



# MEMORANDUM

DATE	August 17,2023
TO	Board Members Osteopathic Medical Board of California (Board)
FROM	Terri Thorfinnson, Program Manager, Administrative Services Unit
RE:	Discussion and Possible Action to Reconsider Previously Approved Text, and to Consider Initiation of a Rulemaking to Amend Sections 1635, 1636, 1638, 1641, 1659.30, 1659.31, 1659.32, 1659.33, 1659.34 and 1659.35 and Repeal Sections 1639 and 1640 in Title 16 of the California Code of Regulations (Requirements for Continuing Medical Education and Citations and Fines) Handout 1

**Background and Statement of the Problem:**

At the Board’s January 19, 2023, the Board approved the proposal attached in **Addendum A** for initiation of a rulemaking to make changes to the Board’s requirements for continuing medical education (CME) at California Code of Regulations, title 16 (CCR), sections 1635, 1636, 1638, 1641, 1659.30, 1659.31. Since that time, staff have identified additional changes to the Board’s citation and fine regulations that need to be made as explained more fully below. Those changes would require further amendments to CCR section 1659.31, which was covered in the prior CME regulations proposal presented and voted on by the Board in January. Having two separate proposals covering the same regulatory sections at the same time could be difficult to manage and cause further delays in implementation.

As a result, Regulations Counsel recommends the Board combine the two proposals into one rulemaking package as set forth in **Addendum B**. Once approved by the Board (see requested actions at the end of this memo), this regulatory language and package would be a combined package for both CMEs and Audits and Cite and Fines and Orders of Abatement.

Staff and Regulations Counsel are not proposing anything new regarding text changes previously approved in January for the CME requirements at CCR sections 1635, 1636, 1638, 1641, 1659.30, 1639 and 1640. Therefore, the focus of this memo will be proposed changes to the Board’s citation and fine regulations at CCR sections 1659.31, 1659.32, 1659.33, 1659.34 and 1659.35.

### **Citation and Fine Regulations Proposed Amendments Overview**

Existing law at Business and Professions Code (BPC) section 125.9 authorizes the Board to establish, by regulation, a system for the issuance to a licensee of a citation where the licensee is in violation of the applicable licensing act or any regulation adopted by the Board. Section 125.9(c) also authorizes the Board, in its discretion, to limit citations to only particular violations of the applicable licensing act or regulations. Existing regulations reflect Board policy at the time to issue citations and fines for only particular violations of laws or regulations. This proposal would, instead, allow the Board to cite and fine for violation of any laws or regulations under the Board's jurisdiction, including violations of the Osteopathic Act (as established as an Initiative Measure, Stats. 1923, p. xciii), the Medical Practice Act, the Confidentiality of Medical Information Act, or any other statute or regulation upon which the Board may base a disciplinary action.

Historically, the Board has approved several versions of the cite and fine language that never proceeded to the review process. Each time the Board approved amendments, it was to add new statutory or regulatory authority to the list of citable offenses. The last approved cite and fine language updated the cite and fine sections to delete repealed statutes and add new statutory violations. Each year, the legislature passes new laws and the Board adopts new regulations for which the Board that the Board would possibly need to consider adding to its list of citable offenses. The Board should be able to consider enforcement options short of discipline for enforcing any of the laws and regulations under its jurisdiction; this would be permitted by taking a new approach for determining whether a violation is a citable offense.

The new approach is to consolidate applicable violations located in the Medical Practice Act, the Osteopathic Act, the Confidentiality of Medical Information Act, and the Board's regulations at Division 16 of Title 16 in the CCR by stating that the Board has authority to issue cite, fines and abatement orders for any violation contained in any of these laws or regulations, or any other statute or regulation upon which the Board may base a disciplinary action. This is a commonsense approach to enforcement because the Legislature envisions the Board to have the authority to enforce the statutes they create and consolidation prevents the Board from having to draft regulatory packages each year as a result of new laws or regulations being added. It is worth noting that the Board shares enforcement authority of the Medical Practice Act with the Medical Board of California per BPC section 2450 for its licensees in addition to receiving its enforcement authority from other laws and regulations including general provisions in the Business and Professions Code, the Confidentiality of Medical Information Act, the Osteopathic Act and its regulations in Division 16 of Title 16 of the CCR.

