

# VERMONT MEDICAL SOCIETY

**Date:** April 3, 2017

**To:** Lillian Colasurdo, Vermont Department of Health, via email to: [AHS.VDHRules@vermont.gov](mailto:AHS.VDHRules@vermont.gov)

**From:** Jessa Barnard, Esq., General Counsel & Vice President for Policy

**CC:** David Herlihy, Executive Director, Vermont Board of Medical Practice

**Re: Vermont Medical Society Comments  
Proposed Rule – Rules of the Board of Medical Practice**

Thank you for the opportunity to present comments from Vermont Medical Society (VMS) members regarding the Department of Health's Proposed Rules of the Board of Medical Practice ("Rules").

The VMS is the state's largest physician membership organization, representing over 1700 medical doctors (MDs) and 80 physician assistants (PAs) across Vermont. Our many Board of Medical Practice licensee-members have a strong interest in ensuring the Rules are crafted to meet the needs of both licensees served by the Board as well as the Board in fulfilling its role to protect public health and safety.

VMS has reviewed the proposed Rules and sent the draft as well as a summary description to all of our members. Our comments are a result of staff review as well as feedback received from members. VMS appreciates the work by the Board of Medical Practice staff and members to update the Rules, which have not been revised since 2001. **VMS supports many of the proposed changes and find that overall they improve the structure of the Rules, provide clarity, and bring the Rules into line with current Board practice.** For example, VMS appreciates the updates to the definitions (Section 2.0), updates to the physician licensing requirements (Section 15) and new special rules to allow participation in a GME program to count towards CME requirements (Section 22.2.3). VMS also appreciates the efforts of Board staff to meet with VMS to discuss and explain the proposed changes.

**VMS does have several areas of concern and/or suggested change, both substantive and technical in nature.** In order of the Rule:

1. **Section 6.0, Fees:**

VMS has discussed with Board staff the possibility of creating a license fee waiver for physicians who only provide volunteer services with the Vermont Medical Reserve Corps. VMS appreciates that the Board has taken a position in support of such a policy and recognizes this change will require change in state statute.

**VMS Recommends:** Section 6.0 of the Rules should be amended to reflect the process for granting such a fee waiver, if the legislature passes the necessary statute while the Rules are still being finalized. Otherwise, such a process should be incorporated into Board policy.

2. **Section 21.0, Professional Standards Specific to Physicians:**

The Board has proposed removing from this Section former Rule 4.1, which identified the statutory bases for disciplinary action applicable to a physician, for example, 26 VSA §§ 1354, 1398, 1739a and 18 VSA § 1852. The Board has retained references to the statutory bases for discipline applicable to other licensees, such as physician assistants (Section 28.4), podiatrists (Section 32.2) and anesthesia assistants (Section 54.2).

**VMS Recommends:** In order to be consistent with other licensees and ensure physicians are on notice of applicable grounds for unprofessional conduct, the Rules should retain a reference to the statutory bases for discipline applicable to physicians.

3. **Section 21.2 and 21.3: Physician Assistant Supervision and Delegation of Tasks**

Discussed in reference to Section 27.0, below

4. **Section 22.0: Continuing Medical Education**

Section 22.1.1 of the Rules states that every physician must certify that he or she has completed thirty hours of qualifying CME during the most recent two-year licensing period “naming the subject, sponsor, date, location and hours” for each activity. However, Section 22.1.1.1 goes on to state that licensees are not required to submit documentation of CME (only retain them in case of audit) and it is VMS’ understanding that the Board does not in fact request or require licensees to submit information regarding the “subject, sponsor, date or location” of each activity.

**VMS Recommends:** To match current practice and simplify the reporting requirements stated for licensees, the Rules should remove the phrase “naming the subject, sponsor, date, location” of CME activities from Section 22.1.1.

5. **Section 27.0: Physician Assistant Supervision, Responsibilities, Delegation Agreement**

VMS received the largest extent of feedback from both physician and physician assistant members regarding Section 27, outlining the requirements for physician assistant supervision and delegation agreements. Members responded with a strong concern that the combined effect of both existing and new proposed changes to Sections 27.0 and 21.2 (investigating physicians at a worksite) is to increase liability for physicians who supervise a PA, create the real or perceived message that the Board is seeking to catch PAs and physicians in improper practice, and dissuade physicians from agreeing to hire or supervise PAs.

