

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA MEDICAL ASSOCIATION, )  
INC., )  
 )  
Petitioner, )  
 )  
and )  
 )  
THE FLORIDA ACADEMY OF )  
PHYSICIANS ASSISTANTS, )  
 )  
Intervenor, )  
 )  
vs. ) Case No. 01-0025RP  
 )  
DEPARTMENT OF HEALTH, BOARD OF )  
ACUPUNCTURE, )  
 )  
Respondent, )  
 )  
and )  
 )  
FLORIDA STATE ORIENTAL MEDICAL )  
ASSOCIATION, )  
 )  
Intervenor. )  
\_\_\_\_\_ )

FINAL ORDER

This cause came on for final hearing in Tallahassee, Florida, on May 10, 2001, before Ella Jane P. Davis, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner Florida Medical Association, Inc.:

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For Respondent Board of Acupuncture:

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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 and Florida Association of Physicians Assistants have standing to initiate this challenge to the proposed rules. (See Section 120.56(3) Florida Statutes.)

(2) Whether proposed Rules 64B1-4.010 and 64B1-4.011, Florida Administrative Code, constitute invalid exercises of

delegated legislative authority because they exceed the Board of Acupuncture's rulemaking authority contained in Section 457.104, Florida Statutes. (See Section 120.52(8)(b), Florida Statutes.)

(3) Whether proposed Rules 64B1-4.010 and 64B1-4.011, Florida Administrative Code, constitute invalid exercises of delegated legislative authority because they enlarge, modify, or contravene the provisions of Section 457.102, Florida Statutes. (See Section 120.52(8)(c), Florida Statutes.)

PRELIMINARY STATEMENT

On January 4, 2001, Petitioner, Florida Medical Association, Inc. (FMA) filed a Petition seeking to have proposed Rules 64B1-4.010 and 4.011, declared invalid exercises of delegated legislative authority by the Board of Acupuncture.

On January 8, 2001, 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. 00-4737RX, later bifurcation from that case, the filing of several Notices of Change, and the granting of several Motions

for Continuance, final hearing was scheduled for May 10, 2001, upon the rules as finally proposed.

At final hearing, Petitioners presented the testimony of Steven West. Respondents' oral motions to dismiss at the close of Petitioners' case was denied, subject to revisitation in this Final Order.

Respondents presented the testimony of Harvey Kaltsas and Edwin Moore.

The parties had Joint Exhibit A, constituting the rules as finally proposed, admitted in evidence.

A Transcript was filed with the Division on May 17, 2001.

The date of July 15, 2001, established for the filing of proposed orders was not met by all parties, but all parties waived any objection to late filings. 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 Petitioner contained in the Petition.

2. Dr. Steven West, an allopathic physician licensed in the State of Florida pursuant to Chapter 458, Florida Statutes, and a member of FMA, testified as follows:

Well, we have two interests. Certainly one interest is that we want to make certain that only qualified individuals and practitioners treat patients and diagnose patients because we have an interest in the health and welfare of the people of the State of Florida. Secondly, we have an interest in making certain that all of the hard work and time that we have spent in our training remains valuable and is considered unique and important. And so we have a concern about the devaluation of the practice of medicine.  
(TR-17)

3. 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 Respondent has standing herein.

4. 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.,  
et al, \_\_\_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.

5. 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)

6. 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)

7. The text of proposed Rule 64B1-4.010, set forth in the petition is no longer correct, because it has been altered by Notices of Change, pursuant to Chapter 120, Florida Statutes.

Rule 64B1-4.010, as currently proposed, would provide:

Traditional Chinese Medical Concepts, Modern Oriental Medical Techniques.

