

**WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION**

Form #4

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2007 NOV -6 AM 9:53

OFFICE OF THE
SECRETARY OF STATE

NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

AGENCY: Board of Acupuncture TITLE NUMBER: 32

CITE AUTHORITY: WV Code 30-1-8(a) and 30-36-1 et seq.

AMENDMENT TO AN EXISTING RULE: YES NO

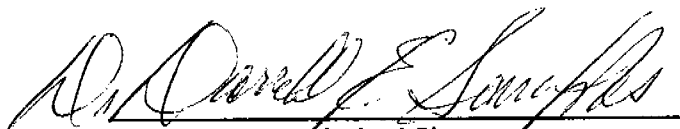
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 32CRS7

TITLE OF RULE BEING PROPOSED: Disciplinary Actions

THE ABOVE PROPOSED LEGISLATIVE RULES, FOLLOWING REVIEW BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE, IS HEREBY MODIFIED AS A RESULT OF REVIEW AND COMMENT BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE. THE ATTACHED MODIFICATIONS ARE FILED WITH THE SECRETARY OF STATE.


Authorized Signature

#3.60

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Title 32
Legislative Rule
Board of Acupuncture

Series 7
Disciplinary Actions

2007 NOV -6 AM 9: 53

OFFICE OF THE
SECRETARY OF STATE

32-7-1. General.

1.1. Scope. -- This rule establishes the due process procedure for disciplinary and complaint procedures for the Board. The Board is charged with these duties in W. Va. Code § 30-36-18.

1.2. Authority. -- W. Va. Code § § 30-1-8(a) and 30-36-1 et seq.;

1.3. Filing Date. --

1.4. Effective Date. --

32-7-2. Application and Enforcement.

This legislative rule applies to all licensed acupuncturists, student acupuncturists, and acupuncture trainees.

32-7-3. Definitions.

3.1. "Board" means the West Virginia Board of Acupuncture.

3.2. "Licensee" means an acupuncturist who holds a license issued by the Board to practice acupuncture and oriental medicine.

3.3. "License" means a license issued by the Board.

3.4. "Practice of acupuncture and oriental medicine" means the practice of acupuncture as defined in W. Va. Code § 30-36-2 and includes licensed acupuncturists, student acupuncturists and acupuncture trainees.

3.5. "False and deceptive advertising" means a statement that includes a misrepresentation of fact, is likely to mislead or deceive because of a failure to disclose material facts, is intended or is likely to create false or unjustified expectations of favorable results or includes representations or implications that in a reasonable probability will cause an ordinary prudent person to misunderstand or be deceived.

3.6. "Adjudicatory hearing" means a formal administrative hearing before the Board or a designated hearing examiner, conducted to determine the truth and validity of complaints filed against a licensee.

3.7. "Crimes involving moral turpitude" means those crimes which have dishonesty as a fundamental and necessary element, including, but not limited to, crimes involving theft, embezzlement, false swearing, perjury, fraud or misrepresentation.

3.8. "Probation" means imposing conditions and requirements upon a licensee for a period of time that the Board determines to be justified under any provision of law.

32-7-4. Causes for Denial, Probation, Limitation, Discipline, Suspension or Revocation of Licenses of Acupuncturists.

4.1. The Board may deny an application for license, place a licensee on probation, suspend a license, limit or restrict a licensee or revoke any license issued by the Board, upon satisfactory proof that the licensee

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has:

4.1.1. Knowingly made, or presented or caused to be made or presented, any false, fraudulent or forged statement, writing, certificate, diploma or other material in connection with an application for a license;

4.1.2. Been or is involved in fraud, forgery, deception, collusion or conspiracy in connection with an examination for a license;

4.1.3. Become addicted to a controlled substance;

4.1.4. Become a chronic or persistent alcoholic;

4.1.5. Engaged in dishonorable, unethical or unprofessional conduct of a character likely to deceive, defraud or harm the public or member of the public;

4.1.6. Willfully violated a confidential communication;

4.1.7. Had his or her license to practice acupuncture or oriental medicine in any other state, territory, jurisdiction or foreign nation revoked, suspended, restricted or limited, or otherwise acted against, or has been subjected to any other disciplinary action by the licensing authority thereof, or has been denied licensure in any other state, territory, jurisdiction, or foreign nation;

4.1.8. Been or is unable to practice acupuncture or oriental medicine with reasonable skill and safety to patients by reason of illness, drunkenness, excessive use of alcohol, drugs, chemicals or any other type of material, or by any reason of any physical or mental abnormality;

