

MEDICAL BOARD OF BOARD

INITIAL STATEMENT OF REASONS

Hearing Date: October 28, 2016

Subject Matter of Proposed Regulations: Citation and Fine Authority – Allied Health Professionals

Section(s) Affected: Title 16, Division 13, Chapter 2, Article 6, California Code of Regulations (CCR), Section(s) 1364.10, 1364.11, 1364.13 and 1364.15

Introduction:

The Medical Board of California (Board) licenses and regulates physicians and surgeons and certain allied health care professionals, including licensed midwives and polysomnographic technologists, technicians, and trainees.

The Board is currently authorized to issue administrative citations with orders of abatement and fines to physicians and surgeons, but the Board's regulations do not currently include an authorization for the Board to issue citations with orders of abatement and fines to allied health care professionals.

Through this proposed rulemaking, the Board seeks to amend the identified regulations to include the authority to issue citations with orders of abatement and fines to licensed midwives and polysomnographic technologists, technicians, and trainees, and to add additional statutes and an additional regulation as citable offenses. This proposed rulemaking also proposes additional conforming changes, and some technical changes to improve the clarity of the regulations at issue, as described below. These changes support the Board's mission of consumer protection.

Specific Purpose of Each Adoption, Amendment, or Repeal and Factual Basis/Rationale:

1. Proposed Amendments to 16 CCR section 1364.10(b)

Under existing law, CCR section 1364.10, states that a Board official is authorized to determine when and against whom a citation will be issued and to issue citations containing orders of abatement and fines for violations by a licensed physician or surgeon of the statutes referred to in section 1364.11.

Business and Professions (B&P) Code section 125.9 authorizes the Board to establish a system by regulation for the issuance of a citation which may contain

an order of abatement or fine to licensees within the Board's jurisdiction. Pursuant to B&P Code section 23.7, "license" means license, certificate or registration. Licensed midwives and polysomnographic technologists, technicians, and trainees are licensed/registered and regulated by the Board, but are not currently covered by the Board's citation and fine regulations.

This rulemaking adds licensed midwives and polysomnographic technologists, technicians, and trainees under CCR section 1364.10(b) as individuals to whom the Board may issue citations containing orders of abatement and fines.

The proposed amendments are necessary for the Board to be able to issue citations with orders of abatement and fines when these allied health care professionals violate statutes or regulations referenced in CCR section 1364.11.

Further, CCR section 1364.10(b) currently states that citations containing orders of abatement and fines may be issued for violations of the statutes referred to in Section 1364.11. Because CCR section 1364.11 also lists regulations as citable offenses, an amendment to 1364.10(b) is necessary to clarify that citations containing orders of abatement and fines may be issued for violations of regulations, as well as statutes, referred to in Section 1364.11.

This amendment is necessary to provide clarity to this section, which furthers the Board's mission of consumer protection.

2. Proposed Amendments to 16 CCR section 1364.11

Under existing law, CCR section 1364.11(a) states that a Board official may issue a citation under section 1364.10 for a violation of the provisions listed in this section. Additional provisions of the B&P and Health and Safety (H&S) Codes and the CCR need to be added to the list of citable offenses to authorize the Board to issue citations with orders of abatement and fines to licensees found in violation of those statutes or regulations, furthering consumer protection.

The proposed additions to 16 CCR section 1364.11(a) include the following statutes and regulation:

- B&P Code section 2234(h), relating to the repeated failure of a certificate holder, in the absence of good cause, to attend and participate in an interview by the board;
- B&P Code section 2507, relating to the practice of midwifery, the midwifery scope of practice, and the requirement for physician referral under certain circumstances;
- B&P Code section 2508, relating to required disclosures by licensed midwives to their clients;

- B&P Code section 2510, relating to requirements for a licensed midwife upon transfer of a client to a hospital;
- B&P Code section 2514, relating to requirements for midwifery students practicing midwifery as part of his or her course of study;
- B&P Code section 2519, relating to grounds for suspension or revocation of a midwifery license;
- B&P Code section 3575, relating to requirements for engaging in polysomnography as a polysomnographic technologist, technician, or trainee;
- B&P Code section 3576, relating to grounds for denial, suspension, or revocation of a registration as a polysomnographic technologist, technician, or trainee;
- B&P Code section 4172, relating to any prescriber who dispenses drugs and fails to store all drugs to be dispensed in an area that is secure;
- H&S Code section 11165.1(a)(1)(A)(i), requiring health care practitioners authorized to prescribe, order, administer, furnish, or dispense Schedule II, Schedule III, or Schedule IV controlled substances to submit an application before July 1, 2016, to the Department of Justice to obtain approval to access information online regarding the controlled substance history of a patient maintained in the CURES database;
- H&S Code section 120370(a), relating to physicians providing a parent or guardian of a child a written statement indicating that the physical condition of a child, or the medical circumstances relating to the child, are such that immunization is not considered safe; and
- 16 CCR section 1355.4, relating to any licensee that practices medicine and fails to provide proper notice to each patient of the fact that the licensee is licensed and regulated by the Board.

