

STATE OF WEST VIRGINIA

**PRELIMINARY PERFORMANCE REVIEW OF THE
REGULATORY BOARD REVIEW OF THE
Board of Osteopathy**

**Licensing Osteopathic Physicians
and Physician Assistants
Is Needed to Protect Public**

**Physician Assistants Should Be
Regulated By Only One Board
and Merging Boards Regulating
Physicians Should Also Be Considered**

**The Board Is in Partial Compliance
with Chapter 30 of the West Virginia
Code and Is in Non-compliance
with Other Applicable Laws**

**Employment of Current Executive
Secretary Presents Conflict of Interest**

**OFFICE OF LEGISLATIVE AUDITOR
Performance Evaluation and Research Division
Building 1, Room W-314
State Capitol Complex**

**CHARLESTON, WEST VIRGINIA 25305
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August 2002

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Executive Summary

Issue 1: Licensing Osteopathic Physicians and Physician Assistants Is Needed to Protect Public

The Board of Osteopathy (Board) licenses 851 osteopathic physicians and 70 physician assistants, who work under the supervision of osteopathic physicians. The need to license these two *professions* is reviewed in this issue. A separate determination of the need for the *Board* will be made in *Issue 2*. In regards to licensure of both osteopathic physicians and physician assistants to osteopathic physicians, the Legislative Auditor finds that the unregulated professions would pose a risk to public safety. Therefore, *licensing* both professions is **necessary for the protection of the public**.

Issue 2: Physician Assistants Should Be Regulated By Only One Board and Merging Boards Regulating Physicians Should Also Be Considered.

The Legislature consider amending Chapter 30 of the Code to prevent professional licensing boards from employing persons As stated in *Issue 1* of this report, regulation of the osteopathic physician and the physician assistant professions is needed. However, it is found that the licensure of osteopathic physicians (D.O) and licensure of allopathic physicians (M.D.) currently licensed by the Board of Medicine, could be performed by one board instead of two. In addition, physician assistants (P.A.) who assist osteopathic physicians and medical physicians must be licensed by the board that licenses the physician, despite identical educational requirements and passage of the same exam. **Of the 70 physician assistants who are licensed by the Board of Osteopathy, 53 are also licensed by the Board of Medicine.** This means that physician assistants pay two license fees and submit continuing education to two separate boards. The Legislature should consider at a minimum requiring only one Board to license physician assistants. Several disadvantages to having physicians and physician assistants licensed by two separate boards include:

- If physician assistants work for both types of physicians (M.D. and D.O.) the physician assistant must be licensed by both boards. If the physician assistant works for one type of physician but changes employment to work for another type of physician, the physician assistant must go through the application process of the other board.
- Two separate boards create some confusion as to which board to file a complaint regarding a physician or physician assistant.
- Monetary inefficiencies result in paying for office space, equipment and two executive directors for two boards.

Therefore, the Legislature should consider merging the functions of the Board of Osteopathy and the Board of Medicine, or at least have one board regulate physician assistants.

Of the complaints received by the Board of Osteopathy from 1999-2002, 34% indicated they were first sent to the Board of Medicine; the number of days of delay resulting from this misdirection varied from 7 to 31. The Legislative Auditor is concerned with the possible consequences to the public any delay in receipt of a complaint. Given the nature of the trust one places in physicians and the purpose of regulating boards, any delay could result in unnecessary harm to the public. The Legislature Auditor feels two boards regulating P.A.'s and physicians could result in inconsistent regulation. The Legislative Auditor is concerned that over time, the differences could become so as the Board's separately seek to amend legislation, which may not be enacted consistently.

Issue 3: The Board Is in Partial Compliance with Chapter 30 of the West Virginia Code and Is in Non-compliance with Other Applicable Laws.

The Board of Osteopathy has not complied with many of the general provisions of Chapter 30 of the West Virginia Code. The Board does meet regularly and maintain adequate records of its meetings. Its complaint process is adequate with a couple of exceptions. However, the Board has some public accessibility issues it needs to resolve and its process of verifying continuing education could be made more efficient. Although the Board is self-sufficient, the Board's budget for FY 2001 was overestimated. The Board has indicated to the Legislative Auditor it was budgeting for cases that it was advised by legal counsel could be expensive.

Issue 4: Employment of Current Executive Secretary Presents Conflict of Interest.

The Board of Osteopathy employs a part-time Executive Secretary. The Executive Secretary is responsible for staff and the daily operation of the Board. The Executive Secretary is the spouse of an osteopathic physician licensed by the Board, and this licensee has served as Board member during the same period of time the Executive Secretary has been a Board employee. Because of the employee's relationship to a licensee, **the independence of the Executive Secretary of the Board is jeopardized.** Furthermore, the Executive Secretary runs her own business and runs the Board part-time out of the same premise. These circumstances create conflict of interest for the Executive Secretary.

