

MEDICAL BOARD STAFF REPORT

DATE REPORT ISSUED: March 29, 2019
 ATTENTION: Members, Medical Board of California (Board)
 SUBJECT: Proposed Changes to Substantial Relationship and
 Rehabilitation Regulations
 STAFF CONTACT: Kerrie Webb, Staff Counsel

REQUESTED ACTION:

After review and consideration of the proposed amendments to the attached regulations, make a motion to direct staff to proceed with the following:

- 1) Prepare the necessary regulatory documents to submit to the Department of Consumer Affairs (DCA) and the Business, Consumer Services and Housing Agency (Agency);
- 2) Upon DCA and Agency approval, submit the documents to the Office of Administrative Law (OAL) to formally notice the proposed regulatory language to amend or repeal the following regulations:
 - Title 16 California Code of Regulations (CCR) section 1309 (Amend)
 - Title 16 CCR section 1360 (Amend)
 - Title 16 CCR section 1360.1 (Amend)
 - Title 16 CCR section 1360.2 (Amend)
 - Title 16 CCR section 1379.68 (Repeal)
 - Title 16 CCR section 1379.70 (Repeal)
 - Title 16 CCR section 1379.72 (Repeal)
- 3) Allow staff to make non-substantive changes to the language during the rulemaking process, as needed.

BACKGROUND:

Assembly Bill (AB) 2138 (Chiu, Chapter 995, Statutes of 2018) was enacted in 2018, and will become operative on July 1, 2020. Among other things, the goal of this bill is to reduce licensing barriers for individuals with prior criminal convictions by limiting the Board's discretion to deny, suspend, or revoke a license based on criminal convictions or administrative discipline by another licensing board. With some exceptions, the Board will be prohibited from denying a license based on criminal convictions or administrative discipline older than seven years, and will not be able to consider convictions, or the acts underlying those convictions, that have been expunged.

To implement the changes required by this bill, the Board must amend its regulations governing substantially-related crimes or acts and rehabilitation criteria for determining when to deny, suspend, revoke, or reinstate a license.

Substantially-Related Crimes or Acts

Currently, Business and Professions Code section 480 authorizes the Board to deny an application for licensure based on a conviction for a crime or act substantially related to the profession, i.e., the practice of medicine, the practice of midwifery, etc. Likewise, Business and Professions Code section 490 authorizes the Board to suspend or revoke a license when the licensee is convicted of a crime substantially related to the qualifications, functions, or duties of the profession.

Existing law under Business and Professions Code section 481 required boards to develop criteria to help evaluate whether a crime or act was substantially related to the profession, and the Board established the criteria under 16 CCR section 1360 and 1379.68.

With the enactment of AB 2138, and the changes to Business and Professions Code section 481, the Board must amend 16 CCR section 1360 regarding substantial relationship criteria to include consideration of the following:

- (1) The nature and gravity of the crime;
- (2) The number of years elapsed since the date of the crime; and
- (3) The nature and duties of a licensee.

Accordingly, staff proposes amendments to 16 CCR section 1360 as indicated in the attached language to conform this regulation to the requirements becoming operative on July 1, 2020. Additionally, staff proposes further minor clarifying changes to this regulation as noted in the attached language.

Moreover, to consolidate and clarify that the section applies to all health care professionals regulated by the Board and not just physicians, the reference section has been amended to include provisions applying to licensed midwives, research psychoanalysts, and polysomnographic technologists, technicians, and trainees.

Rehabilitation Criteria

Existing law under Business and Professions Code sections 480 and 482 required boards to develop criteria to evaluate the rehabilitation of an applicant or licensee when considering denying or disciplining a license based on a conviction, and to consider evidence of rehabilitation in making such decisions. The Board's regulations under 16 CCR sections 1309, 1360.1, and 1360.2 set forth its current criteria for evaluating rehabilitation.

Pursuant to AB 2138, and the changes to Business and Professions Code section 482, the Board must revise its regulatory sections on rehabilitation criteria to include consideration of whether an applicant or licensee "made a showing of rehabilitation" if he or she completed the criminal sentence at issue without a violation of parole or probation, or the Board finds, in applying its rehabilitation criteria, that the individual is rehabilitated.

While it is an option the Board may consider, the revisions to the law do not require the Board to automatically accept that someone is rehabilitated simply based upon completion of a criminal sentence without a violation of parole or probation, since strict compliance with such a sentence is expected. Instead, this proposed rulemaking requires the Board to consider whether the individual made a showing of rehabilitation if he or she successfully completed the criminal sentence and by evaluating the following factors:

- (1) The nature and gravity of the crime(s).
- (2) The length(s) of the applicable parole or probation period(s).
- (3) The extent to which the applicable parole or probation period was shortened or lengthened, and the reason(s) the period was modified.
- (4) The terms or conditions of parole or probation and the extent to which they bear on the individual's rehabilitation.
- (5) The extent to which the terms or conditions of parole or probation were modified, and the reason(s) for modification.

