

TITLE 16. Medical Board of California

NOTICE IS HEREBY GIVEN that the Medical Board of California is proposing to take the action described in the Informative Digest. Any person interested may present statements or arguments orally or in writing relevant to the action proposed at a hearing to be held at Hilton San Diego Mission Valley, 901 Camino del Rio South, San Diego, California, at **9:00 a.m., on November 2, 2007**. Written comments, including those sent by mail, facsimile, or e-mail to the addresses listed under Contact Person in this Notice, must be received by the Board at its office not later than 5:00 p.m. **on October 22, 2007** or must be received by the Board at the hearing. The Division of Medical Quality, upon its own motion or at the instance of any interested party, may thereafter adopt the proposals substantially as described below or may modify such proposals if such modifications are sufficiently related to the original text. With the exception of technical or grammatical changes, the full text of any modified proposal will be available for 15 days prior to its adoption from the person designated in this Notice as contact person and will be mailed to those persons who submit written or oral testimony related to this proposal or who have requested notification of any changes to the proposal.

Authority and Reference: Pursuant to the authority vested by Sections 2018 and 2336 of the Business and Professions Code, and to implement, interpret or make specific Sections 2336 of said Code, the Medical Board of California is considering changes to Division 13 of Title 16 of the California Code of Regulations as follows:

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Amend Section 1364.30 in Article 8 of Chapter 2, Division 13; Adopt Section 1364.32 in Article 8, of Chapter 2, Division 13, relating to oral and written arguments.

In 2003, as a result of legislation (SB 1950, Ch. 1085, stats. of 2002), the Medical Board of California was assigned an Enforcement Monitor to review its enforcement operations and processes. Part of that two-year review was to examine the disciplinary process, including the process used by the Division of Medical Quality (DMQ) to hear oral arguments. In summary, in the "Final Report: Medical Board of California Enforcement Monitor," the Monitor was concerned with two elements of the oral argument process:

- 1) The current oral argument process legally prohibits the introduction of evidence beyond the record. In practice, however, the process often allows the introduction of evidence outside of the record.
- 2) Respondents are allowed to address the DMQ panel without being placed under oath.

The proposed regulation addresses the above two concerns raised by the MBC's Enforcement Monitor. The proposal will:

- 1) Allow an administrative law judge or panel member to ask the parties to cite the record (Sec. 1364.30(c)),
- 2) Require written arguments to cite the record, and authority, if applicable, for each point addressed (Sec. 1364.32), and
- 3) Require respondents to be placed under oath, if the respondent elects to address the panel (Section 1364.30(e)).

FISCAL IMPACT ESTIMATES

Fiscal Impact on Public Agencies Including Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State: None

Nondiscretionary Costs/Savings to Local Agencies: None

Local Mandate: None

Cost to Any Local Agency or School District for Which Government Code Section 17561 Requires Reimbursement: None

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.

AND

☐ The following studies/relevant data were relied upon in making the above determination:

There are no costs associated with the proposed regulatory action. The proposed only relates to the presentation of oral arguments and written arguments and the swearing-in of respondents in disciplinary matters.

Impact on Jobs/New Businesses:

The Medical Board of California has determined that this regulatory proposal will not have

☐ a significant

☒ any

impact on the creation of jobs or new businesses or the elimination of jobs or existing businesses or the expansion of businesses in the State of California.

Cost Impact on Representative Private Person or Business:

The Medical Board of California is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Effect on Housing Costs: None

EFFECT ON SMALL BUSINESS

The Medical Board of California has determined that the proposed regulations would not affect small businesses.

The proposed regulations only make procedural changes to the oral and written argument process of disciplinary actions. The parties will be asked to cite the record for points made in the written and oral arguments to prevent the introduction of evidence beyond the record. The proposal will require respondent to be placed under oath if the respondent elects to address the panel.

CONSIDERATION OF ALTERNATIVES

No reasonable alternative to the regulation would be either more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation.

Any interested person may present statements or arguments orally or in writing relevant to the above determinations at the above-mentioned hearing.

INITIAL STATEMENT OF REASONS AND INFORMATION

The Medical Board of California has prepared an initial statement of the reasons for the proposed action and has available all the information upon which the proposal is based.

TEXT OF PROPOSAL

Copies of the exact language of the proposed regulations and of the initial statement of reasons, and all of the information upon which the proposal is based, may be obtained at the hearing or prior to the hearing upon request from the Medical Board of California at 1426 Howe Avenue, Suite 92, Sacramento, California 95825.

AVAILABILITY AND LOCATION OF THE FINAL STATEMENT OF REASONS AND RULEMAKING FILE

All the information upon which the proposed regulations are based is contained in the rulemaking file which is available for public inspection by contacting the person named below.

