

DEPARTMENT OF CONSUMER AFFAIRS

**TITLE 16. MEDICAL BOARD OF CALIFORNIA**

**CITATION AND FINE**

**INITIAL STATEMENT OF REASONS**

**Hearing Date:** No hearing has been scheduled for the proposed action.

**Subject Matter of Proposed Regulations:** Citation and Fine

**Sections Affected:**

- Amend Section 1364.10 of Article 6, Chapter 2, Division 13, Title 16 of the California Code of Regulations (CCR);
- Amend Section 1364.11 of Article 6, Chapter 2, Division 13, Title 16 of the CCR.

**BACKGROUND AND STATEMENT OF THE PROBLEM**

Business and Professions Code (BPC) section 125.9 authorizes the Medical Board of California (Board) to establish a system by regulation for the issuance of a citation to the Board's licensees, which may contain an order of abatement or fine.

Pursuant to BPC sections 2001.1 and 2229, public protection is the Board's highest priority. BPC section 2229 also provides that the Board "shall, wherever possible, take action that is calculated to aid in the rehabilitation of the licensee..." so long as rehabilitation is not inconsistent with public protection.

A citation, which may include an order of abatement and/or fine, is used to address technical or minor violations of the law and is not considered disciplinary action. The Board's authority to issue a citation furthers public protection, as it allows the Board to take action for violations that do not rise to the level warranting discipline but do raise issues that should be brought to the licensee's attention for correction. Note, however, that pursuant to 16 CCR section 1364.11, subdivision (e), citations are separate from and in addition to any other administrative, civil, or criminal remedies.

This proposed rulemaking will update the Board's citation and fine regulations by

1) making them gender neutral pursuant to Assembly Concurrent Resolution No. 260 of 2018 (ACR 260), which urged state agencies to use gender neutral pronouns and avoid the use of gendered pronouns in drafting regulations;

2) making non-substantive changes to improve readability;

3) clarifying that the Board is authorized to issue a citation to any of its licensees, which may include an order of abatement and/or fine, for a violation of the statutes and regulations listed in 16 CCR section 1364.11; contained in the Medical Practice Act or the Licensed Midwifery Practice Act of 1993; any regulation adopted by the Board under Division 13, Title 16 of the California Coded of Regulations; and any other statute or regulation which would be grounds for discipline by the Board; and

4) clarifying that any fine levied by the Board official shall not exceed the amount specified by the applicable statute.

On May 19, 2023, the Board reviewed and approved proposed language for this rulemaking, and authorized staff to proceed with the rulemaking process.

### **Anticipated Benefits From This Regulatory Action:**

This proposed rulemaking will further consumer protection by updating the Board's cite and fine regulations to clarify that the Board may issue a citation to any of its licensees which may contain a fine and/or order of abatement for a violation of any provision in the Medical Practice Act, the Licensed Midwifery Practice Act of 1993, any regulation adopted by the Board, and any other statute or regulation upon which the Board may base a disciplinary action, in addition to certain specified statutes and regulations contained in the existing regulation. These amendments will help keep the list of citable offenses current, as statutes and regulations are added, repealed, and modified.

Further, this proposed rulemaking clarifies the Board's authority to assess fines to the full extent outlined by applicable code sections and will update the regulations to make them gender neutral.

Updating the cite and fine regulations will enhance public protection by improving this administrative tool allowing the Board to take action for violations that do not rise to the level of warranting discipline but do raise issues that should be brought to the licensee's attention for correction.

### **Specific Purpose of Proposed Changes, Anticipated Benefits, and Rationale:**

#### **1. Amend 16 CCR section 1364.10**

Existing law under 16 CCR section 1364.10 provides 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 of the statutes and regulations referred to in 16 CCR section 1364.11 committed by specified licensees and registrants.

Purpose: This proposed rulemaking will amend section 1364.10, subdivision (a) to make non-substantive changes to capitalize "Board" in reference to the Medical Board of California, and to change "his or her" to "their."

Under section 1364.10, subdivision (b), this proposal will make non-substantive changes to capitalize “Board” in reference to the Medical Board of California, and to change “containing” to “contain” to be grammatically correct. Additionally, this proposal clarifies that the Board may issue citations, which may contain orders of abatement and/or fines to any person who holds a license, certificate, registration, or permit from the Board (licensee), and deletes the reference to the individual license and registration types.