If the above evaluation is not applicable, or the individual did not make a showing of rehabilitation under those factors, then pursuant to this proposed rulemaking, the Board would apply its current set of criteria, with some clarifying modifications as indicated in the attached language, to determine whether the individual is rehabilitated and presently eligible for a license.

Moreover, to consolidate and clarify that the sections on rehabilitation criteria applies to all health care professionals regulated by the Board and not just physicians, the reference sections under 16 CCR sections 1309, 1360.1, and 1360.2 have been amended to include provisions applying to licensed midwives, research psychoanalysts, and polysomnographic technologists, technicians, and trainees.

Finally, this proposed rulemaking would repeal 16 CCR sections 1379.68 (Substantial Relationship Criteria), 1379.70 (Criteria for Rehabilitation for Denial and Reinstatement), and 1379.72 (Rehabilitation Criteria for Suspensions and Revocations) relating to polysomnographic technologists, technicians and trainees. Instead, as indicated above, the reference sections to 16 CCR sections 1309, 1360, 1360.1, and 1360.2 will be applicable to all licensees and registrants of the Board.

STAFF RECOMMENDATION:

Staff recommends the Board grant authorization to proceed with preparing the necessary rulemaking documents to submit to DCA and Agency for approval, and then to OAL to formally notice the proposed amendments for the 45-day comment period. Staff further recommends the Board authorize staff to make any non-substantive changes to the proposed language during the rulemaking process, as needed.

MEDICAL BOARD OF CALIFORNIA
SUBSTANTIAL RELATIONSHIP AND REHABILITATION CRITERIA
PROPOSED AMENDMENTS

Legend

Underlined Indicates proposed amendments or additions to the existing regulation.

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

1. Amend Section 1309, Chapter 1, Article 2, Division 13, of Title 16 of the California Code of Regulations to read as follows:

§ 1309. Rehabilitation Criteria for Denial of Licensure.

(a) When considering the denial of a license, certificate or permit under Section 480 of the code, the division, in evaluating the rehabilitation of the applicant and his or her present eligibility for a license, certificate or permit, on the ground that the applicant was convicted of a crime, the Board shall consider whether the applicant made a showing of rehabilitation and is presently eligible for a license if the applicant completed the criminal sentence at issue without a violation of parole or probation. In making this determination, the Board shall consider the following criteria:

~~(a)~~(1) The nature and gravity of the crime(s).

(2) The length(s) of the applicable parole or probation period(s).

(3) The extent to which the applicable parole or probation period was shortened or lengthened, and the reason(s) the period was modified.

(4) The terms or conditions of parole or probation and the extent to which they bear on the applicant's rehabilitation.

(5) The extent to which the terms or conditions of parole or probation were modified, and the reason(s) for modification.

(b) Where subdivision (a) is inapplicable, or the Board determines that the applicant did not make the showing of rehabilitation based on the criteria in subdivision (a), the Board shall apply the following criteria to determine whether the petitioner is rehabilitated and presently eligible for a license:

~~(a)~~(1) The nature and severity of the act(s) or crime(s) under consideration as grounds for denial.

~~(b)~~(2) Evidence of any act(s) or crime(s) committed subsequent to the act(s) or crime(s) under consideration as grounds for denial which also could be considered as grounds for denial under Section 480.

~~(c)~~(3) The time that has elapsed since commission of the act(s) or crime(s) referred to in subsections subdivisions ~~(a)~~subdivisions ~~(b)~~(1) or ~~(b)~~(2).

- ~~(d)~~(4) The extent to which the applicant has complied with any terms of parole, probation, restitution or any other sanctions lawfully imposed against the applicant.
- ~~(e)~~(5) The criteria in subdivisions (a)(1)-(5), as applicable.
- (6) Evidence, if any, of rehabilitation submitted by the applicant.

Note: Authority cited: Sections 482 and 2018, Business and Professions Code.
Reference: Sections 141, 480, 481, 482, 488, 493, and 2221, 2517, 2529.1, 3576, 2220-2317, Business and Professions Code.

2. Amend Section 1360, Chapter 2, Article 3, Division 13, of Title 16 of the California Code of Regulations to read as follows:

§ 1360. Substantial Relationship Criteria.

