

## MEDICAL BOARD STAFF REPORT

DATE REPORT ISSUED: July 12, 2016  
ATTENTION: Members, Medical Board of California  
SUBJECT: Proposed Amendments to Title 16 of the California Code of Regulations section 1361  
FROM: Kerrie Webb, Senior Staff Counsel

REQUESTED ACTION:

After review and consideration of the attached proposed language modifying Title 16 California Code of Regulations (CCR) section 1361 (Attachment A – Only the pertinent pages are attached), make a motion to approve the second modified language, and authorize staff to notice the modified language for a 15-day comment period. If no substantive negative comments are received, authorize the Executive Director to make any non-substantive changes and complete the rulemaking process.

BACKGROUND:

At the July 2015 meeting of the Medical Board of California (Board) Board Members authorized staff to begin the regulatory process to amend 16 CCR section 1361 and the Manual of Model Disciplinary Orders and Disciplinary Guidelines (Disciplinary Guidelines), which are incorporated by reference to section 1361.

The proposed amendments to section 1361 and the Disciplinary Guidelines were noticed for a 45-day comment period, and a hearing was held on October 30, 2015. Two comments were received at the hearing and were accepted and incorporated into the proposed language. The modified language was noticed for a 15-day comment period. No further comments were received from the public. Upon further review, however, staff has identified additional edits to be made as follows:

- 1) **Change the 12<sup>th</sup> Edition date from 2015 to 2016:** Since staff is proposing further modifications to the Disciplinary Guidelines, the date of the 12<sup>th</sup> Edition should be changed to reflect the current year.
- 2) **Condition 18 – Clinical Competence Assessment Program:** Current language provides in pertinent part: “Respondent shall pay all expenses associated with the clinical training program.” This provision was inadvertently left out of this condition, and must be included with a modification to read, “Respondent shall pay all expenses associated with the clinical competence assessment program.” Additionally, some minor changes from capitalized letters to lower case are being proposed.

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- 3) **Condition 19 – Written Examination:** Current language refers to a “clinical training program” which the Board is seeking to change with this rulemaking. For consistency, each place referencing “clinical training program” is being amended to state “clinical competence assessment program.” Additionally, staff recommends making the following change for consistency between Conditions 18 and 19 under Option 1: Condition Precedent in pertinent part:

This prohibition shall not bar respondent from participating in a clinical competence assessment program practicing in a clinical training program approved by the Board or its designee. ~~Respondent's practice of medicine shall be restricted only to that which is required by the approved training program.~~

- 4) **Condition 23 – Monitoring – Practice/Billing:** Current language provides in pertinent part:

Within 30 calendar days of the effective date of this Decision the respondent shall submit to the Board or its designee for prior approval as a \_\_\_\_\_ [insert: practice, billing, or practice and billing] monitor(s), the name and qualifications of one or more licensed physicians and surgeons whose licenses are valid and in good standing, and who are preferably American Board of Medical Specialties (ABMS) certified.

The Board noticed the language with modifications as follows, that were not identified by underline for new language. Additionally, the “t” in respondent was underlined in error:

Within 30 calendar days of the effective date of this Decision, if the respondent is providing direct patient care, the respondent t shall submit to the Board or its designee for prior approval as a \_\_\_\_\_ [insert: practice, billing, or practice and billing] monitor(s), the name and qualifications of one or more licensed physicians and surgeons whose licenses are valid and in good standing, and who are preferably American Board of Medical Specialties (ABMS) certified.

Staff is seeking permission remove the language that was not properly noticed, and to strike the underline below the “t.”

- 5) **Condition 33 – Non-practice While on Probation: Current language provides** in pertinent part: “Periods of non-practice will not apply to the reduction of the probationary term.” This provision was inadvertently left off the noticed language, and must be included.
- 6) **Recommended Range of Penalties for Violations – Violation of Probation:** Current language refers to a “clinical training program” which the Board is seeking to change with this rulemaking. For consistency, each place referencing “clinical training program” is being amended to state “clinical competence assessment program.”