You may obtain a copy of the final statement of reasons once it has been prepared, by making a written request to the contact person named below or by accessing the website listed below.

CONTACT PERSON

Inquiries or comments concerning the proposed rulemaking action may be addressed to:

Name: Janie Cordray
Medical Board of California
Address: 1426 Howe Avenue, Suite 92
Sacramento, CA 95825
Telephone No.: (916) 263-2389
Fax No.: (916) 263-2387
E-Mail Address: regulations@mbc.ca.gov

The backup contact person is:

Name: Kelly Nelson
Medical Board of California
Address: 1426 Howe Avenue, Suite 92
Sacramento, CA 95825
Telephone No.: (916) 263-2389
Fax No.: (916) 263-2387
E-Mail Address: regulations@mbc.ca.gov

Website Access: Materials regarding this proposal can be found at www.mbc.ca.gov.

**Specific Language of Proposed Changes
Division of Medical Quality
Medical Board of California
Oral and Written Arguments**

1364.30 Procedures for the Conduct of Oral Argument

- (a) A party who wishes to present oral argument to the panel of the division that issued an order of nonadoption or reconsideration shall make a written request for oral argument not later than twenty (20) calendar days after the date of the notice of nonadoption or the order granting reconsideration.
- (b) An administrative law judge will preside at oral argument. The administrative law judge may sit with and assist the panel members with their closed session deliberations.
- (c) The arguments shall be based only on the existing record and shall not exceed the scope of the record of duly admitted evidence. No new evidence will be heard. The panel members may ask questions of the parties to clarify the arguments, but may not ask questions that would elicit new evidence. The administrative law judge and any panel member may ask a party to support the party's oral argument on a matter with a specific citation to the record.
- (d) The administrative law judge shall stop an attorney, a party, or a panel member if the line of questioning or argument is beyond the record or is otherwise out of order.
- (e) The administrative law judge shall offer the respondent an opportunity to address the panel regarding the penalty. If the respondent elects to address the panel, the administrative law judge shall place the respondent under oath.
- (f) The sequence of, and time limitations on, oral argument are as follows:
 - (1) First -the respondent licensee and/or his or her legal counsel, who shall be limited to fifteen minutes.
 - (2) Second -the deputy attorney general, who shall be limited to fifteen minutes.
 - (3) Third -the respondent licensee's rebuttal or that of his or her legal counsel, which shall be limited to five minutes.
 - (4) Fourth -the deputy attorney general, who shall be limited to five minutes.

NOTE: Authority cited: Sections 2018 and 2336, Business and Professions Code.
Reference: Section 2336, Business and Professions Code.

1364.32 Written Argument Submitted in Response to an Order of Nonadoption or Reconsideration

(a) Written argument submitted in response to an order of nonadoption or reconsideration shall:

(1) State each point under a separate heading or subheading summarizing the point and support each point by argument, and citation of authority if applicable; and

(2) Support any reference to a matter in the record by a citation to the volume and page number of the record or exhibit number where the matter appears.

NOTE: Authority cited: Sections 2018 and 2336, Business and Professions Code.
Reference: Section 2336, Business and Professions Code.

MEDICAL BOARD OF CALIFORNIA

INITIAL STATEMENT OF REASONS

Hearing Date: November 2, 2007

Subject Matter of Proposed Regulations: Oral and Written Arguments

- 1) Procedure for the Conduct of Oral Argument
- 2) Written Argument Submitted in Response to an Order of Nonadoption or Reconsideration

Section(s) Affected: 1) Amend Section 1364.30 in Article 8 of Chap. 2, Div. 13
2) Adopt Section 1364.32 in Article 8 of Chap. 2, Div. 13

Specific Purpose of each adoption, amendment, or repeal:

This rulemaking addresses deficiencies in the current oral argument process.

In 2003, as a result of legislation (SB 1950, Ch. 1085, Stats. of 2002), the Medical Board of California was assigned an Enforcement Monitor to review its enforcement operations and processes. Part of that two-year review was to examine the disciplinary process, including the process used by the Division of Medical Quality (DMQ) to hear oral arguments. In summary, in the "Final Report: Medical Board of California Enforcement Monitor," the Monitor was concerned with two elements of the oral argument process:

- 1) The current oral argument process legally prohibits the introduction of evidence beyond the record. In practice, however, the process often allows the introduction of evidence outside of the record.
- 2) Respondents are allowed to address the DMQ panel without being placed under oath.

Factual Basis/Rationale

The proposed regulation addresses the above two concerns raised by the MBC's Enforcement Monitor.