Traditional Chinese medical concepts and modern oriental medical techniques shall include acupuncture diagnosis and treatment to prevent or correct malady, illness, injury, pain, addictions, other conditions, disorders, and dysfunction of the human body; to harmonize the flow of Qi or vital force; to balance the energy and functions of a patient; and to promote, maintain, and restore health; for pain management and palliative care; for acupuncture anesthesia; and to prevent disease by the use or administration of: stimulation to acupuncture points, ah-shi points, auricular points, channels, collaterals, meridians, and microsystems which shall include the use of: akabane; allergy elimination techniques; breathing; cold; color; correspondence; cupping; dietary guidelines; electricity; electroacupuncture; electrodermal screening (EDS); exercise; eight principles; five elements; four levels; hara; heat; herbal therapy consisting of plant, animal, and/or mineral substances; infrared and other forms of light; inquiring of history; jing-luo; listening; moxibustion; needles; NAET; observation; oriental massage -- manual and mechanical methods; palpation; physiognomy; point micro-bleeding therapy; pulses; qi; xue and jin-ye; ryodoraku; san-jiao; six stages; smelling; tongue; tai qi; qi gong; wulun-baguo; yin-yang; zang-fu; Ayurvedic, Chinese, Japanese, Korean, Manchurian, Mongolian, Tibetan, Uighurian, Vietnamese, and other east Asian acupuncture and oriental medical

concepts and treatment techniques; French acupuncture; German acupuncture including electroacupuncture and diagnosis; and, the use of laboratory test and imaging findings. (Emphasis supplied).

8. The "authority" cited by the Board for proposed Rule 64B1-4.010 is Sections 457.102 and 457.104, Florida Statutes.

9. The Board cites the "law implemented" for Rule 64B1-4.010 as Section 457.102, Florida Statutes.

10. The text of Rule 64B1-4.011, as set forth in the petition also is no longer correct, because it has been changed by Notices of Change, pursuant to Chapter 120, Florida Statutes. Rule 64B1-4.011, as currently proposed, would provide:

Diagnostic techniques which assist in acupuncture diagnosis, corroboration and monitoring of an acupuncture treatment plan or in making a determination to refer a patient to other health care providers shall include: traditional Chinese medical concepts and modern oriental medical techniques, recommendation of home diagnostic screening; physical examination; use of laboratory test findings; use of imaging films, reports, or test findings; office screening of hair, saliva and urine; muscle response testing; palpation; reflex; range of motion, sensory testing; thermography; trigger points; vital signs; first-aid; hygiene; and sanitation. (Emphasis supplied).

11. The "authority" cited by the Board for proposed Rule 64B1-4.011 is Sections 457.102(1) and 457.104, Florida Statutes.

12. The Board cites the "law implemented" for proposed Rule 64B1-4.011 as Section 457.102 (1), Florida Statutes.



13. 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.

14. 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)

15. The Board asserts that the use of a comma between "other adjunctive therapies" and "as defined by board rule" in the second sentence of Section 457.102(1), Florida Statutes, establishes that the clause "as defined by board rule" applies 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," and those practices "included but not listed."

16. Rule 64B1-3.001, Florida Administrative Code, most recently amended February 27, 1992, addresses "adjunctive therapies" of acupuncturists as follows:

(3) Acupuncture diagnostic techniques shall include but not be limited to the use of observation, listening, smelling, inquiring, palpation, pulses, tongues, physiognomy, five element correspondence, ryodoraku, akabani, German electro acupuncture, Kirlian photography, and thermography. (Emphasis supplied).

\* \* \*

(5) Adjunctive therapies shall include but not be limited to:  
(a) Nutritional counseling and the recommendation of nonprescription substances which meet the Food and Drug Administration

labeling requirements, as dietary supplements to promote health;

(b) Recommendation of breathing techniques and therapeutic exercises; and

(c) Lifestyle and stress counseling;

(d) The recommendation of all homeopathic preparations approved by the Food and Drug Administration and the United States

Homeopathic Pharmacopeia Committee; and

(e) Herbology.