Under section 1364.10, subdivision (c), this proposal makes a minor change by replacing “the” with “each” to indicate that the citation shall include a reference to each statute or regulation alleged to have been violated. This proposal also changes “regulations” to “regulation” so that it is grammatically correct.

Anticipated Benefit: The Board anticipates that this rulemaking will further consumer protection by updating and clarifying the regulation that makes specific this important administrative tool to educate licensees and encourage their compliance with the law.

Further, proposed changes under section 1364.10, subdivision (b) will clarify that citations issued by the Board may contain orders of abatement and/or fines. This will make it clear that a citation may include one or both of those things but may also be issued without an order of abatement and/or fine. Moreover, proposed changes under section 1364.10, subdivision (b) will clarify to whom the Board may issue a citation – any person who holds a license, certificate, registration, or permit from the Board.

Additionally, the non-substantive change under section 1364.10, subdivision (c) will improve clarity and correct a grammatical error.

Rationale: This proposed rulemaking is necessary to make section 1364.10, subdivision (a) gender neutral and to make another non-substantive clarifying change to capitalize “Board” in reference to the Medical Board of California.

This proposed rulemaking is necessary to update section 1364.10, subdivision (b) to clarify that citations issued by the Board may contain orders of abatement and/or fines but may also be issued without an order of abatement and/or fine. Additionally, the proposed changes under 1364.10, subdivision (b) are necessary to indicate that the Board may issue citations, which may contain orders of abatement and/or fines to licensees, and to strike language referring to certain licensees and registrants. This change is necessary, because as currently worded, subdivision (b) does not list physician and surgeon postgraduate training licensees, special faculty permit holders, BPC Code section 2111 and 2112 permit holders, BPC section 2113 registrants, nor research psychoanalysts as licensees, permit holders, or registrants of the Board who are subject to citation.

Consequently, this change clarifies that the Board may issue such citations to any of its licensees, as indicated. This proposed rulemaking is also necessary to make non-substantive changes to subdivision (b) to capitalize “Board” in reference to the Medical Board of California, and to change “containing” to “contain” to be grammatically correct.

Finally, this proposed rulemaking is necessary to amend 16 CCR section 1364.10, subdivision (c), to change “regulations” to “regulation” for grammatical correctness, and to change “the” to “each” to clarify that the citation shall include a reference to each statute or regulation alleged to have been violated. These changes are necessary to provide education to the licensee about each statute and regulation they have allegedly violated so that they may come into compliance or challenge the bases for the citation if they disagree with the Board’s determination. This educational tool furthers consumer protection by pointing out each alleged violation to the licensee before the violation reaches a level requiring formal disciplinary action with the goal of prompting the licensee to come into compliance and improve their practice to further consumer protection.

## **2. Amend 16 CCR section 1364.11**

Existing law under 16 CCR section 1364.11 provides that a Board official may issue a citation for a violation of the statutes and regulations specified in that section, as well as to a licensee who violates a term or condition of probation. Existing law caps the fine at \$2,500, but permits a fine of up to \$5,000 if the licensee has received two or more prior citations for the same or similar violations, or if the citation involves multiple violations that show a willful disregard for the law.

Purpose: This proposed rulemaking will amend section 1364.11 to strike the first paragraph in reference to BPC section 125.9 referring to the determination of the fine, as relevant language is being moved to section 1364.11, subdivision (c).

This proposed rulemaking will amend section 1364.11, subdivision (a) to change “his or her” to “their,” and to capitalize “Board” in reference to the Medical Board of California.

Additionally, this proposed rulemaking will delete section 1364.11, subdivision (a), paragraphs (18) – (62) and (87) – (88), as the citable code sections referenced in those subdivisions are contained in the Medical Practice Act, the Licensed Midwifery Practice Act of 1993, or the Board’s regulations. The Medical Practice Act, the Licensed Midwifery Practice Act of 1993, and the Board’s regulations are being added to this section in their entirety as separate entries under section 1364.11, subdivision (a), paragraphs (44), (45), and (46), respectively. The remaining and new paragraphs under section 1364.11, subdivision (a) will be renumbered accordingly.

