

**TITLE 16. DENTAL HYGIENE COMMITTEE OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
ADDENDUM TO THE INITIAL STATEMENT OF REASONS**

HEARING DATE: March 21, 2011

SUBJECT MATTER OF PROPOSED REGULATIONS: Citations and Fines

SECTION(S) AFFECTED: Title 16, Division 11, California Code of Regulations, Sections 1139, 1140, 1141, 1142, 1143, and 1144.

UPDATED INTRODUCTION:

The Introduction is updated as follows:

On June 14, 2012, the Office of Administrative Law (OAL) issued a Decision of Disapproval of the Dental Hygiene Committee's (DHCC) proposed regulations due to failure to comply with necessity, clarity and reference standards of Government Code Section 11349.1(a).

OAL's primary necessity concern related to insufficient explanation of the necessity for each new provision of the proposed regulations, indicating that this was not adequately addressed for criteria not currently listed in statute. Those concerns are addressed in this Addendum, which was noticed to the public for a 15-day comment period.

OAL stated concerns regarding the clarity of the proposed text, specifically that Section 1139 references "Article 11 of the Business and Professions Code, or any regulations adopted pursuant thereto, or any laws governing the practice of dental hygiene", but does not specify which of the fourteen existing Article 11's in the Business and Professions Code is referenced. OAL also found it unclear which regulations are being referred to, these regulations or future regulations that may be adopted, and how citations will be issued to unlicensed persons. Further, OAL indicated that CCR Section 1142 does not meet the clarity standard in that it is not clear to whom the written request in subdivision (b) must be submitted and it is not clear whether subdivision (c) refers to the written request in subdivision (b) or the request by written notice in subdivision (a).

At its July 9, 2012 teleconference, the Committee voted to adopt modifications to the text to clarify that persons may be cited "for any violation of Division 11 of Title 16 of the California Code of Regulations or any laws governing the practice of dental hygiene. At that same meeting, the Committee voted to adopt modifications to CCR Section 1139 to clarify that a citation may be issued against either a licensee or unlicensed individual acting in the capacity of a licensee and describes issuance of a citation. The Committee also voted to adopt modifications to CCR Section 1142 to clarify that a cited person may request either a hearing or an informal conference and that the decision shall be deemed to be a final order with regard to the informal conference procedure, and that an informal conference shall not be held on affirmed

citations. The amendments adopted by the Committee clarify that if the citation is modified, the original citation is withdrawn and a new citation is issued and describe the procedure for contesting a modified citation.

UPDATED SPECIFIC PURPOSE OF EACH ADOPTION OR AMENDMENT:

The Committee's proposed changes are updated as follows:

Section 1139(a) – Issuance of Citations and Fines:

This proposed subsection was amended to specify that the Executive Officer or his or her designee may issue a citation and order to pay a fine not to exceed \$5,000 and an order of abatement against a licensee for any violation of Division 11 of the California Code of Regulations or any laws governing the practice of dental hygiene. The subsection allows for the issuance of a citation either with or without the assessment of a fine. The amount of \$5,000 is the statutory limit allowed by Business and Professions Code Section 125.9 and provides the Executive Officer the most flexibility within this dollar range and the freedom to do one or the other or both, so that each citation can be tailored to the specific violation and the facts at hand. Citation is less expensive than formal discipline and can resolve lesser forms of non-compliance more quickly.

Adoption of this subsection enables the DHCC to enforce lesser violations of the law through a citation and possible fine, addressing activities that do not warrant disciplinary action or revocation of the license before the conduct escalates to that point. This regulation is necessary to specify the process by which the DHCC may enforce certain provisions of the law short of a full disciplinary action and benefits licensees by alerting them to conduct that, if repeated, will lead to more serious consequences. This regulation is necessary to inform the public of the framework of how citations will be issued, as they will be standards of general application. This regulation benefits the DHCC by providing additional tools for license enforcement, and benefits consumers by assuring that they are protected from lesser violations of law as well as more serious and egregious ones.