This rule has not been challenged.<sup>1</sup>

17. Likewise, Rule 64B1-4.008, Florida Administrative Code, promulgated December 24, 2000, has not been challenged,<sup>2</sup> and defines "adjunctive therapies," of acupuncturists as follows:

Adjunctive therapies shall include the stimulation of acupuncture points, ah-shi points, auricular points, channels, collaterals, meridians, and microsystems with the use of: air; aromatherapy; color; cryotherapy; electric moxibustion; homeopathy; hyperthermia; ion pumping cords; iridology; kirlian photography; laser acupuncture; lifestyle counseling; magnet therapy; paraffin; photonic stimulation; recommendation of breathing techniques; therapeutic exercises and daily activities; sound including sonopuncture; traction; water; thermal therapy; and other adjunctive therapies and diagnostic techniques of traditional Chinese medical concepts and modern oriental medical techniques as set forth in Rule 64B1-4.010. (Emphasis supplied).

18. Acupuncturists are, by law, "primary health providers." Subsections 457.102(1) and (2), Florida Statutes. (See Finding of Fact 14). A primary health care provider is a professional to whom patients can go without a referring physician and who, by

diagnosis and treatment, assumes responsibility for patients' appropriate care. Allopaths and osteopaths are also primary health care providers.

19. FSOMA asserted that the challenged rules are supported by Section 457.1085, Florida Statutes, which provides,

457.1085 Infection control--Prior to November 1, 1986, the board shall adopt rules relating to the prevention of infection, the safe disposal of any potentially infectious materials, and other requirements to protect the health, safety, and welfare of the public. Beginning October 1, 1997, all acupuncture needles that are to be used on a patient must be sterile and disposable, and each needle may be used only once.

20. The traditional course of education, training, and experience for allopathic physicians and osteopathic physicians involves four years of undergraduate college education, four years of medical school, one-year internship, and one to two years of residency, but is more specifically set out for licensing purposes in Sections 458.311-458.318, Florida Statutes, for allopaths, and Sections 459.0055-459.008, Florida Statutes, for osteopaths. All of these courses/periods of learning involve, to a greater or lesser degree, learning to use and interpret modern laboratory and imaging tests.

21. The traditional course of education for acupuncturists involves only two years of college and four years of acupuncture schooling, but is more specifically set out for licensing

purposes by Section 457.105, Florida Statutes. Four hours per week for one year is about the extent of training in the use and interpretation of modern laboratory tests and imaging films afforded acupuncture students.

22. There clearly are more stringent requirements for licensure of allopaths and osteopaths than for acupuncturists.

23. Allopaths and osteopaths clearly spend more time training in the ordering, use, and interpretation of modern laboratory tests and film imaging.

24. As previously stated (see Finding of Fact 14), an acupuncturist, as defined by law,

. . . 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 . . . (Emphasis supplied).

25. Section 458.305(3), Florida Statutes, defines the "practice of medicine" as

"Practice of medicine" means the diagnosis, treatment, operation, or prescription for any human disease, pain, injury, deformity, or physical or mental condition. (Emphasis supplied).

26. Section 459.003(3), Florida Statutes, defines the "practice of osteopathic medicine" as

"Practice of osteopathic medicine means the diagnosis, treatment, operation, or prescription for any human disease, pain, injury, deformity, or other physical or

mental condition, which practice is based in part upon educational standards and requirements which emphasize the importance of the musculoskeletal structure and manipulative therapy in the maintenance and restoration of health. (Emphasis supplied).

27. The following statutes express the Legislature's intent with regard to regulation of acupuncturists, allopaths, and osteopaths:

457.101 Legislative Intent - The Legislature finds that the interests of the public health require the regulation of the practice of acupuncture in this state for the purpose of protecting the health, safety, and welfare of our citizens while making this healing art available to those who seek it.

458.301 Purpose - The Legislature recognizes that the practice of medicine is potentially dangerous to the public if conducted by unsafe and incompetent practitioners. The Legislature finds further that it is difficult for the public to make an informed choice when selecting a physician and that the consequences of a wrong decision could seriously harm the public health and safety. The primary legislative purpose in enacting this chapter is to ensure that every physician practicing in this state meets minimum requirements for safe practice. It is the legislative intent that physicians who fall below minimum competency or who otherwise present a danger to the public shall be prohibited from practicing in this state.