In addition, staff have identified process improvements that they believe should be made to increase the effectiveness of the administration of the Board's citation and fine program.

Finally, you will notice that there is still a long list of statutory violations that are not being deleted in CCR section 1659.31. These are statutory sections which currently provide the Board with an independent legal basis for citing persons for violating those particular laws that does not exist

in any other law or regulation of the Board. For that reason, we are retaining those existing code sections in that section without amendments.

### **Policy Issues**

The Board's cite and fine regulatory CCR sections 1659.30, 1659.31, 1659.32, 1659.33, 1659.34, and 1659.35 are outdated and need updating. Staff believe that the Board should also have the authority to cite and fine and/or issue an order of abatement for any violation of the laws and regulations under the Board's jurisdiction to allow implementation of additional enforcement tools for the protection of the public. As a result, the Board should decide whether to update its cite and fine authority to include all of the new laws that have come into existence since the Board last updated its cite and fine sections and authority. Finally, the Board needs to decide whether to expand its existing authority for citable offenses to violations of any law or regulation under the Board's jurisdiction including the applicable provisions of the Medical Practice Act, the Confidentiality of Medical Information Act, the Osteopathic Act and implementing regulations in Division 16 of Title 16 of the CCR to its cite and fine authority. In addition, the Board should decide whether to accept process improvements suggested by staff designed to increase the effectiveness of the Board's citation program as specified below.

### **Proposed Changes (starting on p. 9 of the proposed text)**

To address the foregoing issues, staff propose updating the cite and fine regulatory sections 1659.30, 1659.31, 1659.32, 1659.33, 1659.34, and 1659.35 to include all applicable past and current statutory changes and regulatory changes that have occurred since 2005. Besides updating these sections, the overarching policy change is to consolidate the applicable violations contained in the Medical Practice Act, the Osteopathic Act and Division 16 in Title 16 of the CCR by replacing the myriad of individual statutory and regulatory sections with more inclusive reference to the Medical Practice Act, Osteopathic Act and Division 16, Title 16 the regulatory sections dedicated to the Osteopathic Medical Board of California. Making clarifying and other changes to the Board's citation regulations will help assist staff and the regulated community with consistent enforcement and compliance with the laws under the Board's jurisdiction.

In compliance with Assembly Concurrent Resolution No. 260 of 2018, the Board is also updating its regulatory language to comply with this resolution that state agencies should use gender neutral pronouns and avoid the use of gendered pronouns throughout this proposal. Specific changes that would be addressed by this proposal include the following.

**Section 1659.30 Authority to Issue Citations and Fines.** The first proposed change is to capitalize the word "Board." This is the section that provides the Board's Executive Director the authority to issue citations, fines, and orders of abatement for violations listed in Section 1659.31 based upon criteria set forth in that section. To implement the enforcement program's workload more effectively, this proposal would authorize the Executive Director to further delegate to "their designee" this same authority.

The next changes clarify that authority to issue citations containing abatement orders and administrative fines or both to allow flexibility in addressing violations and the best approach to ensuring compliance and remediation of the issue. The postgraduate training licensee is added to clarify that the Board has two separate license types: Physician and Surgeon and Postgraduate Training and that the Executive Director or designee has authority to issue citations, fines, and orders of abatement for both license types.

Finally, this proposal would add new authority to serve citations by regular mail in accordance with Business and Professions Code section 124, which permits a board in this Department to give written notice to licensees of any order by regular mail addressed to the last known address of the licensee or by personal service, at the option of the board. Authorizing regular mail will eliminate the need for the Board to have to serve the citation in person or have proof that the mail was delivered by having to require the signature on the certified mail receipt.

**Section 1659.31 Fine Amounts and Criteria to be Considered.** This section used to be entitled “Citable Offenses” and is being replaced with the wording “Fine Amounts and Criteria to Be Considered.” This would more accurately convey the content of this regulatory section consistent with the changes proposed.