Section 1139(b) – Issuance of Citations and Fines:

This proposed subsection specifies that a citation shall be in writing and shall describe with particularity the nature and facts of each violation, including a reference to the law or regulation being violated. Amendments to this subsection clarify that a citation may be issued either to a licensee or to an individual performing the unlicensed practice of dental hygiene, in order to capture all potential violators/cited persons. This regulation is necessary to specify the exact information regarding alleged violations for purposes of due process to put individuals on notice of what violations are being alleged, so they may either become compliant or may prepare a defense. The citation must be in writing for the sake of clarity, so that all parties involved may know what is at issue. This regulation is necessary to guide staff by clearly stating the required components for each citation issued to avoid underground regulations regarding the composition of citations.

Section 1139(c) – Issuance of Citations and Fines:

This subsection specifies that the person cited shall be either personally served or served by certified U.S. mail. This regulation is necessary to ensure that cited persons are notified timely and clarifies that either of two widely-accepted methods of service in

California may be used. Allowing both is necessary to give the Executive Officer the flexibility to deal with the unique circumstances of each citation, resulting in greater efficiency. Amendments clarify that citations may be issued either to a licensee or an individual performing the unlicensed practice of dental hygiene. This regulation is necessary to capture all parties that may be cited, and is necessary to let cited persons know that they have been cited. This regulation benefits DHCC staff by clearly stating the required delivery method for each citation issued, and is necessary to avoid the underground regulation of delivery methods.

Section 1140 – Criteria to be Considered:

This proposed section lists specific factors to be considered in the issuance of a citation. This regulation is necessary to make clear to the Executive Officer and cited person alike as to what information is pertinent in considering a citation and/or fine and allows the Executive Officer the flexibility to adjust the citation in consideration of the totality of the factors weighed against each other. It also gives the cited person notice of what information is relevant and will be considered at the informal conference. This is necessary to allow cited persons to prepare a defense and gather information for the informal conference. In turn, this will result in a more productive and efficient informal conference with a fair and appropriate outcome based on the facts. These factors are not only necessary to determine the extent of the citation and/or fine, but are also necessary in determining whether a citation and/or fine should even be issued, or whether this case should go straight to discipline.

Section 1140(a) – Criteria to be Considered:

This proposed subsection allows the Executive Officer to consider the nature and severity of the violation in the issuance of a citation. This regulation is necessary to allow the Executive Officer the flexibility to adjust the penalty according to the whether violation is minor, such as advertising or recordkeeping, or more serious, such as direct patient care or unprofessional conduct. All healing arts boards take into account the nature and severity of the violation when determining whether or not to impose a citation and/or a fine, or if a small fine or a more substantial fine is warranted. The nature of the violation concerns what type of misconduct is at issue. Considerations such as if the violation is of a sexual nature, or involved a minor, or if the hygienist simply made an erroneous representation of fact to the Committee are examples of factors that would be used to determine the nature and severity of the offense.

Section 1140(b) – Criteria to be Considered:

This proposed subsection allows the Executive Officer to consider the length of time that has passed since the date of the violation when issuing a citation. This regulation is necessary to allow the Executive Officer the discretion to impose a different penalty for an older violation as opposed to one which has happened recently and reflects a licensee's current practice. Recent violations are more indicative of an individual's present practices and the ability to cite and fine an individual for a recent violation, as well as a pertinent or serious violation which happened a number of years ago, is a valuable enforcement tool for public protection.

Section 1140(c) – Criteria to be Considered:

This proposed subsection allows the Executive Officer to consider the consequences of the violation, including potential or actual patient harm when issuing a citation. This regulation is necessary to provide an effective and quick enforcement tool to the DHCC's Executive Officer, particularly in instances of unsanitary conditions or unprofessional conduct, where an order of abatement would protect the public by preventing patient harm. This section allows the Executive Officer to consider the consequences of the violation and the flexibility to adjust the fine accordingly. Higher fines for serious misconduct reflect the serious nature of potential or actual patient harm, as protection of the public is the Committee's highest priority.