Recommendations

- 1. The Legislative Auditor recommends that the Legislature continue to require osteopathic physicians and physician assistants be licensed by the State of West Virginia.*
- 2. The Legislative Auditor recommends the Legislature consider consolidating the Board of*

Osteopathy and the Board of Medicine.

3. *Should the Legislature decide to consolidate the Boards, the Legislative Auditor recommends the new Board's membership reflect percentages of those licensed in addition to its public representation.*
4. *Should the Legislature choose to maintain two boards regulating physicians, the Legislative Auditor recommends the Legislature consider transferring licensing of all physician assistants to the Board of Medicine.*
5. *Should the Legislature not choose to transfer licensing of physician assistants to the Board of Medicine, the Legislative Auditor recommends the Legislature consider adding a physician assistant member to the Board of Osteopathy so that this licensed group has representation on the Board.*
6. *The Board should consider alternative approaches to confirming continuing education as mentioned in this report. The Board should submit to the Legislature changes to its legislative rules to reflect the new process of verifying continuing education, including what percentage of licensees will be randomly audited for continuing education, a prescribed reporting form, what documents the licensee shall have to provide as proof or maintain, how long a licensee is given to submit the required continuing education and the provisions, such as how many days the licensee would have before the license would lapse or expire, that apply if the Board determines continuing education submitted is unacceptable.*
7. *The Board should make its location visible by placing a sign on the outside of its facility.*
8. *The Legislature should consider requiring all state agencies, including boards and commissions, to have conspicuous signs outside their facility.*
9. *The Board should consider putting the complaint form on its website to be downloaded or submitted electronically, and the Board should list on its website licensees against whom Board action has been taken. The Board should consider using subcommittees of more than one person to investigate complaints and use independent investigators to resolve complaints that involve licensees who have multiple complaints filed against them.*
10. *The Board should comply with the Open Meetings Law in all instances.*
11. *The Board should submit to the Legislature changes to its rule so that continuing education requirements agree with statute.*
12. *When the Board charges administrative fees related to the disciplining of licensees there should be a full accounting of those fees to accurately reflect the actual cost to the Board.*
13. *The Board should maintain a register as required by §30-1-12.*

14. *The Legislature should consider amending §6-10-1 to read from “wife” to “spouse” or “immediate family member.”*
15. *If the Legislature chooses not to amend §6-10-1 of the Code, then the Legislative Auditor recommends as permanent staff who have an immediate family member serving as a current Board member.*
16. *The Board should either replace its Executive Secretary or correct the conflicts of interest identified in this report.*
17. *The Board should pay the Executive Secretary based on the hours worked to comply with the provisions of WV Code §12-3-13.*
18. *The Legislature should consider amending statute to require individuals or agencies who are granted hardship waivers to reapply for the waiver every four years.*
19. *The Board of Osteopathy should submit an application to the Ethics Commission to determine if it qualifies for an exemption from the prohibition established in West Virginia Code §6B-2-5(d)(1) citing excessive costs and undue hardship.*
20. *The Legislative Auditor recommends the Legislature consider amending the general provisions of Chapter 30 of the Code to prohibit arrangements in which a Board operates out of a private business.*

Review Objective, Scope and Methodology

This regulatory board evaluation of the Board of Osteopathy was conducted in accordance with the West Virginia Sunset Law, Chapter 4, Article 10 of the West Virginia *Code*. As stated in *Code* a regulatory board evaluation is to determine whether a Board is 1) necessary for the protection of public health and safety, and 2) whether the Board is operating in compliance with applicable laws and rules. This evaluation also examined a Board staff member's independence.

This regulatory board evaluation covers the period from Calendar Year 1999 through June 2002.

Information compiled in this evaluation was acquired from the West Virginia *Code*, interviews with the Board's staff, examinations of annual reports, meeting minutes, expenditure schedules, and complaint and continuing education files. Every aspect of this report complied with Generally Accepted Government Auditing Standards (GAGAS).

Issue 1: Licensing Osteopathic Physicians and Physician Assistants Is Needed to Protect Public.

The Board of Osteopathy (Board) licenses 851 osteopathic physicians and 70 physician assistants, who work under the supervision of osteopathic physicians. The need to license these two *professions* is reviewed in this issue. A separate determination of the need for the *Board* will be made in Issue 2. In regards to licensure of both osteopathic physicians and physician assistants to osteopathic physicians, the Legislative Auditor finds that the unregulated professions would pose a risk to public safety. Therefore, *licensing* both professions is **necessary for the protection of the public.**

Licensure of Osteopathic Physicians

In determining if there is a need for licensure of osteopathic physicians, a primary consideration is whether the unregulated practice of the profession would clearly endanger the health and safety of the public. **The Legislative Auditor finds that licensing osteopathic physicians is necessary for protecting the citizens of West Virginia.**

“Osteopathy” is defined in the WV Code (§30-14-2) as:

... that system of the healing art which places the chief emphasis on the structural integrity of the body mechanism as being the most important single factor in maintaining the well-being of the organism in health and disease.