- 1) Refining the process to prevent the entering into evidence beyond the record (Secs. 1364.30(d) and 1364.32):

Administrative law judge or panel member may ask parties to cite to the record (Sec. 1364.30 (c)):

Oral arguments are heard by a DMQ panel and presided over by an Administrative Law Judge. The judge presiding over the oral arguments is not the same judge that presided over the hearing. Requiring the parties to cite to

the record to support their arguments will assist the presiding judge and panel members in ensuring new evidence is not introduced.

Written Arguments must cite the record, and authority, if applicable, for each point addressed (Sec. 1364.32):

Before the parties present oral arguments before a panel, written arguments are submitted. Panel members read the written arguments before hearing the oral arguments. For that reason, requiring citation to the record in written arguments will assist the panel members in ensuring new evidence is not introduced.

2) Requiring respondents to be placed under oath, if they elect to address the panel (Sec 1364.30(e)):

To address the Enforcement Monitor's concern that respondents addressing the panel are not under oath, the proposed regulation will require the judge to place the respondent under oath.

Underlying Data

As referenced above, in the "Final Report: Medical Board of California Enforcement Program Monitor" (published November 1, 2005), two major concerns regarding the oral argument process were raised. The following portions of the report are relevant to the proposed regulations:

"Procedurally, the respondent is usually permitted to argue first. The HQE DAG is given equal time to respond, and each side is afforded a brief rebuttal. In making oral argument, the lawyers are required to confine themselves to evidence that is "in the record" — that is, evidence that has been presented at the evidentiary hearing and admitted by the ALJ. The DMQ members have all of this evidence, because in nonadoption cases the entire transcript and record of the evidentiary hearing are ordered and delivered to all panel members, and by law all of them are required to read the entire record and personally hear any additional oral argument and evidence presented to the panel before voting on the nonadoption. However, counsels do not always confine themselves to the record, and an objection to the argument may be voiced — requiring a legal ruling on the objection." (Page 137)

".....1995's SB 609 (Rosenthal) required MBC to adopt regulations governing the procedure at oral arguments, and those regulations now require an ALJ to preside at oral argument. Of course, this cannot be the same ALJ who presided over the hearing and whose decision was nonadopted in the matter at issue, so the ALJ presiding at oral argument necessarily has little or no knowledge of the sometimes voluminous record in the underlying matter. As opposed to the panel chair, this judge might be somewhat more successful in controlling the proceeding, ruling on objections, and requiring counsel to cite to the record when there is a question as to whether argument is based on the record. However, the required presence of the ALJ adds more expense to this process, and interrupts the hearing schedule of that MQHP ALJ." (Page 138)

“..... in what is by far the most unusual aspect of the proceeding, the respondent himself must be given an opportunity to personally address the panel, and members of the DMQ panel are permitted to question either counsel or the respondent. Neither the statute nor the regulation requires that the respondent be put under oath when he makes this statement or answers questions. Respondents sometimes stray from the record and/or the topic at hand, and are subject to objections. Well-meaning DMQ panel members often ask questions outside the record, and are subject to more objections.” (Page 138)

The full report may be accessed at: http://www.cpil.org/MBC_Final_Report.htm. The full section on the oral argument process begins on page 137.

Business Impact

☒ This regulation will not have a significant adverse economic impact on businesses. This initial determination is based on the following facts or evidence/documents/testimony:

This proposed regulation only addresses the oral and written argument process. It requires that counsels providing written and oral arguments include the citation of the official record in their arguments, and that respondents be placed under oath. There are no costs associated with either of these requirements.

☐ Description of alternatives which would lessen any significant adverse impact on business:

Not applicable, as the proposed regulation has no business or economic impact.

Specific Technologies or Equipment

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

☐ This regulation mandates the use of specific technologies or equipment. Such mandates or prescriptive standards are required for the following reasons:

Consideration of Alternatives

No reasonable alternative to the regulation would be either more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation.

Title 16. MEDICAL BOARD OF CALIFORNIA NAME

NOTICE OF EXTENSION OF PUBLIC COMMENT PERIOD

NOTICE IS HEREBY GIVEN that the Medical Board of California is extending the public comment period concerning Oral and Written Arguments (Title 16, California Code of Regulations, Sections 1364.30 and 1364.32) until October 23, 2007. Attached is a copy of the proposed regulations for your reference. These proposed regulations are also available in the board's website: www.mbc.ca.gov/Regulations_Proposed.htm

Any interested person, or his or her authorized representative, may submit written comments no later than 5:00 p.m. on October 23, 2007 to:

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Medical Board of California
Address: 1426 Howe Avenue, Suite 92
Sacramento, CA 95825
Telephone No.: (916) 263-2389
Fax No.: (916) 263-2387
E-Mail Address: regulations@mbc.ca.gov

DATED: _____

Kevin A. Schunke
Regulations Manager
Medical Board of California