

Department of Consumer Affairs

ACUPUNCTURE BOARD

*DISCIPLINARY
GUIDELINES*

INTRODUCTION

The Acupuncture Board* (Board) is a consumer protection agency with the primary mission of protecting consumers of acupuncture services from potentially harmful licensees. In keeping with its obligation to protect the consumer, the Board has adopted the following recommended guidelines for disciplinary orders and conditions of probation for violations of the Acupuncture Licensure Act.

The Board recognizes that a rare individual case may necessitate a departure from these guidelines for disciplinary order. However, in such a rare case, the mitigating circumstances must be detailed in the "Findings of Fact" which is in every Proposed Decision or Stipulation.

If at the time of hearing, the Administrative Law Judge finds that the respondent, for any reason, is not capable of safe practice, the Board expects outright revocation of the license. This is particularly true in cases of patient sexual abuse or bodily harm. In less egregious cases, a stayed revocation with probation pursuant to the attached Penalty Guidelines would be expected.

The Board has adopted the "Department of Consumer Affairs, Acupuncture Board, Disciplinary Guidelines, 1996" as an administrative regulation pursuant to the Administrative Procedures Act. (Government Code Section 11400.20, 11400.21 and 11425.50, Sub. (E); Operative 7/1/97 [Statutes of 1995, Chapter 938, Section 98].)

* Pursuant to Senate Bill 1980, effective January 1, 1999, the Acupuncture Committee is renamed the Acupuncture Board.

TERMS AND CONDITIONS

Terms and conditions of probation are divided into two categories. The first category consists of **optional terms and conditions** that may be appropriate as demonstrated in the Penalty Guidelines depending on the nature and circumstances of each particular case. The second category consists of the **standard terms and conditions** which must appear in all proposed decisions and proposed stipulated settlements.

To enhance the clarity of a proposed decision or stipulation, the Board requests that all optional conditions that are being imposed be listed first in sequence followed immediately by all of the standard terms and conditions.

OPTIONAL TERMS AND CONDITIONS

Listed below are optional conditions of probation which the Board would expect to be included in any proposed decision as appropriate. The terms are not mutually exclusive, but can and should be combined with each other, as appropriate to a particular case. Other terms and conditions may be specified in stipulations for inclusion at the request of the Board depending on the unique aspects of an individual case.

1. Actual Suspension

As part of the probation, respondent is suspended from the practice of acupuncture for ____ days beginning with the effective date of this decision.

2. Psychological Evaluation

Within 90 days of the effective date of this decision and on a periodic basis thereafter as may be required by the Board or its designee, respondent shall undergo a psychological evaluation (and psychological testing, if deemed necessary) by an Board appointed California licensed psychologist. The Board shall receive a current DSM-III-R diagnosis and a written report regarding the respondent's judgment and/or ability to function independently as an acupuncturist with safety to the public, and whatever other information the Board deems relevant to the case. Respondent shall execute a release authorizing the evaluator to release all information to the Board. The completed evaluation is the sole property of the Board.

If the Board concludes from the results of the evaluation that respondent is unable to practice independently and safely, he/she shall immediately cease practice and shall not resume practice until notified by the Board. If the Board concludes from the results of the evaluation that respondent would benefit from ongoing psychotherapy, respondent shall comply with the Board's directives in that regard.

Respondent shall pay all costs associated with the psychological evaluation. Failure to pay costs will be considered a violation of the probation order.

NOTE: Psychological evaluations shall be utilized when an offense calls into question the judgment and/or emotional and/or mental condition of the respondent or where there has been a history of abuse or dependency of alcohol or controlled substances. When appropriate, respondent shall be barred from rendering acupuncture services under the terms of probation until he or she has undergone an evaluation, the evaluator has recommended resumption of practice, and the Board has accepted and approved the evaluation.

3. Physical Examination

Within 90 days of the effective date of this decision, respondent shall undergo a physical examination by a licensed physician and surgeon approved by the Board. Respondent shall bear all costs of such an examination. The Board shall receive the physician's report which shall provide an assessment of respondent's physical condition and capability to safely provide acupuncture services. If medically determined, a recommended treatment program will be instituted and followed by the respondent with the physician providing written progress reports to the Board on a quarterly basis or as otherwise determined by the Board.

It shall be the respondent's responsibility to assure that the required progress reports are filed in a timely manner.

NOTE: This condition permits the Board to require the probationer to obtain appropriate treatment for physical problems/disabilities which could affect safe practice of acupuncture. The physical examination can also be conducted to ensure that there is no physical evidence of alcohol/drug abuse.