Further, this proposed rulemaking will amend section 1364.11, subdivision (a), former paragraph (84), renumbered as paragraph (39), to delete the reference to subdivisions (a) and (b) under Health and Safety Code section 123110, to clarify that a violation of any provision of that section is citable.

Moreover, this proposed rulemaking will amend section 1364.11, subdivision (a) to add a new paragraph (47) to specify that a violation of any other statute or regulation upon which the Board may base a disciplinary action is a citable offense.

This proposed rulemaking will also amend section 1364.11, subdivision (b) to change “his or her” to “their,” and to capitalize “Board” in reference to the Medical Board of California.

Further, this proposed rulemaking will amend section 1364.11, subdivision (c) to delete existing language setting forth the range for any fine amount to be levied and factors to be considered and add language to indicate that the Board official shall not exceed the fine amount specified under the applicable code sections and shall consider the factors listed under those applicable code sections when levying a fine.

Finally, this proposed rulemaking will amend section 1364.11, subdivision (d) to change “his or her” to “their,” and to capitalize “Board” in reference to the Medical Board of California.

Anticipated Benefit: These proposed changes will update the list of citable offenses to help keep this section current as statutes and regulations are added, repealed, and amended. Keeping the list of citable offenses current furthers the Board’s mission of consumer protection, because it improves the Board’s ability to use citations to educate its licensees about violations that do not rise to the level requiring formal discipline, but which should be brought to the licensee’s attention for corrective action. Additionally, the Board’s proposed changes will make the regulation gender neutral, grammatically correct, and improve clarity and consistency.

Finally, the Board anticipates that this rulemaking will further consumer protection by aligning the amount the fine the Board may impose with the full amount authorized by the applicable statutes. This change will raise the amount of fines the Board is authorized to levy in some cases, which may provide further encouragement to licensees to be compliant with the statutes and regulations governing their practice.

Rationale: With regard to the first paragraph under section 1364.11, this proposed rulemaking is necessary to delete the text regarding the amount of any fine to be levied, as this is being addressed in subdivision (c) with updated language. This proposed change will streamline this section and improve clarity.

With regard to section 1364.11, subdivision (a), this proposed rulemaking is necessary to change “his or her” to “their” to make this section gender neutral and to make another non-substantive clarifying change to capitalize “Board” in reference to the Medical Board of California.

Further, this proposed rulemaking is necessary to delete section 1364.11, subdivision (a), paragraphs (18) – (62) and (87) – (88), because the code sections and regulations referenced in those subdivisions are contained in the Medical Practice Act, the Licensed Midwifery Practice Act of 1993, or the Board’s regulations. The Medical Practice Act, the Licensed Midwifery Practice Act of 1993, and the Board’s regulations are being added in their entirety as separate entries to this section under section 1364.11, subdivision (a), paragraphs (44), (45), and (46), respectively. Consequently, if subdivision (a), paragraphs

(18) – (62) and (87) – (88) were not deleted, it may be confusing to interested parties, since those statutes and regulations are contained in the Medical Practice Act, the Licensed Midwifery Practice Act of 1993, or the Board’s regulations and a violation of either act or the Board’s regulations will be a citable offense under this proposal. These proposed changes will streamline this regulation, make it easier to read and apply, and are necessary to keep this regulation current. With these proposed changes, if a code section is added, repealed, or amended under the Medical Practice Act, the Licensed Midwifery Practice Act of 1993, or the Board’s regulations that may form the basis for a citable offense, this regulation will still remain current.

Section 1364.11, subdivision (a), paragraphs (1) – (17), (63) – (86), and (89) – (90) under existing law contain statutes and regulations that are not contained in the Medical Practice Act, the Licensed Midwifery Practice Act of 1993, nor the Board’s regulations, so they will remain listed as citable offenses under this proposal. This proposed rulemaking will also renumber the paragraphs under section 1364.11, subdivision (a).

