

MEDICAL BOARD STAFF REPORT

DATE REPORT ISSUED: January 29, 2024
ATTENTION: Members, Medical Board of California (Board)
SUBJECT: Proposed Regulations on Citation and Fine (Amendments to Title 16 California Code of Regulations (CCR) sections 1364.10 and 1364.11) - Discussion and Possible Action on Proposed Responses to Public Comments Received During the 45-day Public Comment Period on the Originally Proposed Regulatory Text and Adoption of Proposed Amendments to CCR sections 1364.10 and 1364.11
FROM: Kerrie Webb, Attorney III

REQUESTED ACTION:

After review and consideration of the public comments, the proposed responses thereto, and the proposed text for the rulemaking on citation and fines (citable offenses), staff requests that the Board make a motion to:

- 1) Direct staff to proceed as recommended to reject the comments as specified and provide the responses to the comments as indicated in the meeting materials; and,
- 2) Direct staff to take all steps necessary to complete the rulemaking process including the filing of the final rulemaking package with the Office of Administrative Law, authorize the Executive Director to make any non-substantive changes to the proposed regulations and the rulemaking documents, and adopt the proposed regulations as noticed for Title 16 CCR sections 1364.10 and 1364.11.

BACKGROUND

At the May 19, 2023 Board meeting, the Board reviewed and approved proposed language to amend 16 CCR sections 1364.10 and 1364.11 relating to citable offenses, and authorized staff to proceed with the rulemaking process. Among other changes, this proposed rulemaking will maintain a streamlined list of citable offenses and will add additional language to include violations of relevant practice acts, the Board's regulations, and any other statute or regulation upon which the Board may base a disciplinary action, as citable offenses. The proposed rulemaking also raises the cap for fines up to the full extent authorized by law, consistent with Business and Professions Code (BPC) section 125.9(b)(3) or other applicable sections of law.

Pursuant to the Administrative Procedure Act, the proposed text was noticed for the 45-day comment period on September 29, 2023, which ended on November 14, 2023. The California Medical Association (CMA) provided written comments during the comment period. No other comments were received.

SUMMARY OF WRITTEN COMMENTS FROM THE CALIFORNIA MEDICAL ASSOCIATION (CMA) DATED NOVEMBER 14, 2023 AND PROPOSED RESPONSES:

Please review the summary of the comments below and the proposed responses for inclusion in the Board's final statement of reasons for this rulemaking.

Comment 1: CMA notes that the Board amended 16 CCR section 1364.11 to include the entirety of the Medical Practice Act (MPA), the entirety of the Board's regulations, and any other statute or regulation upon which the Board may base a disciplinary action as citable offenses instead of listing each citable code section. CMA believes that this change is overly broad and could lead to individuals misinterpreting the way the Board may seek to use its authority, which may cause uncertainty and concern for applicants and licensees. CMA provided an example of a person in a residency program who fails to obtain their postgraduate training license within 180 days of beginning their program as someone who may be concerned about getting a citation. Consequently, CMA believes the Board should maintain the list of specific code violations for which it wishes to have the authority to issue citations so that those affected do not have to guess what is eligible for a citation and fine.

Response to Comment 1: Board staff have reviewed this comment and do not recommend any changes to the language. BPC section 125.9(a) specifically authorizes any board, bureau, or commission within this department to establish, by regulation, "a system for the issuance to a licensee of a citation which may contain an order of abatement or an order to pay an administrative fine assessed by the board, bureau, or commission where the licensee is in violation of the applicable licensing act or any regulation adopted pursuant thereto." Subdivision (c)(2) of Section 125.9(c)(2) indicates that the boards "may" limit the assessment of administrative fines to only particular violations of the applicable licensing act, but this section does not require such a limitation.