4. Practice Monitor

Within 90 days of the effective date of this decision, respondent shall submit to the Board for its prior approval, the name and qualifications of one or more California licensed acupuncturists whose license is clear (no record of complaints) and current and who has agreed to serve as a practice monitor. Once approved, the monitor shall submit to the Board a plan by which respondent's practice shall be monitored. The monitor's education and experience shall be in the same field of practice as that of the respondent. The monitor shall submit written reports to the Board on a quarterly basis verifying that monitoring has taken place and providing an evaluation of respondent's performance. It shall be respondent's responsibility to assure that the required reports are filed in a timely fashion. The respondent shall provide access to the monitor of respondent's fiscal and client records and shall be permitted to make direct contact with patients. Further, the monitor shall have no prior business, professional, personal or other relationship with respondent. Respondent shall execute a release authorizing the monitor to divulge any information that the Board may request.

Respondent shall notify all current and potential patients of any term or condition of probation which will affect their treatment or the confidentiality of their records (such as this condition which requires a practice monitor). Such notification shall be signed by each patient prior to continuing or commencing treatment.

If the monitor quits or is otherwise no longer available, respondent shall not practice until a new monitor has been approved by the Board. All costs of monitoring shall be borne by the respondent. Monitoring shall consist of at least one hour per week of individual face to face meetings.

NOTE: Monitoring shall be utilized when respondent's ability to function independently is in doubt, as a result of a deficiency in knowledge or skills, or as a result of questionable judgment.

5. Restriction of Patient Population

NOTE: In cases wherein some factor of the patient population at large (e.g. age, gender) may put a patient at risk if in treatment with the respondent, language appropriate to the case may be developed to restrict such a population. The language would vary greatly by case.

6. Examination(s)

Respondent shall take and pass the written and/or clinical licensing examination(s) prior to the termination of probation. The examinations shall be taken on regularly scheduled exam dates. Respondent shall pay the established examination fee.

If respondent fails the examination three times, his/her license to practice acupuncture is suspended until the examination is successfully passed.

NOTE: In cases involving evidence of severe deficiencies in the body of knowledge required to be minimally competent to practice independently, it may be appropriate to require the respondent to take and pass both the written and clinical examinations during the course of the probation period. In some instances, it may be appropriate for practice to be suspended until the examination is passed (condition precedent).

7. Restitution

Within 90 days of the effective date of this Decision, respondent shall provide proof to the Board of restitution in the amount of \$_____ paid to _____.

NOTE: In offenses involving breach of contract, restitution is an appropriate term of probation. The amount of restitution shall be the amount of actual damages sustained as a result of breach of contract. Evidence relating to the amount of restitution would have to be introduced at the Administrative hearing.

8. Alcohol and Drug Abuse Treatment

Effective 30 days from the date of this Decision, respondent shall enter an inpatient or outpatient alcohol or other drug abuse recovery program (a minimum of six (6) months duration) or an equivalent program as approved by the Board.

Quitting the program without permission or being expelled for cause shall constitute a violation of probation by respondent. Subsequent to the program, respondent shall participate in on-going treatment such as receiving individual and/or group therapy from a psychologist trained in alcohol and drug abuse treatment; and/or attend Twelve Step meetings or the equivalent as approved by the Board at least three times a week during the first year of probation; and/or other substance abuse recovery programs approved by the Board. Respondent shall pay all costs of treatment and therapy, and provide documentation of attendance at Twelve Step meetings or the equivalent as approved by the Board. The psychologist shall confirm that respondent has complied with the requirements of this Decision and shall notify the Board immediately if he or she believes the respondent cannot safely render acupuncture services. Respondent shall execute a release authorizing the psychologist to divulge the aforementioned information to the Board.

NOTE: Alcohol and other drug abuse treatment shall be required in addition to other terms of probation in cases where the use of alcohol or other drugs by respondent has impaired respondent's ability to safely provide acupuncture services to patients. This condition must be accompanied by condition #9.

9. Abstain from Drugs and Alcohol and Submit to Tests and Samples

Respondent shall abstain completely from the personal use or possession of controlled substances as defined in the California Uniform Controlled Substances Act (Division 10, commencing with section 11000, Health and Safety Code) and dangerous drugs as defined by Section 4211 of the Business and Professions Code, or any drugs requiring a prescription. Respondent shall abstain completely from the use of alcoholic beverages. Respondent shall undergo random, biological fluid testing as determined by the Board. Respondent shall bear all costs of such testing. The length of time and frequency will be determined by the Board. Any confirmed positive finding will be considered a violation of probation.