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CONCLUSION:

If the Members vote to support these modifications, the rulemaking will be noticed for a 15-day comment period. The Board could authorize the Executive Director to make any non-substantive changes required to complete the rulemaking process if no substantive adverse comments are received.

**MEDICAL BOARD OF CALIFORNIA  
DISCIPLINARY GUIDELINES**

**SECOND MODIFIED TEXT**

**Legend**

Underlined        Indicates proposed amendments or additions to the existing regulation.  
~~Strikeout~~        Indicates proposed deletions to the existing regulation.

Changes to the originally proposed language are shown by ~~red double strikethrough~~ for deleted text and by red double underline for new text.

Changes to the first modified text are shown by ~~yellow highlighted double strikethrough~~ for deleted text and by yellow highlighted double underline for new text.

**1. Amend section 1361 in Article 4 of Chapter 2, Division 13, Title 16 of the California Code of Regulations to read as follows:**

**1361. Disciplinary Guidelines and Exceptions for Uniform Standards Related to Substance-Abusing Licensees**

(a) In reaching a decision on a disciplinary action under the Administrative Procedure Act (Government Code section 11400 et seq.), the Medical Board of California shall consider the disciplinary guidelines entitled "Manual of Model Disciplinary Orders and Disciplinary Guidelines" (~~11th Edition/2014~~ 12<sup>th</sup> Edition/20152016) which are hereby incorporated by reference. Deviation from these orders and guidelines, including the standard terms of probation, is appropriate where the Board in its sole discretion determines by adoption of a proposed decision or stipulation that the facts of the particular case warrant such a deviation - for example: the presence of mitigating factors; the age of the case; evidentiary problems.

(b) Notwithstanding subsection (a), the Board shall use the Uniform Standards for Substance-Abusing Licensees as provided in section 1361.5, without deviation, for each individual determined to be a substance-abusing licensee.

(c) Nothing in this section or section 1361.5 shall be construed as a limitation on the Board's authority to seek an interim suspension order against a licensee pursuant to section 11529 of the Government Code.

Note: Authority cited: Sections 315, 315.2, 315.4 and 2018, Business and Professions Code; and Section 11400.20, Government Code. Reference: Sections 315, 315.2, 315.4, 2227, 2228, 2229 and 2234, Business and Professions Code; and Sections 11400.20, ~~and 11425.50(e)~~, and 11529, Government Code.

2. Amend the “Manual of Model Disciplinary Orders and Disciplinary Guidelines” incorporated by reference into section 1361 in Article 4 of Chapter 2, Division 13, Title 16 of the California Code of Regulations to read as follows:

State of California

~~State and Consumer Services Agency~~  
Business, Consumer Services, and Housing Agency

## MEDICAL BOARD OF CALIFORNIA

# MANUAL OF MODEL DISCIPLINARY ORDERS AND DISCIPLINARY GUIDELINES



44<sup>th</sup> ~~12<sup>th</sup>~~ Edition  
2011 ~~2015~~ 2016

STATE OF CALIFORNIA  
MEDICAL BOARD OF CALIFORNIA

State of California  
~~State and Consumer Services Agency~~  
~~Business, Consumer Services, and Housing Agency~~  
MEDICAL BOARD OF CALIFORNIA  
MANUAL OF MODEL DISCIPLINARY ORDERS  
AND DISCIPLINARY GUIDELINES  
11<sup>th</sup> ~~12<sup>th</sup>~~ Edition  
~~2011~~ ~~2015~~ ~~2016~~  
STATE OF CALIFORNIA  
MEDICAL BOARD OF CALIFORNIA

The Board produced this Manual of Model Disciplinary Orders and Disciplinary Guidelines, 44 ~~11<sup>th</sup>~~ ~~12<sup>th</sup>~~ Edition for the intended use of those involved in the physician disciplinary process: Administrative Law Judges, defense attorneys, physicians-respondents, trial attorneys from the Office of the Attorney General, and the Board's disciplinary panel members who review proposed decisions and stipulations and make final decisions. These guidelines are not binding standards.

