

TITLE 16 OCCUPATIONAL AND PROFESSIONAL LICENSING
CHAPTER 16 OPTOMETRIC PRACTITIONERS
PART 22 DISCIPLINARY PROCEEDINGS

16.16.22.1 ISSUING AGENCY: New Mexico Board of Optometry.
[10-14-95; 16.16.22.1 NMAC - Rn, 16 NMAC 16.22.1, 03-15-2001; A, 03-15-2004; A, 07-06-2012]

16.16.22.2 SCOPE: Part 22 of Chapter 16 applies to all license applicants or New Mexico licensed optometrists.
[10-14-95; 16.16.22.2 NMAC - Rn, 16 NMAC 16.22.2, 03-15-2001]

16.16.22.3 STATUTORY AUTHORITY: Authority for Part 22 of Chapter 16 is the Optometry Act NMSA 1978 Section 61-2-6.D, Section 61-2-13, Section 61-2-14, Section 61-2-17 (1995 Repl. Pamp.) and the Uniform Licensing Act, NMSA 1978, Sections 61-1-1 through 61-1-33 (1993 Repl. Pamp.).
[11-17-73; 3-31-91; 8-21-92; 6-24-94; 10-14-95; 16.16.22.3 NMAC - Rn, 16 NMAC 16.22.3, 03-15-2001]

16.16.22.4 DURATION: Permanent.
[10-14-95; 16.16.22.4 NMAC - Rn, 16 NMAC 16.22.4, 03-15-2001]

16.16.22.5 EFFECTIVE DATE: October 14, 1995, unless a later date is cited at the end of a section.
[8-21-92...10-14-95; 10-15-97; 16.16.22.5 NMAC - Rn, 16 NMAC 16.22.5, 03-15-2001; A, 03-15-2004]

16.16.22.6 OBJECTIVE: The objective of Part 22 of Chapter 16 is to set forth the policies and procedures for processing complaints submitted to the Board against licensees and for instituting disciplinary actions against applicants and licensees.
[10-14-95; 16.16.22.6 NMAC - Rn, 16 NMAC 16.22.6, 03-15-2001]

16.16.22.7 DEFINITIONS: For the purposes of this rule:

A. “Complaint” means a complaint filed with the board against an applicant for licensure or against a licensee.

B. “Complainant” means the party who files a complaint against a licensee or against an applicant for licensure.

C. “Respondent” means the licensure applicant or the licensee who is the subject of the complaint filed with the board.

D. “Hearing” means the formal process whereby the respondent is afforded the opportunity to be heard by the board or its designated hearing officer before the board takes action which might result in disciplinary action against the respondent's application for licensure or his or her license to practice optometry.

E. “Must” means required.

F. “Violation of practice” means a violation of the New Mexico Optometry Act or the rules and regulations duly adopted by the board.

G. “Notice of contemplated action” or “NCA” means the administrative process provided for by the Uniform Licensing Act whereby the respondent is notified of the board's intent to take action based upon the violations of practice charged in the subject complaint, and whereby the respondent is afforded the opportunity for a hearing before the board.

H. “Shall” means mandatory; a requirement.

I. “Should,” means a suggestion or recommendation; not a requirement.

J. “License revocation” means to prohibit the conduct authorized by the license.

K. “License suspension” means to prohibit, for a stated period of time, the conduct authorized by the license.

L. “License restriction” means to restrict or condition the license as to the scope of practice, place of practice, supervision of practice, duration of the licensed status, or other condition as deemed appropriate by the board as a disciplinary measure in connection with a formal disciplinary action.

M. “Redacted” means the act or process of editing or revising the complaint so that the parties that are the subject of the complaint are unknown to the board.

N. “Pre-NCA agreement” means an agreement reached between the board and the respondent as an

option to the formal NCA and hearing administrative hearing process.

O. “Mediation agreement” means an agreement reached through mediation between the board and the respondent as an option to the formal NCA and formal administrative hearing process. [10-15-97; 16.16.22.7 NMAC - Rn, 16 NMAC 16.22.7, 03-15-2001; A, 03-15-2004]

16.16.22.8 DISCIPLINARY PROCEEDINGS: An investigation may be instituted by the board upon the receipt of a written complaint filed by any person, including any member of the board.

A. Written Complaint Required. A complaint filed with the board will be received by the board administrator who will process the complaint and determine how the complaint will be handled.

(1) In cases where it is clearly evident that the complaint does not fall within the board’s statutory authority or jurisdiction, the board administrator will not process the complaint and will inform the complainant of the reasons.

(2) If the complaint appears to contain violations of the board’s statute or its rules and regulations, or if the complaint is not a complicated one, the administrator may present the processed complaint to the entire board in a redacted form.

(3) If the complaint is lengthy, or if it is unclear or questionable as to whether there may have been violations of the board’s statute or its rules and regulations, the administrator shall refer it to the board’s standards of practice committee for review and consideration.

(4) The board may provide the respondent with a copy of the complaint and allow a reasonable time for the respondent to reply to the allegations in the complaint.

(5) The foregoing notwithstanding, the board will not be required to provide the respondent with a notice of the complaint filing, or a copy of the complaint, or any related investigatory evidence prior to the notice of contemplated action if it is determined that disclosure may impair, impede, or compromise the efficacy or integrity of an investigation into the matter.

B. Standards of practice committee appointed. On an annual basis, the board chairperson shall appoint a member or members of the board to a standards of practice committee.

(1) The standards of practice committee shall review all documentation referred to it by the board administrator regarding a subject complaint.