Moreover, this proposed rulemaking is necessary to amend section 1364.11, subdivision (a), former paragraph (84), renumbered as paragraph (39), to delete the reference to subdivisions (a) and (b) under Health and Safety Code section 123110, to clarify that a violation of any provision of that section is citable. This is necessary because Health and Safety Code section 123110 contains additional subdivisions that a licensee may violate with regard to providing patients or their representatives access to their medical records for inspection or to obtain copies of medical records, and the Board should have the authority to issue a citation, which may include an order of abatement and/or fine, to help educate the licensee, bring them into compliance, and protect consumers.

As indicated above, this proposed rulemaking will add a violation of any provision of the Medical Practice Act as a citable offense under 1364.11, subdivision (a), paragraph (44), and a violation of any provision of the Licensed Midwifery Practice Act of 1993 as a citable offense under section 1364.11, subdivision (a), paragraph (45). Additionally, this proposed rulemaking will add that a violation of any regulation adopted by the Board is a citable offense under section 1364.11, subdivision (a), paragraph (46), and that a violation of any other statute or regulation upon which the Board may base a disciplinary action is a citable offense under section 1364.11, subdivision (a), paragraph (47). These additions are necessary, because they will help keep this regulation current with citable offenses as statutes and regulations are added, repealed, or amended. Keeping this section current furthers the Board’s mission of consumer protection, because it gives the Board the most up to date authority to issue citations to licensees for violating any statute or regulation that is 1) listed in section 1364.11, subdivision (a); 2) contained in the Medical Practice Act or the Licensed Midwifery Practice Act of 1993; 3) a regulation adopted by the Board; or 4) another statute or regulation upon which the Board may base a disciplinary action.

With regard to section 1364.11, subdivision (c), this proposed rulemaking is necessary to delete existing language setting forth the range for any fine amount to be levied and the

factors to be considered when determining the amount of the fine, and to add language to indicate that the Board official shall not exceed the fine amount specified under applicable code sections and shall consider the factors listed under those code sections when levying a fine. Under this proposal, the Board official shall not levy a fine that exceeds the amount specified in BPC section 125.9, subdivision (b), paragraph (3) or in other applicable sections of California law. It is necessary to account for limitations set forth in other applicable sections, since they may impose a limit that is different than what is provided for under BPC section 125.9, subdivision (b), paragraph (3). For example, BPC section 2244 indicates that the Board may impose a fine against a licensee not to exceed the sum of \$1,000 for a violation of that section, which is less than the limits provided for under BPC section 125.9, subdivision (b), paragraph (3).

The amendments to subdivision (c) are necessary to clarify that the Board official shall consider the factors listed in BPC section 125.9, subdivision (b), paragraph (3) or other applicable sections of California law. Pursuant to BPC section 125.9, subdivision (b), paragraph (3), the Board official must consider the gravity of the violation, the good faith of the licensee, and the history of previous violations when determining the amount of the fine to be levied. These proposed amendments will account for other sections of law that provide their own factors the Board must consider when setting the fine under those parts.

For example, when determining the fine amount for a violation of Civil Code section 56.10, which is a section under the Confidentiality of Medical Information Act, the Board official must consider the relevant factors set forth under Civil Code section 56.36, subdivision (d), including but not limited to, the following: (1) Whether the licensee has made a reasonable, good faith attempt to comply with this part; (2) The nature and seriousness of the misconduct; (3) The harm to the patient, enrollee, or subscriber; (4) The number of violations; (5) The persistence of the misconduct; (6) The length of time over which the misconduct occurred; (7) The willfulness of the defendant's misconduct; and (8) The licensee's assets, liabilities, and net worth.

Consequently, the proposed changes to section 1364.11, subdivision (c) are necessary to ensure that the Board official can issue citations to the full amount authorized by BPC section 125.9, subdivision (b), paragraph (3), or other sections of law, as applicable, and will apply the required factors under BPC section 125.9, subdivision (b), paragraph (3), or other sections of law, as applicable, when determining the amount of the fine to be levied. These changes are necessary to improve this regulation, which provides a valuable regulatory tool for educating licensees and achieving compliance with statutes and regulations by clarifying the amount of the fine the Board official may issue and factors to be considered when determining the fine to be imposed. In turn, this proposed rulemaking will further consumer protection.