The Federation of State Medical Boards and other state medical boards have requested and received this manual. All are welcome to use and copy any part of this material for their own work.

To view this document visit [http://www.mbc.ca.gov/Enforcement/disciplinary\\_guide.pdf](http://www.mbc.ca.gov/Enforcement/disciplinary_guide.pdf)  
For additional copies of this manual, please write to the address below or visit [http://www.medbd.ca.gov/publications/disciplinary\\_guide.pdf](http://www.medbd.ca.gov/publications/disciplinary_guide.pdf):

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Revisions to the Manual of Model Disciplinary Orders and Disciplinary Guidelines are made periodically. Listed below are the most recent changes included in the 11<sup>th</sup> edition approved by the Board following open discussion at a public meeting.

### **Summary of Changes**

The former "Disciplinary Guidelines — Index" printed after the last "Standard Conditions" has been moved to the Table of Contents (a formatting change only) and has been renamed the "Recommended Range of Penalties for Violations" for clarity.

Model Condition Number:

#### **5. Controlled Substances — Total Restriction**

Eliminated the term "good faith" prior examination to reflect amendments made to statute that now requires an "appropriate prior examination and a medical indication" and adds "furnish" to the list of prohibited activities.

**(Option # 1: Condition Precedent)**

Respondent shall not practice medicine until respondent has successfully completed the Pprogram and has been so notified by the Board or its designee in writing.

**(Option # 2: Condition Subsequent)**

If respondent fails to complete the Pprogram within the designated time period, respondent shall cease the practice of medicine within three (3) calendar days after being notified by the Board or its designee that respondent failed to complete the Pprogram.

**18. Clinical Competence Assessment Training Program**

Within 60 calendar days of the effective date of this Decision, respondent shall enroll in a clinical competence assessment training or educational program equivalent to the Physician Assessment and Clinical Education Program (PACE) offered at the University of California - San Diego School of Medicine ("Program") approved in advance by the Board or its designee. Respondent shall successfully complete the Pprogram not later than six (6) months after respondent's initial enrollment unless the Board or its designee agrees in writing to an extension of that time.

The Pprogram shall consist of a Comprehensive Assessment program ~~comprised of an two-day assessment of respondent's physical and mental health; basic clinical and communication skills common to all clinicians; and medical knowledge, skill and judgment~~ and the six general domains of clinical competence as defined by the Accreditation Council on Graduate Medical Education and American Board of Medical Specialties pertaining to respondent's current or intended area of practice in which respondent was alleged to be deficient, and at minimum, a 40-hour a program of clinical education in the respondent's area of practice in which respondent was alleged to be deficient and. The program shall which takes into account data obtained from the pre-assessment, self-report forms and interview, and the Decision(s), Accusation(s), and any other information that the Board or its designee deems relevant. The program shall require respondent's on-site participation for a minimum of 3 ~~to~~ and no more than 5 days as determined by the program for the assessment and clinical education evaluation. Respondent shall pay all expenses associated with the clinical competence assessment program.

At the end of the evaluation, the program will submit a report to ~~Based on respondent's performance and test results in the assessment and clinical education, the Program will advise the Board or its designee~~ which unequivocally states whether the respondent has demonstrated the ability to practice safely and independently. Based on respondent's performance on the Clinical Competence Assessment, the program will advise the Board or its designee of its recommendation(s) for the scope and length of any additional educational or clinical training, evaluation or treatment for any medical condition, treatment for any or psychological condition, or anything else affecting respondent's practice of medicine. Respondent shall comply with the Pprogram's recommendations.

