

243 CMR: BOARD OF REGISTRATION IN MEDICINE

243 CMR 4.00: DISCIPLINARY PROCEEDINGS FOR ACUPUNCTURISTS

Section

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4.01: Scope and Construction of Rules

(1) Procedure Governed. 243 CMR 4.00 governs the disposition of matters relating to the practice of acupuncture by any person holding or having held a license issued by the Board of Registration in Medicine's Committee on Acupuncture under M.G.L. c. 112, §§ 148 through 162, and the conduct of adjudicatory hearings by the Committee. 243 CMR 4.00 is based on the principle of fundamental fairness to acupuncturists and patients and shall be construed to secure a speedy and just disposition. The Board and Committee may issue standing orders consistent with 243 CMR 4.00 and 801 CMR 1.00: *Standard Adjudicatory Rules*.

(2) Definitions. For the purposes of 243 CMR 4.00 and 5.00, the terms below have the following meanings:

Adjudicatory Hearing: a formal administrative hearing conducted pursuant to M.G.L. c. 30A.

Administrative Magistrate: a Hearing Officer from the Division of Administrative Law Appeals, conducting an adjudicatory hearing on behalf of the Committee, pursuant to M.G.L. c. 30A and 801 CMR 1.00.

Board: the Board of Registration in Medicine, including, but not limited to, its Acupuncture Unit, Data Repository Unit, Enforcement Unit, Patient Care Assessment Unit, Legal Unit, Licensing Unit, and its agents and employees.

Committee: the Committee on Acupuncture of the Board of Registration in Medicine, established under the provisions of M.G.L. c. 112, § 149.

Complaint: a communication filed with the Board or Committee which charges an acupuncturist with misconduct.

Informal: not subject to strict procedural or evidentiary rules.

Licensee: a person holding or having held any type of license issued pursuant to M.G.L. c. 112, §§ 148 through 162.

Party: a respondent, a complaint counsel representing the Enforcement Unit, or an intervenor in an adjudicatory proceeding pursuant to 801 CMR 1.01(9).

Respondent: the licensee named in a Statement of Allegations.

Statement of Allegations: a paper served by the Committee upon a licensee ordering the licensee to appear before the Committee for an adjudicatory proceeding and to show cause why the licensee should not be disciplined; a "Statement of Allegations" is an "Order to Show Cause" within the meaning of 801 CMR 1.01(6)(d).

4.02: General Provisions

(1) Communications. All written correspondence should be addressed to and filed with the Board of Registration in Medicine, Committee on Acupuncture, at its official mailing address, 200 Harvard Mill Square, Suite 330, Wakefield, Massachusetts 01880.

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- (2) (a) Service. The Committee shall provide notice of its actions in accordance with 801 CMR 1.01(4)(b) and (5)(f), or otherwise with reasonable attempts at in-hand service, unless the Respondent otherwise has actual notice of the committee's action. 243 CMR 4.00 provides that the Committee must notify parties, service may be made by first class mail. A notice of appearance on behalf of a Respondent shall be deemed an agreement to accept service of any document on behalf of the Respondent, including a Final Decision and Order of the Committee. When an Administrative Magistrate has jurisdiction over an adjudicatory proceeding, proper service by the Respondent includes filing copies of all papers and exhibits with:
1. the Committee, care of the Director of the Acupuncture Unit;
 2. the Administrative Magistrate assigned to the adjudicatory proceeding; and
 3. the Complaint Counsel assigned to the adjudicatory proceeding. All papers served must be accompanied by a certificate of service.
- (b) Notice to Committee Members. A Respondent (or his/her representative) and other persons shall not engage in *ex parte* communications with individual Committee members regarding a disciplinary proceeding. Communications to Committee members regarding disciplinary proceedings shall be in writing and directed to Committee members as follows: Eight copies to the Executive Director of the Board of Registration in Medicine, one copy to the Director of the Acupuncture Unit, and one copy to the Director of the Enforcement Unit.
- (3) Date of Receipt. Communications are deemed received on the date of actual receipt by the Committee.
- (4) Computation of Time. The Committee shall compute time in accordance with 801 CMR 1.01(4)(c).
- (5) Extension of Time. The Committee in its discretion may extend any time limit prescribed or allowed by 243 CMR 4.00.
- (6) Identification and Signature; Paper Size. All papers filed with the Committee in the course of a disciplinary proceeding must contain the name, address, and telephone number of the party making the filing, and must be signed by either the party or an authorized representative. Paper size shall be 8 ½ inches by 11 inches.
- (7) Decisions by the Committee; Quorum. Unless 243 CMR 4.00 provides otherwise, a majority of members present and voting at a Committee meeting shall make all decisions and the Committee shall record its decisions in the minutes of its meetings. A quorum is a majority of the Committee, excluding vacancies.
- (8) Availability of Committee Records to the Public.
- (a) The availability of the Committee's records to the public is governed by the provisions of the Public Records Law, M.G.L. c. 66, § 10, and M.G.L. c. 4, § 7, clause 26, as limited by the confidentiality provisions of the Committee's regulations. A file or some portion of it is not a public record if the Committee determines that disclosure may constitute an unwarranted invasion of personal privacy, prejudice the effectiveness of law enforcement efforts (if the records were necessarily compiled out of public view), violate any provision of state or federal law, or if the records are otherwise legally exempt from disclosure.
 - (b) Before the Committee issues a Statement of Allegations, dismisses a complaint, or takes other final action, the Committee's records concerning a disciplinary matter are confidential.
 - (c) The Committee's records of disciplinary matters, as limited by 243 CMR 4.02(8)(a) and (b), include the following:
 1. Closed complaint files, which contain the complaint and other information, are public records. The name of a complainant or patient and relevant acupuncture records shall be disclosed to the Respondent, but this information is otherwise confidential. The names of reviewers and the contents of complaint reviews shall be confidential.