Section 1140(d) – Criteria to be Considered:

This proposed subsection allows the Executive Officer to consider the history of previous violations of the same or a similar nature when issuing a citation. This regulation is necessary to allow the Executive Officer to take into consideration whether a licensee has a pattern of violations that would warrant a more serious penalty than for a single violation, and allows a consequence for repetitive violations of the same type. This allows the DHCC to consider a cited individual's history of violations in a particular area in deciding the appropriate penalty, and acts as a deterrent to future violations.

Section 1140(e) – Criteria to be Considered:

This proposed subsection allows the Executive Officer to consider the evidence that the violation was willful in the issuance of a citation. This regulation is necessary to assist the DHCC in its efforts to curb offenses such as fraud, stealing patient records and falsifying records. Willful offenses are more egregious, in that the cited person intended to violate the law. This provision is necessary to allow the Executive Officer to take this factor into consideration and have the citation and/or fine reflect this fact.

Section 1140(f) – Criteria to be Considered:

This proposed subsection allows the Executive Officer to consider the gravity of the violation when issuing a citation. Some violations may potentially cause harm to the public, even though no harm actually occurred. For example, a licensee's impaired driving outside of work hours is grave, even though no patient was harmed, because it may indicate a substance abuse problem or simply bad judgment. The gravity of a violation is assessed by the severity of the harm that could result from the offense and the probability that harm could occur, even though in the particular instance there was no harm. This regulation is necessary to give the Executive Officer the ability to impose a higher fine for more serious violations that do not result in actual patient harm and a smaller fine or no fine at all if the offense is minor and not grave. Allowing the Executive Officer this discretion increases protection of the public and allows the Executive Officer to appropriately tailor the citation/fine to the circumstances and impose a higher fine or more substantial order of abatement for grave violations and a smaller/no fine or more minor order of abatement if the offense is minor or easily corrected.

Section 1140(g) – Criteria to be Considered:

This proposed subsection allows the Executive Officer to consider the extent to which the cited person has remediated any knowledge or skill deficiencies which could have resulted in injury to the public. In some circumstances, a licensee may be cited for a practice which could have resulted in injury to a patient, who has in the meantime addressed the deficiency appropriately. This regulation would allow the Executive Officer to take into account whether a cited person has taken action to correct such deficiencies when issuing the citation, and may not include any fine if those deficiencies have been corrected. This benefits the DHCC and the public by encouraging a cited person to remediate knowledge or skill deficiencies as an alternative to using enforcement resources to pursue further citations or disciplinary actions and the public will benefit from a better educated licensee. This provision is necessary to allow the Executive Officer to consider remediated knowledge in tailoring the citation/fine to the facts at hand.

Section 1141 – Citations for Unlicensed Practice:

This proposed section allows the Executive Officer to issue a citation to any unlicensed person who is acting in the capacity of a licensee and is not exempted from licensure, and allows for a reasonable period of time for abatement and provides for a fine up to \$5,000 per occurrence. This regulation is necessary to allow the Executive Officer the same ability to cite unlicensed individuals who are practicing illegally and provides for the same statutory maximum fine allowed as a licensee would be subject to. Individuals should not be allowed to circumvent the requirements of law through being unlicensed. This regulation benefits the public by providing the same level of protection from unlicensed individuals practicing dental hygiene as from licensees practicing dental hygiene. The last sentence of Section 1141 is necessary to make clear that the remedy in 1141 does not pre-empt or preclude other remedies that may be available for this type of violation.