4.1.9. Demonstrated a lack of professional competence to practice acupuncture or oriental medicine with a reasonable degree of

skill and safety for patients. In this connection, the Board may consider repeated acts of an acupuncturist indicating his or her failure to properly treat a patient and may require the acupuncturist to submit to inquiries or examinations, written or oral, by members of the Board, by its agent, or designee, as the Board considers necessary to determine the professional qualifications of the licensee;

4.1.10. Engaged in unprofessional conduct, including, but not limited to, any departure from, or failure to conform to, the standards of acceptable and prevailing oriental medical practice, or the ethics of the oriental medical profession, or unprofessional conduct as presented in the Board's rule, Code of Ethics for Licensed Acupuncturist, 32CSR10 of the Boards Rules, irrespective of whether a patient is injured by the conduct, or has committed any act contrary to honesty, justice or good morals, whether the act is committed in the course of his or her practice or otherwise and whether committed within or without this State;

4.1.11. Been convicted of or found guilty of a crime in any jurisdiction which directly relates to the practice of acupuncture or oriental medicine or to the ability to practice acupuncture or oriental medicine. A plea of nolo contendere will be considered conviction for the purposes of this rule;

4.1.12. Advertised, practiced or attempted to practice under a name other than his or her own;

4.1.13. Failed to report to the Board any person whom the licensee knows is in violation of this rule or of provisions of the West Virginia Acupuncture Practice Act;

4.1.14. Aided, assisted, procured or advised any unlicensed person to practice oriental medicine contrary to this rule or the West Virginia Acupuncture Practice Act;

4.1.15. Failed to perform any

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statutory or legal obligation placed upon an acupuncturist;

4.1.16. Made or filed a report which the licensee knows to be false, intentionally or negligently failed to file a report or record required by state or federal law, willfully impeded or obstructed the filing or induced another person to do so. The reports or records will include only those which are signed in the capacity as a licensed acupuncturist;

4.1.17. Paid or received any commission, bonus, kickback or rebate, or engaged in any split-fee arrangement in any form whatsoever with an acupuncturist, organization, agency or person, either directly or indirectly, for patients referred to providers of health care goods and services, including, but not limited to, hospitals, nursing homes, clinical laboratories, ambulatory surgical centers or pharmacies. The provisions of this subdivision will not be construed to prevent an acupuncturist from receiving a fee for professional consultation service;

4.1.18. Exercised influence within a patient-practitioner relationship for purposes of engaging a patient in sexual activity;

4.1.19. Made deceptive, untrue or fraudulent representations in the practice of oriental medicine or employed a trick or scheme in the practice of oriental medicine when the trick or scheme fails to conform to the generally prevailing standards of treatment in the oriental medical community;

4.1.20. Solicited patients, either personally or through an agent, through use of fraud, intimidation, undue influence, or by overreaching or vexatious conduct. A solicitation is any communication which directly or implicitly requests an immediate response from the recipient;

4.1.21. Failed to keep written

records justifying the course of treatment of the patient, including, but not limited to, patient histories, examination results and test results and treatment rendered, if any;

4.1.22. Exercised influence on the patient or client in such a manner as to exploit the patient or client for the financial gain of the licensee or of a third party, which includes, but not be limited to, the promoting or selling of services, goods, appliances or materia medica and the promotion or advertising on any prescription form of a pharmacy. For the purposes of this subdivision, prescribing, dispensing, administering, mixing or otherwise preparing materia medica, including all controlled and non-controlled substances, inappropriately or in excessive or inappropriate quantities, is not in the best interests of the patient and is not in the course of the acupuncturist or oriental medical practitioners professional practice, without regard to his or her intent;

4.1.23. Engaged in malpractice or failed to practice acupuncture or oriental medicine with that level of care, skill and treatment which are recognized by a reasonable, prudent, acupuncturist or an oriental medical practitioner engaged in the same or similar specialty as being acceptable under similar conditions and circumstances;

4.1.24. Performed any procedure or prescribed any therapy which, by the prevailing standards of oriental medical practice in the community, would constitute experimentation on a human subject, without first obtaining full, informed and written consent from the patient;

4.1.25. Practiced or offered to practice acupuncture beyond the scope permitted by the West Virginia Acupuncture Practice Act or accepted and performed professional responsibilities which the licensee knows or has reason to know he or she is not competent to perform;

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4.1.26. Delegated professional responsibilities to a person whom the licensee knew or had reason to know was not qualified by training, experience or licensure to perform the responsibilities;

4.1.27. Violated or attempted to violate any law or rule of any jurisdiction, which relates to the practice of acupuncture.