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2. Enforcement Unit files, which contain portions of complaint files (and related confidential files) as well as papers related to adjudicatory proceedings and attorney work product, are not public records and are confidential.
 3. The Committee's files, which contain each paper filed with the Committee in connection with an adjudicatory proceeding, are public records, unless otherwise impounded or placed under seal by the Administrative Magistrate or the Committee.
 4. Records of the review and investigation of statutory reports are not public records and are confidential.
 5. Closed anonymous complaints, which are determined to be frivolous or lacking in either legal merit or factual basis, consistent with 243 CMR 4.03(3)(a) are not public records and are confidential.
 6. Letters of Agreement and related materials; except that, if the Committee suspends the license of an acupuncturist for violation of the terms of a Letter of Agreement, the fact that the acupuncturist had entered a Letter of Agreement shall become public, and a general description of Letters of Agreement will be provided, but the Letter of Agreement itself and the related materials shall remain confidential.
 7. Social security numbers.
 8. National Provider Identifier (NPI) numbers and personal information collected during the NPI application process shall be confidential, except to the extent that federal or state law, or the Rules and Advisory Statements of the Centers for Medicare and Medicaid Services (CMS) or the National Plan and Provider Enumeration System (NPPES) require the information be disclosed or made public.
- (9) Public Nature of Committee Meetings.
- (a) All meetings of the Committee are open to the public to the extent required by M.G.L. c. 30A, § 11A.
 - (b) As provided by M.G.L. c. 30A, § 11A, a Committee meeting held for the purpose of making a decision required in an adjudicatory proceeding is not open to the public. Evidentiary hearings before individual hearing officers are generally open to the public, but the Committee may carry out its functions under these rules in closed session if these functions affect an individual licensee or patient, the licensee or patient requests that the Committee function in closed session, and the Committee or hearing officer determines that functioning in closed session would be consistent with law and in the public interest.
- (10) Conditional Privilege of Communications with the Committee. All communications with the Committee charging misconduct, or reporting or providing information to the Committee pursuant to M.G.L. c. 112, § 158, or assisting the Committee in any manner in discharging its duties and functions, are privileged, and a person making a communication is privileged from liability based upon the communication unless the person makes the communication in bad faith or for a malicious reason.
- (11) State or Federal Agencies, Boards or Institutions Designated to Receive Investigative Records or Confidential Information. The Committee is authorized by the Board to review written requests for the Committee's investigative records or other confidential information from the following agencies which are hereby designated to receive, upon Committee approval, such information consistent with the Fair Information Practices Act (FIPA), M.G.L. c. 66A:
- (a) Massachusetts Department of the Attorney General;
 - (b) Offices of the Massachusetts District Attorneys;
 - (c) Massachusetts Municipal Police Departments;
 - (d) Massachusetts State Police;
 - (e) Federal Trade Commission;
 - (f) Office of the United States Attorney;
 - (g) U.S. Postal Inspector;
 - (h) U.S. Department of Justice, Drug Enforcement Administration, and Federal Bureau of Investigation;
 - (i) Divisions of Professional Licensure and Health Professions Licensure;
 - (j) all other state Medical and Acupuncture Boards;
 - (k) Division of Insurance and the Insurance Rating Bureau;

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- (l) Massachusetts Health Data Consortium, Inc.;
- (m) Department of Public Health;
- (n) Massachusetts Department of Revenue;
- (o) U.S. Internal Revenue Service;
- (p) National Certification Commission for Acupuncture and Oriental Medicine.

