



## Ohio Legislative Service Commission 123rd House Bill Analysis

**Sub. H.B. 341\*\*** *This analysis was prepared before the report of the Senate Health, Human Services and Aging Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

123rd General Assembly  
(As Reported by S. Health, Human Services & Aging)

**Reps. Schuring, Van Vyven, Ogg, Hollister, Padgett, Jones, Netzley, Schuler, Sullivan, Allen, Maier, Smith, Patton, Barrett**

**Sens. Drake, Spada, Kearns**

### BILL SUMMARY

- Prohibits any person, other than a physician, from practicing acupuncture unless the person holds a valid certificate of registration issued by the State Medical Board.
- Establishes standards of practice for acupuncturists.
- Authorizes the State Medical Board to enforce laws related to the practice of acupuncturists.
- Makes changes in the laws pertaining to the Board's authority to take disciplinary actions against physicians with respect to criminal behavior or mental illness.

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## **CONTENT AND OPERATION**

### **The practice of acupuncture**

(secs. 4731.36 and 4762.01)

Under current law, the practice of acupuncture is the practice of medicine and, thus, only individuals authorized by the State Medical Board to practice medicine or podiatry may perform acupuncture. The bill provides that the laws regulating the practice of medicine, osteopathic medicine, and podiatry do not prohibit the practice of acupuncture by a person who holds a certificate of registration as an acupuncturist. This certificate, issued by the Board pursuant to the bill, authorizes an acupuncturist to practice under the general supervision of a physician who has made a written referral or prescription for a patient to receive acupuncture.

"Acupuncture" is defined under the bill as a form of health care performed by the insertion and removal of specialized needles, with or without the application of moxibustion or electrical stimulation, to specific areas of the body.

"Moxibustion" is defined as the use of an herbal heat source on one or more acupuncture points.

### **Prohibitions**

(secs. 4762.02 and 4762.99)

The bill prohibits anyone from engaging in the practice of acupuncture unless the person holds a valid certificate of registration as an acupuncturist issued by the State Medical Board. A person who violates the prohibition is guilty of a first degree misdemeanor on a first offense. On each subsequent offense, the person is guilty of a fourth degree felony.

The prohibition does not apply to a physician, defined by the bill as including a doctor of medicine, osteopathic medicine, or podiatry. It also does not apply to a person who performs acupuncture in Ohio as part of a training program operated by an educational institution certified by the Ohio Board of Regents or a school certified by the State Board of Proprietary School Registration.

### **Obtaining a certificate**

(secs. 4731.07, 4762.03, and 4762.04)

The bill requires an individual seeking a certificate of registration as an acupuncturist to file with the State Medical Board a written application prescribed and supplied by the Board that includes all of the following:

- (1) Evidence satisfactory to the Board that the applicant is at least 18 years of age and of good moral character;
- (2) Evidence satisfactory to the Board that the applicant has been designated as a diplomate in acupuncture by the National Certification Commission for Acupuncture and Oriental Medicine and that the designation is current and active;
- (3) Any other information the Board requires.

The Board is required by the bill to review all applications received. The Board must determine whether each applicant meets the requirements to receive a certificate of registration not later than 60 days after receiving a complete application. An affirmative vote of not fewer than six members of the Board is required to determine that an applicant meets the requirements for a certificate.

The bill provides that at the time of making an application for a certificate of registration, the applicant must pay the Board a fee of \$100, no part of which may be returned.

The bill provides that if the Board determines that applicant meets the requirements for a certificate of registration as an acupuncturist, the secretary of the Board must issue to the applicant a certificate of registration. The certificate expires biennially and may be renewed. The Board is required to keep a register that shows for each applicant whether the applicant was granted or refused a certificate.

### **Duplicate certificates**

(sec. 4762.05)

The bill provides that on the application of the holder of a certificate of registration, the Board must issue a duplicate certificate to replace one that is missing or damaged, to reflect a name change, or for any other reasonable cause. The fee for a duplicate certificate is \$35.

### **Renewing a certificate**

(sec. 4762.06)

Under the bill a person seeking to renew a certificate of registration as an acupuncturist must, on or before January 31 of each even-numbered year, apply for renewal. The State Medical Board must send renewal notices at least one month prior to the expiration date.

Applications must be submitted to the Board on forms the Board will prescribe and supply. Each application must be accompanied by a biennial renewal fee of \$100.

The bill requires the applicant to report any criminal offense that constitutes grounds for refusing to issue a certificate of registration and to which the applicant has pleaded or been found guilty or for which the applicant has been found eligible for intervention in lieu of conviction, since last signing an application for a certificate of registration as an acupuncturist.