(a) For the purposes of denial, suspension or revocation of a license, ~~certificate or permit~~ pursuant to Section 141 or Division 1.5 (commencing with Section 475) of the code, a crime, professional misconduct, or act shall be considered to be substantially related to the qualifications, functions or duties of a person holding a license, ~~certificate or permit under the Medical Practice Act~~ if to a substantial degree it evidences present or potential unfitness of a person holding a license, ~~certificate or permit~~ to perform the functions authorized by the license, ~~certificate or permit~~ in a manner consistent with the public health, safety or welfare. Such crimes or acts shall include but not be limited to the following: Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate any provision of state or federal law governing the licensee's professional practice.~~Medical Practice Act.~~

(b) In making the substantial relationship determination required under subdivision (a) for a crime, the Board shall consider the following criteria:

- (1) The nature and gravity of the crime;
(2) The number of years elapsed since the date of the crime; and
(3) The nature and duties of a licensee.

Note: Authority cited: Sections 481, 493, and 2018, Business and Professions Code.
Reference: Sections 141, 480, 481, 493, 2081, 2221, 2234, and 2236, 2305, 2517, 2519, 2529.1, 3576, and 3576.3 Business and Professions Code.

3. Amend Section 1360.1, Chapter 2, Article 3, Division 13, of Title 16 of the California Code of Regulations to read as follows:

§ 1360.1. Rehabilitation Criteria for Suspension Revocations.

(a) When considering the suspension or revocation of a license, certificate or permit on the ground that a person holding a license, certificate or permit under the Medical Practice Act has been convicted of a crime, the division, in evaluating the rehabilitation of such person and his or her eligibility for a license, certificate or permit Board shall consider whether the licensee made a showing of rehabilitation and is presently eligible for a license if the licensee completed the criminal sentence at issue without a violation of parole or probation. In making this determination, the Board shall consider the following criteria:

(1) The nature and gravity of the crime(s).

(2) The length(s) of the applicable parole or probation period(s).

(3) The extent to which the applicable parole or probation period was shortened or lengthened, and the reason(s) the period was modified.

(4) The terms or conditions of parole or probation and the extent to which they bear on the licensee's rehabilitation.

(5) The extent to which the terms or conditions of parole or probation were modified, and the reason(s) for the modification.

(b) If subdivision (a) is inapplicable, or the Board determines that the licensee did not make the showing of rehabilitation based on the criteria in subdivision (a), the Board shall apply the following criteria to determine whether the licensee is rehabilitated and presently eligible for a license:

(a)(1) The nature and severity of the act(s) or offense(s)crime(s).

(b)(2) The total criminal record.

(c)(3) The time that has elapsed since commission of the act(s) or offense(s)crime(s).

(d)(4) Whether the licensee, certificate or permit holder has complied with any terms of parole, probation, restitution or any other sanctions lawfully imposed against such person.

(5) The criteria in subdivisions (a)(1)-(5), as applicable.

(e)(6) If applicable, evidence of expungement dismissal proceedings pursuant to Section 1203.4 of the Penal Code.

(f)(7) Evidence, if any, of rehabilitation submitted by the licensee, certificate or permit holder.

Note: Authority cited: Sections 482 and 2018, Business and Professions Code.

Reference: Sections 141, 480, 482, 488, 493, 2236, 2305, 2519, 2529.1, 3576, and 3576.3 Business and Professions Code.

4. Amend Section 1360.2, Chapter 2, Article 3, Division 13, of Title 16 of the California Code of Regulations to read as follows:

§ 1360.2. Rehabilitation Criteria for Petitions for Reinstatement.

When considering a petition for reinstatement of a license, ~~certificate or permit holder~~ pursuant to the provisions of Section 2307, 2522, or 3576.1 of the Business and Professions Code, or Section 11522 of the Government Code, as applicable, the ~~division~~ Board or panel shall evaluate evidence of rehabilitation submitted by the petitioner as follows: ~~considering the following criteria:~~

(a) If the revocation was based in part on the conviction of a crime, the Board shall consider whether the petitioner made a showing of rehabilitation and is presently eligible for a license if the petitioner completed the criminal sentence at issue without a violation of parole or probation. In making this determination, the Board shall consider the following criteria:

(1) The nature and gravity of the offense(s).

(2) The length(s) of the applicable parole or probation period(s).

(3) The extent to which the applicable parole or probation period was shortened or lengthened, and the reason(s) the period was modified.

(4) The terms or conditions of parole or probation and the extent to which they bear on the petitioner's rehabilitation.

(5) The extent to which the terms or conditions of parole or probation were modified, and the reason(s) for the modification.