All recipients of confidential information designated by 243 CMR 4.00 shall preserve the confidentiality of such data and make it available to the data subject, to the extent such access is required by FIPA.

4.03: Disposition of Complaints

(1) Initiation. Any person, organization, or member of the Committee may make a complaint to the Committee which charges a licensee with misconduct. A complaint may be filed in any form. The Committee, in its discretion, may investigate anonymous complaints.

(2) Complaint Subcommittee. The Committee may establish a subcommittee known as the Complaint Subcommittee to review complaints charging a licensee with misconduct. If the Subcommittee or a Board or Committee Investigator determines that a communication does not relate to any of the matters set forth in 243 CMR 4.03(5), the Subcommittee or the investigator may refer the communication to the proper authority or regulatory agency.

(3) Investigation.

(a) A Board or Committee Investigator shall conduct such preliminary investigation, including a request for an answer from the licensee, as is necessary to allow the Complaint Subcommittee to determine whether a complaint is frivolous or lacking in either legal merit or factual basis. If, after a preliminary investigation of an anonymous complaint, the investigator determines that the anonymous complaint is frivolous or lacking in either legal merit or factual basis, the anonymous complaint shall not be docketed, shall be filed in a general correspondence file, and shall remain confidential.

(b) After receipt and review of a complaint, if the Complaint Subcommittee determines that the complaint is frivolous or lacking in either legal merit or factual basis, it may close the complaint. The Subcommittee shall notify the person who made the communication of its determination and the reasons for it. As to other complaints, the Subcommittee shall conduct, or cause to be conducted, any reasonable inquiry or investigation it deems necessary to determine the truth and validity of the allegations set forth in the complaint.

(4) Conference. To facilitate disposition, the Committee or the Complaint Subcommittee may request any person to attend a conference at any time prior to the commencement of an adjudicatory proceeding. The Committee or Subcommittee shall give timely notice of the conference, and this notice must include either a reference to the complaint or a statement of the nature of the issues to be discussed.

(5) Grounds for Complaint.

(a) Specific Grounds for Complaints Against Acupuncturists. A complaint against an acupuncturist must allege that a licensee is practicing acupuncture in violation of law, regulations, or good and accepted acupuncture practice, and may be founded on any of the following:

1. Fraudulent procurement of his/her license or its renewal;
2. Violation of any provision of the laws of the Commonwealth relating to the practice of medicine or acupuncture, or any rule or regulation adopted thereunder;
3. Conduct which places into question the acupuncturist's competence to practice acupuncture including, but not limited to, gross misconduct in the practice of acupuncture, or practicing acupuncture fraudulently, or beyond its authorized scope, or with gross incompetence, or with gross negligence on a particular occasion or negligence on repeated occasions;
4. Practicing acupuncture while the ability to practice is impaired by alcohol, drugs, chemicals, or any other type of substance, or by reason of illness, or as a result of any physical or mental condition;

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5. Engaging in the abuse or illegal use of alcohol, prescription drugs, or controlled substances;
 6. Knowingly permitting, aiding or abetting an unlicensed person to perform activities requiring a license;
 7. Conviction of any crime;
 8. Continuing to practice while his/her license is lapsed, suspended, or revoked;
 9. Practicing acupuncture in a manner which is professionally unethical according to the ethical standards of the profession.
 10. Violation of any rule or regulation of the Board or Committee;
 11. Having been disciplined in another jurisdiction in any way by the proper licensing authority for reasons substantially the same as those set forth in M.G.L. c. 112, § 158 or 243 CMR 4.03(5);
 12. Cheating on or attempting to compromise the integrity of any acupuncture licensing examination;
 13. Failure to report to the Committee, as required by law or regulation, any disciplinary action taken against the licensee by another licensing jurisdiction (United States or foreign), by any health care institution, by any professional or acupuncture society or association, by any governmental agency, by any law enforcement agency, or by any court for acts or conduct substantially the same as acts or conduct which would constitute grounds for complaint as defined in 243 CMR 4.03;
 14. Failure to respond to a subpoena or to furnish the Committee, its investigators or representatives, documents, information or testimony to which the Committee is legally entitled;
 15. Malpractice within the meaning of M.G.L. c. 112, § 61;
 16. Misconduct in the practice of acupuncture.
- (b) Other Grounds for Complaints Against Acupuncturists. Nothing in 243 CMR 4.03(5) shall limit the Committee's adoption of policies and grounds for discipline through adjudication as well as through rule-making.
- (6) Docket. The Committee shall assign a docket number to all complaints and shall mark the complaint with this number and the date filed. All subsequent papers relating to the particular complaint shall be marked with the same docket number and shall be placed in a file (the docket) with all other papers bearing the same number.
- (7) Order for Answering and Answer. The Complaint Subcommittee may order that the licensee complained of answering the complaint within 30 days. The Subcommittee shall attach a copy of the complaint to the order for answering or shall describe the acts alleged in the complaint. A licensee shall respond to an order for answering either personally or through his/her attorney, in compliance with 243 CMR 4.02(6). An answer must address the substantive allegations set forth in the complaint or order.
- (8) Complaint Subcommittee. Upon receipt of a licensee's answer or at any point during the course of investigation or inquiry into a complaint, the Subcommittee may determine that there is not and will not be sufficient evidence to warrant further proceedings or that the complaint fails to allege misconduct for which a licensee may be sanctioned by the Committee. In such event, the Subcommittee shall close the complaint. The Subcommittee shall retain a file of all complaints. The Complaint Subcommittee may resolve matters with non-disciplinary action by closing complaints under the terms and conditions it deems appropriate and by approving a Letter of Agreement.
- (9) Committee Action Required. If a licensee fails to answer within the 30-day period or if the Complaint Subcommittee determines that there is reason to believe that the acts alleged occurred and constitute a violation for which a licensee may be sanctioned by the Committee, the Subcommittee may recommend to the Committee that it issue a Statement of Allegations.