NOTE: This condition provides documentation that the probationer is substance or chemical free. It also provides the Board with a mechanism through which to require additional laboratory analyses for the presence of narcotics, alcohol and/or dangerous drugs when the probationer appears to be in violation of the terms of probation or appears to be under the influence of mood altering substances.

10. Reimbursement for Probation Surveillance Monitoring

Respondent shall reimburse the Board for the hourly costs it incurs in monitoring the probation to ensure compliance for the duration of the probation period.

NOTE: This condition can only be included in a proposed stipulation, since there is no legal authority to include it in proposed decisions.

11. Coursework

Respondent shall take and successfully complete not less than twenty (20) semester units or thirty (30) quarter units of coursework in the following area(s) _____. All coursework shall be taken at the graduate level at a school approved by the Board. Classroom attendance must be specifically required. Course content shall be pertinent to the violation and all coursework must be completed within the first 3 years of probation. The required coursework must be in addition to any continuing education courses that may be required for license renewal.

Within 90 days of the effective date of this decision, respondent shall submit a plan for the Board's prior approval for meeting the educational requirements. All costs of the coursework shall be borne by the respondent.

12. Community Service

NOTE: In addition to other terms of probation, community service work may be required for relatively minor offenses which do not involve deficiencies in knowledge, skills or judgment. Community service may be appropriately combined with restitution or other conditions as a term of probation. Specific language applicable to the case shall include the requirement that services rendered shall be professional in nature and under the auspices of a governmental entity or a non-profit corporation tax exempt under the Internal Revenue Code.

STANDARD TERMS AND CONDITIONS

(To be included in all Decisions)

13. Obey All Laws

Respondent shall obey all federal, state and local laws and all regulations governing the practice of acupuncture in California. A full and detailed account of any and all violations of law shall be reported by the respondent to the Board in writing within seventy-two (72) hours of occurrence.

14. Quarterly Reports

Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Board, stating whether there has been compliance with all the conditions of probation.

15. Surveillance Program

Respondent shall comply with the Board's probation surveillance program and shall, upon reasonable notice, report to the assigned investigative district office. Respondent shall contact the assigned probation surveillance monitor regarding any questions specific to the probation order. Respondent shall not have any unsolicited or unapproved contact with 1) victims or complainants associated with the case; 2) Board members or members of its staff; or 3) persons serving the Board as expert examiners.

16. Interview with the Board or Its Designee

Respondent shall appear in person for interviews with the Board or its designee upon request at various intervals and with reasonable notice.

17. Changes of Employment

Respondent shall notify the Board in writing, through the assigned probation surveillance compliance officer of any and all changes of employment, location and address within 30 days of such change.

18. Tolling for Out-of-State Practice or Residence

In the event respondent should leave California to reside or to practice outside the State, respondent must notify the Board in writing of the dates of departure and return. Periods of residency or practice outside California will not apply to the reduction of this probationary period.

19. Employment and Supervision of Trainees

Respondent shall not employ or supervise or apply to employ or supervise acupuncture trainees during the course of this probation. Respondent shall terminate any such supervisory relationship in existence on the effective date of this probation.

20. Cost Recovery

Respondent shall pay to the Board its costs of investigation and enforcement in the amount of \$ _____.

21. Violation of Probation

If respondent violates probation in any respect, the Board may, after giving respondent notice and the opportunity to be heard, revoke probation and carry out the disciplinary order that was stated. If an accusation or petition to revoke probation is filed against respondent during probation, the Board shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final. No petition for modification or termination of probation shall be considered while there is an accusation or petition to revoke probation pending against respondent.

22. Completion of Probation

Upon successful completion of probation, respondent's license will be fully restored.

PENALTY GUIDELINES

The following is an attempt to provide information regarding the range of offenses under the Acupuncture Licensure Act and the appropriate penalty for each offense. Examples are given for illustrative purposes, but no attempt is made to catalog all possible offenses. The Board recognizes that the penalties and conditions of probation listed are merely guidelines and that individual cases will necessitate variations, which take into account each case's unique circumstances.

If there are deviations or omissions from the guidelines in formulating a Proposed Decision, the Board always appreciates it if the Administrative Law Judge hearing the case will include some explanation of this in the Proposed Decision so that the circumstances can be better understood by the Board during its review and consideration of the Proposed Decision for final action.

All references are to the specified subsections of section **4955** of the Business and Professions Code.