(2) The standards of practice committee may employ an investigator or other persons determined to be necessary in order to assist in the processing and investigation of the complaint.

(a) The standards of practice committee may be authorized by the board to employ such persons without prior approval of the full board.

(b) In such cases, the board administrator will contract for any such required services once budgetary availability is determined.

(3) Upon completion of its investigation the standards of practice committee shall present a summary of the subject complaint to the board with proposed recommendations concerning the proper disposition of the subject complaint.

(4) Upon review, the board shall vote upon the proposed recommendations and either uphold, reverse, or modify the standards of practice committee's recommendations.

(5) The standards of practice committee with the assistance of board counsel may draw up a pre-NCA settlement or mediation agreement proposal with the respondent as a means of resolving the complaint and enter into a proposed settlement agreement with the respondent as a means of resolving a complaint without having to go through the NCA and formal hearing process. However, final approval of the settlement or mediation agreement must be made by the full board prior to execution of the agreement.

C. Standards of practice committee recused from participation in further action: Members of the standards of practice committee who participate in the preparation of recommendations on complaints shall not participate further in any actions initiated by the board against the applicant or the licensee(s) who is the subject of the complaint.

D. Board action: In accordance with those provisions contained within the Uniform Licensing Act, the board may refuse to issue, suspend, or revoke any license upon finding, after a hearing, that the licensee or applicant for licensure has violated those provisions as set forth in Section 61-2-13 of the Optometry Act or those provisions found to constitute unprofessional conduct under Part 21 of the board rules and regulations (16.16 NMAC).

(1) If the board determines that it lacks jurisdiction, or that there is insufficient evidence or cause to issue a notice of contemplated action, the board may vote to dismiss or close the complaint.

(2) If the board determines that there is sufficient evidence or cause to issue a notice of contemplated action, it may vote to refer the complaint to the attorney general's office for possible prosecution in accordance with the provisions contained in the Uniform Licensing Act.

(3) The board may take any other action with regard to a complaint which is within its authority and which is within the law, including referring the complaint to the attorney general and/or the district attorney for prosecution of persons alleged to be practicing without a valid license.

(4) [RESERVED]

(5) **Prehearing motions:** The board may appoint a hearing or presiding officer to decide non-dispositive motions filed prior to a hearing.

(6) [RESERVED]

(7) **Settlement agreements:** Following the issuance of a notice of contemplated action, the board may enter into a settlement or mediation agreement with the respondent as a means of resolving a complaint.

(8) **Settlement officer:** To facilitate approval of settlement agreements at times when it is not feasible to convene a full board meeting, the board may designate one of its members as a "settlement officer", and authorize that member to approve settlements in appropriate cases.

E. Costs of disciplinary proceedings: Licensees shall bear all costs of disciplinary proceedings unless they are excused by the board from paying all or part of the fees, or if they prevail at the hearing and an action specified in Section 61-1-3 of the Uniform Licensing Act is not taken by the board.

F. Private cause of action: Neither the action nor inaction of the board on any complaint shall preclude the initiation of any private cause of action by the complainant.

G. License returned to the board: The wall license, renewal license, and therapeutic certificates issued by the board must be returned to the board subsequent to disciplinary revocation or suspension. The wall license, renewal license, and therapeutic certificates must be returned to the board in person or by registered mail no later than twenty (20) days after the suspension or revocation order by the board.

H. ULA protection from liability for complainant: There shall be no liability on the part of, and no action for damages against, a person who provides information to the board in good faith and without malice in the reasonable belief that such information is accurate. A licensee who directly or through an agent intimidates, threatens, injures or takes any adverse action against a person for providing information to the board shall be subject to disciplinary action.

I. Federal fraud and abuse databank: In accordance with federal requirements imposed by the enactment of the Health Insurance Portability and Accountability Act of 1996, also known as the Kassebaum-Kennedy bill, the board shall report any final adverse actions taken against a licensee to the federal fraud and abuse databank established under that act.

(1) The board may report to the databank disciplinary actions taken by the board that do not contain an admission or finding of guilt or liability against applicants or licensees.

(2) The board must report to the databank disciplinary actions taken by the board that do contain an admission or finding of guilt or liability against applicants or licensees.

J. National optometric database. All final adverse actions shall also be reported by the board to the association of regulatory boards of optometry (ARBO) national optometric database (NODB).

(1) The board may report to the databank disciplinary actions taken by the board that do not contain an admission or finding of guilt or liability against applicants or licensees.

(2) The board must report to the databank disciplinary actions taken by the board that do contain an admission or finding of guilt or liability against applicants or licensees.

[8-21-92; 10-14-95; A, 10-15-97; 16.16.22.8 NMAC - Rn, 16 NMAC 16.22.8, 03-15-2001; A, 03-15-2004]

HISTORY of 16.16.22 NMAC:

Pre-NMAC History:

Material in the part was derived from that previously filed with the commission of public records - state records center and archives:

NMBO Rule 22, Board Rule No. 22 - Disciplinary Proceedings, filed 7-22-92.

History of Repealed Material: [Reserved]

Other History:

16 NMAC 16.22, Disciplinary Proceedings, filed 9-21-95, replaced that relevant portion of NMBO Rule 22 - Board

Rule No. 22, Disciplinary Proceedings.
16 NMAC 16.22, Disciplinary Proceedings, filed 9-21-95, was renumbered and reformatted **to** 16.16.22,
Disciplinary Proceedings, effective 03-15-2001.