

# **Overview of the LAW and PROCESS for Disciplinary actions before the California Acupuncture Board**

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9:30 a.m.**

**Acupuncture Board AG Liaison**

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**Business and  
Professions Code §  
4925, et. seq.,**

**Acupuncture  
Licensure Act.**



# **Section 4928.1, Priority of the Board; Protection of the Public**

**“Protection of the public shall be the highest priority for the Acupuncture Board in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be protected, the protection of the public shall be paramount.”**



# Functions of the Board separate from AGO



- **General administration of Board**
- **Rulemaking**
- **Standards of care, duties of professionalism, scope of practice**
- **Licensure Requirements**
- **Credentialing Program**
- **Continuing Education Requirements**
- **Probation Monitoring**
- **Funding**
- **Fee schedules**

# Role of AGO is in Enforcement



- The AGO helps the Board to:
  - File and Prosecute Accusations
  - Conduct Probation Violation Hearings
  - File Statement of Issues (contested licensure applications)
  - Conduct Contested Citation Hearings, and;
  - Appear at Petitions (Govt. Code 11522).

# How is administrative discipline different from other legal disputes?



- Criminal: Liberty Interest  
→ Beyond a Reasonable Doubt
- Civil: Monetary Interest  
→ More likely than Not

## What about your license?

Property Right (Livelihood)

→ Clear and Convincing Evidence

Proceedings are Governed by the  
Administrative Procedures Act  
(Government Code 11370, et. seq.)

Civil in nature with quasi-criminal procedures  
mixed in.

# Business and Professions Code Sections Grounds for Action

- Business and Professions Code section 4955  
(subsections a through l, broad coverage includes use of drugs and alcohol, conviction of a crime, false advertising, failure to prevent blood-borne illness, harassment, and abandonment.)
- Business and Professions Code section 4955.1  
(fraudulent acts, and record keeping violations)
- Business and Professions Code section 4955.2  
(repeated negligence, gross negligence, and incompetence)

We also must look at Regulations

For example, Title 16, Code of Regulations 1399.469.2 (Licensee arrest and crime reporting requirements)

And other Business and Profession Code sections, B and P 726 (sexual abuse/misconduct)



# Let's unpack that a little, shall we?



**These are the things that the Board can do re: a license application**

- **Issue**
- **Issue subject to terms and conditions, per B and P 480**
- **Deny**



# The Board also can do a few things if there is a Disciplinary Case against a Licensee

- Issue a Public Reproval
  - B and P 495
- Revoke and Stay with Probation Conditions
  - Set forth in the Disciplinary Guidelines
  - Can include a suspension period
- Accept a License Surrender
- Revoke a License

**When can the Board take these actions against a license? When those following events occur. The events broadly speaking break down into these categories:**

- **Conviction of a crime (substantially related)**
- **Sexual Misconduct with a Patient**
- **Use of Alcohol/controlled substances in dangerous manner; self, others or to the public**
- **Advertising that violates BP section 17500, Misleading**
- **Dishonesty or Fraud (substantially related)**
- **Violations of the standard of care (negligence, gross negligence)**
- **Poor Medical Record Keeping, Billing Issues**
- **Violation of Blood Borne-Illness Protocols**
- **B and P 119, allowing license to be used in a crime (prostitution)**

# Substantially related

- ***Griffiths v. Superior Court***—There must be a nexus between conduct or crime and practicing a profession. The purpose of disciplining a professional license is to protect the public, not to punish or impose moral judgments. Harm to a patient or client is not required because the purpose of regulating professions is to prevent harm in the future. There is a nexus if the conduct could cause a lack of professional fitness. Procedural vs. Substantive due process requirement.

# Crimes

- *Arneson v. Fox*—Plea of “no contest” will be treated as a guilty plea for licensing purposes.
- *Alvarez v. Sanchez*—Privilege against self-incrimination is not absolute outside of criminal cases. In administrative licensing proceedings failure to make a statement can be used against you.



# Use of Alcohol or Drugs

- ***Watson v. Superior Court***—Analyzes § 2239 which is very similar to the Board's section 2533, subdivision (c). In *Watson*, the court held that the Medical Board may discipline a physician for using alcohol in a manner dangerous to self or to others, even without a conviction and even if the use of alcohol did not directly affect the practice. Reasoning is that drinking and driving and being so drunk in public that you are unable to care for your own safety or block a public highway shows lack of concern for personal and public safety and an inability to follow the law which does not reflect well on following practice and professional rules.



# **Incompetence, Gross Negligence, and Repeated Negligent Acts**

**They all relate to the standard of care.**

**Standard of Care: The degree of care that reasonable prudent practitioner would provide under the same or similar circumstances.**



# What is the difference?

- **Gross Negligence:** The want of even scant care. (*Eastburn v. Regional Fire Protection Authority.*)
- **Simple Negligence:** A lesser departure from the standard of care. Must be more than one.
- **Incompetence:** The absence of qualification, ability or fitness to perform a prescribed duty or function. (*Sherman L. Kearl v. BMQA*)



## **Example of how this works in an actual case.**



Example: A complainant filed with the Board triggers an investigation; patient records will be reviewed and may be subpoenaed; the licensee and witnesses will be interviewed. The evidence obtained will be provided to an expert, who will render an opinion as to whether the licensee violated the standard of care.

# Burden of Proof



- The party who must prove the facts and the law to establish grounds for action.
- May be the Board (in cases of enforcement of discipline action against an existing license).
- May be the individual (as in cases of an applicant seeking a license or petitioning for reinstatement).
- Degree of proof? Clear and convincing evidence for an Accusation, or preponderance of the evidence for a probation violation. (Depends on the nature of the proceeding)

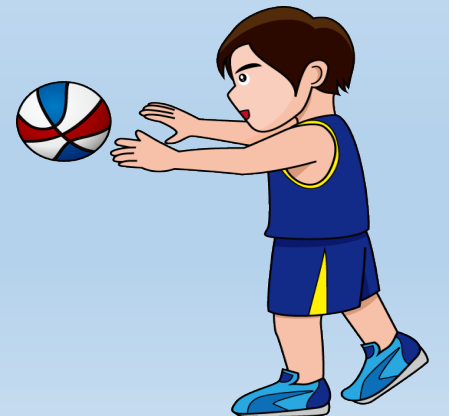
# Disciplinary Process

- **Complaint**
- **Investigation**
- **Referral to AGO**
- **File Accusation**
- **Default/Settlement/Hearing**
- **Proposed Decision**
- **Board Review/Final Decisions**
- **Court Review—Writ**



# Functions of the Players in Process

- Executive Officer. The “Complainant” in disciplinary actions, such as a Statement of Issues, Accusation, or Petition to revoke probation.
- DCA Legal Counsel advises the Board.
- Board Members make the decision.
- AG’s Office carries out the enforcement sought by the Executive Officer.
- ALJ Facilitates the Hearing, i.e. procedural aspect of the Hearing.
- Respondent seeks to obtain or maintain license.



# Justice is Blind

## BOARD AS JUDGE

- **Decision-makers cannot participate in the investigation, hearing, or negotiation process.**
- **No Ex-Parte Communications**
- **Division of Government**
- **Proper Forum to Contact a DAG about a pending decision:**
  - **Before the entire Board in closed session to explain a stipulation.**
  - **We can't provide guidance after a contested hearing under the APA**



# Questions?