To be eligible for renewal, an acupuncturist must certify to the Board that the acupuncturist has maintained the acupuncturist's designation as a diplomate in acupuncture by the National Certification Commission for Acupuncture and Oriental Medicine. If an applicant submits a complete renewal application and qualifies for renewal, the Board must issue the applicant a renewed certificate of registration.

A certificate that is not renewed on or before its expiration date is automatically suspended on its expiration date. The State Medical Board must reinstate a certificate suspended for failure to renew on an applicant's submission of the renewal fee and applicable monetary penalty. The penalty is \$25 if the certificate has been suspended for two years or less and \$50 if it has been suspended for more than two years.

### **Use of titles**

(sec. 4762.08)

Under the bill, an individual who holds a certificate of registration as an acupuncturist may use the following titles, initials, or abbreviations, or the equivalent: "Acupuncturist," "Registered Acupuncturist," "R. Ac.," "Reg. Ac.," "Certified Acupuncturist," "C.A.," "C. Ac.," "Diplomate of Acupuncture (NCCAOM)," "Dipl. Ac. (NCCAOM)," or "National Board Certified in Acupuncture (NCCAOM)." The individual is prohibited from using other titles, initials, or abbreviations in conjunction with the practice of acupuncture, including the title "Doctor."

### **Standards of practice**

(secs. 4731.051 and 4762.10)

The bill provides that an acupuncturist may perform acupuncture for a patient only if the patient has received a physician's written referral or prescription for acupuncture. As specified in the referral or prescription, the acupuncturist must provide reports to the physician on the patient's condition or progress in treatment and comply with any conditions or restrictions the physician places on the acupuncturist's course of treatment.

The acupuncturist must perform acupuncture for a patient under the general supervision of the referring or prescribing physician. General supervision does not require that the acupuncturist and physician practice in the same office.

The bill provides that prior to treating a patient, the acupuncturist must advise the patient that acupuncture is not a substitute for conventional medical diagnosis and treatment. When first meeting a patient in person, an acupuncturist must provide in writing the acupuncturist's name, business address, and business telephone number, and information on acupuncture, including the techniques that are used.

While treating a patient, the acupuncturist is prohibited from making a diagnosis. If a patient's condition is not improving

or a patient requires emergency medical treatment, the bill requires that the acupuncturist consult promptly with the supervising physician.

The acupuncturist must maintain records for each patient treated. In each patient's records, the acupuncturist must include the written referral or prescription pursuant to which the acupuncturist is treating the patient. The records must be confidential and retained for not less than three years following termination of treatment.

Under existing law, the State Medical Board is required to adopt rules establishing universal blood and body fluid precautions that must be used by the professionals the Board regulates when the professionals perform exposure prone invasive procedures. The bill specifies that acupuncturists are included in the requirement to use universal precautions, which include hand washing, disinfection and sterilization of equipment, appropriate handling and disposal of needles and sharp instruments, and wearing and appropriate disposal of gloves.

### **Supervising physicians**

(secs. 4731.22(B)(36) and 4762.11)

Before making a referral or prescription for acupuncture, the patient's physician must perform a medical diagnostic examination of the patient or review the results of an examination recently performed by another physician.

When a referral or prescription for acupuncture is made, the physician must specify in the referral or prescription (1) the physician's diagnosis of the ailment or condition that is to be treated by acupuncture, (2) a time by which or intervals at which the acupuncturist must provide reports to the physician regarding the patient's condition or progress in treatment, and (3) the conditions or restrictions the physician places on the acupuncturist's course of treatment. These conditions or restrictions must be placed in compliance with accepted or prevailing standards of medical care.

The bill requires that the supervising physician be personally available for consultation with the acupuncturist. If the physician is not on the premises, the bill requires that the physician be readily available to the acupuncturist through some means of telecommunication and be in a location that under normal circumstances is not more than 60 minutes travel time away from the location where the acupuncturist is practicing.

If a physician fails to supervise an acupuncturist in accordance with the bill and the Board's rules for supervising acupuncturists, the Board may take disciplinary action against the physician under the laws governing the practice of medicine.

### **Workers' compensation**

(sec. 4762.12)

In the case of a patient with a claim for workers' compensation, the bill provides that a supervising physician is eligible to be reimbursed for making a referral or prescription for acupuncture only if the physician has attained knowledge in the treatment of patients with acupuncture, demonstrated by successful completion of a course of study in acupuncture. The course must be administered either by a college of medicine, osteopathic medicine, or podiatric medicine acceptable to the Bureau of Workers' Compensation or by another entity acceptable to the Bureau.