A. SECURING A CERTIFICATE BY FRAUD OR DECEIT

Revocation is the only suitable penalty inasmuch as the license would not have been issued but for the fraud or deception. If the fraud is substantiated prior to issuance of the license or registration, then denial of the application is the only suitable penalty.

B. COMMITTING A FRAUDULENT OR DISHONEST ACT AS AN ACUNCTURIST RESULTING IN INJURY TO ANOTHER

MAXIMUM: Dishonest or fraudulent act resulting in substantial harm to patient(s)
Penalty: Revocation; denial of license.

MINIMUM: Dishonest or fraudulent t resulting in minimal harm to patient(s)
Penalty: 5 years probation, minimum 60 days suspension [1], psychological evaluation and ongoing therapy if appropriate [2], full restitution [7], written and clinical examination [6], coursework in ethics [11], community service [12], and standard terms and conditions [13 - 22].

C. USING ANY CONTROLLED SUBSTANCE, OR DANGEROUS DRUG, OR ALCOHOLIC BEVERAGE TO AN EXTENT OR IN A MANNER DANGEROUS TO HIMSELF OR HERSELF, OR TO ANY OTHER PERSON, OR THE PUBLIC, AND TO AN EXTENT THAT SUCH USE IMPAIRS HIS OR HER ABILITY TO ENGAGE IN THE PRACCE OF ACUPUNCTURE WITH SAFETY TO THE PUBLIC

MAXIMUM: Abuse of alcohol or a controlled substance resulting in substantial harm to patient(s).
Penalty: Revocation; denial of license.

MINIMUM: Abuse of alcohol or controlled substance to the extent that ability to safely perform acupuncture services is impaired.
Penalty: 5 years probation, actual suspension [1], participation in an alcohol/drug abuse treatment program and continuing therapy with a psychologist trained in substance abuse treatment [8], biological fluid testing [9], practice monitor [4], physical examination (if appropriate) [3], and standard terms and conditions [13 - 22].

D. CONVICTION OF A CRIME SUBSTANTIALLY RELATED TO THE FUNCTIONS OF AN ACUPUNCTURIST, THE RECORD OF CONVICTION BEING CONCLUSIVE EVIDENCE THEREOF

MAXIMUM: Convictions of a crime of violence against person or property or economic crime resulting in substantial harm to patient(s).

Penalty: Revocation; denial of license.

MINIMUM: Conviction of other crime resulting in little or no harm to patient(s).

Penalty: 5 years probation, minimum 30 day suspension [1], ethics course [11], restitution (if appropriate) [7], community service [12], and standard terms and conditions [13 - 22].

E. IMPROPER ADVERTISING

Repeated infraction of statute regarding advertising.

Penalty: 5 years probation, written and clinical examination [6], coursework in ethics [11], community service [12], and standard terms and conditions [13 - 22].

F. VIOLATING OR CONSPIRING TO VIOLATE THE TERMS OF THIS CHAPTER

No guidelines drafted.

Refer to underlying statute or regulation.

G. GROSS NEGLIGENCE IN THE PRACTICE OF ACUPUNCTURE

MAXIMUM: Gross negligence resulting in substantial harm to patient(s).

Penalty: Revocation; denial of license.

MINIMUM: Gross negligence resulting in minimal harm to patient(s).

Penalty: 5 years probation, minimum 60 days suspension [1], psychological evaluation prior to resumption of practice (condition precedent) [2], practice monitor [4], clinical examination [6], coursework [11], and standard terms and conditions [13 - 22].

H. REPEATED NEGLIGENT ACTS

MAXIMUM: Repeated negligent acts resulting in substantial harm to patient(s).

Penalty: Revocation; denial of license.

MINIMUM: Repeated negligent acts resulting in minimal harm to patient(s).

Penalty: 5 years probation, minimum 90 days suspension [1], psychological evaluation prior to resumption of practice (condition precedent) [2], practice monitor [4], clinical examination [6], coursework [11], and standard terms and conditions [13 - 22].

I. INCOMPETENCE

MAXIMUM: Incompetence resulting in harm to patient(s).

Penalty: Revocation; denial of license.

MINIMUM: Incompetence resulting in minimal harm to patient(s).
Penalty: 5 years probation, minimum 60 days suspension [1], psychological evaluation prior to resumption of practice (condition precedent) [2], practice monitor [4], clinical examination [6], coursework [11], and standard terms and conditions [13 - 22].

The following makes reference to **4935** and are in conjunction with **4955(f)** of the Business and Profession Code.