459.001 Purpose - The Legislature recognizes that the practice of osteopathic medicine is potentially dangerous to the public if conducted by unsafe and incompetent practitioners. The Legislature finds further that it is difficult for the public to make an informed choice when selecting an

osteopathic physician and that the consequences of a wrong decision could seriously harm the public health and safety. The primary legislative purpose in enacting this chapter is to ensure that every osteopathic physician practicing in this state meets minimum requirements for safe and effective practice. It is the legislative intent that osteopathic physicians who fall below minimum competency or who otherwise present a danger to the public shall be prohibited from practicing in this state.

28. There was competent testimony that allopathic and osteopathic physicians may utilize acupuncture in the practice of their professions, as defined respectively at Sections 458.305(3) and 459.003(3), Florida Statutes. They are permitted to perform acupuncture, although their traditional course of professional education and training involves fewer (or no) hours of acupuncture education and training than are required under Chapter 457, Florida Statutes, the acupuncture practice Act. Presumably, that is because their respective professions and the Legislature have recognized that the training of allopaths and osteopaths encompasses the appropriate skills for acupuncture. However, if they perform acupuncture, they can only be disciplined under their respective practice Acts, Chapters 458 and 459, Florida Statutes. The Board of Acupuncture has no authority to discipline them.

29. The record is silent as to whether or not Physicians Assistants, whether FAPA members or not, may legitimately perform acupuncture.

30. To "practice medicine" or to "practice osteopathic medicine," as those terms have been respectively defined by Sections 458.305(3) and 459.003(3), Florida Statutes, do not render modern laboratory tests and imaging films unique to medical or osteopathic diagnosis.

31. However, Harvey Kaltsas, a Florida-licensed acupuncturist and a member of the Board of Acupuncture, testified that "traditional Chinese medical concepts," and "modern oriental medical techniques" include gynecological and obstetric services, abortions, and cut-and-stitch surgery and that these services are performed by acupuncturists in China today. He further testified that the Board of Acupuncture believed that these tasks are "better handled" by allopathic physicians, and therefore the Board of Acupuncture has promulgated rules (most particularly the unchallenged rules addressing adjunctive therapies) which do not list these services. The Board believed that by not listing these services, it was prohibiting its licensees from performing them.

32. The Board further asserts that its challenged rules only define "traditional Chinese medical concepts" and "modern oriental medical techniques" as used in Chapter 457, Florida



Statutes, to include the use of laboratory tests and imaging findings and to clearly specify that "diagnostic techniques" for acupuncturists also include the use of modern laboratory test findings, and use of imaging films, reports, and test findings.

33. There was competent testimony that modern laboratory Chinese medical tests on urine and feces evolved from ancient and traditional concepts and are regularly used in China and the orient by acupuncturists today. There was competent testimony that comparison of x-rays, at least for gross chest problems or for placement of acupuncture needles, is taught in an acupuncture college in Florida as part of its usual and required curriculum today.

34. Allopaths and osteopaths use laboratory tests, imaging films, and reports thereon to reach an initial diagnosis and to test and revise that diagnosis through a course of treatment.

35. Dr. West testified that he relies on his own "reading" of x-rays for his specialty of cardiology, while other allopaths may rely on a radiologist to read x-rays for them or may rely on a radiology report.

36. Diagnosis is also a part of acupuncture. Acupuncturists want to use modern laboratory tests and imaging films to reach an initial diagnosis and to test that diagnosis through a course of treatment. They want to use laboratory tests and film imaging to properly direct their own initial treatment

efforts, such as using urinalysis to eliminate a urinary tract infection before treating muscles and bones for a backache. They want to determine blood clotting speeds via an INR test on persons presenting with a prescriptive history of blood-thinner use, such as Coumadin, before using acupuncture needles. They want to be able to eliminate conditions they do not feel competent to treat, i.e. cancer, and to properly refer those patients for treatment by allopaths and osteopaths.