4.1.28. Violated or failed to comply with a lawful order of the Board, or has violated an order of any court entered pursuant to any proceedings commenced by the Board;

4.1.29. Offered, undertaken or agreed to cure or treat disease by a secret method, procedure, treatment or medicine; or has treated for any human condition, by a method, means, or procedure which the licensee has refused to divulge upon demand of the Board;

4.1.30. Engaged in false or deceptive advertising. "False or Deceptive Advertising" means a statement that includes a misrepresentation of fact, is likely to mislead or deceive because of a failure to disclose material facts, is intended or is likely to create false or unjustified expectations of favorable results or includes representations or implications that in reasonable probability will cause an ordinary prudent person to misunderstand or be deceived; or

4.1.31. Engaged in advertising that is not in the public interest. Advertising that is not in the public interest includes the following:

4.1.31.a. Advertising that has the effect of intimidating or exerting undue pressure;

4.1.31.b. Advertising that uses testimonials;

4.1.31.c. Advertising

which is false, deceptive, misleading, sensational or flamboyant;

4.1.31.d. Advertising which guarantees satisfaction or a cure;

4.1.31.e. Advertising which offers gratuitous services or discounts, the purpose of which is to deceive the public. This paragraph does not apply to advertising which contains an offer to negotiate fees, nor to advertising in conjunction with an established policy or program of free care for patients; and

4.1.31.f. Advertising which make claims of professional superiority which a licensee is unable to substantiate.

4.2. For the purposes of Section 4.1., acts declared to constitute dishonorable, unethical or unprofessional conduct of a character likely to deceive, defraud or harm the public or any member thereof includes, but is not limited to;

4.2.1. Prescribing or dispensing any "Controlled Substance" as defined in the W. Va. Code § 60A-1-101(d);

4.2.2. Issuing or publishing in any manner whatsoever, representations in which grossly improbable or extravagant statements are made which have a tendency to deceive or defraud the public, or a member thereof, including, but not limited to:

4.2.2.a. Any representation in which the licensee claims that he or she is able to cure or treat manifestly incurable diseases, ailments or infirmities by any method, procedure, treatment or medicine which the licensee knows or has reason to know has little or no therapeutic value;

4.2.2.b. Represents or professes or holds himself or herself out as being able and

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willing to treat diseases, ailments or infirmities under a system or school of practice, except:

4.2.2.b.1. for which he or she holds a degree or diploma from a school otherwise recognized by the Board, or

4.2.2.b.2. Which he or she professes to be self-taught or self-developed.

4.2.3. A serious act, or a pattern of acts committed during the course of an acupuncture practice which, under the attendant circumstances, would be considered to be gross incompetence, gross ignorance, gross negligence or malpractice, including the performance of any unnecessary service or procedure;

4.2.4. Conduct which is calculated to bring or has the effect of bringing the acupuncture or oriental medical profession into disrepute, including, but not limited to, any departure from or failure to conform to the standards of acceptable and prevailing oriental medical practice within the State;

4.2.5. Any charges or fees for any type of service rendered within forty-eight (48) hours of the initial visit, if the licensee advertises free service, free examination or free treatment;

4.2.6. Failing to meet the standard of practice in connection with any supervisory and/or collaborative agreement with any category of health practitioner licensed under Chapter 30 of the W. Va. Code;

4.2.7. Charging or collecting an excessive or unconscionable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

7.1. The time and effort required;

7.2. The novelty and difficulty of the procedure or treatment;

7.3. The skill required to perform the procedure or treatment properly;

7.4. Any requirements or conditions imposed by the patient or circumstances;

7.5. The nature and length of the professional relationship with the patient;

7.6. The experience, reputation, and ability of the licensee; and

7.7. The nature of the circumstances under which the services are provided.

4.2.8. In any case where it is found that an excessive, unconscionable fee has been charged, in addition to any actions taken under the provisions of section 4.3 of this rule, the Board may require the licensee to reduce or pay back the fee.

4.3. When the Board finds that any applicant is unqualified to be granted a license or finds that any licensee should be disciplined pursuant to the West Virginia Acupuncture Practice Act or rules of the Board, the Board may take anyone or more of the following actions:

4.3.1. Refuse to grant a license to an applicant;

4.3.2. Administer a public reprimand;

4.3.3. Suspend, limit or restrict any license for a definite period, not to exceed five (5) years;

4.3.4. Require any licensee to participate in a program of education prescribed

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by the Board;

4.3.5. Revoke any license;

4.3.6. Require the licensee to submit to care, counseling or treatment by physicians or other professional persons;

4.3.7. Require him or her to practice under the direction or supervision of another practitioner; or

4.3.8. Require the licensee to provide a period of free public or charitable service.

4.3.9. In addition to and in conjunction with these actions, the Board may make a finding adverse to the licensee or applicant, but withhold imposition of judgment and penalty, or it may impose the judgment and penalty but suspend enforcement of the penalty and place the acupuncturist on probation, which may be vacated upon the noncompliance with any terms imposed by the Board. In its discretion, the Board may restore and reissue a license under the West Virginia Acupuncture Practice Act, W. Va. Code § 30-36-1 et. seq. , and as a condition it may impose any disciplinary or corrective measure provided for in this Rule or in the West Virginia Acupuncture Practice Act.

