

**Title 16. DENTAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS**

INITIAL STATEMENT OF REASONS

HEARING DATE: Tuesday April 14, 2020; 10:00 AM

SUBJECT MATTER OF PROPOSED REGULATIONS: Citations and Fines

SECTION(S) AFFECTED: California Code of Regulations (Cal. Code of Regs.), Title 16, Division 10, Chapter 1, Article 7, Sections 1023.2 and 1023.7

INTRODUCTION

The Dental Board of California (Board) regulates approximately 82,000 licensees; consisting of 35,000 dentists (DDS), 30,000 registered dental assistants (RDA), and 1,500 registered dental assistants in extended functions (RDAEF). In addition, the Board has the responsibility for setting the duties and functions of approximately 50,000 unlicensed dental assistants. The Board's highest priority is the protection of the public when exercising its licensing, regulatory, and disciplinary functions. The primary methods by which the Board achieves this goal are: issuing licenses to eligible applicants; investigating complaints against licensees and disciplining licensees for violations of the Dental Practice Act (DPA); monitoring licensees whose licenses have been placed on probation; and managing the Diversion Program for licensees whose practice may be impaired due to abuse of dangerous drugs or alcohol.

The Board's Executive Officer is authorized to issue a citation and administrative fine to any person who holds a license or permit, or certificate issued by the Board for a violation of any provision of the Dental Practice Act or other law enforced by the Board. The Board has determined that the current fine maximum fine amounts of \$2,500 are insufficient to properly function as deterrents against violations of statutes and regulations. Therefore, the Board seeks to increase the maximum fines the Executive Officer may issue for a violation of any provision of the Dental Practice Act or other law enforced by the Board to act as a further deterrent.

SPECIFIC PURPOSE OF EACH ADOPTION, AMENDMENT, OR REPEAL:

Business and Professions Code (BPC) section 125.9 specifies any board, bureau, or commission within the Department of Consumer Affairs may establish, by regulation, a system for the issuance of a citation to a licensee which may contain an order of abatement or an order to pay an administrative fine assessed by the board, bureau, or commission where the licensee is in violation of the applicable licensing act or any regulation adopted pursuant thereto. BPC 125.9 specifies that in no event shall the administrative fine assessed by the board, bureau, or commission exceed five thousand

dollars (\$5,000) for each inspection or each investigation made with respect to the violation, or five thousand dollars (\$5,000) for each violation or count if the violation involves fraudulent billing submitted to an insurance company, the Medi-Cal program, or Medicare.

The Board proposes to amend California Code of Regulations, title 16, sections 1023.2 and 1023.7 to increase the maximum fine amount that may be assessed by the Board. Specifically, the Board is proposing the following:

- Section 1023.2. Administrative Fines for Citations
 - Amend Section 1023.2 to increase the maximum fine amount that may be assessed for each class “A” or class “B” violation from \$2,500 to \$5,000.
 - A class “A” violation is a violation which the executive officer has determined involves a person who has violated a statute/regulation, and either:
 - (1) the violation presents a substantial probability that death or serious physical harm to a patient could result therefrom; or
 - (2) the person has been issued three class B violations within a 24 month time period immediately preceding the act, serving as the basis for the citation, without regard to whether the actions to enforce the previous citations have become final. (Cal. Code Regs., tit. 16, § 1023.2, subd. (a).)
 - A class “B” violation is a violation which the executive officer has determined involves a person who has violated a statute/regulation relating to the practice of dentistry which does not present a substantial probability that either death or serious physical harm to a patient will result therefrom. (Cal. Code Regs., tit. 16, § 1023.2, subd. (b).)
- Section 1023.7. Unlicensed Practice.
 - Amend Section 1023.7 to increase the maximum fine amount that may be assessed for unlicensed practice from \$2,500 to \$5,000.

Factual Basis/Rationale

Existing law, Business and Professions Code section 1614, specifies that the Board is authorized to adopt, amend, or repeal such rules and regulations as may be reasonably necessary to enable the Board to carry into effect the provisions of the Dental Practice Act.

Existing law, Business and Professions Code section 1601.2, establishes the Board’s highest priority, which is the protection of the public when the Board exercises its licensing, regulatory, and disciplinary functions.

Citations are issued for violations of sufficient severity to warrant an enforcement action by the Board, but which are not severe enough to warrant disciplinary action, or in the case of unlicensed practice where the Board does not have the authority to pursue disciplinary action.