### **Display of certification**

(sec. 4762.09)

The bill requires an acupuncturist to conspicuously display at the acupuncturist's primary place of business both of the following:

- (1) A certificate of registration issued by the State Medical Board as evidence that the acupuncturist is authorized to practice acupuncture in Ohio;
- (2) A notice specifying that the practice of acupuncture is regulated by the State Medical Board and the address and telephone number of the Board's office.

### **Procedures for imposing licensing sanctions**

The bill establishes grounds for discipline of acupuncturists that are similar to those in existing law for physicians and physician assistants. The procedures for taking disciplinary action against an acupuncturist are virtually the same as those for action against a physician or physician assistant.

### **Grounds for discipline**

(secs. 4762.13(A) and (B) and 4762.131)

The bill authorizes the State Medical Board, by an affirmative vote of not fewer than six members, to revoke or refuse to grant a certificate of registration as an acupuncturist to a person found to have committed fraud, misrepresentation, or deception in applying for or securing the certificate.

It requires the Board, by an affirmative vote of not fewer than six members and to the extent permitted by law, to limit, revoke, or suspend an individual's certificate of registration as an acupuncturist, refuse to issue a certificate, refuse to reinstate a certificate, or reprimand or place on probation the holder of a certificate for any of the following reasons:

- (1) Permitting the holder's name or certificate to be used by another person;
- (2) Failure to comply with the bill's requirements, the statutes that apply to the practice of medicine, or any rules adopted by the Board;
- (3) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate, any of the bill's requirements, the statutes that apply to the practice of medicine, or rules adopted by the Board;
- (4) A departure from, or failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances whether or not actual injury to the patient is established;
- (5) Inability to practice according to acceptable and prevailing standards of care by reason of mental illness or physical illness, including physical deterioration that adversely affects cognitive, motor, or perceptive skills;
- (6) Impairment of ability to practice according to acceptable and prevailing standards of care because of habitual or excessive use or abuse of drugs, alcohol, or other substances that impair ability to practice;
- (7) Willfully betraying a professional confidence;
- (8) Making a false, fraudulent, deceptive, or misleading statement in soliciting or advertising for patients or in securing or attempting to secure a certificate of registration to practice as an acupuncturist. The bill defines a "false, fraudulent, deceptive, or misleading statement" as a statement that includes a misrepresentation of fact, is likely to mislead or deceive because of a failure to disclose material facts, is intended or likely to create false or unjustified expectations of favorable results, or includes representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived;
- (9) Representing, with the purpose of obtaining compensation or any other advantage personally or for any other person, that an incurable disease or injury, or other incurable condition, can be permanently cured;
- (10) Obtaining, or attempting to obtain, money or a thing of value by fraudulent misrepresentations in the course of practice;
- (11) A plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a felony;
- (12) Commission of an act that constitutes a felony in Ohio, regardless of the jurisdiction in which the act was committed;
- (13) A plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a misdemeanor committed in the course of practice;
- (14) A plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for, a misdemeanor involving moral turpitude;
- (15) Commission of an act in the course of practice that constitutes a misdemeanor in Ohio, regardless of the jurisdiction in which it was committed;
- (16) Commission of an act involving moral turpitude that constitutes a misdemeanor in Ohio, regardless of the jurisdiction in which it was committed;
- (17) A plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu of conviction for violating any state or federal law regulating the possession, distribution, or use of any drug, including trafficking in drugs;
- (18) Any of the following actions taken by the state agency responsible for regulating the practice of acupuncture in another jurisdiction, for any reason other than the nonpayment of fees: the limitation, revocation, or suspension of an individual's license to practice; acceptance of an individual's license surrender; denial of a license; refusal to renew or reinstate a license; imposition of probation; or issuance of an order of censure or other reprimand;

(19) Violation of the conditions placed by the Board on a certificate of registration;

(20) Failure to use universal blood and body fluid precautions established by the Board;

(21) Failure to cooperate in an investigation conducted by the Board, including failure to comply with a subpoena or order issued by the Board or failure to answer truthfully a question presented by the Board at a deposition or in written interrogatories, except that the failure to cooperate with an investigation may not constitute grounds for discipline if a court of competent jurisdiction has issued an order that either quashes a subpoena or permits the individual to withhold the testimony or evidence in issue;

(22) Failure to comply with the standards of the National Certification Commission for Acupuncture and Oriental Medicine regarding professional ethics, commitment to patients, commitment to the profession, and commitment to the public;

(23) Failure to comply with a court order to make child support payments.

### **Disciplinary procedures**

(sec. 4762.13(C), (D), and (E))

The bill provides that disciplinary actions must be taken by the Board in accordance with the Administrative Procedure Act (R.C. Chapter 119.), except that in lieu of adjudication, the Board may enter into a consent agreement with an acupuncturist or applicant to resolve an allegation of a violation of any of the bill's provisions or any rule adopted under them. A consent agreement, when ratified by an affirmative vote of not fewer than six members of the Board, constitutes the findings and order of the Board with respect to the matter addressed in the agreement. If the Board refuses to ratify a consent agreement, the admissions and findings contained in the consent agreement will be of no force or effect.