4.4. The Board has the authority to place a licensee in a probationary status and to apply varying conditions upon the licensee during the probationary period. Upon reaching the conclusion that a licensee to practice acupuncture should be placed on probation, the Board may impose anyone or more of the following conditions:

4.4.1. The Board may appoint one or more Board members to be responsible for having the probationary licensee report for interviews on a regular basis. These interviews may be set up on a periodic basis as determined

by the Board and the appointed Board members will then report back to the Board at its regularly scheduled meeting on the progress of the licensee;

4.4.2. The Board may request the probationary licensee to appear before the Board at intervals determined by the Board order that the licensee may report on his or her progress. During these appearances by the probationary licensee, the Board may ask the probationary licensee questions so as to observe his or her behavior and progress;

4.4.3. The Board may select a physician or request the probationary licensee to select a physician who will be approved by the Board and the physician shall submit periodic progress reports on the probationary licensee as directed by Board;

4.4.4. The Board may appoint a medical consultant whose responsibility is to conduct interviews with the probationary licensee. The probationary licensee shall then report to the appointed medical consultant on a regular basis as determined by the Board, and the medical consultant shall report to the Board at intervals determined by the Board;

4.4.5. In cases of alcoholism and/or drug abuse, as a condition of probation, the Board may require that the probationary licensee submit periodic blood samples and/or urine drug screen samples;

4.4.6. The Board may require that the probationary licensee authorize his or her personal physician to submit to the Board, for review, the probationary licensee's medical history, both as to past medical history and any and all new medical history as may become available to the personal physician during the period of the probationary term;

4.4.7. The Board may require that the probationary licensee report all medications that he or she may be utilizing and

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that he or she make the reports to the Board, at intervals as directed by the Board from time to time;

4.4.8. The Board may require that prior to the termination of a probationary term, the probationary licensee appear at a regularly scheduled Board meeting and furnish the Board with information as it may request, and the Board may utilize subpoenas, subpoenas duces tecum and its investigators as it considers necessary to gather facts and evidence to determine compliance by the probationary licensee with the terms of probation; and

4.4.9. In those situations where indicated, the Board may impose additional terms of probation, restriction, or revocation upon a licensee who has initially been placed on probation. The period of probation shall not exceed five (5) years from its initiation date.

32-7-5. Required Reports from Hospitals, Professional Societies, Insurers and Courts.

5.1. Any person, medical peer review committee, firm, corporation, members of the Board or public officer may make a complaint to the Board which charges an acupuncturist with a violation of the W. Va. Code § 30-36-1 et seq., or of the Rules of the Board. The Board may provide a form for that purpose, but a complaint may be filed in any written form. In addition to describing the alleged violation which prompted the complaint, the complaint should contain the following:

5.1.1. The name and address of the individual against whom the complaint is lodged;

5.1.2. The date of care or other incident;

5.1.3. The name of individual who may have treated the patient after the alleged incident; and

5.1.4. The name of any health care institution in which the patient was an inpatient or outpatient after or during the alleged incident.

5.2. The Board may prepare forms for filing complaints and make them available upon request.

5.3.. Any information regarding a complaint shall be sent by the Board to the practitioner concerned for his or her written comment and he or she will submit a written reply within twenty (20) days, or waive the right to do so.

32-7-6. Appeal

6.1. Any applicant for a license who has had his or her application denied by order of the Board may appeal the order within thirty (30) days of that action, in accordance with the contested case hearing procedure, W. Va. Code § 29A-5-1 et seq., and rules of the Board: Provided, That the appeal shall not include cases in which the Board denies a license or certificate after an examination to test the knowledge or the ability of the applicant where the controversy concerns whether the examination was fair or whether the applicant passed the examination.

6.2 Any licensee practicing acupuncture and oriental medicine in this State, who has had his or her license denied, suspended, restricted, or revoked by order of the Board, may appeal the order within thirty (30) days of this action in accordance with the contested case hearing procedure, W. Va. Code § 29A-5-1 et seq., and the rules of the Board.