Individuals are expected to follow the law, and if they commit a violation, this proposed rulemaking will give the Board the authority to issue a citation at an early stage, where appropriate. This tool is a form of progressive enforcement that serves to protect the public and rehabilitate the license before the licensee's misconduct reaches a point where disciplinary action is necessary for public protection. While the Board chose to self-limit its citation authority to only particular violations a long time ago, the Board has now determined, in its experience, that a policy change is necessary to provide other enforcement options short of discipline that would aid in the rehabilitation of licensees consistent with its public protection mission. In order to implement this policy change, the Board needs to revise the existing regulations to claim its full citation authority permitted under the law. Other healing arts boards in this department have implemented such policy changes in the manner being proposed for this Board as discussed in the Response to Comment No. 2 below.

Further, with regard to CMA's example of an individual failing to obtain a postgraduate training license within 180 days of beginning their postgraduate training program, if the person continues to practice medicine after that deadline, the Board already has the authority to issue a citation and fine and order of abatement for the unlicensed practice of medicine under 16 CCR section 1364.13. If the person ceases practice because they were not licensed within 180 days of beginning their program, there would not be a reason to issue a citation because no violation occurred. The burden of proving that a citation is warranted is on the

Board, and citations may be contested informally through the Board, as well as formally through the Office of Administrative Hearings as authorized by 16 CCR section 1364.14.

Comment 2: CMA believes that maintaining a list of specific code violations for which the Board wishes to have authority to issue citations and fines will avoid inaccurately suggesting to a licensee that a citation and fine, which is not a disciplinary action, is an option the Board may pursue in lieu of discipline in any and all cases, including for serious acts of unprofessional conduct. CMA points out that under existing text for section 1364.11, the Board was limited to a citation and fine under BPC section 2234 to a violation of one subdivision, which they believe supports their interpretation that the Board does not interpret the entirety of that section as appropriate for application of a citation and fine.

Response to Comment 2: Board staff have reviewed this comment and do not recommend any changes to the language. As indicated above, the Board is within its authority to indicate that it may issue citations for a violation of the Medical Practice Act, any regulation adopted by the Board, and any other statute or regulation upon which the Board may base a disciplinary action. In fact, several California boards have broad authority for issuing citations, including the State Board of Chiropractic Examiners under 16 CCR section 390, the California State Board of Pharmacy under 16 CCR section 1775, the Board of Registered Nursing under 16 CCR section 1435, and the Dental Board of California under 16 CCR section 1023.

Further, licensees facing discipline by the Board currently often explore whether the Board would consider issuing a citation and fine and/or order of abatement, rather than pursuing discipline, and Board staff expects this will continue if the proposed regulatory changes are adopted. Citations are public documents and are posted on the licensee's profile and maintained by the Board for three years, so they are subject to public scrutiny to guard against their inappropriate use. Again, this tool is a form of progressive enforcement that serves to protect the public and rehabilitate the license before the violation reaches a point where disciplinary action is necessary for public protection. Consequently, it is appropriate to broaden this tool to the extent allowed by law.

Comment 3: CMA points out that the proposed regulations effectively add numerous new code sections to the pool of violations eligible for a citation and believes that the scope of the proposed changes to the regulations was never contemplated or discussed by the Board, and that it was not addressed in the notice of proposed regulatory action. They indicated that if this is the intent of the Board, then the Board should have this discussion and clearly identify which codes it intends to add to the list of citable offenses and to continue to maintain that list in regulation.

Response to Comment 3: Board staff have reviewed this comment and do not recommend any changes to the language. The proposed regulatory language approved by the Board is clear that a violation of any provision of the Medical Practice Act, the Licensed Midwifery Practice Act of 1993, any regulation adopted by the Board, or any other statute or regulation upon which the Board may base a disciplinary action could be a citable offense. In fact, Board staff made changes to the proposed amendments to these regulations between 2019, when the rulemaking concept was first discussed by the Board, and 2023, when the current proposed text was approved by the Board, seeking to ensure that the Board's authority to issue citations and fines and/or orders of abatement would be expanded to the full extent authorized by law, rather

than limited by a list of specified code and regulatory sections. The reasons for the proposed rulemaking were presented to the Board and discussed at public Board meetings on November 8, 2019, December 2, 2022, and May 19, 2023.