#### Designee Changes

This section lists the statutes and regulations for which the Board’s Executive Director has authority to issue citations, fines, and orders of abatement. To implement the enforcement program’s workload more effectively, this proposal would authorize the Executive Director to further delegate to “their designee” this same authority.

#### Fine Amounts

This proposal would set the floor for most fine amounts at \$100 and retain the existing cap of \$2500 per citation as well as existing authority to increase the amount above \$2500 per citation if certain criteria are met. The Board would also specify caps in this section that are prescribed by law for issuing fines for violations of BPC sections 2244 (requirements for specimens in locked containers capped by law at \$1,000), 2262 (alteration of medical records capped by law at \$500), and the caps prescribed by law for violating the Confidentiality of Medical Information Act (as set forth in Civil Code section 56.36(c)).

#### Bases for Issuing a Citation – Consolidation of licensing act and regulatory provisions and addition of new authority to issue citations

As discussed under the “Policy Issues” section, above, this section also proposes to add language that consolidates existing licensing act and regulations citation authority into broader categories that cover all provisions under the jurisdiction of the Board including violations of the Osteopathic Act (as established as an Initiative Measure, Stats. 1923, p. xciii), the Medical Practice Act, the Confidentiality of Medical Information Act, or any other statute or regulation

upon which the Board may base a disciplinary action. These changes are covered at subsection (a)(1) of this proposal.

In particular, Subsection (BB) references any statute or regulation upon which the Board may base a disciplinary action. The purpose of this reference is to provide the Board with authority to enforce statutes and regulations that they can otherwise base enforcement actions on that may not be specifically listed (for example: BPC section 141 (disciplinary action by another state, agency of the federal government or another country for substantially related acts)). This section provides a commonsense consolidation of citation authority that eliminates the cumbersome need to add every new statute or regulation that the Board has authority to enforce through formal discipline but also allows the Board a reasonable alternative of issuing a citation in lieu of disciplinary action for those cases that may not rise to the level of needing restriction on practice.

A reference to BPC section 655.6 in existing subsection (a)(16) would be deleted, as that statute was repealed in 2008.

Other substantive changes include amending the criteria for the Executive Director or designee to consider when setting the fine amount. In amending the criteria, reference to BPC section 125.9 was deleted to make room for a more expansive criteria to consider factors that are commonly considered by the Executive Director in increasing or decreasing the amount of the fine assessed based upon the conduct of the cited person in a particular case but not covered by existing regulations. The criteria is listed in this section in subsection (b)(1) and includes existing criteria currently required to be considered by the Board as well the following additional criteria: (A) "bad faith" of the cited person, (C) evidence that the violation was willful; and (E) the extent to which the cited person has cooperated with the Board.

**Section 1659.32 Compliance with Orders of Abatement.** This section provides for the criteria and procedure for requesting an extension of time to the Executive Director to complete the abatement if compliance within the time frame is not possible. This section also defines the procedure and timeline for when the abatement order becomes effective. It also provides the consequences for non-compliance with the abatement order.

To implement the enforcement program's workload more effectively, this proposal would authorize the Executive Director to further delegate to "their designee" this same authority.

**Section 1659.33 Citations for Unlicensed Practice.** This section provides the Board's Executive Director with the authority to issue citations, fines, and orders of abatement for individuals who are unlicensed and practicing medicine. To implement the enforcement program's workload more effectively, this proposal would authorize the Executive Director to further delegate to "their designee" this same authority.

The next change is to add postgraduate licensee to distinguish that the Board has two separate license types for which citations, fines and orders of abatement could be issued.

The third change is to delete language that limits the authority of the Executive Director and the eligible violations for issuing citations, fines, and orders of abatement. The current language being deleted limits unlicensed practice to an otherwise licensed physician whose license status is delinquent (a) or an applicant that practices prior to the issuance of their license. There are other instances where it may be deemed that someone may be practicing medicine which may be determined by the Executive Director to be eligible to issue a citation, fine and order of abatement. Deleting this language allows other instances of unlicensed practice of medicine to be determined to be a citable offense and for which the Board may take enforcement action and provides the Board with greater options for protecting the public other than referral for criminal prosecution.