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(10) Disposition by the Committee. The Committee shall review each recommendation which the Subcommittee forwards to it within a reasonable time and shall require an adjudicatory hearing if it determines that there is reason to believe that the acts alleged occurred and constitute a violation of any provision of 243 CMR 4.03(5) or M.G.L. c. 112, § 158. The Committee may take such informal action as it deems a complaint warrants. If the Committee requires an adjudicatory hearing, it may refer the matter to an administrative magistrate.

(11) Suspension Prior to Hearing. The Committee may suspend or refuse to renew a license pending a hearing on the question of revocation if the health, safety or welfare of the public necessitates such summary action. The procedure for summary suspension is as follows:

(a) Immediate and Serious Threat. If, based upon affidavits or other documentary evidence, the Committee determines that a licensee is an immediate and serious threat to the public health, safety or welfare, the Committee may suspend or refuse to renew a license, pending a final hearing on the merits of the Statement of Allegations. The Committee must provide a hearing on the necessity for the summary action within seven days after the suspension.

(b) Serious Threat. If, based upon affidavits or other documentary evidence, the Committee determines that a licensee may be a serious threat to the public health, safety or welfare, the Committee may order the licensee to file opposing affidavits or other evidence within three business days. Based upon the evidence before it, the Committee may then suspend or refuse to renew the license, pending a final hearing on the merits of the Statement of Allegations. The Committee must provide a hearing on the necessity for the summary action within seven days after the suspension.

(12) Assurance of Discontinuance.

(a) 243 CMR 4.03(12) shall apply to minor violations of 243 CMR 4.03(5), and, unless there is an allegation of patient harm, or allegations of drug or alcohol impairment, as determined within the discretion of the Complaint Subcommittee and the Committee.

(b) At the time that the Complaint Subcommittee determines that a recommendation for a Statement of Allegations is warranted, it may either forward such recommendation to the Committee or refer the matter to a conference including a Hearing Officer, a representative of the Enforcement Unit, and the Respondent. At the conference, the representative of the Enforcement Unit and the Respondent may submit to the Hearing Officer a proposed Assurance of Discontinuance, which shall include:

1. Recitation of circumstances giving rise to the Assurance of Discontinuance,
2. The Respondent's assurance of discontinuance,
3. A sanction and/or the Respondent's agreement to pay the Commonwealth's costs of the investigation, and
4. The Respondent's agreement that violation of the Assurance of Discontinuance shall be *prima facie* evidence of violation of the applicable law, regulations or standards of good and accepted acupuncture practice referenced in the Assurance of Discontinuance.

(c) If the Hearing Officer approves the Assurance of Discontinuance, it shall be forwarded to the Committee for final approval.

(d) If the Hearing Officer and the Committee do not approve an Assurance of Discontinuance within 60 days of referral of the matter to the Hearing Officer for conference, or if the Hearing Officer refers the matter back to the Complaint Subcommittee, the Complaint Subcommittee shall forward its recommendation regarding issuance of the Statement of Allegations to the Committee.

(e) The Respondent may request that the Committee not process his/her case pursuant to 243 CMR 4.03, in which event the Complaint Subcommittee shall forward its recommendation regarding issuance of a Statement of Allegations to the Committee.