Likewise, the Board's Notice of Proposed Action (Notice) for this rulemaking alerts interested parties that the proposed amendments to 16 CCR section 1364.11 would add that a violation of any provision of the Medical Practice Act, the Licensed Midwifery Practice Act of 1993, any regulation adopted by the Board, or any other statute or regulation upon which the Board may base a disciplinary action as citable offenses. This has the benefit of helping to keep the list of citable offenses current, as statutes and regulations are added, repealed, and modified, and by definition, these changes add new code and regulatory sections to the pool of violations eligible for a citation. Further, the Notice indicates under the Business Impact Estimates section that there will be more citable offenses under this rulemaking, and consequently, the Board anticipates that it will double the number of citations issued annually from an average of 88 to an average of 176.

STAFF RECOMMENDATION:

Make and approve a motion to approve the responses set forth in this memo and finalize this rulemaking with the motion suggested on page 1 of this memo.

Attachment 1: Citable Offenses – Noticed text approved by the Board on May 19, 2023.

Attachment 2: CMA's Public Comment dated November 14, 2023.

DEPARTMENT OF CONSUMER AFFAIRS
TITLE 16. MEDICAL BOARD OF CALIFORNIA

PROPOSED REGULATORY LANGUAGE

Citable Offenses

Underlined: Indicates proposed additions to the existing regulation.

~~Strikeout~~: Indicates proposed deletions to the existing regulation

Amend Section 1364.10 in Article 6 of Chapter 2, Division 13, of Title 16 of the California Code of Regulations to read as follows:

§ 1364.10. Citations and Fines.

(a) For purposes of this article, "bBoard official" shall mean the executive director of the bBoard or ~~his or her~~ their designee.

(b) A bBoard official is authorized to determine when and against whom a citation will be issued and to issue citations, which may containg orders of abatement and/or fines, to any person who holds a license, certificate, registration, or permit from the Board (licensee) for violations ~~by a licensed physician or surgeon, licensed midwife, or polysomnographic technologist, technician, or trainee~~ of the statutes and regulations referred to in Section 1364.11.

(c) A citation shall be issued whenever any fine is levied or any order of abatement is issued. Each citation shall be in writing and shall describe with particularity the nature and facts of the violation, including a reference to ~~the~~ each statute or regulations alleged to have been violated. The citation shall be served upon the individual personally or by certified mail.

Note: Authority cited: Sections 125.9, 148 and 2018, Business and Professions Code.
Reference: Sections 125.9 and 148, Business and Professions Code.

Amend Section 1364.11 in Article 6 of Chapter 2, Division 13, of Title 16 of the California Code of Regulations to read as follows:

§ 1364.11. Citable Offenses.

~~The amount of any fine to be levied by a board official shall take into consideration the factors listed in subdivision (b)(3) of Section 125.9 of the code and shall be within the range set forth below.~~

(a) In ~~his or her~~ their discretion, a bBoard official may issue a citation under Section 1364.10 for a violation of the provisions listed in this section.