With regard to section 1364.11, subdivision (d), this proposed rulemaking is necessary to change "his or her" to "their," to make the regulation gender neutral and to capitalize "Board" in reference to the Medical Board of California for clarity and consistency.

### **Underlying Data:**

- May 18-19, 2023 Board meeting agenda, relevant meeting materials, and relevant meeting minutes
- December 1-2, 2022 Board meeting agenda, relevant meeting materials, and relevant meeting minutes
- November 7-8, 2019 Board meeting agenda, relevant meeting materials, and relevant meeting minutes

### **Business Impact:**

The Board has made an initial determination that the proposed regulatory action will 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 fact that individuals who are in compliance with the law will not be impacted by the proposed amendments. The Board also only issues citations to individuals not businesses. Over the last two fiscal years, 2020-2021 and 2021-2022, the Board received an average of 10,054 complaints across all license types per fiscal year. Over that same period the Board issued an average of 88 citations with an average fine of \$771 assessed. The Board anticipates that the number of citations issued may double as a result of this rulemaking to an average of approximately 176 citations each fiscal year, as there will be additional license types that may receive a citation, and there will be more citable offenses under this proposal.

The average amount of the fine may increase to approximately \$1,542 as a result of this rulemaking package, since the Board is modifying section 1364.11 to refer to BPC section 125.9, which authorizes a fine of up to \$5,000, even for a first offense, unless another limit applies.

### **Economic Impact Assessment:**

The Board has made the initial determination that this regulatory proposal will have the following impact:

- **It will not create or eliminate jobs within the State of California.** This determination is based on the fact that the proposed amendments would only affect licensees who commit minor violations of the law. Issuance of a citation which may include an order of abatement and/or fine, is not likely to impact a person's ability to practice.
- **It will not create new businesses or eliminate existing businesses within the State of California.** This determination is based on the fact that the proposed



amendments would only affect licensees who commit minor violations of the law and the imposition of a citation, which may include an order of abatement and/or fine, is not likely to affect businesses.

- **It will not affect the expansion of businesses currently doing business within the State of California.** This determination is based on the fact that the proposed amendments would only affect a licensee that committed a minor violation of the law and the imposition of a citation, which may include an order of abatement and/or fine, is not likely to affect the expansion of businesses.
- **It will benefit the health and welfare of California residents** because this regulatory proposal allows the Board to take action for violations that do not rise to the level warranting formal discipline, but do raise issues that should be brought to the licensee's attention for correction. This rulemaking is consistent with the Board's primary mission of consumer protection.
- **It will not have an impact on worker safety** because this regulatory proposal does not address issues relevant to worker safety.
- **It will not have an impact on the state's environment** because this regulatory proposal does not address issues relevant to the state's environment.

### **Cost Impact on Representative Private Person or Business**

There may be a cost impact to a licensee for committing a citable violation. Individuals in compliance with the law will not be impacted by these proposed amendments. Based on data over a two-year period, the average assessed fine amount is \$771.

The average amount of the fine may increase to approximately \$1,542 as a result of this rulemaking package, since the Board is modifying section 1364.11 to refer to BPC section 125.9, which authorizes a fine of up to \$5,000, even for a first offense, unless other statutory limits apply.

### **Fiscal Impact Assessment**

The Board anticipates workload and costs related to the issuance of additional citations and fines. Total workload and costs are estimated at approximately \$39,097 per year and up to \$390,975 over a 10-year period including:

**Citations and Fines:** The Board estimates an additional 88 citations and fines will be issued per year and anticipates workload costs of approximately \$177.50 per citation, which results in workload costs of approximately \$15,620 per year and up to \$156,200

over a 10-year period as follows:

Medical Board of California Citation & Fine - Fiscal Impact (Costs)					
Job Class/ Job Task	Events	Hours Per	Total Hours	Cost Per Unit	Total Costs
*AGPA/ Write Citation	88	1	88	\$70.00	\$6,160
**SSM II/ Review & Approve Citation	88	1	88	\$90.00	\$7,920
*AGPA/Issue Citation	88	0.25	22	\$17.50	\$1,540
<b>Total Costs:</b>				<b>\$177.50</b>	<b>\$15,620</b>

