians" (material in parentheses has been inferred by the undersigned), FMA has only directly alleged a "Good Samaritan" argument of wanting the best for Florida citizens and not wanting patients to confuse, to the patients' detriment, the terms, "physician" and "physician's

assistant" in Chapter 458, Florida Statutes; "osteopathic physician," and "physician's assistant" in Chapter 459, Florida Statutes, and "acupuncture physician," in the challenged rule. Petitioners assert that a technical deficiency exists as to acupuncturists, and therefore, a potential harm exists as to patients, but this was not demonstrated by evidence.

35. In 1993, the Florida Optometric Association challenged a rule of the Board of Medicine. The Board filed a motion to dismiss the association, alleging that it lacked standing to challenge a rule of the Board of Medicine. The association was dismissed, and that dismissal was affirmed purely because the challengers (optometrists, their association, and a nurses' association) were not regulated by, or subject to, rules or discipline of the Board of Medicine. Florida Bd. of Optometry v. Florida Bd. of Medicine, 616 So. 2d 581 (Fla. 1st DCA 1993). Herein, the Board of Acupuncture, joined by FSOMA, urges this very narrow interpretation of the standing necessary to challenge any of its rules, including the one at bar. They assert that only acupuncturists may legally challenge a Board of Acupuncture rule.

36. Both proponents and opponents of the rule challenged herein have cited Dept. of Professional Regulation, Bd. of Dentistry v. Florida Dental Hygienist Ass'n., Inc., 612 So. 2d 646 (Fla. 1st DCA 1993), and the recent case of Florida Medical

Ass'n. Inc., v. Board of Podiatric Medicine, DOAH Case No. 99-4167RP (Final Order December 30, 1999), reversed in part in Bd. of Podiatric Medicine v. Florida Medical Ass'n. Inc., 779 So. 2d 658 (Fla. 1st DCA 2001). These cases and Florida Medical Ass'n. Inc., et al. v. Dept. of Health, Florida Bd. of Nursing, DOAH Case No. 99-5337RP, cited supra, Finding of Fact 3, are worthy of discussion at this point. Together, they present some fine distinctions in the case law sufficient to resolve the issue of standing in the instant case.

37. The Florida Dental Hygienist Ass'n, Inc., case involved a challenge by dental hygienists to a proposed rule which would have allowed dental hygienists with less educational training (based on the incorporation of a category of dental hygiene schools into the licensing Act) to apply for licensing in Florida. The court held,

> By allowing unqualified persons to enter the field, the proposed rule changes tend to diminish the value of the additional time and capital expended by the hygienists in order to meet the higher educational and training standards required under existing law. Thus, those hygienists who are already qualified, licensed and practicing in Florida have a sufficient interest in maintaining the levels of education and competence required for licensing to afford them standing to challenge an unauthorized encroachment upon their practice.

38. The dental hygienists case is distinguishable from the one at bar for a number of reasons. First, it differs

significantly because therein, the challenging dental hygienists were licensed by, and subject to discipline by, the same Board as had promulgated the rule, and the challenging dental hygienists were already licensed and practicing in Florida. Their concern was with the integrity of their own profession and licenses under existing law, versus changes to be effected by the proposed rule. Also, the First District Court of Appeal stated most emphatically therein that economic interest is not sufficient to confer standing of third parties (persons outside the practice Act) unless a statute contemplates consideration of such interests. Therein, the dental hygienists were found to have standing to challenge the rule because the challenged rule would have the effect of opening their profession of dental hygiene to persons of lesser qualifications. Likewise, the court took into consideration that dental hygienists were employed almost exclusively by dentists and therefore the majority of dental hygienists were subject to dentists' employment control. Dentists were also licensed and subject to discipline by the same Board as had promulgated the challenged rule. Under these circumstances, the dental hygienists who were already licensed were "substantially affected" by the rule.

39. Herein, there was no showing that any member of FMA or FAPA is already a licensed acupuncturist or otherwise subject to the Board of Acupuncture which promulgated this rule.