(1) Business and Professions Code Section 119

- (2) Business and Professions Code Section 125
- (3) Business and Professions Code Section 125.6
- (4) Business and Professions Code Section 475(a)(1)
- (5) Business and Professions Code Section 496
- (6) Business and Professions Code Section 650
- (7) Business and Professions Code Section 650.1
- (8) Business and Professions Code Section 654
- (9) Business and Professions Code Section 654.1
- (10) Business and Professions Code Section 654.2
- (11) Business and Professions Code Section 655.5
- (12) Business and Professions Code Section 702
- (13) Business and Professions Code Section 730
- (14) Business and Professions Code Section 732
- (15) Business and Professions Code Section 802(a)
- (16) Business and Professions Code Section 802.1
- (17) Business and Professions Code Section 810
- ~~(18) Business and Professions Code Section 2021~~
- ~~(19) Business and Professions Code Section 2052~~
- ~~(20) Business and Professions Code Section 2054~~
- ~~(21) Business and Professions Code Section 2065~~
- ~~(22) Business and Professions Code Section 2066~~
- ~~(23) Business and Professions Code Section 2072~~
- ~~(24) Business and Professions Code Section 2073~~
- ~~(25) Business and Professions Code Section 2168~~
- ~~(26) Business and Professions Code Section 2168.4~~
- ~~(27) Business and Professions Code Section 2216.1~~
- ~~(28) Business and Professions Code Section 2221.1~~
- ~~(29) Business and Professions Code Section 2234(h)~~
- ~~(30) Business and Professions Code Section 2236~~
- ~~(31) Business and Professions Code Section 2238~~
- ~~(32) Business and Professions Code Section 2240~~
- ~~(34) Business and Professions Code Section 2244 (maximum fine \$1000 pursuant to section 2244)~~
- ~~(33) Business and Professions Code Section 2243~~
- ~~(35) Business and Professions Code Section 2250~~
- ~~(36) Business and Professions Code Section 2255~~
- ~~(37) Business and Professions Code Section 2256~~
- ~~(38) Business and Professions Code Section 2257~~
- ~~(39) Business and Professions Code Section 2259~~
- ~~(40) Business and Professions Code Section 2261~~
- ~~(41) Business and Professions Code Section 2262~~
- ~~(42) Business and Professions Code Section 2263~~
- ~~(43) Business and Professions Code Section 2264~~
- ~~(44) Business and Professions Code Section 2266~~

- ~~(45) Business and Professions Code Section 2271~~
- ~~(46) Business and Professions Code Section 2272~~
- ~~(47) Business and Professions Code Section 2273~~
- ~~(48) Business and Professions Code Section 2274~~
- ~~(49) Business and Professions Code Section 2285~~
- ~~(50) Business and Professions Code Section 2286~~
- ~~(51) Business and Professions Code Section 2305~~
- ~~(52) Business and Professions Code Section 2400~~
- ~~(53) Business and Professions Code Section 2415~~
- ~~(54) Business and Professions Code Section 2426~~
- ~~(55) Business and Professions Code Section 2439~~
- ~~(56) Business and Professions Code Section 2440~~
- ~~(57) Business and Professions Code Section 2441~~
- ~~(58) Business and Professions Code Section 2507~~
- ~~(59) Business and Professions Code Section 2508~~
- ~~(60) Business and Professions Code Section 2510~~
- ~~(61) Business and Professions Code Section 2514~~
- ~~(62) Business and Professions Code Section 2519~~
- ~~(63)18) Business and Professions Code Section 3516~~
- ~~(64)19) Business and Professions Code Section 3575~~
- ~~(65)20) Business and Professions Code Section 3576~~
- ~~(66)21) Business and Professions Code Section 4080~~
- ~~(67)22) Business and Professions Code Section 4081(a)~~
- ~~(68)23) Business and Professions Code Section 4172~~
- ~~(69)24) Business and Professions Code Section 17500~~
- ~~(70)25) Civil Code Section 56.10~~
- ~~(71)26) Health and Safety Code Section 1248.15~~
- ~~(72)27) Health and Safety Code Section 11165.1(a)(1)(A)(i)~~
- ~~(73)28) Health and Safety Code Section 102795~~
- ~~(74)29) Health and Safety Code Section 102800~~
- ~~(75)30) Health and Safety Code Section 103785~~
- ~~(76)31) Health and Safety Code Section 109275~~
- ~~(77)32) Health and Safety Code Section 109277~~
- ~~(78)33) Health and Safety Code Section 109278~~
- ~~(79)34) Health and Safety Code Section 109282~~
- ~~(80)35) Health and Safety Code Section 120250~~
- ~~(81)36) Health and Safety Code Section 120370(a)~~
- ~~(82)37) Health and Safety Code Section 121362~~
- ~~(83)38) Health and Safety Code Section 121363~~
- ~~(84)39) Health and Safety Code Section 123110(a), (b)~~
- ~~(85)40) Health and Safety Code Section 123148~~
- ~~(86)41) Penal Code Section 11166~~
- ~~(87) Title 16 California Code of Regulations Section 1338(c)~~
- ~~(88) Title 16 California Code of Regulations Section 1355.4~~

