

PHYSICAL THERAPY BOARD OF CALIFORNIA

INITIAL STATEMENT OF REASONS

Hearing Date: November 3, 2011

Subject Matter of Proposed Regulations: Model Guidelines for Issuing Citations and Imposing Discipline

Section(s) Affected: California Code of Regulations, Title 16, Division 13.2, Section 1399.15

INTRODUCTION: On September 28, 2008, Senate Bill 1441 (Chapter 548, Statutes of 2008) was enacted and required the Department of Consumer Affairs (Department) to establish a Substance Abuse Coordination Committee (SACC) comprised of the Executive Officers of the Department's healing arts boards, a representative of the California Department of Alcohol and Drug Programs, and chaired by the Director of the Department. The SACC was charged with the task of developing uniform standards in sixteen specific areas for use in dealing with substance abusing licensees, whether or not a healing arts board chose to have a formal diversion program. In April 2010, the SACC developed a document named *Uniform Standards Regarding Substance-Abusing Healing Arts Licensees*, which contained the sixteen uniform standards as required by SB 1441.

The Physical Therapy Board of California (Board) is proposing to implement those uniform standards in its Disciplinary Guidelines through the regulatory process.

The Physical Therapy Board of California (Board) is proposing to implement those uniform standards in its Disciplinary Guidelines. For ease of use by Deputies Attorney General and Administrative Law Judges, only those standards specific to discipline were incorporated in the Guidelines in the introductory information and also in the specific terms of conditions, where applicable. Those Uniform Standards that are specific to the Diversion program vendor, contracted by PTBC, do not serve the purpose of the Guidelines. Therefore, those Uniform Standards were not incorporated as part of the Disciplinary Guidelines. The Uniform Standards (SB 1441) is incorporated by reference, in its entirety, in section 1399.15 of the California Code of Regulation.

In July 2009, the *Los Angeles Times* published an article indicating that the Board of Registered Nursing often takes years to take disciplinary action on complaints of egregious misconduct, while the licensees were still practicing. These articles exposed the need for healing arts boards within the Department of Consumer Affairs (Department) to improve the enforcement process to ensure patient safety.

As a result of the article, the Department held an informational hearing and investigated the problems that were addressed in the *Los Angeles Times* article. The Department developed a report (*Department of Consumer Affairs "Consumer Protection Enforcement Initiative BCP Independent Verification & Validation Report, March 2010"*) regarding the existing enforcement problems and made recommendations for improving the enforcement programs of the healing arts boards. The Department also sponsored legislation, Senate Bill 1111 (Negrete McLeod), during the 2009-2010 Legislative Session to codify many of the recommendations contained within the report. However, the bill failed to be enacted.

When the bill failed to be enacted into law, the Department encouraged the healing arts boards to pursue regulatory action to assist the boards with investigating and prosecuting complaints in a timely manner, and to provide the boards with tools to improve the enforcement process and ensure patient safety. This rulemaking package also implements recommendation made by the Department.

SPECIFIC PURPOSE:

The Board is proposing to produce the 4th edition of the Model Guidelines and to incorporate them into regulation by reference which includes additional violations and modifications of the penalties to be consistent and appropriate to the practice of physical therapy. Additionally, there have been changes to the physical therapy laws and regulations that are not reflected in the June 16, 2009 publication of the Model Guidelines thereby hindering the Board's ability to effectively imposes appropriate disciplinary action when these laws or regulations have been violated.

The Board currently regulates a total of 31,225 licensees; consisting of 24,984 physical therapists and 6,241 physical therapy 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 violating of the Physical Therapy Practice Act (PTPA); 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. Business and Professions Code Section 2615 authorizes the Board to adopt regulations that may be necessary to effectuate the provisions of the PTPA.

FACTUAL BASIS:

The Physical Therapy Board of California is mandated to protect the health, safety, and welfare of California Consumers. The Board's highest priority is to protect consumers by utilizing its authority to investigate complaints and take appropriate disciplinary action against licensees and applicants for licensure who endanger the health and safety of consumers.

The Board's Model Guidelines are intended to assist administrative law judges, deputy attorney generals, and staff in selecting the most appropriate consequence for a licensee who has violated the laws and regulations governing the practice of physical therapy and for the consumer or licensee to be educated on the consequences of violating the Physical Therapy Practice Act whether it be the issuance of a citation for the less egregious violations or revocation for the most egregious violation.

The Board is proposing the following changes:

Amend California Code of Regulations, Title 16, Division 13.2, Section 1399.15

The title of Section 1399.15 would be changed from "Model Guidelines for Imposing Discipline" to "Uniform Standards Related to Substance Abuse and Guidelines for Issuing Citation and Imposing Discipline".

The proposed language specifies that the Board will revoke a license if an individual is required to register as a sex offender pursuant to Penal Code Section 290. Because of the seriousness of sex offenses and sexual misconduct, and the potential threat to consumers that sex offenders pose, the Board proposes to revoke physical therapist and physical therapist assistants licenses in any disciplinary matter where there is a finding that the licensee was convicted of a sex offense. This proposed language heavily borrows from the definition of sex offense that is used in the Education Code to apply to teachers.

Amend the Physical Therapy Board of California Disciplinary Guidelines with language revised August 3, 2011, that is incorporated by reference in Section 1399.15 of Division of Title 16 of the California Code of Regulations to add the changes to 1399.15 language. The document incorporated by reference would be amended to the uniform standards developed by the SACC and contained within the document entitled "Uniform Standards Regarding Substance Abusing Healing Arts Licensees", dated April 2010.