The bill provides that the commission of certain criminal acts may be established by a finding of the Board, pursuant to an adjudication under the Administrative Procedure Act, that the applicant or certificate holder committed the act in question. Under the bill, the Board has no jurisdiction in cases where the trial court renders final judgment in the certificate holder's favor and that judgment is based on an adjudication on the merits. The Board has jurisdiction in cases where the trial court issues an order of dismissal on technical or procedural grounds.

Under the bill the sealing of conviction records by any court will have no effect on a prior Board order entered under the bill's disciplinary provisions or on the Board's jurisdiction if, based on a plea of guilty, a judicial finding of guilt, or a judicial finding of eligibility for intervention in lieu of conviction, the Board issued a notice of opportunity for a hearing prior to the court's order to seal the records. The Board is not required to seal, destroy, redact, or otherwise modify its records to reflect the court's sealing of conviction records.

### **Mental and physical examinations**

(sec. 4762.13(F))

Any individual who holds a certificate of registration as an acupuncturist, or applies for a certificate of registration, is deemed by the bill to have given consent to a mental or physical examination when directed to do so in writing by the Board and to have waived all objections to the admissibility of testimony or examination reports that constitute a privileged communication.

On a showing of a possible violation of the bill's provision dealing with inability to practice acceptably because of mental or physical illness or because of habitual or excessive use or abuse of drugs or alcohol, the Board may compel an individual who holds a certificate of registration or who has applied for a certificate to submit to a mental examination, a physical examination, or both. The expense of the examination is the responsibility of the individual examined. In the case of an individual who is unable to practice acceptably because of physical illness, a physical examination ordered by the Board may include an HIV test. In the case of an individual who is unable to practice acceptably because of habitual or excessive use or abuse of drugs or alcohol, the mental or physical examination must be undertaken by a treatment provider or physician chosen by the Board who is qualified to conduct the examination.

Failure to submit to a mental or physical examination or consent to an HIV test ordered by the Board constitutes an admission of the allegations against the individual unless the failure is due to circumstances beyond the individual's control. A default and final order may be entered without the taking of testimony or presentation of evidence.

If the Board finds that an individual's ability to practice is impaired by the habitual or excessive use or abuse of drugs or alcohol, the Board must suspend the individual's certificate or deny the individual's application and require the individual, as a condition for initial, continued, reinstated, or renewed licensure to practice, to submit to treatment. If the Board finds that an acupuncturist is unable to practice because of an inability to practice acceptably because of mental or physical

illness, the Board must require the acupuncturist to submit to care, counseling, or treatment by physicians approved or designated by the Board, as a condition for an initial, continued, reinstated, or renewed certificate of registration. An individual affected by mental or physical illness must be afforded an opportunity to demonstrate to the Board the ability to resume practicing in compliance with acceptable and prevailing standards of care.

Before being eligible to apply for reinstatement of a suspended certificate, an acupuncturist whose ability to practice was found to be impaired by use or abuse of drugs or alcohol must demonstrate the ability to resume practice in compliance with acceptable and prevailing standards of care. The demonstration must include the following:

- (1) Certification from a treatment provider approved by the Board that the individual has successfully completed any required inpatient treatment;
- (2) Evidence of continuing full compliance with an aftercare contract or consent agreement;
- (3) Two written reports indicating that the individual's ability to practice has been assessed and the individual has been found capable of practicing according to acceptable and prevailing standards of care. The reports must be made by individuals or providers approved by the Board for making assessments and describe the basis for their determination. The Board may reinstate a suspended certificate after this demonstration and after the individual has entered into a written consent agreement.

When the impaired acupuncturist resumes practice, the Board must require continued monitoring. The monitoring must include compliance with the written consent agreement entered into before reinstatement or with conditions imposed by Board order after a hearing, and, on termination of the consent agreement, submission to the Board for at least two years of annual written progress reports made under penalty of falsification stating whether the acupuncturist has maintained sobriety.

### **Suspension without a hearing**

(sec. 4762.13(G))

If the secretary and supervising member of the State Medical Board determine that there is clear and convincing evidence that an acupuncturist has violated one of the bill's disciplinary provisions and that continued practice presents a danger of immediate and serious harm to the public, the bill permits them to recommend that the Board suspend the acupuncturist's certificate to practice without a prior hearing. Written allegations must be prepared for consideration by the Board.