40. On the merits, the Final Order in Florida Medical Ass'n., Inc., et al. v. Dept. of Health, Florida Bd. of Nursing, et al., DOAH Case No. 99-5337RP, supra., determined that the legend drugs prescription statute precluded a Board of Nursing rule which would have permitted Advanced Registered Nurse Practitioners to prescribe legend drugs. In determining that FMA and other petitioners not subject to the Board of Nursing's rules or discipline had standing to challenge the rule, the Administrative Law Judge considered the rule challenged, the challenged rule in relation to the statutes applicable to the challenging physicians, the challenged rule in relation to the statutes applicable to the Board of Nursing, and the challenged rule in relation to independent statutes dealing specifically with the subject matter of legend drugs. Having done so, he determined that FMA had standing to challenge the Board of Nursing rule, despite the different practice Acts applying to nurses, allopaths, and osteopaths, because the several practice Acts and the challenged rule itself contemplated a role of oversight of Advanced Registered Nurse Practitioners by both allopathic and osteopathic physicians and this oversight role was both real and immediate. His approach is analogous to the dental hygienists case, and likewise is distinguishable from the case at bar. Herein, no statute of "exclusive territory" (such as the legend drug statute) has been

shown to contemplate standing by allopaths, osteopaths, physicians assistants, FMA, or FAPA. Neither association, nor any member thereof, has an oversight role as to acupuncturists.

41. In Florida Medical Ass'n. Inc., v. Bd. of Podiatric Medicine, DOAH Case No. 99-4167RP (Final Order December 30, 1999), reversed on the merits in Bd. of Podiatric Medicine v. Florida Medical Ass'n., Inc., 779 So. 2d 658 (Fla. 1st DCA 2001), the Administrative Law Judge determined that FMA had standing to challenge a proposed rule of the Board of Podiatric Medicine because the definition within the proposed rule expanded podiatrists' scope of practice into an area of the human leg reserved exclusively for allopathic and osteopathic physicians. The Final Order invalidated the proposed rule. On appeal, the First District Court of Appeal reversed the Final Order's determination on the merits, by holding that the proposed rule was valid. The decision did not discuss the standing issue, which FMA and FAPA assert herein had been extensively briefed before that appellate court. FMA and FAPA further assert that by its silence on the standing issue, the First District Court of Appeal implicitly acquiesced in the Administrative Law Judge's conclusion that FMA had standing to challenge the rules of a Board which does not regulate members of the association, and that same should be the grounds of determining Petitioners' standing in the instant case.

42. The undersigned does not concur. There is no standard of case interpretation that permits the inference that Petitioners assert. Also, it was reasonable to suppose that until the Board of Podiatry rule defining "leg" expanded the statutory definition thereof from the area strictly below the knee to include the area above the knee, the area above the knee was, by law, the exclusive statutory territory of allopaths and osteopaths. Certainly, the Administrative Law Judge in that case saw a distinction between the concept of an "exclusive statutory territory" of allopaths and osteopaths based on what was not included in the podiatry statute's bounds of podiatry practice, which concept previous courts have used to uphold challengers' standings, and the concept of mere overlapping of the traditional practice of medicine into a body part also treated by another type of health care provider, such as a leg or an eye, which latter concept previous courts have ruled will not support standing to challenge a rule. However, that distinction apparently did not sway the appellate court on the merits, and that distinction simply does not exist in the case at bar. No "exclusive territory" statute has been presented herein for purposes of determining FMA's and FAPA's standing.

43. The undersigned shares the concerns of the Administrative Law Judge in the podiatrists case that Florida's narrowing view of "standing" ensures that only persons governed

by a rule may challenge that rule but never will challenge it. Likewise, there may be excellent grounds to invalidate this challenged rule, but the case law is now clear that the merits of a rule challenge may not even be considered if standing does not exist.

44. Speculative economic loss alone will not create standing, and although the case law leaves open the possibility that loss of esteem in the eyes of the public for allopaths and osteopaths if more professions assume the title of "physician" may be considered in relationship to the standing issue, that theory is too remote and without any evidentiary support herein. Moreover, "loss of esteem" of another profession does not constitute a real or immediate injury in fact. Although the effect or impact of the challenged rule itself and of the challenged rule in relation to other statutes may be considered in determining standing, that has been done here and is not helpful to Petitioners. A demonstration of overlapping practices based solely on body parts or patients will not support a finding of standing. Neither challenger nor their respective memberships are subject in any way to the challenged rule; the rule contemplates no involvement or oversight by either challenger of any acupuncturist or of acupuncturists over them. The challengers have alleged a proprietary or exclusive interest in the word, "physician," but Respondents point out

that the word, "physician," is not a strictly statutory term any more than "leg" and that "physician" has many meanings in common usage. Likewise, Petitioners have pointed to no statute that currently confers or formerly conferred an area of practice exclusive to themselves which this rule invades.