Adding these statutes and regulation as citable offenses is necessary to provide the Board with the administrative authority to bring licensees and registrants into compliance with these sections, furthering consumer protection.

Additionally, under existing law, CCR section 1364.11(a) is not organized by code and section in a logical way that makes citable offenses easy to find. Under the proposed rulemaking, section 1364.11(a) will be reorganized and renumbered so that it is easier for interested parties to locate citable offenses.

Further, technical changes to section 1364.11(a) are proposed in this rulemaking as follows:

- B&P Code sections 655.6 and 2265 have been repealed in statute, and these sections will be deleted as citable offenses.
- B&P Code section 802(b) is currently listed as a citable offense, but

subsection (b) falls under the jurisdiction of the Board of Behavioral Sciences. The citable offense has been corrected to reflect B&P Code section 802(a) in the proposed amendments, as this subsection applies to physicians and surgeons.

- B&P Code section 2630 now falls under the Physical Therapy Board's jurisdiction, and will be stricken as a citable offense by this rulemaking.
- B&P Code section 2097 was renumbered by the legislature to B&P Code section 2426, and that change will be reflected in the amendment to this section.

These technical changes are necessary to improve the clarity of this section.

Existing law under CCR section 1364.11 does not make it clear that citations with orders of abatement and fines are separate from and in addition to any other administrative, civil, or criminal remedies. Thus, the proposed rulemaking adds subsection (e) to CCR section 1364.11 to make it clear that a citation issued under this section is separate from and in addition to any other administrative, civil, or criminal remedies. These changes are necessary to improve the clarity of the section, and to remind recipients of citations that all other remedies to address the wrongful conduct remain available.

3. Proposed Amendments to 16 CCR section 1364.13

Under existing law, CCR section 1364.13 authorizes a Board official to issue citations containing orders of abatement and fines against individuals, partnerships, corporations or associations, who are performing, or who have performed, services for which licensure as a physician and surgeon is required under the Medical Practice Act. However, individuals, partnerships, corporations or associations who are performing, or who have performed, services as unlicensed midwives or unregistered polysomnographic technologists, technicians, and trainees are not currently covered by the Board's citation and fine regulations.

B&P Code section 148 authorizes the Board to establish a system by regulation for the issuance of a citation which may contain an order of abatement or fine to an unlicensed person acting in the capacity of a licensee or registrant within the Board's jurisdiction. Thus, this proposed rulemaking specifies that a Board official is authorized to issue citations containing orders of abatement and fines against persons, partnerships, corporations or associations who are performing or who have performed services for which licensure as a physician and surgeon licensed under Chapter 5 of the code (commencing with section 2000) or as a licensed midwife licensed under Chapter 5 of the code (commencing with section 2505), or registration as a polysomnographic technologist, technician, or trainee

registered under Chapter 7.8 (commencing with section 3575) is required.

Additionally, this rulemaking proposes to strike the reference to the Medical Practice Act from CCR section 1364.13, since allied health care providers are being added, and each licensee's or registrant's authorizing code section under the B&P Code is specified. CCR section 1364.13 will be further clarified by indicating that the provisions of CCR sections 1364.10 and 1364.12 apply to the issuances of citations for unregistered as well as unlicensed activity, since polysomnographic technologists, technicians, and trainees are required to be registered, not licensed.

Finally, existing law under CCR section 1364.13 indicates that any sanction under this section is separate and in addition to any other civil or criminal remedies. This rulemaking will add administrative remedies to that list to clarify that any sanction under this section is separate and in addition to any other administrative, civil, or criminal remedies.

This proposed rulemaking is necessary to amend CCR section 1364.13 to allow the Board to issue citations with orders of abatement and fines to these unlicensed/unregistered individuals and entities who violate the law, thereby giving the Board an administrative tool to further its mission of consumer protection.

4. Proposed Amendments to 16 CCR section 1364.15

Existing law under 16 CCR section 1364.15 states that every citation that is issued pursuant to this article shall be disclosed to an inquiring member of the public, and citations that have been resolved by payment of the administrative fine or compliance with the order of abatement shall be purged five (5) years from the date of resolution. However, effective January 1, 2015, pursuant to amendments to B&P Code section 2027(b)(9), the Board shall post on its website all historical information in its possession, custody, or control regarding all current and former licensee to include citations issued within the last three (3) years that have been resolved by payment of the administrative fine or compliance with the order of abatement.

This proposed rulemaking will change the citation purge date from five years to three years to be consistent with the time period specified by B&P Code section 2027(b)(9).

This proposed amendment is necessary to make CCR section 1364.15 consistent with the three-year time period set forth by B&P Code section 2027(b)(9).

Underlying Data

At the May 6, 2016 quarterly Board meeting, Board staff requested the Board to authorize staff to prepare the necessary regulatory documents to submit to the Office of Administrative Law (OAL) to formally notice the proposed regulatory amendment and schedule a hearing on the rulemaking.

The Board adopted a motion to approve staff to begin the regulatory process to formally notice the proposed regulatory amendments and schedule a hearing on the rulemaking to amend Title 16, Division 13, Chapter 2, Article 6, California Code of Regulations, sections 1364.10, 1364.11, 1364.13 and 1364.15.