37. Modern laboratory test results are variously formatted, sometimes as a report or value and result. X-rays are frequently the subject of a narrative report from a radiologist.

38. Some modern imaging results are available directly to the public, like mobile TB screenings.

#### CONCLUSIONS OF LAW

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

40. 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 "acupuncturists have not been given the statutory authority to use laboratory testing--such remains the exclusive realm of physicians licensed under Chapters 458 and 459. The Board's impermissible intrusion into an area of medical practice reserved

for physicians confers standing on FMA to challenge the rule." FAPA adopts this reasoning.

41. Petitioners assert, further, that since Section 457.102(1), Florida Statutes, defines "acupuncture" as "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," the rules challenged are invalid because they attempt to define, by rule, the underlined terms contained in the statute. The thrust of Petitioners' argument is in opposition to acupuncturists being permitted to order and read laboratory test findings and use imaging films, reports, and test findings, including, but not limited to, x-rays.

42. It is further asserted that the challenged rule is invalid, pursuant to Section 120.56(3), Florida Statutes, because only the Legislature may promulgate the content of the challenged rules; because they exceed the Board's rulemaking authority as provided in Section 457.102, Florida Statutes, which confers no duties upon the Board; and because they enlarge, modify and contravene the provisions of Section 457.104, Florida Statutes.<sup>3</sup>

43. In the parties' Joint Prehearing Stipulation, they agreed that "Petitioner has the burden of going forward with

evidence sufficient to make out a legitimate basis for invalidation of the rules as an invalid exercise of delegated legislative authority as that standard is defined in Section 120.52(8)(b) or (c)"; and that "if Petitioner succeeds, the Respondent has the burden of persuasion that the challenges are factually or legally unsound." However, Section 120.56(2)(a), Florida Statutes, provides that "[t]he petitioner has the burden of going forward. The agency then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised." Therefore, if the merits of the instant challenge to proposed Rules 64B1-4.010 and 64B1-4.011, may be reached, the statutory burden placed on the Board is heavier than stipulated by the parties. However, before the merits may be addressed, the threshold of "standing" must be crossed.

44. Standing of Respondent is axiomatic. (See Finding of Fact 3) 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 6.)

45. 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 constitute "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.

46. "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."

47. 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.

48. 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."

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

51. Allopathic physicians are licensed under, and governed by, Chapter 458, Florida Statutes, which 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.

52. Osteopathic physicians, 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.

53. 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 rules. No licensed Florida "osteopathic physician", defined at Section 459.003(4), Florida Statutes, is governed by the challenged rules. No physicians assistant, permitted at Sections 458.347 and 459.022, Florida Statutes, is governed by the challenged rules; and no stipulated member of FMA is governed by the challenged rules.

54. 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 the challenged rules. There also is no evidence that physicians assistants, be they members of FAPA or not, are impacted by the rules. Indeed, these professions are insulated from any direct imposition of the rules by Chapters 457, 458, and 459, Florida Statutes.

55. Upon the facts of this case, it remains problematic whether allopaths and osteopaths are more highly skilled at acupuncture than acupuncturists, and there is no evidence that physicians assistants have any training or skill in acupuncture. Assuming, arguendo, that FMA's assertion in its Proposed Final Order is correct that "[w]ithout a doubt, allopathic physicians receive a higher level of training than do acupuncturists," that distinction lacks significance where different licensing statutes are concerned.

56. The evolution of the case law on standing must be examined with regard to FMA's and FAPA's relationship to the rules now challenged.

57. 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 ophthalmologists) licensed under Chapter 458, Florida Statutes, by a 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).

58. In Bd. of Optometry v. Florida Soc. of Ophthalmology, 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 Ophthalmology; 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 Ophthalmology'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.<sup>4</sup>

59. Herein, except for the speculation that use of modern diagnostic techniques by acupuncturists 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 diagnosis and treatment for Florida citizens. Petitioners also asserted that a technical deficiency based on the differences in training of acupuncturists exists as to acupuncturists' ability to order, use, and interpret modern laboratory tests and imaging films, and therefore, potential harm exists as to patients, but this was not demonstrated.