J. IMPERSONATING ANOTHER PERSON HOLDING AN ACUPUNCTURE LICENSE OR ALLOWING ANOTHER PERSON TO USE HIS OR HER LICENSE

MAXIMUM: Impersonation or use resulting in substantial harm to patient(s).
Penalty: Revocation; denial of license, or written and clinical examination application.

MINIMUM: Impersonation or use resulting in little or no harm to patient(s).
Penalty: 5 years probation / actual suspension [1], coursework in ethics [11], community service [12], and standard terms and conditions [13 - 22].

K. AIDING OR ABETTING UNLICENSED PRACTICE

MAXIMUM: Aiding or abetting unlicensed practice which results in harm to patient(s).
Penalty: Revocation; denial of license.

MINIMUM: Aiding or abetting unlicensed practice which results in minimal harm to patient(s).
Penalty: 5 years probation / actual suspension [1], oral examination [6], coursework [11], and standard terms and conditions [13 - 22].

ACCUSATIONS

The Board has the authority, pursuant to Section 125.3 of the Business and Professions Code, to recover costs of investigation and prosecution of its cases. The Board requests that this fact be included in the pleading and made part of the accusation.

STATEMENTS OF ISSUES

The Board will file a Statement of Issues to deny an application of a candidate for the commission of an act which if committed by a licensee would be cause for license discipline.

STIPULATED SETTLEMENTS

The Board will consider agreeing to stipulated settlements to promote cost effective consumer protection and to expedite disciplinary decisions. The respondent should be informed that in order to stipulate to a settlement with the Board, he/she must admit to the violations set forth in the accusation. All proposed decisions must be accompanied by a memo from the Deputy Attorney General addressed to Board members explaining the background of the case, defining the allegations, mitigating circumstances, admissions and proposed penalty along with a recommendation.

PROPOSED DECISIONS

The Board requests that proposed decisions include the following:

1. Names and addresses of all parties to the action.
2. Specific code section violated with the definition of the code in the Determination of Issues.
3. Clear description of the acts or omissions which caused the violation.
4. Respondent's explanation of the violation if he/she is present at the hearing in the findings of fact.
5. Explanation of deviation from Board's Disciplinary Guidelines.

When a probation order is imposed, the Board requests that the order first list any combination of the Optional Terms and Conditions as they may pertain to the particular case followed by **all** of the Standard Terms and Conditions [13 - 22].

If the respondent fails to appear for his/her scheduled hearing or does not submit a Notice of Defense form, such inaction shall result in a default decision to revoke licensure or deny application.

REINSTATEMENT/PENALTY RELIEF HEARINGS

The primary concerns of the Board at reinstatement or penalty relief hearings are that the evidence presented by the petitioner of his/her rehabilitation. The Board is not interested in retrying the original revocation or probation case.

The Board will consider the following criteria of rehabilitation:

1. Nature and severity of the act(s) or offense(s)
2. Total criminal record
3. The time that has elapsed since commission of the act(s) or offense(s)
4. Whether the licensee has complied with any terms of parole, probation, restitution or any other sanctions lawfully imposed against such person
5. If applicable, evidence of expungement proceedings pursuant to Section 1203.4 of the **Penal Code**
6. Evidence, if any, of rehabilitation submitted by the licensee or registration holder.

In the Petition Decision, the Board would appreciate a summary of the offense and the specific codes violated which resulted in the revocation, surrender or probation of the license.

The Board requests that comprehensive information be elicited from the petitioner regarding his/her rehabilitation. The petitioner should provide details which include:

- A. Continuing education pertaining to the offense and its effect on the practice of acupuncture.
- B. Specifics of rehabilitative efforts and results which should include programs, psychotherapy, medical treatment, etc., and the duration of such efforts.
- C. If applicable, copies of court documents pertinent to conviction, including documents specifying conviction and sanctions, and proof of completion of sanctions.
- D. If applicable, copy of Certificate of Rehabilitation or evidence of expungement proceedings.
- E. If applicable, evidence of compliance with and completion of terms of probation, parole, restitution, or any other sanctions.
- F. A culpability or non-culpability statement.

If the Board should deny a request for reinstatement of licensure or penalty relief, the Board requests that the Administrative Law Judge provide technical assistance in the formulation of language clearly setting forth the reasons for denial. Such language would include methodologies or approaches which would demonstrate rehabilitation.

If a petitioner fails to appear for his/her scheduled reinstatement or penalty relief hearing, such action shall result in a default decision to deny reinstatement of the license or reduction of penalty.

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