The Board may, on review of the allegations and by an affirmative vote of not fewer than six of its members, excluding the secretary and supervising member, suspend a certificate without a prior hearing. A telephone conference may be used for reviewing the allegations and taking the vote on the suspension.

Under the bill the Board must issue a written order of suspension by certified mail or in person in accordance with the Administrative Procedure Act. The order is not subject to suspension by the court during the pendency of any appeal filed under the Administrative Procedure Act. If the acupuncturist requests an adjudicatory hearing by the Board, the date set for the hearing must be within 15 days, but not earlier than seven days, after the acupuncturist requests the hearing, unless otherwise agreed to by both the Board and the acupuncturist.

A summary suspension will remain in effect, unless reversed on appeal, until a final adjudicative order issued by the Board pursuant to the provisions in the bill and the Administrative Procedure Act becomes effective. The Board must issue its final adjudicative order within 60 days after completion of its hearing. Failure to issue the order within 60 days will result in dissolution of the suspension order, but will not invalidate any subsequent, final adjudicative order.

### **Overtured convictions**

(sec. 4762.13(H))

If the Board takes disciplinary action under the bill against an acupuncturist for certain criminal actions, and the judicial finding of guilt, guilty plea, or judicial finding of eligibility for intervention in lieu of conviction is overturned on appeal, on exhaustion of the criminal appeal, a petition for reconsideration of the order may be filed with the Board along with appropriate court documents. On receipt of a petition and supporting court documents, the Board must reinstate the acupuncturist's certificate. The Board may then hold an adjudication under the Administrative Procedure Act to determine whether the individual committed the act in question. Notice of opportunity for hearing must be given in accordance with the Administrative Procedure Act. If the Board finds, pursuant to an adjudication, that the acupuncturist committed the act, or if no hearing is requested, it may order any of the sanctions specified in the bill.

### **Automatic suspension for committing crimes**

(sec. 4762.13(I))

The certificate of registration of an acupuncturist and the acupuncturist's practice in Ohio are automatically suspended under the bill as of the date the acupuncturist pleads guilty to, is found by a judge or jury to be guilty of, or is subject to a judicial finding of eligibility for intervention in lieu of conviction in Ohio or treatment or intervention in lieu of conviction in another jurisdiction for any of the following criminal offenses in Ohio or a substantially equivalent criminal offense in another jurisdiction: aggravated murder, murder, voluntary manslaughter, felonious assault, kidnapping, rape, sexual battery, gross sexual imposition, aggravated arson, aggravated robbery, or aggravated burglary. Continued practice after the suspension will be considered practicing without a certificate.

Under the bill, the Board must notify the acupuncturist by certified mail or in person in accordance with the Administrative Procedure Act. If an acupuncturist whose certificate is suspended fails to make a timely request for adjudication under the Administrative Procedure Act, the Board must enter a final order permanently revoking the certificate.

#### **Automatic suspension for mental illness or incompetence**

(sec. 4762.132)

If a person who is an acupuncturist is adjudged by a probate court to be mentally ill or mentally incompetent, the bill provides that the person's certificate of registration is automatically suspended until the person is restored to competency. The probate court judge must notify the Board of an adjudication of mental illness or mental incompetence and must note the suspension of the acupuncturist's certificate of registration in the margin of the court's record.

Under the bill, if the Board has reason to believe that a person who is an acupuncturist is mentally ill or mentally incompetent, it may file in probate court an affidavit for a hearing to determine if the person should be hospitalized or detained. The bill specifies that the Attorney General may represent the Board in any proceeding that is commenced.

#### **Board findings**

(sec. 4762.13(J))

The bill provides that in any instance in which the Board is required by the Administrative Procedure Act to give notice of opportunity for hearing and the person subject to the notice does not timely request a hearing, the Board is not required to hold a hearing, but may adopt, by an affirmative vote of not fewer than six of its members, a final order that contains the Board's findings. In the final order, the Board may take any of the disciplinary actions provided for in the bill.

#### **Conditions for reinstatement**

(sec. 4762.13(K))

The bill requires that any disciplinary action taken by the Board that results in a suspension be accompanied by a written statement of the conditions under which the certificate may be reinstated. The Board must adopt rules in accordance with the Administrative Procedure Act governing conditions to be imposed for reinstatement. Reinstatement of a certificate requires an affirmative vote of not fewer than six members of the Board.

#### **Permanent suspension**

(sec. 4762.13(L))

When the Board refuses to grant a certificate of registration as an acupuncturist, revokes a certificate, refuses to issue a certificate, or refuses to reinstate a certificate, the bill permits the Board to specify that its action is permanent. An individual subject to a permanent action taken by the Board is forever ineligible to hold a certificate of registration as an acupuncturist, and the Board may not accept an application for reinstatement of the certificate or for issuance of a new certificate.