It is necessary to increase the maximum amount of a fine that the Board may assess when it issues citations for the protection of the public's health and wellbeing. The Board has determined that the current fine maximum fine amounts of \$2,500 are insufficient to act as deterrents against violations of statutes and regulations. The Board proposes an increase to this amount to act as a further deterrent to licensees. In addition, when a licensee is found to have violated the DPA or the Board's regulations, disciplinary proceedings may be initiated by the Board, which would require the case to be referred to the OAG for prosecution. This can be costly for not only the licensee to obtain legal representation, but for the Board as well because it would be required to pay to the OAG all costs associated with prosecuting the case. The Board would also incur costs to have the case investigated. Although the Board might be reimbursed for its costs when a disciplinary decision is rendered in its favor pursuant to BPC 125.3, many licensees cannot afford to reimburse the Board. In many cases, licensees surrender their license, or if a decision revokes their license, the Board is not reimbursed until a licensee seeks to have a license reinstated. This greatly impacts the Board's enforcement program.

Citations may be used when patient harm is not found, but the quality of care provided to the consumer is substandard. When issuing citations, the Board's goal is not to be punitive. Rather, the Board seeks to protect California consumers by getting the subject dentist's attention, re-educating him/her as to the DPA or the Board's regulations, and emphasizing the importance of following dental practices that fall within the community's standard of care.

When deciding whether to issue a citation, 16 CCR 1023.4 requires that the executive officer consider the following factors when assessing the amount of an administrative fine:

- The good or bad faith exhibited by the cited person
- The nature and severity of the violation
- Evidence that the violation was willful
- History of violations of the same or similar nature
- The extent to which the cited person has cooperated with the board
- The extent to which the cited person has mitigated or attempted to mitigate any damage or injury caused by his or her violation
- Such other matters as justice may require.

The Board has expanded the scope of its use of cite and fine to address a wider range of violations that can be more efficiently and effectively addressed through a cite and fine process with abatement and/or remedial education outcomes.

Examples of “lesser” violations of the DPA that may not warrant referral to the OAG, but where a citation and fine may be more appropriate, include documentation issues, e.g., recordkeeping, advertising violations, failure to keep up with continuing education requirements, unprofessional conduct for the failure to disclose or report convictions, e.g., driving under the influence, and disciplinary actions taken by another professional licensing entity. In addition to using citations as a tool to address less egregious violations that would not otherwise result in discipline. Moreover, citations can address skills and training concerns promptly.

The average number of days to complete a case that has been referred to the OAG for disciplinary action has continued to increase from 1645 days in 2015/16 to 1863 days in 2017/18 (over 13%). By issuing a citation and fine, the Board is providing the licensee with an easier path to resolution and obtaining swift compliance. The Board has determined that the fine amount plays an important role in deterring future violations of the DPA and the Board’s regulations and the unlicensed practice of dentistry. In cases that do not warrant formal discipline, or in the case of unlicensed practice, a citation with a fine amount of \$5,000 would carry with it a deterrent factor that would far exceed that of a fine in the amount of \$2,500. This assists the Board in meeting its obligation to protect consumers when citations with a fine are issued.

Presently, section 1023.2 imposes the same maximum fine of \$2,500 for Class A and Class B offenses. This proposal retains this consistency by increasing the maximum fine amounts to \$5,000 for both types of offenses. Additionally, increasing the maximum fine for both classes of citations to \$5,000 is necessary to avoid creating a conflict with the proposed amendment to section 1023.7. The proposed amendment to section 1023.7 raises the fine for unlicensed practice of dentistry for \$2,500 to \$5,000. However, the unlicensed practice of dentistry could also be a Class B violation under section 1023.2 if the unlicensed “practitioner’s” activities do not “present a substantial probability that either death or serious physical harm to a patient will result.” Therefore, changing the fine amounts for both classes of violation ensures a uniform regulatory framework and prevents confusion amongst licensees and the general public.

UNDERLYING DATA

1. Dental Board of California Meeting Minutes, August 10-11, 2017
2. Dental Board of California Background Information and Overview of the Current Regulatory Program – Volume 1

BUSINESS IMPACT

The Board has made the initial determination that the proposed regulations would not
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have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states, because the regulations pertain to the Board's enforcement of the Dental Practice Act and its regulations. This determination is based on the fact that the proposal only affects persons found to be in violation of the Board's statutes and regulations. For example, a person may be issued a citation and administratively fined for violations which the executive officer has determined involves a person who has violated a statute or regulation relating to the practice of dentistry which does not present a substantial probability that either death or serious physical harm to a patient will result therefrom.

A business owned by a licensee who is facing a citation due to a violation of the DPA or the Board's regulations may incur a fiscal impact as it relates to costs associated with payment of the fine. The Board does not maintain data relating to the number or percentage of licensees who own a business; therefore, the number or percentage of businesses that may be impacted cannot be predicted. The Board only has the authority to issue a citation that includes a fine for unlicensed practice or to a licensee and not a business. Accordingly, the initial or ongoing costs for a small business owned by a licensee who is facing a citation with a fine cannot be projected. Businesses operated by licensees who are in compliance with the DPA and the Board's regulations will not incur any fiscal impact.