45. Under the controlling case law, standing cannot exist on any theory that the challengers derive standing from representation of their patients, potential patients, or patients mutual to acupuncturists. In so saying, the undersigned has not overlooked the possibility of a continuum of care being provided by allopaths and osteopaths for persons previously mistreated by another health care professional, which theory was discussed by the Administrative Law Judge in the podiatrists' case. There just is no evidence herein to find that mistreatment of patients by acupuncturists will now occur as a result of this rule, just as there is no evidence herein that this very old rule will somehow now immediately cause confusion among potential patients as to which variety of primary health care provider they should employ.

46. FMA and FAPA have not borne their burden to establish standing to challenge this rule. Having made this determination, it is not necessary to address the validity vel non of the rule itself.

## ORDER

Petitioner, Florida Medical Association, Inc., and Intervenor, Florida Association of Physicians Assistants, are without standing to challenge existing Rule 64B1-3.001(6), Florida Administrative Code, and the challenge is accordingly dismissed.

DONE AND ORDERED this 23rd day of August, 2001, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of August, 2001.

## ENDNOTES

1/ No legislative history was presented to validate this statement. Even if a legislative history had been presented, the statement is, at best, merely someone's opinion of what the statute means. Witnesses do not interpret the law, and stipulations on what the words of a statute mean are neither useful nor binding in these proceedings.

Statutes "speak for themselves."

This statute does not inform the reader what "A.P." means. The Legislature could have intended it to mean an educational degree conferred. It is noted that "D.O.M," is used in the same sub-section; that "D.O.M." commonly refers to a "Doctor of

Osteopathic Medicine" degree and is recognized as such for purposes of Chapter 459, Florida Statutes, at Section 459.003(5), Florida Statutes. However, from the context of Section 457.116(1)(b), Florida Statutes, "D.O.M." as used in that statute could just as easily be meant to refer to "Doctor of Oriental Medicine" or something else. Likewise, the Legislature could have intended "A.P." to mean "acupuncture practitioner," "acupuncture professional," or "acupuncture provider," just as well as "acupuncture physician." More likely, Section 457.116(1)(b), means exactly what it says, that persons not licensed under that Chapter are prohibited from using the term "A.P." because the term itself is subject to misinterpretation.

2/ The assertion that only the Legislature may promulgate the definition is clear enough, but as to Petitioners' other assertions, the undersigned anticipated some discussion or legal argument based on the content of these statutes at the time the rule was promulgated (1984) or most recently amended (1992) or some argument based on the requirements of subsequent independent legislation requiring those agencies/boards, which retained existing rules after certain dates, to justify the retention of those existing rules at a legislative committee review, of sorts. However, no party briefed such an argument, and the undersigned therefore elects to take the statutes and rule "as we find them" as of the date of hearing.

That being the case, the undersigned concludes that Petitioner's argument on the merits was intended to suggest that Sections 457.102 and 457.104 are insufficient grants of rule-making authority to enact the challenged rule and that no duties "to be implemented" are contained in Section 457.102, which Petitioner asserts constitutes only a list of definitions.

3/ The Proposed Final Order inadvertently used the common usage terms "doctors" and "medical doctors." Allopaths most often obtain the educational degree of "M.D.," symbolizing "Medical Doctor," and osteopaths most often obtain an educational degree of "D.O.," symbolizing Doctor of Osteopathy," or "D.O.M.," symbolizing "Doctor of Osteopathic Medicine."

4/ Prior to this case, the prescription of legend drugs had been limited to allopathic and osteopathic physicians, within whose practice Acts the opthmologists whom FMA and the Society represented operated their practices. However, in this case, the challenged rule was promulgated to implement a <u>new</u> <u>statutory</u> amendment permitting optometrists to use legend drugs.

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## NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a notice of appeal with the Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.