#### **Continuing jurisdiction**

(sec. 4762.13(M))

With respect to the Board's authority over an individual who has applied for or received a certificate of registration as an acupuncturist, the bill provides the following:

(1) The surrender of a certificate of registration as an acupuncturist is not effective until accepted by the Board. Reinstatement of a certificate surrendered to the Board requires an affirmative vote of not fewer than six members of the Board.

(2) An application for a certificate of registration may not be withdrawn without the approval of the Board.

(3) Failure to renew a certificate of registration does not remove or limit the Board's jurisdiction to take disciplinary action against an individual.

### **Board investigations**

(sec. 4762.14)

The bill requires the State Medical Board to investigate evidence that appears to show that any person has violated any provision of the bill or the rules adopted under it. Any person may report to the Board in a signed writing any information the person has that appears to show a violation of any provision of the bill or the rules. In the absence of bad faith, a person who reports such information or testifies before the Board in an adjudication conducted under the Administrative Procedure Act is not liable for civil damages as a result of reporting the information or providing testimony. Each complaint or allegation of a violation received by the Board must be assigned a case number and recorded by the Board.

Investigations of alleged violations of a provision of the bill or rules must be supervised by the Board member elected as the supervising member and the member elected to serve as secretary. The Board's president may designate another Board member to supervise the investigation in place of the supervising member. A Board member who supervises the investigation of a case may not participate in further adjudication of the case.

In investigating a possible violation of a provision of the bill or the rules, the Board may administer oaths, order the taking of depositions, issue subpoenas, and compel the attendance of witnesses and production of books, accounts, papers, records, documents, and testimony, except that a subpoena for patient record information may not be issued without consultation with the Attorney General's office and approval of the secretary and supervising member of the Board. Before issuance of a subpoena for patient record information, the secretary and supervising member must determine whether there is probable cause to believe that the complaint filed alleges a violation of a provision of the bill or a rule adopted under it and that the records sought are relevant to the alleged violation and material to the investigation. The subpoena may apply only to records that cover a reasonable period of time surrounding the alleged violation. On failure to comply with any subpoena issued by the Board and after reasonable notice to the person being subpoenaed, the Board may move for an order compelling the production of persons or records under the Ohio Rules of Civil Procedure.

A subpoena issued by the Board may be served by a sheriff, the sheriff's deputy, or a Board employee designated by the Board. Service of a subpoena issued by the Board may be made by delivering a copy of the subpoena to the person named on it, reading it to the person, or leaving it at the person's usual place of residence. When the person being served is an acupuncturist, service of the subpoena may be made by certified mail, restricted delivery, return receipt requested, and the subpoena will be deemed served on the date delivery is made or the date the person refuses to accept delivery.

A sheriff's deputy who serves a subpoena under the bill must receive the same fees as a sheriff. Each witness who appears before the Board in obedience to a subpoena must receive the fees and mileage provided for witnesses in civil cases in the courts of common pleas.

The bill provides that proceedings and records within the scope of peer review or utilization review functions of review boards, committees, or corporations are not subject to discovery or introduction in evidence in a disciplinary action against an acupuncturist.

The bill specifies that information the Board receives pursuant to an investigation is confidential and not subject to discovery in any civil action. The Board is required to conduct all investigations and proceedings in a manner that protects the confidentiality of patients and persons who file complaints with the Board. The Board may not make public the names or other identifying information about patients or complainants unless proper consent is given.

The bill authorizes the Board to share information received through an investigation, including patient records and patient record information, with other licensing boards and governmental agencies that are investigating alleged professional misconduct and with law enforcement agencies and other governmental agencies that are investigating or prosecuting alleged criminal offenses. A board or agency that receives the information must comply with the same requirements regarding confidentiality as those with which the State Medical Board must comply. The information may be admitted into evidence in a criminal trial in accordance with the Rules of Evidence, but the court must require that appropriate measures be taken to ensure that confidentiality is maintained with respect to any part of the information that contains names or other identifying information about patients or complainants whose confidentiality was protected by the State Medical Board when the information was in the Board's possession. Measures to ensure confidentiality that may be taken by the court include sealing its records or deleting specific information from its records.

The Board must develop requirements for and provide appropriate initial training and continuing education for investigators employed by the Board to carry out its duties under the bill. The training and continuing education may include enrollment in courses operated or approved by the Ohio Peace Officer Training Council that the Board considers

appropriate.

On a quarterly basis, the bill requires the Board to prepare a report that documents the disposition of all cases during the preceding three months. The report must contain the following information for each case with which the Board has completed its activities:

- (1) The case number assigned to the complaint or alleged violation;
- (2) The type of certificate to practice, if any, held by the individual against whom the complaint is directed;
- (3) A description of the allegations contained in the complaint;
- (4) The disposition of the case.