The Occupational Outlook Handbook indicates Doctors of Osteopathy emphasize the body’s musculoskeletal system, preventative medicine, and holistic patient care. According to the Handbook, an osteopathic physician has general responsibility for areas such as:

- Diagnosing illnesses;
- Performing surgeries;
- Prescription and administration of treatment for injury or disease; and
- Ordering, performing and interpreting diagnostic tests.

Possible harm an incompetent practitioner or unqualified person could cause includes:

- Increase in disease;
- Death;
- Loss of limbs;
- Loss of sight; and
- Complications due to improperly prescribed medications.

Licensure of Physician Assistants

The Board also licenses physician assistants working for osteopathic physicians. Physician Assistants (P.A.) are responsible for providing healthcare services under the supervision of physicians. P.A.'s are formally trained to provide diagnostic, therapeutic and preventative healthcare services, as delegated by a physician. Work tasks may include:

- Examine and treat patients;
- Order and interpret laboratory tests and x-rays;
- Make diagnoses;
- Take medical histories; and
- Prescribe medications.

As with determining a need for licensure of osteopathic physicians, a primary consideration is whether the unregulated practice of physician assistants would clearly endanger the health and safety of the public. The P.A. is a profession directly involved with the public; performing tasks that without the direction of the physician, under whom the P.A. works, could cause harm and possibly life. **As such, there is need for licensure of the P.A. profession to prevent irresponsible and unqualified individuals from engaging in this profession.** Licensure ensures a minimal degree of competence relating to the tasks required of a P.A.

Conclusion

Osteopathic physicians and P.A.'s are responsible for functions which are potentially harmful to the public if competency is not regulated. Licensure of osteopathic physicians and P.A.'s are important to protect the citizens of West Virginia. **Therefore, it is the opinion of the Legislative Auditor that it is necessary to continue licensing these professions to provide for the protection of public health and safety.**

Recommendation

1. *The Legislative Auditor recommends that the Legislature continue to require osteopathic physicians and physician assistants be licensed by the State of West Virginia.*

Issue 2: Physician Assistants Should Be Regulated By Only One Board and Merging Boards Regulating Physicians Should Also Be Considered.

As stated in *Issue 1* of this report, regulation of the osteopathic physician and the physician assistant professions is needed. However, it is found that the licensure of osteopathic physicians (D.O) and licensure of allopathic physicians (M.D.) currently licensed by the Board of Medicine, could be performed by one board instead of two. In addition, physician assistants (P.A.) who assist osteopathic physicians and medical physicians must be licensed by the board that licenses the physician, despite identical educational requirements and passage of the same exam. **Of the 70 physician assistants who are licensed by the Board of Osteopathy, 53 are also licensed by the Board of Medicine.** This means that physician assistants pay two license fees and submit continuing education to two separate boards. The Legislature should consider at a minimum requiring only one Board to license physician assistants. Several disadvantages to having physicians and physician assistants licensed by two separate boards include:

- If physician assistants work for both types of physicians (M.D. and D.O.) the physician assistant must be licensed by both boards. If the physician assistant works for one type of physician but changes employment to work for another type of physician, the physician assistant must go through the application process of the other board.
- Two separate boards create some confusion as to which board to file a complaint regarding a physician or physician assistant.
- Monetary inefficiencies result in paying for office space, equipment and two executive directors for two boards.

Therefore, the Legislature should consider merging the functions of the Board of Osteopathy and the Board of Medicine, or at least have one board regulate physician assistants.

Two Boards to Regulate Physicians and Physician Assistants Are Unnecessary

Osteopaths are physicians and surgeons, as are those physicians and surgeons licensed by the Board of Medicine, whose physicians are medical physicians. The differences between the two types of physicians are not in the privileges of license, but in the philosophy of the medical schools the two attend. Generally speaking, osteopathic physicians practice a “whole person” approach to health care; allopathic physicians look at the patient’s specific symptoms. On the other hand, there is no difference in education or qualification requirements for physician assistants regardless of which board regulates them.

Table 1 shows that all states regulate these professions, but 36 states regulate both types of physicians through one board, and 44 states regulate physician assistants through one board.

Table 1		
Structure of State Boards Licensing Physicians and Physician Assistants		
	No. of States with Separate Boards	No. of States with One Board
Physicians	14	36
Physician Assistants	6	44

In West Virginia, the board the P.A. seeks licensure from depends on whether he or she will work for an osteopathic physician or a medical physician. If a P.A. wishes to work for both types of physicians then the P.A. must be licensed by both boards. If the P.A. changes the type of physician they assist, the P.A. must go through the application process of the other board. This process could cause delay in practice privileges of the P.A. while the application is being processed, and it could result in the duplicative effort of a second board ensuring validity of education and possibly eradicate any history of discipline problems the licensee might have had with the other board. While both boards are financially stable, the Board of Medicine may be the best choice to regulate physician assistants because it regulates the large majority of physician assistants and it has a larger staff as shown in Table 2.