(13) Letter of Agreement. A Letter of Agreement is a non-disciplinary monitoring agreement between the complaint subcommittee and an acupuncturist. Letters of Agreement are limited to licensees who meet the following criteria:

- (a) The licensee has disclosed a medical condition that could interfere with the practice of acupuncture; and
- (b) There has been no patient harm or imminent risk of patient harm as a result of the condition; and

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- (c) The complaint subcommittee determines that disciplinary proceedings against the licensee are not warranted.

4.04: Adjudicatory Hearing

- (1) Rules for Conducting Hearings. After the Committee issues a Statement of Allegations, the Committee shall conduct all hearings in accordance with 801 CMR 1.00: *Standard Adjudicatory Rules of Practice and Procedure.*

4.05: Final Decision and Order, and Miscellaneous Provisions

- (1) In General. Every Final Decision and Order of the Committee requires the concurrence of at least four members, or of a majority of the Committee if it has more than one vacancy. If the Hearing Officer is a member of the Committee, his/her vote counts in the event the Committee is not otherwise able to reach a final decision.

- (2) Sanctions. In disposition of disciplinary charges brought by the Committee, the Committee may revoke, suspend, or cancel the license, or reprimand or censure the acupuncturist, or require a course of education or training or otherwise discipline or limit the practice of the acupuncturist. A reprimand is a severe censure. The Committee may also condition the stay or other cessation of a sanction upon reasonable conditions consistent with the public health, safety and welfare. A Probation Agreement may be required by the Committee as a condition of the stay of an indefinite suspension. Failure to comply with the terms of a Probation Agreement may result in the immediate suspension of the acupuncturist's license to practice acupuncture.

- (3) Nature and Effect, Generally. Any order of the Committee which imposes a sanction as a result of a disciplinary action is effective immediately, unless the Committee orders otherwise.

- (a) Suspension. A licensee whose license is suspended for a period of time is automatically reinstated upon expiration of the suspension period.

- (b) Revocation. The cancellation or revocation of a license is effective for at least five years, unless the Committee orders otherwise. Reinstatement thereafter may be granted or denied in the Committee's discretion. A cancellation or revocation is lifted only through a petition for reinstatement.

- (4) Reinstatement. A person previously licensed by the Committee may apply for reinstatement of his/her license no sooner than five years after revocation, unless the Committee orders otherwise. An application for reinstatement is addressed to the Committee's discretion, must be made in the form the Committee prescribes, must be filed in the original with ten copies, and will be granted only if the Committee determines that doing so would advance the public interest. If the Committee denies a petition for reinstatement, the Respondent shall not re-petition for reinstatement until at least two years after the date of denial, unless the Committee orders otherwise.

- (5) Resignation.

- (a) A licensee who is named in a complaint or who is subject to an investigation by the Committee or who is the respondent in a disciplinary action may submit his/her resignation by delivering to the Committee a writing stating that: he/she desires to resign; his/her resignation is tendered voluntarily; he/she realizes that resignation is a public disciplinary action reportable to national data reporting systems; the resignation is a final act which deprives a person of all privileges of licensure and is not subject to reconsideration or judicial review; and that the licensee is not currently licensed to practice in any other state or jurisdiction, will make no attempt to gain licensure elsewhere, or will resign any other licenses contemporaneously with his/her resignation in the Commonwealth.

- (b) If a complaint, investigation, or Statement of Allegations arises solely out of a disciplinary action in another jurisdiction, within the meaning of 243 CMR 4.03(5)(a)12., then the licensee may submit a resignation pursuant to 243 CMR 4.05(5)(a), but need not make any representation regarding licensure status in other jurisdictions, is permitted to gain licensure elsewhere, and need not resign any other licenses contemporaneously with the resignation.

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(c) The acceptance of a resignation is within the discretion of the Committee.

(6) Unauthorized Acupuncture Practice. The Committee shall refer to the appropriate District Attorney or other appropriate law enforcement agency any incidents of unauthorized acupuncture practice which come to its attention.

(7) Imposition of Restrictions. Consistent with 243 CMR 4.00 and M.G.L. c. 30A or otherwise by agreement with the licensee, the Board may impose restrictions to prohibit a licensee from performing certain acupuncture procedures, or from performing certain acupuncture procedures except under certain conditions, if the Board determines that:

- (a) the licensee has engaged in a pattern or practice which calls into question his/her competence to perform such procedures, or
- (b) the restrictions are otherwise warranted by the public health, safety and welfare.

REGULATORY AUTHORITY

243 CMR 4.00: M.G.L. c. 13, § 10; c. 112, §§ 2 through 9B, and 148 through 162.