~~At the completion of any additional educational or clinical training, respondent shall submit to and pass an examination. Determination as to whether respondent successfully completed the examination or successfully completed the~~ clinical competence assessment program is solely within the program's jurisdiction.

[Note: The following language shall be included in this condition unless Option #1 is included: If respondent fails to enroll, participate in, or successfully complete the clinical competence



~~assessment training~~ program within the designated time period, respondent shall receive a notification from the Board or its designee to cease the practice of medicine within three (3) calendar days after being so notified. The respondent shall not resume the practice of medicine until enrollment or participation in the outstanding portions of the clinical competence assessment training program have been completed. If the respondent did not successfully complete the clinical competence assessment training program, the respondent shall not resume the practice of medicine until a final decision has been rendered on the accusation and/or a petition to revoke probation. The cessation of practice shall not apply to the reduction of the probationary time period.]

(Option #1: Condition Precedent)

Respondent shall not practice medicine until respondent has successfully completed the Pprogram and has been so notified by the Board or its designee in writing, ~~except that respondent may practice in a clinical training program approved by the Board or its designee. Respondent's practice of medicine shall be restricted only to that which is required by the approved training program.~~

(Option #2)

Within 60 days after respondent has successfully completed the clinical competence assessment training program, respondent shall participate in a professional enhancement program ~~equivalent to the one offered by the Physician Assessment and Clinical Education Program at the University of California, San Diego School of Medicine~~ approved in advance by the Board or its designee, which shall include quarterly chart review, semi-annual practice assessment, and semi-annual review of professional growth and education. Respondent shall participate in the professional enhancement program at respondent's expense during the term of probation, or until the Board or its designee determines that further participation is no longer necessary.

## 19. ~~Oral and/or~~ Written Examination

[NOTE: This condition should **only** be used where a clinical competence assessment training program is not appropriate.]

~~Within 60 calendar days of the effective date of this Decision, respondent shall take and pass an oral and/or a written examination, administered by the Board or its designee. The Board or its designee shall designate a subject matter and administer the oral and/or written.~~

~~If the examination is an oral examination, it shall be conducted in accordance with section 2293(a) and (b) of the Code.~~

~~If respondent is required to take and pass a written exam, that examination shall be either the Special Purpose Examination (SPEX) or an equivalent examination as determined by the Board or its designee.~~

~~If respondent fails the first examination, respondent shall be allowed to take and pass a second examination.~~

~~Failure to pass the required oral and/or written examination within 180 calendar days after the effective date of this Decision is a violation of probation. Respondent shall pay the costs of all examinations.~~



**[Note:** The following language shall be included in this condition unless Option #1 is included: If respondent fails to pass the ~~first~~ written examination, respondent shall receive a notification from the Board or its designee to cease the practice of medicine within three (3) calendar days after being so notified. Respondent shall not practice medicine until respondent successfully passes the examination, as evidenced by written notice to respondent from the Board or its designee.]

**(Option 1: Condition Precedent)**

Respondent shall not practice medicine until respondent has passed the required examination and has been so notified by the Board or its designee in writing. This prohibition shall not bar respondent from participating in a clinical competence assessment program ~~practicing in a clinical training program~~ approved by the Board or its designee. ~~Respondent's practice of medicine shall be restricted only to that which is required by the approved training program.~~

Note: The condition precedent option is particularly recommended in cases where respondent has been found to be incompetent, repeatedly negligent, or grossly negligent.

**20. Psychiatric Evaluation**

Within 30 calendar days of the effective date of this Decision, and on whatever periodic basis thereafter may be required by the Board or its designee, respondent shall undergo and complete a psychiatric evaluation (and psychological testing, if deemed necessary) by a Board-appointed board certified psychiatrist, who shall consider any information provided by the Board or designee and any other information the psychiatrist deems relevant, and shall furnish a written evaluation report to the Board or its designee. Psychiatric evaluations conducted prior to the effective date of the Decision shall not be accepted towards the fulfillment of this requirement. Respondent shall pay the cost of all psychiatric evaluations and psychological testing.