At the July 29, 2016 quarterly Board meeting, Board staff readdressed its May 6, 2016 request to authorize staff to prepare the necessary regulatory documents to submit to the Office of Administrative Law (OAL) to formally notice the proposed regulatory amendment and schedule a hearing on the rulemaking. The purpose of the proposal was to expand the list of citable offenses to include H&S Code section 120370(a) to the list due to the recent enactment of Senate Bill 277 relating to medical exemptions for vaccinations.

Business Impact

The Board has made an initial determination that the proposed regulatory action would have no significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. This initial determination is based on the fact that individuals who are in compliance with the law will not be impacted by the proposed amendments. Further, very few individuals are issued citations with orders of abatement and fines. For example, the Board issued 158 citations and fines for fiscal year (FY) 2012/2013 to physicians and surgeons, which was approximately .002% of the California licensed physician and surgeon population. In FY 2013/2014, the Board issued 50 citations and fines to physicians and surgeons, which was approximately .0004% of the California licensed physician and surgeon population. The Board's allied health care professionals comprise less than 1% of the total population of the Board's licensees, and the Board anticipates issuing only one to two citations per year for allied health professionals, and fewer for unlicensed individuals and entities.

Economic Impact Assessment

The Board has made an initial determination that the proposed regulatory action would have no significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. This initial determination is based on the following facts:

- Analysis of creation/elimination of jobs: The Board has made an initial determination that this regulatory proposal will not likely have any impact on the creation of jobs or the elimination of jobs in the State of California. This initial determination is based on the fact that individuals who are in compliance with the law will not be impacted by the proposed amendments. Further, very few individuals are issued citations with orders of abatement and fines. For example, the Board issued 158 citations and fines for FY 2012/2013 to physicians and surgeons, which was approximately .002% of the California licensed physician and surgeon population. In FY 2013/2014, the Board issued 50 citations and fines to physicians and surgeons, which was approximately .0004% of the California licensed physician and surgeon population. The Board's allied health care professionals comprise less than 1% of the total population of the Board's licensees, and the Board anticipates issuing only one to two citations per year for allied health professionals, and fewer for unlicensed individuals and entities.
- Analysis of creation/elimination of businesses: The Board has made an initial determination that this regulatory proposal will not likely have any impact on the creation of new businesses or the elimination existing businesses or the expansion of businesses in the State of California. This initial determination is based on the fact that individuals who are in compliance with the law will not be impacted by the proposed amendments. Further, very few individuals are issued citations with orders of abatement and fines. For example, the Board issued 158 citations and fines for FY 2012/2013 to physicians and surgeons, which was approximately .002% of the California licensed physician and surgeon population. In FY 2013/2014, the Board issued 50 citations and fines to physicians and surgeons, which was approximately .0004% of the California licensed physician and surgeon population. The Board's allied health care professionals comprise less than 1% of the total population of the Board's licensees, and the Board anticipates issuing only one to two citations per year for allied health professionals, and fewer for unlicensed individuals and entities.
- Analysis of expansion of business: This proposal is not expected to lead to the expansion of new businesses within California. This initial determination is based on the fact that this proposal gives the Board a tool to bring licensees into compliance with the law if they violate certain specified statutes or regulations, and it impacts a very small percentage of licensees.
- Benefits of the Regulation to the Health and Welfare of California

Residents, Worker Safety, and the State's Environment: The Board has determined that this regulatory proposal will benefit the health and welfare of California residents because the proposed additions to the list of citable offenses under CCR section 1364.11(a) provides further consumer protection. Moreover, authorizing the Board to issue citations with orders of abatement and fines to licensed midwives and polysomnographic technologists, technicians, and trainees and unlicensed individuals performing services as midwives and polysomnographic technologists, technicians, and trainees, provides an administrative tool to the Board to address consumer complaints that do not warrant formal disciplinary action. This assists in bringing the licensee or unlicensed individual or entity into compliance, furthering consumer protection.

This proposed rulemaking is not anticipated to have an impact on worker safety or the state's environment.

Economic Impact for "Major Regulations" (If applicable)

Non-Applicable.

Specific Technologies or Equipment

This regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

No reasonable alternative to the regulatory proposal would be either more effective in carrying out the purpose for which the action is proposed or would be as effective or less burdensome to affected private persons and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the law being implemented or made specific.

Set forth below are the alternatives which were considered and the reasons each alternative was rejected:

1. Do not seek a change. This alternative was rejected because the amendments are necessary for consumer protection and support the Board's mission to regulate physicians and certain allied health care professionals. Additionally amendments are needed to delete repealed or incorrect references to law, and to provide clarity.
2. Adopt the proposed regulatory amendments. This alternative was determined to be the most appropriate because the proposed changes align with the Board's mission to protect consumers by bringing licensees and registrants into compliance with the law, and taking action against unlicensed or unregistered

individuals and entities performing services requiring a license or registration.
The proposed changes also improve clarity to the sections at issue.