60. 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 of, or discipline by, 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 Rules 64B1-4.010 and 64B1-4.011, here at bar. They assert that only acupuncturists may legally challenge a Board of Acupuncture rule.

61. Both proponents and opponents of the rules 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. Bd. 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 4, are worthy of some discussion at this point. Together, they present some fine distinctions sufficient to resolve the issue of standing in the instant case.

62. 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.

63. 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.

64. 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.

65. 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 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 exclusive right to diagnose or to use modern laboratory tests, film imaging, or reports, and none of those professions has an oversight role as to acupuncturists.

66. 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.

67. 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' standing, 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" as to statute or as to the words, "laboratory test findings; use of imaging films, reports or test findings" has been shown herein.

68. 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 are permitted to order, use, and interpret modern health care laboratory tests, reports and imaging films may be considered in relationship to the standing issue, that theory is too remote. Moreover, "loss of esteem" based on the authority to use diagnostic tools is premised on conjecture and does not constitute a real or immediate injury in



fact. It is, if anything, in the nature of limiting competition. Although the effect or impact of the challenged rules themselves and of the challenged rules 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 rules; the rules contemplate 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 words, "diagnosis," "laboratory tests," "reports," and "imaging films," and all permutations thereof, but they have pointed to no statute(s) or rules which define or limit procedures which allopaths, osteopaths, or acupuncturists may use for diagnosis which might support that theory. Likewise, Petitioners have pointed to no statute that currently confers or formerly conferred an area of practice exclusive to themselves which these rules invade.

69. In reaching the foregoing legal conclusion, the undersigned has compared Section 457.102(1), permitting acupuncturists to diagnose, Section 458.305(3), permitting allopaths to diagnose, and Section 459.003(3), permitting osteopaths to diagnose (see Findings of Fact 24-26), has compared

unchallenged rules permitting acupuncturists to use other methods of diagnosis (see Findings of Fact 16-17), and has gone so far as to compare the Legislative intents and purposes expressed in the respective statutes. (See Finding of Fact 27.) None of these comparisons suggests that diagnosis by way of modern laboratory tests, reports, and imaging films is exclusive to any particular practice Act and or that exclusivity of diagnosis methods has been reserved by the Legislature to any profession.

70. 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. Herein, the limited evidence suggests that the proposed rules would encourage referrals by acupuncturists to allopaths and osteopaths, but a continuum of care concept is speculative at best and does not equate with "oversight." There just is no evidence herein to find that mistreatment of patients by acupuncturists will now occur as a result of these proposed rules.

71. FMA and FAPA have not borne their burden to establish standing to challenge the proposed rules. Having made this determination, it is not necessary to address the validity, vel non, of the rules themselves.

ORDER

Petitioner, Florida Medical Association, Inc., and Intervenor, Florida Association of Physicians Assistants, are without standing to challenge proposed Rules 64B1-4.010 and 64B1-4.011, Florida Administrative Code, and the challenges are accordingly dismissed.

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

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

ENDNOTES

1/ Originally, this rule was challenged in its entirety, but the parameters of the challenge in Florida Medical Ass'n., Inc., et al. v. Dept. of Health, Bd. of Acupuncture, et al., DOAH Case No. 00-4737RX, were ultimately limited by these same parties to subsection (6).

2/ At hearing, Petitioners limited themselves to challenging the invalidity of the language emphasized in Findings of Facts 7 and 10, dealing with the use of laboratory tests, film imaging, and reports thereon, specifically announcing that no challenge was being made to the rules defining "adjunctive therapies." (TR-42, 45-47). Indeed, Petitioner affirmatively assert that Section 457.102, Florida Statutes, permits the Board of Acupuncture to define by rule what adjunctive therapies are included in the definition of acupuncture. (FMA Proposed Final Order page 5). See also the Joint Prehearing Stipulation and the Conclusions of Law.

3/ It is probable Petitioner FMA inadvertently reversed these statutory cites.

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