(b) If subdivision (a) is inapplicable, or the Board determines that the petitioner did not make the showing of rehabilitation based on the criteria in subdivision (a), the Board shall apply the following criteria to determine whether the petitioner is rehabilitated and presently eligible for a license:

~~(a)~~(1) The nature and severity of the act(s) or crime(s) under consideration as grounds for denial.

~~(b)~~(2) Evidence of any act(s) or crime(s) committed subsequent to the act(s) or crime(s) under consideration as grounds for denial which also could be considered as grounds for denial under Section 480.

~~(c)~~(3) The time that has elapsed since commission of the act(s) or crime(s) referred to in ~~subsections~~subdivisions ~~(a)(1)~~ or ~~(b)(2)~~.

~~(d)~~(4) In the case of a suspension or revocation based upon the conviction of a crime, the criteria set forth in Section 1360.1, ~~subsections (b), (d) and (e).~~

(5) The criteria in subdivisions (a)(1)-(5), as applicable.

~~(e)~~(6) Evidence, if any, of rehabilitation submitted by the ~~applicant~~petitioner.

Note: Authority cited: Section 2018, Business and Professions Code. Reference: Sections 141, 480, 482, 493, 2236, 2307, 2517, 2522, 2529.1, and 3576.1 Business and Professions Code.

5. Repeal Sections 1379.68, 1379.70, 1379.72, Chapter 4.3, Article 5, Division 13, of Title 16 of the California Code of Regulations:

~~Article 5. Enforcement~~

~~§ 1379.68. Substantial Relationship Criteria.~~

~~For the purpose of denial, suspension, or revocation of the registration of a polysomnography registrant pursuant to Division 1.5 (commencing with Section 475) of the Code, a crime or act shall be considered substantially related to the qualifications, functions, and duties of a polysomnographic registrant if to a substantial degree it evidences present or potential unfitness of a polysomnographic registrant to perform the functions authorized by his or her registration in a manner consistent with the public health, safety, or welfare. Such crimes or acts shall include, but not be limited to, those involving the following:~~

- ~~(a) Violating or attempting to violate, directly or indirectly, or assisting or abetting the violation of or conspiring to violate any provision or term of Chapter 7.8 of Division 2 of the Code.~~
- ~~(b) Conviction of a crime involving fiscal dishonesty, or theft.~~
- ~~(c) Battery or assault.~~
- ~~(d) Sexual misconduct or abuse.~~
- ~~(e) Conviction of a crime involving lewd conduct, prostitution or solicitation thereof, or pandering and/or indecent exposure, as defined by the Penal Code.~~

~~Note: Authority cited: Sections 481 and 2558, Business and Professions Code.~~

~~Reference: Sections 481, 2555.1, 2556 and 3576, Business and Professions Code.~~

~~§ 1379.70. Criteria for Rehabilitation for Denial and Reinstatement.~~

~~When considering the denial of a registration under Section 480 of the Code, or a petition for reinstatement under Section 11522 of the Code, the board in evaluating the rehabilitation of the applicant and his or her present eligibility for registration, shall consider the following criteria:~~

- ~~(a) The nature and severity of the act(s) or crime(s) under consideration.~~
- ~~(b) Evidence of any act(s) committed subsequent to the act(s) or crime(s) under consideration which also could be considered as grounds for denial under Section 480 of the Business and Professions Code.~~
- ~~(c) The time that has elapsed since commission of the act(s) or crime(s) referred to in subdivision (a) or (b).~~
- ~~(d) The extent to which the applicant or petitioner has complied with any terms of parole, probation, restitution or any other sanctions lawfully imposed against him or her.~~
- ~~(e) Evidence, if any, of rehabilitation submitted by the applicant or petitioner.~~

~~Note: Authority cited: Sections 482 and 2018, Business and Professions Code.~~

~~Reference: Sections 482 and 3576, Business and Professions Code.~~

~~§ 1379.72. Rehabilitation Criteria for Suspensions and Revocations.~~

~~When considering the suspension or revocation of a registration on the grounds that the registrant has been convicted of a crime, the board, in evaluating the rehabilitation of such person and his or her present eligibility for a registration, shall consider the following criteria:~~

~~(a) Nature and severity of the act(s) or offense(s).~~

~~(b) Total criminal record.~~

~~(c) Extent of time that has elapsed since commission of the act(s) or offense(s).~~

~~(d) Whether the registrant has complied with any or all terms of parole, probation, restitution or any other sanctions lawfully imposed against the registrant.~~

~~(e) If applicable, evidence of expungement proceedings pursuant to Section 1203.4 of the Penal Code.~~

~~(f) Evidence, if any, of rehabilitation submitted by the registrant.~~

~~Note: Authority cited: Section 482, Business and Professions Code. Reference: Sections 482 and 3576, Business and Professions Code.~~