The final change is to add the remedy and timeframe for enforcement of non-compliance of an unpaid fine. Under current law, the Board may submit a request to the Franchise Tax Board (FTB) to intercept any refund owed to a taxpayer and transfer the funds to the board if the taxpayer owes the Board a debt. This section defines when the remedy of collection can be triggered by the Board, in accordance with recommendation by the staff to provide sufficient time for notice and other informal collection efforts, which is six months from the due date in the final order of the Board. Adding the FTB tax refund intercept remedy for collection of unpaid fines provides clarity and notice to the regulated public of this process authorized by law for the Board to use this specific collection remedy. (**See Addendum C.**) A definition for the word “final” would be added at the recommendation of Regulations Counsel to give adequate notice of when the Board may use the remedy in accordance with legal standards for when an order or judgment may be considered final.

**Section 1659.34 Contest of Citations.** This section provides the various options and procedures to be followed to contest a citation, fine and abatement order. Generally, the individual who receives a citation, fine and order of abatement has several options: request an informal conference; request a formal hearing; request both an informal conference and formal hearing; or not contest the citation, fine and order of abatement. Each option comes with different time frames for the request and the resulting final determination.

Except for changes to correct gendered pronouns, this section is proposed to remain unchanged.

**Section 1659.35 Public Disclosure: Records Retention.** This section provides for disclosure of the citation, fine and order of abatement to the public upon request. Citations that have been resolved, can be purged after 10 years from the date of resolution of the citation, fine and order of abatement.

There is only one minor change to this section. The change with respect to the 10-year time frame for purging citations that have been resolved. The current text has the date of resolution, and the new text sets the date of issuance as the date the clock begins of the 10-year purging timeframe making it easier to track and implement for staff and for cited persons to understand.

**ACTION REQUESTED:**

The Board should review the proposed revisions to the regulatory text the Board approved in January and consider whether they should support the revisions as written or if there are suggested changes to the proposed revised text in **Addendum B**. After review, Board staff requests that the Board consider one of the following motions.

**Motion A:** (The Board has no suggested changes for the proposed revised regulatory text.)

Rescind the Board's prior January 19, 2023 motion and approve the proposed revised regulatory text in Addendum B and submit the text to the Director of the Department of Consumer Affairs and the Business, Consumer Services, and Housing Agency for review and if no adverse comments are received, authorize the Executive Director to take all steps necessary to initiate the rulemaking process, make any non-substantive changes to the text and the package, and set the matter for a hearing if requested. If after the 45-day public comment period, no adverse comments are received, and no public hearing is requested, authorize the Executive Director to take all steps necessary to complete the rulemaking, and adopt the proposed regulations as described in the text noticed for 16 CCR sections 1635, 1636, 1638, 1639, 1640, 1641, 1659.30, 1659.31, 1659.32, 1659.33, 1659.34 and 1659.35.

**Motion B:** (The Board has suggested changes for the proposed revised regulatory text.)

Rescind the Board's prior January 19, 2023 motion and approve the proposed revised regulatory text in Addendum B, with the following changes: (Specify the proposed changes to the proposed text).

In addition, submit the text to the Director of the Department of Consumer Affairs and the Business, Consumer Services, and Housing Agency for review and if no adverse comments are received, authorize the Executive Director to take all steps necessary to initiate the rulemaking process, make any non-substantive changes to the text and the package, and set the matter for a hearing if requested. If after the 45-day public comment period, no adverse comments are received, and no public hearing is requested, authorize the Executive Director to take all steps necessary to complete the rulemaking, and adopt the proposed regulations as described in the text noticed for 16 CCR sections 1635, 1636, 1638, 1639, 1640, 1641, 1659.30, 1659.31, 1659.32, 1659.33, 1659.34 and 1659.35.

## **Addenda**

**Addendum A: Originally Proposed Text for Continuing Medical Education Requirements  
Approved by the Board on January 19, 2023**

**Addendum B: Proposed Regulatory Language (Combining Amendments to both CME and  
Citation and Fine Requirements)**

**Addendum C: Franchise Tax Board Interagency Intercept Collections Program Information**