Respondent shall comply with all restrictions or conditions recommended by the evaluating psychiatrist within 15 calendar days after being notified by the Board or its designee.

**(Option: Condition Precedent)**

Respondent shall not engage in the practice of medicine until notified by the Board or its designee that respondent is mentally fit to practice medicine safely. The period of time that respondent is not practicing medicine shall not be counted toward completion of the term of probation.

**21. Psychotherapy**

Within 60 calendar days of the effective date of this Decision, respondent shall submit to the Board or its designee for prior approval the name and qualifications of a California-licensed board certified psychiatrist or a licensed psychologist who has a doctoral degree in psychology and at least five years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders. Upon approval, respondent shall undergo and continue psychotherapy treatment, including any modifications to the frequency of psychotherapy, until the Board or its designee deems that no further psychotherapy is necessary.

The psychotherapist shall consider any information provided by the Board or its designee and any other information the psychotherapist deems relevant and shall furnish a written evaluation report to the Board or its designee. Respondent shall cooperate in providing the psychotherapist any information and documents that the psychotherapist may deem pertinent.

Note: This condition is for those cases where the evidence demonstrates that medical illness or disability was a contributing cause of the violations.

### 23. Monitoring - Practice/Billing

Within 30 calendar days of the effective date of this Decision, if the respondent is providing direct patient care, the respondent shall submit to the Board or its designee for prior approval as a \_\_\_\_\_ [insert: practice, billing, or practice and billing] monitor(s), the name and qualifications of one or more licensed physicians and surgeons whose licenses are valid and in good standing, and who are preferably American Board of Medical Specialties (ABMS) certified. A monitor shall have no prior or current business or personal relationship with respondent, or other relationship that could reasonably be expected to compromise the ability of the monitor to render fair and unbiased reports to the Board, including but not limited to any form of bartering, shall be in respondent's field of practice, and must agree to serve as respondent's monitor. Respondent shall pay all monitoring costs.

The Board or its designee shall provide the approved monitor with copies of the Decision(s) and Accusation(s), and a proposed monitoring plan. Within 15 calendar days of receipt of the Decision(s), Accusation(s), and proposed monitoring plan, the monitor shall submit a signed statement that the monitor has read the Decision(s) and Accusation(s), fully understands the role of a monitor, and agrees or disagrees with the proposed monitoring plan. If the monitor disagrees with the proposed monitoring plan, the monitor shall submit a revised monitoring plan with the signed statement for approval by the Board or its designee.

Within 60 calendar days of the effective date of this Decision, and continuing throughout probation, respondent's \_\_\_\_\_ [insert: practice, billing, or practice and billing] shall be monitored by the approved monitor. Respondent shall make all records available for immediate inspection and copying on the premises by the monitor at all times during business hours and shall retain the records for the entire term of probation.

If respondent fails to obtain approval of a monitor within 60 calendar days of the effective date of this Decision, respondent shall receive a notification from the Board or its designee to cease the practice of medicine within three (3) calendar days after being so notified. Respondent shall cease the practice of medicine until a monitor is approved to provide monitoring responsibility.

The monitor(s) shall submit a quarterly written report to the Board or its designee which includes an evaluation of respondent's performance, indicating whether respondent's practices are within the standards of practice of \_\_\_\_\_ [insert: medicine or billing, or both], and whether respondent is practicing medicine safely, billing appropriately or both. It shall be the sole responsibility of respondent to ensure that the monitor submits the quarterly written reports to the Board or its designee within 10 calendar days after the end of the preceding quarter.

If the monitor resigns or is no longer available, respondent shall, within 5 calendar days of such resignation or unavailability, submit to the Board or its designee, for prior approval, the name and qualifications of a replacement monitor who will be assuming that responsibility within 15 calendar days. If respondent fails to obtain approval of a replacement monitor within 60 calendar days of the resignation or unavailability of the monitor, respondent shall receive a notification from the Board or its designee to cease the practice of medicine within three (3) calendar days after being so notified. Respondent shall cease the practice of medicine until a replacement monitor is approved and assumes monitoring responsibility.