\*AGPA: Associate Government Program Analyst (\$70 per hour)

\*\*SSM II: Staff Services Manager II (\$90 per hour)

**Citations and Fines Informal Conferences:** The Board anticipates approximately 25 citations and fines out of the 88 issued will be reviewed at an informal conference where the licensee will request the Board to dismiss the citation and/or remove or reduce the fine. This process requires Board staff to review and prepare for the informal conference and decide whether to affirm, modify, or dismiss the citation. The Board anticipates workload costs of approximately \$187.50 per informal conference, \$3,359 total costs per year, and up to \$33,593 over a 10-year period as follows:

Medical Board of California Citation & Fine Informal Conference - Fiscal Impact (Costs)					
Job Class/ Job Task	Events	Hours Per	Total Hours	Cost Per Unit	Total Costs
*AGPA/ Process Request	25	0.5	12.5	\$35.00	\$437.50
**SSM II/ Conduct Conference	25	1	25	\$90.00	\$2,250.00
**SSM II/Write Decision	25	0.5	12.5	\$45.00	\$562.50
*AGPA/Issue decision	25	0.25	6.25	\$17.50	\$109.38
<b>Total Costs:</b>				<b>\$187.50</b>	<b>\$3,359.38</b>

\*AGPA: Associate Government Program Analyst (\$70 per hour)

\*\*SSM II: Staff Services Manager II (\$90 per hour)

**Citations and Fines Appeals:** The Board anticipates approximately three citations and fines out of the 88 issued will go through a formal appeal. This process requires Board staff to process the appeal and refer it to the Attorney General's Office for representation. The Board anticipates two out of three appeals will be resolved through stipulation, and one will go to hearing through the Office of Administrative Hearings. The Board

anticipates workload and costs related to appeals of \$20,118 per year up to \$201,181 over a 10-year period as follows:

Medical Board of California Citation & Fine Appeal Workload					
Job Class/ Job Task	Events	Hours Per	Total Hours	Cost Per Unit	Total Costs
*AGPA/ Process Appeal	3	0.75	2.25	\$52.50	\$118.13
AG/OAH Stipulated Settlement	2	-	-	\$5,000.00	\$10,000.00
AG/OAH Hearing	1	-	-	\$10,000.00	\$10,000.00
<b>Total Costs:</b>				<b>\$15,052.50</b>	<b>\$20,118.13</b>

\*AGPA: Associate Government Program Analyst (\$70 per hour)

**Total Costs:** Total workload and costs are estimated at approximately \$39,097 per year and up to \$390,975 over a 10-year period as follows:

Medical Board of California Fiscal Impact (Total Costs)	
Job Task	Annual Costs
Issuance of Citation & Fine	\$15,620.00
Informal Conference	\$3,359.38
Appeal of Citation & Fine	\$20,118.13
<b>Total Costs:</b>	<b>\$39,097.51</b>

**Revenues:** The Board estimates up to 88 more citations will be issued to licensees per year with an average fine amount of \$1,542, which would result in revenues of \$135,696 per year, and up to \$1,356,960 over a ten-year period.

Additionally, the Board currently issues an average of 88 citations a year under existing law with an average fine of \$771. Assuming that the average amount of fine doubles from \$771 to \$1,542 for these citations, there will be additional revenue to the Board of \$67,848 per year and up to \$678,480 over a 10-year period.

Total revenues are estimated at \$203,544 per year and up to \$2,035,440 over a 10-year

period under this proposal as follows:

<b>Medical Board of California Citation &amp; Fine - Fiscal Impact (Revenues)</b>			
<b>Citation &amp; Fines</b>	<b>Issued Per Year</b>	<b>Fine Amt</b>	<b>Total Revenues</b>
Currently Issued	88	\$771*	\$67,848
Additional Issued	88	\$1,542	\$135,696
<b>Total Revenues:</b>			<b>\$203,544</b>

\*Incremental increase

**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 or would be more cost effective 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. The public is invited to submit such alternatives during the public comment period.

Set forth below is the alternative that was considered and the reason it was rejected:

1. Do not seek a change. This alternative was rejected because the amendments are necessary to support the Board’s mission of consumer protection.