Physicians are concerned with the number of detailed requirements for Supervision (Section 27.1) and Delegation Agreements (Section 27.3) combined with a lack of concrete guidance or definition of terms to know when they are meeting those requirements. For example, members questioned how to assess if access to the supervising physician is “regular and effective”? (27.1.1) What constitutes “regular” review of charts and “documentation of such review”

(27.1.2) – can documentation be contained within the charts or is it expected to be in a stand-alone document? How do physicians know if they are in compliance with requirements to review referrals “outside the normal practice patterns” (27.1.4) or patients not improving in a “reasonable manner or time frame” (27.1.5)? Similarly, Section 27.3.2.5 requires a detailed description of the frequency, number and method for chart review, without giving any indication of what the Board finds adequate. The addition of new Section 27.6 (stating that filing a Delegation Agreement with the Board does not constitute Board approval of the substance of the Delegation Agreement) furthers the sense that the PA-MD team is left on its own to guess what the Board wants contained in these agreements.

The number of detailed requirements for supervision and delegation agreements appears unnecessary in light of the general requirements stated in Section 21.3 that it is unprofessional conduct for a physician to delegate to someone who is not qualified by training, experience, education or licensing to perform the tasks or to inappropriately use the services of a PA. VMS also supports and incorporates the comments from the PA Academy of Vermont (PAAV) that the level of detail required is not consistent with the current state of PA practice.

**VMS Recommends:**

- The Board should simplify and reduce the number of requirements in Section 27.1 (Supervision), Delegation Agreement (27.3) and 27.7 (Adequacy of Supervision) and allow more of these details to be addressed at the practice level. VMS supports the language changes proposed by PAAV to these sections.
- For those requirements retained, the Board should add concrete guidance and/or definitions of terms – For example, is there a minimum number and type of cases that are expected to be reviewed? Or a minimum number of times per year a supervising physician and PA are expected to perform a case review?
- The Board should create a work group of Board and non-Board member physicians and PAs to create a more flexible, workable regulatory structure and that also gives needed concrete guidance to physicians entering a supervising role. For example, if the Board is unable to review and approve submitted delegation agreements (as stated in Section 27.6), the work group should draft sample Delegation Agreements for the most common practice settings (for example, outpatient primary care and specialty care) that would meet the requirements expected by the Board.
- VMS also supports the comment submitted by the University of Vermont Medical Center that one business day to notify the Board of the termination of a PA (Sections 27.2.2.5 and 27.2.7) is not sufficient and should be increased to “prompt” notification, defined as within seven days of the termination.

**6. Disciplinary Action: Section 28.5 (PAs); Section 32.3 (Podiatrists); Section 54.0 (Anesthesiologist Assistants) & 68.0 (Radiologist Assistants)**

VMS understands that one purpose of the proposed Rule changes is to consolidate language and clarify the structure of the Rule. The process for disciplinary action for all licensees is contained in Section V of the Rules and not repeated, for example, in Section II for physicians.

**VMS Recommends:** These sections should be removed; at a minimum, the reference to processing complaints in accordance with “Section IV” of the Rules found in Section 28.5, 54.1 and 68.1 should be corrected to Section V. As an alternate to removing these sections, parallel language should be added to Section II for physicians.

7. **Right to Appeal: Section 28.6 (PAs); Section 32.4 (Podiatrists); 55.0 (Anesthesiologist Assistants) & 69.0 (Radiologist Assistants)**

As with item 6, above, it appears that the intent of the rule is to discuss the right to appeal for all licensees in Section 5.0 of the rule. It is not, for example, repeated in Section II for physicians.

**VMS Recommends:** The referenced sections should be removed. Alternatively, parallel language should be added to Section II for physicians.

8. **Rule 34.0, Notice**

The Board proposes to remove the description of the geographic committees currently found in Rule 13.1 and strikes the sentence “Complaints are divided between the three committees based on geography; therefore the Committee are called the North Committee, the Central Committee and the South Committee.” VMS is aware of no other location in statute or rule where the committees are defined. However, later provisions of the rule reference the geographic committees (see 34.2.1.3) as well as the investigating committees, more generally (see 35.1).

**VMS Recommends:** In order to give notice to licensees regarding how the Committee and investigation process proceeds, the Rules should retain a description of the geographic committees as found in current Rule 13.1.