**License Renewal**

Respondent shall maintain a current and renewed California physician's and surgeon's license.

**Travel or Residence Outside California**

Respondent shall immediately inform the Board or its designee, in writing, of travel to any areas outside the jurisdiction of California which lasts, or is contemplated to last, more than thirty (30) calendar days.

In the event respondent should leave the State of California to reside or to practice respondent shall notify the Board or its designee in writing 30 calendar days prior to the dates of departure and return.

**32. Interview with the Board or its Designee**

Respondent shall be available in person upon request for interviews either at respondent's place of business or at the probation unit office, with or without prior notice throughout the term of probation.

**33. Non-practice While on Probation**

Respondent shall notify the Board or its designee in writing within 15 calendar days of any periods of non-practice lasting more than 30 calendar days and within 15 calendar days of respondent's return to practice. Non-practice is defined as any period of time respondent is not practicing medicine in California as defined in Business and Professions Code sections 2051 and 2052 for at least 40 hours in a calendar month in direct patient care, clinical activity or teaching, or other activity as approved by the Board. If respondent resides in California and is considered to be in non-practice, respondent shall comply with all terms and conditions of probation. All time spent in an intensive training program which has been approved by the Board or its designee shall not be considered non-practice and does not relieve respondent from complying with all the terms and conditions of probation.

In the event respondent's period of non-practice while on probation exceeds 18 calendar months, respondent shall successfully complete the Federation of State Medical Board's Special Purpose Examination, or, at the Board's discretion, a clinical competence assessment program that meets the criteria of Condition 18 of the current version of the Board's "Manual of Model Disciplinary Orders and Disciplinary Guidelines" ~~a clinical training program that meets the criteria of Condition 18 of the current version of the Board's "Manual of Model Disciplinary Orders and Disciplinary Guidelines"~~ prior to resuming the practice of medicine. Respondent's period of non-practice while on probation shall not exceed two (2) years.

Periods of non-practice will not apply to the reduction of the probationary term.

Periods of non-practice for a respondent residing outside of California, will relieve respondent of the responsibility to comply with the probationary terms and conditions with the exception of this condition and the following terms and conditions of probation: Obey All Laws; ~~and~~ General Probation Requirements; Quarterly Declarations; Abstain from the Use of Alcohol and/or Controlled Substances; and Biological Fluid Testing.

**BUSINESS ORGANIZATION IN VIOLATION OF CHAPTER (B&P 2417)**

Minimum penalty: Revocation

Effective January 1, 2002, Business and Professions Code section 2417 was added to read, in part, "(b) A physician and surgeon who practices medicine with a business organization knowing that it is owned or operated in violation of Section 1871.4 of the Insurance Code, Section 14107 or 14107.2 of the Welfare and Institutions Code, or Section 549 or 550 of the Penal Code shall have his or her license to practice permanently revoked."

**VIOLATION OF PROBATION**

Minimum penalty: 30 day suspension

Maximum penalty: Revocation

The maximum penalty should be given for repeated similar offenses or for probation violations revealing a cavalier or recalcitrant attitude. A violation of any of the following conditions of probation should result in, at minimum, a 60 day suspension:

1. Controlled Substances -Maintain Records and Access to Records and Inventories [8]
2. Biological Fluid Testing [11]
3. Professional Boundaries Program [17]
4. Psychiatric Evaluation [20]
5. Psychotherapy [21]
6. Medical Evaluation and Treatment [22]
7. Third Party Chaperone [25]

It is the expectation of the Medical Board of California that the appropriate penalty for a physician who did not successfully complete a clinical competence assessment training program ordered as part of his or her probation is revocation.