Table 2		
Boards Regulating Physicians and Physician Assistants		
	Board of Medicine	Board of Osteopathy
Licensed Physicians	6,120	851
Physician Assistants	335	70
Number of Employees	12	1.5
EOY Cash Balance (2001)	\$231,338	\$318,649

Public Access May Be Hindered

An effect of two boards regulating the same profession is that it may hinder public access. Of the 38 complaints received by the Board of Osteopathy from 1999-2002, 34% indicated they were first sent to the Board of Medicine. The number of days of delay resulting from this misdirection varied from 7 to 31. To give an example of the delay that could occur, the Health Care Authority received a complaint against an osteopathic physician. The Health Care Authority forwarded it next door to the Board of Medicine who returned the complaint to the Health Care Authority saying it was not the proper authority to respond to such a complaint. The Health Care Authority then forwarded it to the Board of Osteopathy. The Legislative Auditor is concerned with

the possible consequences to the public of any delay in receipt of a complaint. Given the nature of the trust one places in physicians and the purpose of regulating boards, any delay could result in unnecessary harm to the public.

Monetary Inefficiencies of Having Two Boards

Some degree of financial savings could be obtained by merging the administrative functions of the Boards. Two office spaces and some office equipment would no longer be necessary, and two web sites, utility and insurance cost, and salaries for two executive directors would be reduced or eliminated.

Conclusion

Osteopaths are physicians and surgeons, just as are those physicians and surgeons licensed by the Board of Medicine. The Legislature should consider regulating physicians by one entity, regardless of philosophy of medical schools, and further, to allow the physician assistant profession to be regulated by one entity.

Recommendations

2. *The Legislative Auditor recommends the Legislature consider consolidating the Board of Osteopathy and the Board of Medicine.*
3. *Should the Legislature decide to consolidate the Boards, the Legislative Auditor recommends the new Board's membership reflect percentages of those licensed in addition to its public representation.*
4. *Should the Legislature choose to maintain two boards regulating physicians, the Legislative Auditor recommends the Legislature consider transferring licensing of all physician assistants to the Board of Medicine.*
5. *Should the Legislature not choose to transfer licensing of physician assistants to the Board of Medicine, the Legislative Auditor recommends the Legislature consider adding a physician assistant member to the Board of Osteopathy so that this licensed group has representation on the Board.*

Issue 3: The Board Is in Partial Compliance with Chapter 30 of the West Virginia Code and Is in Non-compliance with Other Applicable Laws.

The Board of Osteopathy has failed to comply with many applicable state laws and rules. These laws and rules, primarily found within the Board's own article of Code, and in the general provisions of Chapter 30, are important in the effective operation of a licensing board. The Board has complied with the following requirements:

- A Board representative attended one orientation session provided by the State Auditor's Office in the required two year time frame (§30-1-2a);
- The Board's membership has consumer representation (two lay members) as required for health licensing boards (§30-1-4a);
- The Board meets at least once annually (§30-1-5(a));
- The Board has set fees by rule (§30-1-6(c));
- The Board maintains a record of its proceedings (§30-1-12(a));
- An annual report has been submitted to the Governor and Legislature describing budget data and transactions for the proceeding two years (§30-1-12(b));. and
- The Board has a listing in the state government section of the Charleston area telephone book (§30-1-12(c)).

Continuing Education Requirements Contradict and Compliance Could Not Be Reliably Verified

Due to the different continuing education requirements between the Osteopathic Physicians and the Physician Assistants, a separate review of each profession will be provided in this section.

Osteopathic Physicians

West Virginia Code §30-1-7a(a) requires boards to develop continuing education criteria, which includes course content, course approval, hours required and reporting periods. The Board is in compliance with this requirement as indicated by its rules (CSR 15.2.8):

Documentation of a minimum of thirty-two (32) hours of AOA approved Continuing Medical Education, of which at least 50% must be category 1 or CME hours in standard heart saver courses obtained during the preceding two (2) year licensing period pursuant to W. Va. Code §30-14-10.

Although verification of continuing education is not required by law, it is necessary in protecting the public. The Board does have a process in place to verify continuing education, and evidence suggests that the Board reviews all continuing education submitted by licensees. However, there are some inefficiencies in the process in two areas: 1) requiring all licensees to submit continuing education information and then reviewing all of this information; 2) the reporting process results in a large amount of disorganized information.