~~(8942)~~ Title 16 California Code of Regulations Section 1399.545

~~(9043)~~ Title 17 California Code of Regulations Section 2500

(44) any provision of ~~T~~the Medical Practice Act (Business and Professions Code section 2000, et seq.)

(45) any provision of ~~T~~the Licensed Midwifery Practice Act of 1993 (Business and Professions Code section 2505, et seq.)

(46) any regulation adopted by the Board under Division 13, Title 16 of the California Code of Regulations.

(47) Any other statute or regulation upon which the Board may base a disciplinary action.

(b) In ~~his or her~~their discretion, a ~~b~~Board official may issue a citation under Section 1364.10 to a licensee for a violation of a term or condition contained in the decision placing that licensee on probation.

(c) The amount of any fine to be levied by a Board official shall not exceed the amount specified in Section 125.9(b)(3) of the Code or other applicable sections of California law. When determining the amount of the fine to be assessed, the Board official shall consider the factors listed in Section 125.9(b)(3) or in other applicable sections of California law.

~~A citation may include a fine from \$100 to \$2500. However, a citation may include a fine up to \$5,000 if one or more of the following circumstances apply:~~

~~(1) The cited person has received two or more prior citations for the same or similar violations;~~

~~(2) The citation involves multiple violations that demonstrate a willful disregard for the law.~~

(d) In ~~his or her~~their discretion, a ~~b~~Board official may issue a citation with an order of abatement without levying a fine for the first violation of any provision set forth above.

(e) The sanction authorized under this section shall be separate from and in addition to any other administrative, civil, or criminal remedies.

Note: Authority cited: Sections 125.9, 148 and 2018, Business and Professions Code.

Reference: Sections 125.9, 148, 2227, 2228, 2229 and 2234, Business and Professions Code.



November 14, 2023

Alexandria Schembra
Medical Board of California
2005 Evergreen St., Ste. 1200
Sacramento, CA 95815

Sent via email to regulations@mbc.ca.gov

Dear Ms. Schembra:

On behalf of the California Medical Association (CMA) and our nearly 50,000 physician and medical student members, CMA writes to respectfully request amendments to the proposed regulations updating the Medical Board of California's (MBC) system for the issuance of citations to its licensees, which may contain an order of abatement or fine.

The MBC amended Section 1364.11 to include the entirety of the Medical Practice Act (MPA), the entirety of the MBC's regulations, and any other statute or regulation upon which the MBC may base a disciplinary action instead of listing each citable code section in an effort to update the list of citable offenses to help keep the section current as statutes and regulations are added, repealed, and amended. CMA believes that this application is overly broad and could give rise to misinterpretation by licensees about the way the Board may seek redress for situations that come before it.

For example, Business and Profession Code Section 2064.5(a) reads:

§2064.5(a) Within 180 days after beginning a board-approved postgraduate training program pursuant to Section 2065, medical school graduates shall obtain a physician's and surgeon's postgraduate training license. To be considered for a postgraduate training license, the applicant shall submit the application forms and primary source documents required by the board, shall successfully pass all required licensing examinations, shall pay a nonrefundable application and processing fee, and shall not have committed any act that would be grounds for denial.

This section falls within the MPA and therefore a person affected by these regulations, in this case a graduating medical student beginning their postgraduate training program, may reasonably believe that if they do not obtain a physician's and surgeon's postgraduate training license within 180 days after beginning a board approved postgraduate training program, they may now be subject to a citation and order of abatement. The postgraduate training license has been the subject of significant uncertainty over the last few years. It is ill-advised to add another layer of concern for applicants or licensees. Nor have we seen any

indication that this is the MBC's intent. However, the regulations, plainly read, allow for this use.