9. **Rule 34.2, Notice to Respondent**

Rule 34.2.1 states that the Board will send the Respondent a copy of the complaint as well as “a copy of the grounds of unprofessional conduct.” As VMS has previously indicated to the Board in conversations regarding investigatory procedures, VMS believes that the licensee should be informed of the specific unprofessional conduct standard or standards upon which the investigation is based. This would provide the licensee with the information necessary to form a meaningful response, rather than trying to identify which, if any, grounds of unprofessional conduct are implicated by facts alleged in a complaint. VMS acknowledges that as an investigation proceeds, additional grounds or bases for unprofessional conduct might be discovered.

VMS Recommends: 34.2.1 should be amended to state that the Respondent will be provided “a copy of the complaint, a copy of the release of medical records..., a copy of the ~~grounds~~ statutory definition of unprofessional conduct, identifying which of the unprofessional conduct standards the investigation is based on, and a standard letter stating that....”

10. **Rule 34.2.1.3; 34.2.3, Time to Respond**

Section 34.2.1.3 of the Rules propose to extend from 10 to 20 days the amount of time a Respondent has to respond to a complaint. Twenty days is calculated from “the date of the letter,” which is typically mailed via standard USPS mail. Under Section 34.2.3, the Respondent can be granted an additional 20 days to respond by the Executive Director or Investigator. While VMS appreciates the increase from 10 to 20 days for a response, this remains a short timeline to meaningfully respond to a complaint of unprofessional conduct, especially if 20 days is calculated from when the letter is dated.

**VMS Recommends:** The initial amount of time granted to a Respondent to respond should be 30 days. This is consistent with the American Medical Association Principles of Due Process for Medical License Complaints, D-275.964, and would allow Respondents meaningful time to contact attorneys, malpractice carriers and/or formulate a response. Alternatively, VMS recommends that Respondents be granted 20 *business days* to respond, calculated *from the date of service*, rather than the date on the complaint. By comparison, Respondents are allowed 20 days from the date of service to respond to a notice of hearing (Rule 38.2.1). Consistent with the Rules of Civil Procedure, the date of service under both Rule 34.2.1.3 and 38.2.1 should be calculated from the date of mailing plus three additional calendar days (Vermont Rules of Civil Procedure Rule 6(e)).

11. **Confidentiality; Access to Documents**

The proposed Rules delete Part 19 of the current Board Rules, outlining what aspect of complaints, investigations and other disciplinary matters can become public. VMS recognizes that the elements of Part 19 are also contained in state statute (26 VSA § 1318) however licensees may look to Section V of the rules for complete information regarding the investigation and discipline process, including what information becomes public.

**VMS Recommends:** The Rules should retain Part 19 or some reference to 26 VSA § 1318 regarding confidentiality and public access to information.

12. **Additional Investigative Procedures**

As Board staff is well aware, VMS and the Board have been in discussion regarding additional policies and procedures for investigating unprofessional conduct cases for over two years. In January 2015, the Board submitted a letter to the House Committee on Health Care and Senate Committee on Health & Welfare, summarizing progress on the negotiations and stating that “the draft document with investigation procedures [will be] incorporated into the Board’s overall draft of revised administrative rules.” As outlined in that letter, the issues of priority to VMS and incorporated into rules for investigative procedures drafted by the Board included:

- Standards for Board-initiated and Executive Director-initiated investigations
- Notice to licensees of Board-initiated cases or when notice may be delayed
- Standards for visits to practices
- Standards for when and how reports are made to law enforcement
- Standards for issuing subpoenas and access to patient records

VMS notes that some issues in discussion have been incorporated into this proposed rulemaking (e.g. changes in Section 34.2 allowing 20 days for response to a complaint and notifying Respondents of a Board-initiated investigation). However, the majority of the Board-drafted procedures for investigation have not been addressed in this proposed rulemaking. Board staff have informed VMS that these issues have been determined to be more appropriate for a separate Board policy. VMS respectfully disagrees and believes that these issues are entirely consistent with the other topics addressed by Section V of the rules, particularly those in Section 34.2, and that creating a stand-alone policy risks duplication, confusion and creating a policy that does not require the public input of a formal rulemaking process.

**VMS Recommends:** The Board should incorporate the Board draft “Rules Governing Board Investigations” into this rulemaking process and reopen the rules for public comment, allowing the investigative procedures to be incorporated into these Rules. Alternatively, the Board should commit to a separate formal rulemaking process to incorporate Rules Governing Board Investigations into the Rules of the Board of Medical Practice no later than the end of 2017.

Thank you for considering the comments of Vermont Medical Society members and we look forward to working with the Department of Health and Board of Medical Practice in finalizing these rules. Please let us know if you have any questions or if we can be of further assistance.