The Legislative Auditor randomly sampled licensee files. In the sample taken, the Legislative Auditor could not verify whether continuing education requirements had been met. This is in part due to the Board's reliance on rosters from providers of continuing education, which were maintained separate from licensees' files. In addition, the sample indicated there was inconsistency in the verification within the licensees' files to determine if the number of hours obtained in the required categories were met. For instance, some persons submitted transcripts, while others submitted certificates that sometimes had the number of hours and the type of course taken, and sometimes did not. It is clear from the sample and from the Board's rules that the Board has not developed a reporting form or instructions on what licensees are to submit for documenting their continuing education. As a result, **the Board receives a large amount of information that is unorganized and inconsistent from one licensee to another.** The Board should develop a reporting form that must be submitted by licensees that will organize the information in terms of dates, name of courses, name of continuing education provider, number of hours, etc. Furthermore, instructions should be provided in terms of what supporting documentation should be attached. The Board's rules should also specify this procedure.

Furthermore, the Board should consider an alternative approach to verify continuing education. The Legislative Auditor determined it is somewhat inefficient for the Board to require all licensees to submit proof of continuing education, or that the Board must make contact with continuing education providers to ascertain attendance, particularly when such an assortment of responses are received from licensees who were never told specifically what documents would provide the necessary information.

It is not uncommon for licensing boards with a large number of licensees to instruct them of what continuing education documentation they must maintain in the event that the board selects them to be audited for continuing education. These boards may only require licensees to submit a one page prescribed form that provides for a uniform, concise and organized report of continuing education. These boards generally sample a percentage of the licensees and may confirm reported information with continuing education providers, or require sampled licensees to submit supporting documentation.

For example, the Board of Medicine requires licensees to submit with their license renewal a certificate of successful completion of continuing education, which requires the licensee's signature and the date after an attestation to the truth and correctness of the licensee's statements pertaining to the successful completion of the required continuing education. The certification includes a statement that any license issued from the application is based on the truth of the licensee's statements and that if false information is submitted in the application, such an act

constitutes good cause for the denial or revocation of the license. The Board of Medicine's legislative rules allow it to conduct audits as it considers necessary to determine if licensees are complying with continuing education requirements and if the statements made on the Board's renewal application forms as to continuing education are accurate. The licensees are required to provide supporting written documentation of the successful completion of the continuing education certified as received on the biennial renewal application form, if the Board requests such written documentation in writing.

The State Bar Association requires attorneys to submit a two page form (Form C) documenting the name of the seminar and sponsor, date, location and credit hours. The attorney is instructed to keep a copy of the form because once the information is entered into the Association's database, the form is not maintained. Education providers are required to keep information concerning the attendance and credit hours achieved for each attorney in attendance. This information can be requested by the Association.

If the Board decides to continue its current practice of requiring all licensees to submit continuing education information, it should prescribe a form that will better organize the information and reduce paperwork. Whichever approach is used to verify continuing education, the Board should revise its rules to specify the process, including details on how many days the licensee would have before the license would lapse or expire.

Physician Assistants

Physician assistants to osteopathic physicians are required by statute to successfully complete 20 hours of continuing education annually, two of which must be in end-of-life care. Contradicting this requirement is the Board's rules, which requires 20 hours of continuing education every two years. The Board should submit to the Legislature amendments to make its rules consistent with statute.

Complaint Process Is Adequate

The Board logs complaints received. All but two of the complaints reviewed by the Legislative Auditor alleged improper treatment or unethical conduct. During the time period of 1999 through June 2002 the average length of time for a resolution was 150 days. The Board's current rules outline the procedures for investigation and resolution of complaints, denied licenses and hearing procedures as required by law. Table 3 shows the number of complaints logged for the past three and a half years.

Table 3 Complaints Filed 1999 - 2002*						
Year	# of	Dismissed	Pending	Suspensions	Probation	Revocation
1999	10	9	1	0	0	0
2000	11	7	4	0	0	0
2001	10	8	2	0	0	0
2002	7	3	3	0	0	1
* Data is as of June 25, 2002						

Of the thirty-eight complaints received during the scope of the review, all but one was dismissed. These dismissals occurred despite some doctors having multiple complaints against them with serious accusations, such as sexual misconduct. The Board's practice in investigating complaints is to have one member investigate the complaint and then report a recommendation to the full board. Most boards form subcommittees of more than one member to investigate complaints. For example, the Board of Medicine requires subcommittees of at least three members investigate complaints. In addition, the complaint files indicate that in only one complaint an investigator was employed to look into the complaint. To enhance public protection, the Board should consider using an investigator to examine certain complaints, particularly against physicians who have had multiple complaints filed against them.