Fiscal Impact on Individuals

This proposal would have a minor fiscal impact on individual licensees of the Board who have been issued a citation with an administrative fine. Though these regulations pertain to the Board's internal enforcement procedures, a citation against a license or person for unlicensed practice will result in costs associated with payment. The average salary of a DDS in California is approximately \$150,000 per year and the annual salary of a registered dental assistant in California is approximately \$35,000 per year. Licensees who are in compliance with the Board's statutes and regulations will not incur any fiscal impact. With respect to persons who are issued a citation with a fine for unlicensed practice, the Board is unable to speculate who might engage in such practice. Therefore, the fiscal impact on such persons is unknown.

Fiscal Impact on the Board

The impact on the Board as a result of this regulatory rulemaking is negligible, because this rulemaking merely increases the maximum amount of a citation to \$5,000.

ECONOMIC IMPACT ASSESSMENT

This regulatory proposal will have the following effects:

- It will not create nor eliminate jobs within the State of California because this proposal will not be sufficient to have the effect of creating or eliminating jobs. The Board has made this determination because this proposal pertains to the

Board's citations and fines and it would only impact individual licensees of the Board who are issued a citation and administrative fine as a result of violating the Board's statutes and regulations and persons who engage in the unlicensed practice of dentistry. The Board estimates that approximately 83 investigations each year result in a citation and fine.

- It will not create new business or eliminate existing businesses within the State of California because this proposal will not be sufficient to have the effect of creating or eliminating jobs. The Board has made this determination because this proposal pertains to the Board's citations and fines and would only impact individual licensees of the Board who are issued a citation and administrative fine as a result of violating the Board's statutes and regulations and persons who engage in the unlicensed practice of dentistry. The Board estimates that approximately 83 investigations each year result in a citation and fine.
- It will not affect the expansion of businesses currently doing business within the State of California because this proposal will not be sufficient to limit or further the expansion of businesses. The Board has made this determination because this proposal pertains to the Board's citations and fines and would only impact individual licensees of the Board who are issued a citation and administrative fine as a result of violating the Board's statutes and regulations and persons who engage in the unlicensed practice of dentistry. The Board estimates that approximately 83 investigations each year result in a citation and fine.
- This regulatory proposal affects the health and welfare of California residents because the proposed regulation doubles the available fine which may be levied against practitioners who violate the laws and regulations administered by the Board. This increase in the fine will increase the deterrent effect of the fine thereby increasing protections for the health and welfare of California residents.
- This regulatory proposal does not affect worker safety because the regulations pertain to the Board's citations and fines as it pertains to issuing a citation and fine against licensees and persons who engage in the unlicensed practice of dentistry and this proposal is not relative to worker safety.
- This regulatory proposal does not affect the state's environment because the regulations pertain to the Board's citations and fines, and this proposal is not relevant to the State's environment.

Benefit: The Board's highest priority is the protection of the public while exercising its licensing, regulatory, and disciplinary functions. These proposed regulatory changes provide the Board with the means to ensure that individuals who violate the Board's statutes or regulations and persons who engage in the unlicensed practice of dentistry will be issued a citation with an administrative fine in an amount allowed under sections Citation and Fines

1023.2 and 1023.7.

SPECIFIC TECHNOLOGIES OR EQUIPMENT

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

CONSIDERATION OF ALTERNATIVES

Alternative No. 1: Do not seek a regulatory change.

Rejected: The Board's highest priority is the protection of the public while exercising its licensing, regulatory, and disciplinary functions. These proposed regulatory changes provide the Board with the means to ensure that individuals who violate the DPA or the Board's regulations and persons who engage in the unlicensed practice of dentistry will be issued a citation in an amount allowed under the Board's regulations. The alternative was rejected, as not increasing the maximum amount would not provide the Board with a more effective means of deterring licensees from violating the DPA or the Board's regulations and persons from engaging in the unlicensed practice of dentistry. Citations and fines are effective administrative enforcement tools that are utilized by the Board for public protection.

Alternative No. 2: Change to another amount besides maximum.

Rejected: The Board's highest priority is the protection of the public while exercising its licensing, regulatory, and disciplinary functions. These proposed regulatory changes provide the Board with the means to ensure that individuals who violate the DPA or the Board's regulations and persons who engage in the unlicensed practice of dentistry will be issued a citation and administrative fine in an amount allowed under the Board's regulations. The alternative was rejected, as an amount less than the maximum would be less likely to deter egregious conduct by licensees that does not rise to the level of requiring formal discipline and persons who engage in the unlicensed practice of dentistry.