CMA believes the MBC should make clear the specific code violations it wishes to have the authority for which to issue citations so those directly affected by the regulation do not have to divine what is eligible for cite and fine.

Similarly, critical to that is the need to avoid inaccurately suggesting to licensees that cite and fine, which is not a disciplinary action, is a course the Board may pursue in lieu of discipline. For example, Business and Professions Code Section 2234 requires the MBC to take action against any licensee charged with unprofessional conduct and defines unprofessional conduct to include, but not be limited to, the following:

(a) Violating or attempting to violate, directly or indirectly, assisting in or abetting the violation of, or conspiring to violate any provision of this chapter.

(b) Gross negligence.

(c) Repeated negligent acts. To be repeated, there must be two or more negligent acts or omissions. An initial negligent act or omission followed by a separate and distinct departure from the applicable standard of care shall constitute repeated negligent acts.

(1) An initial negligent diagnosis followed by an act or omission medically appropriate for that negligent diagnosis of the patient shall constitute a single negligent act.

(2) When the standard of care requires a change in the diagnosis, act, or omission that constitutes the negligent act described in paragraph (1), including, but not limited to, a reevaluation of the diagnosis or a change in treatment, and the licensee's conduct departs from the applicable standard of care, each departure constitutes a separate and distinct breach of the standard of care.

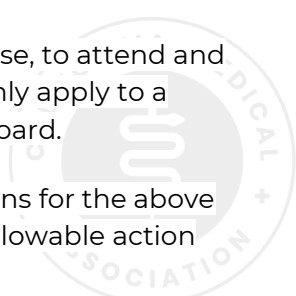
(d) Incompetence.

(e) The commission of any act involving dishonesty or corruption that is substantially related to the qualifications, functions, or duties of a physician and surgeon.

(f) Any action or conduct that would have warranted the denial of a certificate.

(g) The failure by a certificate holder, in the absence of good cause, to attend and participate in an interview by the board. This subdivision shall only apply to a certificate holder who is the subject of an investigation by the board.

CMA does not believe it is the intent of the MBC to begin issuing citations for the above offenses not previously covered by the cite and fine regulations as an allowable action



referenced in Business and Professions Code 2234 in place of disciplinary action. Notably, the currently adopted Section 1364.11 (29) authorized cite and fine for only one subsection of Business and Professions Code 2234, which supports our interpretation that the Board does not interpret the entirety of that section as appropriate for application of cite and fine.

The MBC wrote in the notice for these regulations that citations are used to address technical or minor violations of the law and not considered disciplinary action. Violations of Business and Professions Code 2234 are typically not technical or minor. However, CMA believes a physician may interpret the new regulations to mean that all subsections of Business and Professions Code Section 2234 may now be resolved through a citation and order of abatement because Business and Professions Code Section 2234 is in the MPA, and the MBC has listed the entire MPA as eligible for citation. This kind of misinterpretation could occur throughout the MPA without additional specificity. The MBC's regulations should simply and clearly identify what violations the MBC deems eligible for a citation.

The proposed regulations effectively add numerous new code sections to the pool of violations eligible for citation. The scope of this policy decision was never contemplated or discussed by the MBC, and it was not addressed in the notice of proposed regulatory action. The MBC only contemplated the effect these changes would have on its ability to keep the list of citable offenses current. However, CMA believes that this proposal would have a more substantive impact. If this is the intent of the MBC, then the MBC should have this discussion and clearly identify which codes it intends to add to the list of citable offenses and continue to maintain that list in regulation.

For these reasons, we ask the MBC to revert to the former approach to drafting regulations and list each code section to clearly identify which sections the MBC intends to reserve the right to issue a citation for. If you have additional questions, please contact me at levensen@cmadocs.org.

Sincerely,



Lucas Evensen
Associate Director, Strategic Engagement
California Medical Association