Public Accessibility Could Be Improved

As stated previously, the Board has the required telephone book listing assisting the public in finding it. However, the Legislative Auditor has concerns related to public accessibility:

- The physical location of the Board has no outside or inside sign to indicate to the public that they have found the Board. In contrast, both the Executive Secretary's private accounting firm, and her spouse's medical practice in the same building have outside demarcation, and when the public steps inside the waiting room of the medical practice, a sign indicates the direction to the accounting firm.
- The Board does not provide the opportunity to the public to file a complaint electronically nor download a complaint form from the website.
- The Board's website does not list disciplined licensees, as does the Board of Medicine.
- Table 4 illustrates how the filing of open meeting notices could be improved, as several meetings were not properly filed with the Secretary of State's Office.

Table 4 Open Meeting Notices				
	1999	2000	2001	2002*
Notices Filed Timely	1	6	2	1
Notice Filed Late	0	0	0	0
Notices Not Filed	2	0	1	0
*Data is as April 2, 2002.				

The Board also provided the Legislative Auditor with meeting minutes for which the Secretary of State had no record of notice. Notices not filed with the Secretary of State's Office in the prescribed manner hinder public access and could have potentially put any action of the Board in question. One meeting for which a notice was not filed concerned complaints filed against licensees. A second meeting where a notice was not filed concerned staff pay raises, disallowed a course as acceptable for physician assistants to have prescriptive privileges, and again dealt with complaints against licensees. These actions illustrate the importance Board actions can take in any given meeting. Public notice is important in the Board's charge to protect the public from possible incompetent practice.

The Board is Financially Self-Sufficient

The Board is financially self-sufficient as required by West Virginia Code §30-1-6(c). The Board had an ending cash balance for FY 2001 of \$318,649 with average annual expenditures of less than \$100,000 (see Table 5). However, Table 5 shows that the Board submitted its budget for fiscal year 2001 that overestimated actual expenditures by more than \$131,000, or nearly 300%. The Board overestimated actual expenditure to a lesser extent in fiscal year 1999 and 2000.

Under §30-1-10(a) of the Code, if a Board has a balance at the end of the year that exceeds twice the budget, the excess is to be transferred to the State General Fund. Based on the large difference of \$131,000 between the Board's estimated budget and the actual expenditures, it could appear that the Board is overestimating its budgeted expenditures to avoid transferring funds to the State General Fund. However, the Board has indicated to the Legislative Auditor it was budgeting for cases that it was advised by legal counsel could be expensive.

Table 5
Budget versus Actual Board
Revenues and Expenses 1999 - 2001

Fiscal Year	Revenues			Expenditures			Fund Balance
	Budgeted Revenues	Actual Revenues	Diff	Budgeted Expenditures	Actual Expenditures	Diff	EOY Cash Balances
1999	80,000	168,648	(88,648)	103,900	57,959	45,941	154,500
2000	80,000	163,865	(83,865)	153,100	94,762	58,338	223,473
2001	150,000	165,604	(15,604)	202,000	70,428	131,572	318,649

Assessing administrative costs is permitted by §30-1-8 and fees are to be deposited in the Board's special revenue account. In one instance the Board fined a licensee \$500 and assessed an administrative fee of \$1,500 for a hearing. The fine was remitted to the general revenue fund as required by law. However, the Board could document only \$720 of the \$1,500 administrative fee. **For the licensee's sake, the Board should be able to document that the administrative fee assessed against a licensee reflects the actual administrative cost of carrying out an action.**

Register and Roster

A Board register of all applicants was requested by the Legislative Auditor. Under §30-1-12(a) of the *Code*, the register of a Board is required to detail all individuals who have applied for licensure, including whether a license was granted, any suspensions, and qualifications for licensure. The Board did provide the Legislative Auditor with a register containing the fields in its database. The following required fields were not indicated: date of application, application granted or rejected, date application granted or rejected, all renewal dates, exam required, and a field for suspensions and revocations.

The roster of licensed practitioners provided was arranged alphabetically as well as by county of practice, but did not have the social security numbers required by §30-1-13. During the 2002 Session, HB 4124 removed the provision requiring social security numbers, to be effective May 15, 2002.

Conclusion

The Board of Osteopathy has not complied with many of the general provisions of Chapter 30 of the West Virginia Code. The Board does meet regularly and maintain adequate records of its meetings. Its complaint process is adequate with a couple of exceptions. However, the Board has

some public accessibility issues it needs to resolve, and its process of verifying continuing education could be made more efficient. Although the Board is self-sufficient, the Board's budget for FY 2001 was significantly overestimated. The result of this is that the Board maintained funds that should have been transferred to the state general fund.