The report must state how many cases are still pending and be prepared in a manner that protects the identity of the person involved in each case. The report is a public record for the purposes of Ohio law.

### **Reports from prosecutors**

(sec. 4762.15)

When an acupuncturist pleads guilty to, is found guilty of, or is found to be eligible for intervention in lieu of conviction for committing a drug or sex offense, the bill requires that the prosecutor in the case notify the Board. Within 30 days after receiving the information, the Board must initiate action to determine whether to suspend or revoke the acupuncturist's certificate of registration.

The prosecutor in a case against an acupuncturist also must notify the Board of a plea of guilty to, a finding of guilt of, or a finding of eligibility for intervention in lieu of conviction for a felony, a misdemeanor committed in the course of practice, or a misdemeanor involving moral turpitude. The notice requirement extends to cases in which the trial court issues an order of dismissal on technical or procedural grounds. The report must include the name and address of the acupuncturist, the nature of the offense, and the certified court documents recording the action.

### **Reports from health care facilities**

(sec. 4762.16(A))

The bill requires that a report be made to the Board within 60 days after the imposition of any formal disciplinary action taken against an acupuncturist by any health care facility. The report must include a summary of the underlying facts leading to the action taken. On request, the Board must be given certified copies of patient records. The bill provides immunity from civil liability for an individual or entity for providing patient records in the absence of fraud or bad faith. The bill specifies that a health care facility's authority to take disciplinary action against an acupuncturist is not affected by filing a report with the Board, choosing not to file a report, or any action taken by the Board with respect to the acupuncturist.

### **Reports from practitioners, associations, and malpractice insurers**

(secs. 4731.224 and 4762.16(B) to (E))

The bill requires that a report to the Board be made by an acupuncturist, physician, or professional association or society of acupuncturists or physicians when the person or entity believes that a violation has occurred with respect to the requirements of the bill, the laws regulating the practice of medicine, or any of the Board's rules. The bill specifies that reports are not required in the case of an acupuncturist participating in drug or alcohol treatment, unless the acupuncturist fails to continue treatment.

If a professional association or society composed primarily of acupuncturists suspends or revokes an individual's membership for violations of professional ethics, or for professional incompetence or malpractice, the association or society must report to the Board. The report must be made within 60 days of the action taken.

Insurers providing professional liability insurance to an acupuncturist are required by the bill to notify the Board within 30 days after the final disposition or any claim for damages that results in a payment exceeding \$25,000. The Board must conduct an investigation in cases of repeated malpractice, which is defined as three or more judgments or settlements for negligence that exceed \$25,000 and occur in a five-year period.

### **Information obtained from reports**

(sec. 4762.16(F) and (G))

With regard to the reports made to the Board by health care facilities, practitioners, associations, and malpractice insurers, the bill includes requirements for maintaining the confidentiality of the information in the reports. The bill permits the Board to share the information in a confidential manner with health care facility committees in Ohio or other states that are considering whether to grant practice privileges to an acupuncturist or supervising physician. Except when a report is made on the belief that a violation has occurred, the acupuncturist must be given a copy of each report made to the Board and the opportunity to file a statement with the Board concerning the correctness or relevance of the information.

### **Penalty for failure to report**

(sec. 4762.99)

If a health care facility, practitioner, association, or malpractice insurer fails to make a report to the Board as the bill requires, the bill provides for the imposition of a criminal penalty. On a first offense, the person who fails to report is guilty of a minor misdemeanor. On each subsequent offense, the person is guilty of a fourth degree misdemeanor with no term of imprisonment but a fine of up to \$1,000.

### **Impaired acupuncturists**

(secs. 4731.25 and 4762.16(E) and (F))

Current law requires the Board to approve treatment providers for practitioners who are impaired by habitual or excessive use or abuse of drug, alcohol, or other substances. The treatment provider statutes apply to all of the practitioners regulated by the Board, including physicians, podiatrists, physician assistants, cosmetic therapists, and massage therapists.

The bill extends the existing treatment provider statutes to acupuncturists. It provides immunity from civil liability for reporting an impaired acupuncturist to the Board or referring the acupuncturist to a treatment provider for either examination or treatment.

### **Enforcement**

(sec. 4762.17)

The secretary of the State Medical Board is to enforce the laws relating to the practice of acupuncture. If the secretary has knowledge or notice of a violation of a provision of the bill or the rules adopted under it, the secretary must investigate the matter, and, on probable cause appearing, file a complaint and prosecute the offender. When requested by the secretary, the prosecuting attorney of the proper county must take charge of and conduct the prosecution.