Section 1142(a) – Contested Citations:

This proposed subsection was amended to specify that a citation may be issued to any person, not only to a licensee. These amendments allow the DHCC to issue a citation to an unlicensed person illegally performing the duties of a registered dental hygienist (RDH), registered dental hygienist in extended functions (RDHEF) or registered dental hygienist in alternative practice (RDHAP), and that any cited person may contest the citation through the process specified. This regulation is necessary to provide a specific process that a cited individual may use to contest a citation, which benefits the cited person by allowing for due process, and benefits the Committee by setting out the process clearly in law thereby avoiding an underground regulation. The regulation specifies that a request for hearing be received by the Committee within 30 days of the citation to provide for a reasonable and finite timeline for both the DHCC and the cited individual to request a hearing. Statute, Business and Professions Code Section 125.9(b)(5), requires that fines be paid within 30 days unless being appealed. A cited person must either pay the fine or request a hearing within this thirty day period.

Section 1142(b) – Contested Citations:

This proposed subsection was amended to clarify that a cited person may request an informal conference with the Executive Officer either in addition to or as an alternative to the hearing provided according to Section 1142(a) and that such a request be made to the Committee within 14 days of the citation. Other healing arts boards have similar regulatory language in place to use the informal conference to more swiftly bring a citation to a close which may eliminate the need for a full hearing process. This regulation is necessary to clarify that a cited person may request either or both a hearing and an informal conference, and that such request must be made in writing to the Committee within 14 days. The request must be made in writing so that the Executive Officer has documentation that an informal conference has been requested, and to establish the date of the request so that the conference can be scheduled timely. Other healing arts boards' regulations allow similar timeframes for such requests. This abbreviated timeframe of 2 weeks results in an expedited timeframe for resolution of the matter before an APA hearing, if any is held, while still providing the cited person with enough time to determine whether he or she wishes to informally contest the citation. This regulation benefits the cited person by clarifying the options and the required process to use when contesting a citation. The regulation benefits the Committee by clearly specifying the process for cited individuals and preventing underground regulations in the absence of a specified timeline and process.

Section 1142(c) – Contested Citations:

This proposed subsection was amended to clarify that the Executive Officer or his or her designee must hold an informal conference with the person cited and his or her legal counsel or authorized representative, if any, when requested in writing, within 30 calendar days from receipt of the request for the conference. The one month timeframe provides an expedited timeframe for resolution of the matter while providing the cited person adequate time to prepare a defense. The quick turnaround time is necessary for the informal conference to be held before the Administrative Procedures Act (APA) hearing, if any, so that the cited person may determine whether to still pursue an APA hearing if the citation is upheld. This regulation is necessary to provide a timetable for the informal conference process, conforms with other healing arts boards cite and fine regulations and benefits the Committee, cited persons and consumers by establishing a timeframe of due process for cited persons.

Section 1142(d) – Contested Citations:

This proposed subsection was amended to clarify that the Executive Officer or his or her designee may affirm, modify or dismiss the citation at the conclusion of the informal conference, and that this decision and the reasons for it must be mailed to the cited person and his or her legal counsel within 14 days of the conference and shall be deemed to be a final order with regard to the informal conference procedure. The 14-day period is to expedite the informal conference process and at the same time allow the cited individual time to decide whether to pursue an APA hearing and prepare a defense. The informal conference timeframes have been selected to allow enough time for the cited person to be notified of the outcome of the informal conference before the APA hearing, if requested, is held. The Office of Administrative Hearings usually

schedules APA hearings approximately 3 to 4 months from the time a hearing is requested. This regulation is necessary to specify the type of decision that may be rendered, the form of the decision, the timeframe of the decision, and that this decision shall be final with regard to the informal conference procedure only, and does not impact the cited person's APA hearing rights if the citation is modified or upheld. The regulation benefits the cited person and the Committee by providing information and a timetable regarding the possible outcome of an informal conference.

Section 1142(d)(i) – Contested Citations:

This proposed subsection was amended to clarify that if the citation, including any order of abatement or administrative fine levied, is dismissed the request for hearing shall be deemed withdrawn. This regulatory section is necessary to stop the hearing process for citations which are dismissed by the Executive Officer or his or her designee subsequent to an informal conference. There is no purpose in pursuing a hearing for a citation which has been dismissed, so this section is necessary to promote efficiency in formal APA hearings that are scheduled with the Office of Administrative Law. It also benefits the cited person, the Committee and the court system by eliminating this workload once a citation has been dismissed.