Recommendations

6. *The Board should consider alternative approaches to confirming continuing education as mentioned in this report. The Board should submit to the Legislature changes to its legislative rules to reflect the new process of verifying continuing education, including what percentage of licensees will be randomly audited for continuing education, a prescribed reporting form, what documents the licensee shall have to provide as proof or maintain, how long a licensee is given to submit the required continuing education and the provisions, such as how many days the licensee would have before the license would lapse or expire, that apply if the Board determines continuing education submitted is unacceptable.*
7. *The Board should make its location visible by placing a sign on the outside of its facility.*
8. *The Legislature should consider requiring all state agencies, including boards and commissions, to have conspicuous signs outside their facility.*
9. *The Board should consider putting the complaint form on its website to be downloaded or submitted electronically, and the Board should list on its website licensees against whom Board action has been taken. The Board should consider using subcommittees of more than one person to investigate complaints and use independent investigators to resolve complaints that involve licensees who have multiple complaints filed against them.*
10. *The Board should comply with the Open Meetings Law in all instances.*
11. *The Board should submit to the Legislature changes to its rule so that continuing education requirements agree with statute.*
12. *When the Board charges administrative fees related to the disciplining of licensees there should be a full accounting of those fees to accurately reflect the actual cost to the Board.*
13. *The Board should maintain a register as required by §30-1-12.*

Issue 4: Employment of Current Executive Secretary Presents Conflict of Interest.

The Board of Osteopathy employs a part-time Executive Secretary. The Executive Secretary is responsible for staff and the daily operation of the Board. The Executive Secretary is the spouse of an osteopathic physician licensed by the Board, and **for several years this licensee served as a Board member during the same period of time that his spouse served as the Executive Secretary of the Board.** Furthermore, the Executive Secretary runs her own business and runs the Board part-time out of the same premise, with the Board paying the Executive Secretary rent for the Board's office space. **These circumstances create a conflict of interest for the Executive Secretary.**

Board Member's Spouse Should not Serve as the Board's Executive Secretary

For over ten years (approximately from 1988 to 1999) the Board had the wife of a Board member serve as its Executive Secretary. Statute prohibits employment of wives by state officials. As written in Code, §6-10-1,

The employment of his wife at public expense by any official or employee of the state is expressly prohibited.

Although the Executive Secretary was employed by the Board before her spouse was appointed a Board member, the Legislative Auditor finds that the Board was in violation of statute when the Executive Secretary's spouse was appointed as a Board member. Possible conflicts for a Board member's spouse serving as a Board's executive secretary include salary increases and potential disciplinary actions.

With respect to a Board member's spouse being employed by the Board, the Ethics Commission has filed advisory opinions for similar situations. The opinions indicate that there is no ethics violations in these circumstances when appropriate precautions are taken, such as having the open position advertised for equally qualified applicants, ensure that the relative is qualified for the position and the Board member remove himself or herself from voting on decisions relating to the relative. The Legislative Auditor has no indication that any of these precautions were taken.

As conflicts of interest, such as salary increases and disciplinary actions, could occur regardless of gender, the Legislative Auditor recommends the Legislature consider amending §6-10-1 to read "spouse," not just "wife." If the Legislative Auditor chooses not to make this amendment, the Legislative Auditor recommends Legislature consider amending Code to prevent all Chapter 30 licensing boards from allowing immediate relatives of Board members be employed by the Board.

The Executive Secretary's husband is no longer a board member, but is still regulated by the Board. The Ethics Commission has indicated that spousal employment of regulated individuals is not an ethics violation as long as complaints against the licensee are not handled by the executive

secretary.

Conflict Exist When Board is Operated Out Of Employee's Own Business

The Board's Executive Secretary is receiving salary and rental income from the Board because she works for the Board and the Board is operated out of the business building she owns. Since at least 1987 the Executive Secretary and spouse have been the lessors of the Board's office space. The rent has been \$300 a month since 1989 and there is designated space set aside for the Board, as witnessed by Legislative Auditor staff. The Executive Secretary receives a salary of \$16,000 for part-time employment, and as a part-time employee is required to work a 20-hour work week or 10 days a month.

The Legislative Auditor wrote to the Ethics Commission and asked if the lease between the Board and its Executive Secretary for office space is in violation of the Ethics Act. The Ethics Commission responded by indicating that it issued an advisory opinion (number #92-08) in 1992 in response to the question "*Is it a violation of the Ethics Act for the Director of a State Board to lease office space to that Board?*" This situation is similar to the Board of Osteopathy. The Ethics Commission indicated to the Legislative Auditor that "***...such an arrangement, in the absence of a hardship exemption from the Commission, would violate the prohibition in West Virginia Code §6B-2-5(d)(1) against a public employee having an interest in a public contract over which their position gives them control.***" Therefore, if the Board is unable to show the Ethics Commission that the rent it would be charged by another entity would create a financial hardship for the Board, the Board should end the current lease for Board office space with the Executive Secretary. The Legislative Auditor acknowledges that the Board has been charged a relatively low monthly rent of \$300 since 1989 and that it is likely that rent charged elsewhere may be higher. However, the operations of state government needs to avoid the appearance of impropriety, even if it means paying a higher amount for rent unless it can be demonstrated that the higher rent would create a financial hardship for the Board.