### **Injunctions**

(sec. 4762.18)

The bill provides for issuance of an injunction against a person practicing as an acupuncturist without a certificate of registration from the Board. An injunction may be applied for by the Attorney General, a prosecuting attorney, the Board, or other person having knowledge of a person engaging in the unlawful practice of acupuncture. In the case of the Board, before applying for an injunction, the secretary of the Board must notify the person, who then has 30 days to respond. The bill requires the court to conduct a hearing on the petition and to give the same preference to the proceeding as is given all proceedings under the Administrative Procedure Act (Chapter 119.), irrespective of the position of the proceeding on the court's calendar. The bill specifies that injunction proceedings are in addition to, not in lieu of, other penalties or remedies available to the Board.

### **Adoption of rules**

(sec. 4762.19)

The bill permits the Board to adopt any rules necessary to govern the practice of acupuncture, the supervisory relationship between acupuncturists and supervising physicians, and the administration and enforcement of the bill. The rules must be adopted in accordance with the Administrative Procedure Act (Chapter 119.).

### **Fees**

(secs. 4731.24 and 4762.20)

All fees, penalties, and other funds received under the bill by the Board must be deposited into the state treasury to the credit of the existing Occupational Licensing and Regulatory Fund and must be used solely for the administration and enforcement activities of the State Medical Board.

The bill authorizes the Board to increase the \$100 application and renewal fees, subject to the approval of the Controlling Board. The fees may not exceed \$100 by more than 50%.

### **Civil immunity**

(sec. 4762.21)

The bill provides that no liability for damages to any person is created as the result of any act, omission, proceeding, conduct, or decision related to official duties undertaken or performed pursuant to the bill. This immunity extends, in the absence of fraud or bad faith, to the Board, a current or former Board member, an agent of the Board, a person formally requested by the Board to be the Board's representative, or an employee of the Board. If any of these persons asks to be defended by the state against any claim or action related to the person performing official duties, the bill requires the state to provide and pay for the person's defense and to pay for any resulting judgment, compromise, or settlement. The person must request the assistance within a reasonable time before trial and must cooperate in the defense. At no time will the state be required to pay for punitive or exemplary damages.

### **Provisions regarding the regulation of physicians**

#### **Intervention in lieu of conviction**

(Section 3; secs. 4731.22, 4731.223, and 4731.281)

If drug or alcohol usage was a factor leading toward a person's criminal behavior, the person may, prior to entering a plea, make a request for intervention in lieu of conviction. If the court finds the person to be eligible for intervention in lieu of conviction, and the person successfully completes the intervention plan established by the court, the court must dismiss the criminal proceedings against the person.

Under current law, if a physician, podiatrist, or other person regulated under R.C. Chapter 4731. is found eligible for treatment in lieu of conviction, the State Medical Board has authority to impose disciplinary actions against the person. Am. Sub. S.B. 107 of the 123rd General Assembly, signed by the Governor December 22, 1999, changed the term "*treatment in lieu of conviction*" to "*intervention in lieu of conviction*," and modified some of the criteria used to determine whether a person is eligible for this court action. The bill makes corresponding changes to references that remain in Chapter 4731. to treatment in lieu of conviction. The bill provides that these changes do not alter the Board's authority to take disciplinary action against a person who was found eligible for treatment in lieu of conviction on or before S.B. 107's effective date.

#### **Actions occurring in other jurisdictions**

(sec. 4731.22(B)(22) and (I))

Current law authorizes the Board to take disciplinary action against a physician or any of the other professionals it regulates if another state has taken disciplinary action against the person. Thus, a licensing sanction imposed against a physician in another country cannot be used by the Board as a reason for taking action against the person's license to practice in Ohio. The bill provides that the Board may take action when any other jurisdiction has taken action.

Current law provides for the automatic suspension of a person's right to practice in Ohio if the person is guilty of specified violent crimes in Ohio or another state. The bill requires automatic suspension if the crimes are committed in another jurisdiction.

#### **Reports of mental illness**

(sec. 4731.221)

Under current law, if a physician or any of the other professionals the Board regulates is found by a probate court to be mentally ill or mentally incompetent, the person's license to practice in Ohio is automatically suspended. Notice must be given by the probate court to the Board when there has been an adjudication of incompetence. The bill provides that notice must be given when there has been an adjudication of mental illness.

## **HISTORY**

ACTION	DATE	JOURNAL ENTRY
Introduced	05-13-99	p. 663
Reported, H. Health, Retirement & Aging	10-13-99	p. 1268
Passed House (94-0)	10-20-99	p. 1306

Reported, S. Health, Human Services & Aging	---	---
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