Section 1142(d)(ii) – Contested Citations:

This proposed subsection was amended to clarify that if the citation, including any administrative fine levied or order of abatement, is affirmed, the cited person may withdraw the request for hearing or proceed with the administrative hearing process set forth in subdivision (a), at his or her discretion. This subsection was amended to specify that an informal citation conference shall not be held on affirmed citations, as the cited person would have already had an opportunity to present an informal defense on that citation. This subsection is needed to prevent repetitive requests for informal conferences on the same affirmed citations resulting in an eternal cycle, which is necessary to preserve Committee time and resources and to prevent undue delay in making a final informal order. It also provides specific information to cited individuals regarding their request for administrative hearing if their informal conference results in an affirmed decision. This regulation benefits cited persons and the Committee by specifying the actions that may or may not occur if a citation is affirmed through an informal conference.

Section 1142(d)(iii) – Contested Citations:

This proposed subsection was amended to clarify that if the citation, including any administrative fine levied or order of abatement, is modified as a result of an informal conference, the original citation shall be withdrawn and a new citation issued. This subsection specifies the process by which a cited person may contest a modified citation, including the required timeline and requirements, and that an informal citation conference shall not be held on modified citations, as the cited person would have already had an opportunity to present an informal defense on that citation. This subsection is needed to inform cited individuals of the requirements and procedure for citations that are modified due to an informal conference, and gives the same 30 day period for the cited individual to contest the citation, to be consistent with subdivision

(a). This will prevent repetitive requests for informal conferences on modified citations and provides specific information to cited individuals regarding their request for administrative hearing if their informal conference results in a modified decision. This regulation benefits cited persons and the Committee by specifying the actions that may or may not occur if a citation is modified through informal conference.

Section 1143(a) – Compliance with Citation/Order of Abatement:

This proposed subsection would allow a cited person who has been issued an order of abatement and is unable to complete the correction in the time set forth to request an extension of time in writing from the Executive Officer. This regulation is necessary to provide the Executive Officer the ability to grant an extension of time to cited individuals who are unable to complete a correction due to circumstances beyond their control. Cited individuals may be unable to comply with an order of abatement due to various circumstances, and this provision allows the Executive Officer to take those into account and allow for a reasonable extension of time for correction, if warranted. The regulation specifies that the request be made within the time set for abatement, to ensure that cited individuals do not wait until after the time for correction has passed to request the extension. This flexibility is necessary to encourage and enable cited persons to comply with an order of abatement.

Section 1143(b) – Compliance with Citation/Order of Abatement:

This proposed subsection provides that it is a violation to fail to timely abate the violation or pay the fine imposed unless the citation or order of abatement is contested or successfully appealed. This regulation is necessary to prevent cited individuals from simply ignoring the citation by making the failure to comply an independent violation in itself and providing an additional penalty for non-compliance.

Section 1143(c) – Compliance with Citation/Order of Abatement:

This proposed subsection specifies that it is unprofessional conduct for a cited individual to fail to timely comply with an order for abatement or pay a fine, and may result in disciplinary action. Defining this failure as “unprofessional conduct” is necessary to provide the Committee with a direct route to pursuing formal disciplinary proceedings pursuant to Business and Professions Code Section 1949.

Section 1144 – Disclosure:

This proposed section provides that the issuance and disposition of citations be public. This regulation is necessary to make sure that the public is informed of actions against licensees and informs cited licensees and unlicensed persons that the citation and its result will be public information. The public needs to have access to this information in order to make informed choices about the care that they receive. This information is public in that no exceptions from disclosure exist under the Public Records Act.