Despite the opinion received from the Ethics Commission that indicates the Board of Osteopathy is in violation of the Ethics Act, the Legislative Auditor notes that when an audit of the Board of Dental Examiners found a similar situation with an employee receiving rental income from the Board, the Board of Dental Examiners provided the Legislative Auditor with a letter it had received from the Ethics Commission, which provided conflicting information. Specifically, the Ethics Commission wrote in a letter to the Executive Secretary of the Board of Dental Examiners, who was receiving rental income from the Board, that because he, as an employee, was not involved in the decision to rent the office space, there was no violation of the Ethics Act. Due to the outcome of this letter, when the Legislative Auditor reviewed the Board of Dental Examiners, an issue was not made of this arrangement of employee receiving rental income in the regulatory board evaluation. However, the letter relating to the Board of Dental Examiners from the Ethics Commission was not a formal opinion, but was written by the legal counsel for the Ethics Commission. In this letter, the legal counsel stated, "*...if you find that you require a formal opinion from the Ethics Commission, please feel free to submit a written request.*" Furthermore, another distinction between the Board of Dental Examiners and the Board of Osteopathy is it appears that

at the time the Board of Osteopathy's lease was made, the Executive Secretary's husband was a member of the Board, and there is no evidence that the member abstained from the decision to enter into the contract. Given the contradicting statements from the Ethics Commission, the Legislative Auditor cannot formally determine if the Board of Osteopathy is in violation of the Ethics Act by renting space from the Executive Secretary and her husband.

In addition to the leasing of office space to the Board, the arrangement of the Executive Director working for the Board and for her own business on the same premise creates a conflict of interest. The Board's version of time sheets do not reflect daily or even weekly totals of in or out times for the Executive Secretary. Nor would this employee be required by article 5C of Chapter 21 to keep time sheets by law, because she serves in an administrative capacity. The Executive Secretary of the Board states:

[The Executive Secretary's] time is not spent equally throughout the year on the Board. For example, during tax season, which is a slow time of the year for the Board, [the Executive Secretary's] time is spent more in her tax practice. During the summer, [the Executive Secretary's] time is spent with the Board to oversee renewals.

The Legislative Auditor is concerned that the Board may not be receiving the time it pays the employee to work because by the employee's own admission more time is spent at certain times a year which may not equate to the time required of a part time employee. Moreover, the Executive Secretary is daily confronted with the conflict of how her time will be used between the Board and her business.

The Legislative Auditor feels the Board's payment of the Executive Secretary should comply with West Virginia Code, §12-3-13,

No money shall be drawn from the treasury to pay the salary of any officer or employee before his services have been rendered.

Even if this means the employee would have to be paid in arrears, the Legislative Auditor feels the law should be abided.

Conclusion

The Legislative Auditor has concerns that the Board of Osteopathy has inappropriate arrangements that give the appearance of impropriety. Although it is not an ethics violation to have the spouse of a licensee serve as the Executive Director, the Legislative Auditor finds that such an arrangement can and should be avoided for appearance sake, especially in this case, since this Board is not on record of taking the necessary precautions to avoid conflicts of interests. A natural conflict of the Executive Secretary's time exist with the Board and her own business being operated out of the same building. Furthermore, it is a clear violation of the Ethics Act to have the Board pay rent to its Executive Secretary, unless the Board can receive an exemption from the Ethics Commission

on the grounds of financial hardship to the Board. The Legislative Auditor concludes that there are other individuals who are qualified to serve as the Board's Executive Secretary. Therefore, employing the Executive Secretary with the present conflicts of interest is an unnecessary arrangement. Thus, either the Executive Secretary should be replaced or the Board should take immediate steps to end the conflicts of interest.

Recommendations

14. *The Legislature should consider amending §6-10-1 to read from "wife" to "spouse" or "immediate family member."*
15. *If the Legislature chooses not to amend §6-10-1 of the Code, then the Legislative Auditor recommends the Legislature consider amending Chapter 30 of the Code to prevent professional licensing boards from employing persons as permanent staff who have an immediate family member serving as a current Board member.*
16. *The Board should either replace its Executive Secretary or correct the conflicts of interest identified in this report.*
17. *The Board should pay the Executive Secretary based on the hours worked to comply with the provisions of WV Code §12-3-13.*
18. *The Legislature should consider amending statute to require individuals or agencies who are granted hardship waivers to reapply for the waiver every four years.*
19. *The Board of Osteopathy should submit an application to the Ethics Commission to determine if it qualifies for an exemption from the prohibition established in West Virginia Code §6B-2-5(d)(1) citing excessive costs and undue hardship.*
20. *The Legislative Auditor recommends the Legislature consider amending the general provisions of Chapter 30 of the Code to prohibit arrangements in which a Board operates out of a private business.*

APPENDIX A

Transmittal Letter to Agency

APPENDIX B
Agency Response