Factual Basis/Rationale:

The DHCC is the regulatory board responsible for licensing and regulation of the dental hygiene profession in California. Business and Professions Code Section 1905(a)(7) gives the Committee the authority to “Deny, suspend or revoke a license under this

article, or otherwise enforce the provisions of this article.” Business and Professions Code Section 1947 allows the DHCC to revoke or suspend a license “for any reason specified in this article”, including provisions in Business and Professions Code Section 1949 relative to unprofessional conduct, incompetence, gross negligence, repeated acts of negligence in the profession, receiving a license by mistake and the like. Business and Professions Code Section 1950 allows for revocation, suspension, probation or reprimand as “Consequences of conviction of crime substantially related to the licensee’s qualifications, functions or duties.” Business and Professions Code Section 1905 defines unprofessional conduct, Section 1951 outlines probation options and Section 1952 describes violations relative to controlled substances as unprofessional conduct. Business and Professions Code Section 1953 requires treatment entries in a patient’s record be signed or initialed and dated, and specifies that repeated violations constitute unprofessional conduct. Section 1954 relates to holding oneself out as able to perform professional services beyond the scope of one’s license and field of competence as unprofessional conduct and provides exceptions for accredited dental schools, dental hygiene schools or research conducted pursuant to the U.S. Food and Drug Administration. Business and Professions Code Section 1955 states the licensee’s duty to release a patient’s records within 15 days according to the patient’s written request and specifies an administrative penalty (fine) of up to \$250 per day up to a maximum of \$5,000. Business and Professions Code Section 1956 provides that negligence is unprofessional conduct.

In addition to the above statutory authority to revoke or suspend a dental hygienist’s license, these regulations provide a mechanism for the Committee to issue a citation, a fine, and/or an order of abatement for less egregious violations that would not warrant revocation or suspension of the license. These regulations would enable the Committee to more readily enforce existing statutes for lesser violations of the law which would logically call for lesser penalties. Certain violations, such as the licensee’s failure to identify himself or herself in the patient record, a requirement of Business and Professions Code Section 1953, would lend itself to a citation rather than disciplinary action, in the absence of any other violations. The text provides for a fine up to \$5,000; lesser fines would be assigned to lesser violations and greater fines would apply to repeated or more serious violations that do not warrant suspension or revocation of the license. A larger fine, up to \$5,000, would indicate repeated or more serious violations and a higher number of investigative hours involved in preparing the case. Title 16 of the California Code of Regulations (CCR), Section 1139 allows for the issuance of a citation without the assessment of a fine, which would be a simple matter of notifying the licensee of a potential violation. CCR Section 1140 defines criteria that will be used in considering a citation. CCR Section 1141 specifies that the Committee may issue citations for unlicensed practice, and that these citations may include a fine and/or order of abatement. CCR Section 1142 sets out the procedure for a cited person to contest a citation and provides the cited person an opportunity for either an informal conference with the Executive Officer of the Committee or a hearing pursuant to the provisions of Chapter 5 of the Government Code, or both, and gives procedural information. Section 1143 addresses the process for failure to comply with an order of abatement, including the cited individual’s ability to request an extension and the Committee’s ability to

pursue a disciplinary action for failure to comply. The Committee believes that by enforcing lesser violations it is possible to prevent major violations. This type of enforcement activity more efficiently utilizes the Committee's budget for enforcement and advises licensees and others who may consider acting as licensees without benefit of a license that the Committee takes even minor violations in the law very seriously. As the Committee is seen to be active in its enforcement, this will act as a preventative to more serious violations of the law. Other boards, specifically the Medical Board, Dental Board, Physical Therapy Board, Acupuncture Board, and Psychology Board, all use citations and fines as an alternative means by which the Board can take an enforcement action against a licensed or unlicensed individual who is found to be in violation of the law. Each of these boards states on their respective websites that "The citation and fine program increases the effectiveness of the Board's disciplinary process by providing a method to more effectively address relatively minor violations which normally would not warrant more serious license discipline in order to protect the public. The Dental Hygiene Committee of California would utilize this valuable enforcement tool to the same end.