Title of Document

The Board purposes to add "Uniform Standards Related to Substance Abuse" and to the Guidelines title page to reflect the addition of the uniform standards to the Guidelines to read "Uniform Standards Related to Substance Abuse and Guidelines for Issuing Citations and Imposing Discipline". Also, the word "Model" was struck from the title. The word "Model" is unnecessary since this document contains "Guidelines" to follow. Title was changed throughout document.

Responsible Governmental Members

The Director, Governor, Physical Therapy Board Members, Interim Executive Officer names are revised to reflect the names and titles of those currently holding the positions.

Publication Date and address of the Physical Therapy Board of California

The publication dates are unnecessary in two places and will become cumbersome as new editions are adopted. However; the “4th Edition” will be updated to reflect the date the Board adopts the amendments to the Model Guidelines from June 2009 to date of revision.

Table of Contents

The Table of Contents will be revised to include the additional information added in the text. The title of the Physical Therapy Board and the title of the document have been deleted since it is redundant to the prior pages. Once adopted, the page numbers will be changed to reflect the changes in the text.

Statement of Purpose, Intent & Expectations

Grammatical changes for clarity; separated language regarding the stipulated decisions vs. proposed decisions and moved sentences for better structure. Clarified # 2) – Included language that clearly states the outcome of not filing a Notice of Defense or not appearing at a hearing. 4) Added language that consideration of suspension of the license should be taken to allow the probationer time to complete educational or medical examinations to ensure probationer is safe to practice. Community Service was struck since it was determined that it has no educational value.

Legal Authority

The Board proposes to add “Legal Authority” to the incorporated document to specify the legal authority for the “Uniform Standards Related to Substance Abuse and Disciplinary Guidelines for Issuing Citations and Imposing Discipline” is included in Section 1399.15 of Title 16 of the California Code of Regulations.

Uniform Standards Related to Substance Abuse

The Physical Therapy Board of California (Board) is proposing to implement those uniform standards in its Disciplinary Guidelines. For ease of use by Deputies Attorney General and Administrative Law Judges, only those standards specific to discipline were incorporated in the Guidelines in the introductory information and also in the specific terms of conditions, where applicable. Those Uniform Standards that are specific to the Diversion program vendor, contracted by PTBC, do not serve the purpose of the Guidelines. Therefore, those Uniform Standards were not incorporated as part of the Disciplinary Guidelines. The Uniform Standards (SB 1441) is incorporated by reference, in its entirety, in section 1399.15 of the California Code of Regulation

The Board is implementing the following uniform standards as adopted by the substance abuse counsel and adding the following uniform standards that should be used in all cases in which a license is placed on probation due to a substance abuse problem. Whether individual conditions are ordered; however, is within the discretion of the Board.

1. Clinical Diagnostic Evaluations: (Uniform Standard #1)

In consideration of the uniform standards of the SACC, the Board proposes to require that if a licensee is ordered to undergo a clinical diagnostic evaluation, the evaluation must be conducted by a licensed practitioner who holds a valid, unrestricted license which authorizes the practitioner to conduct clinical diagnostic evaluations, has three (3) years' experience in providing evaluations of health care professionals with substance abuse disorders and is approved by the Board. The evaluations would be conducted in accordance with acceptable professional standards for conducting substance abuse clinical diagnostic evaluations. This standard would increase consumer protection by:

- Specifying requirements for a clinical diagnostic evaluation of the licensee, required qualifications for the providers evaluating the licensee, and timeframes for completion of the clinical diagnostic evaluation.
- Ensuring that the Board is notified quickly if the licensee is a threat to himself/herself or the public while allowing for due process.
- Setting forth minimum standards for clinical diagnostic evaluations and ensures evaluations are conducted in accordance with applicable best practices, while allowing the evaluator the discretion to determine and use the most appropriate tool in assessing the licensee.
- Providing the Board with a professional opinion as to whether the licensee has a substance abuse problem, and whether the licensee is a threat to himself/ herself or others.
- Providing the Board with a professional opinion as to whether the licensee has a substance abuse problem, and whether the licensee is a threat to himself/ herself or others.
- Prohibiting personal, financial and business relationships between the evaluator and licensee, thereby ensuring objectivity in assessments.

By specifying that the Board be provided with expert recommendations for treatment and practice restrictions, the standard also ensures that licensees who have undergone treatment and have made steps towards recovery can safely return to practice.

2. Clinical Diagnostic Evaluation Report: (Uniform Standard #2 & 6) In consideration of the uniform standards of the SACC, the Board proposes to require what the Clinical Diagnostic Evaluation Report (Report) would contain, including but not limited to, the evaluator's opinion, whether the licensee has a substance abuse problem and recommendations for substance abuse treatment. The Board also proposes to require that (1) the evaluator not have a financial, personal or business relationship with the licensee in the last five years; (2) if the evaluator determines during the process that a licensee is a threat to himself or herself or others, the evaluator is to notify the Board with 24 hours of such a determination; and (3) the final written Report is to be provided to the Board no later than 10 days from the date the evaluator is assigned the matter unless the evaluator requests additional information to complete the evaluation, not to exceed 30 days. In addition, the Board proposes to require a review of the evaluation to determine whether or not the licensee is safe to return to either part-time or full-time practice and what restrictions

or recommendations should be imposed on the licensee based on the specified criteria that includes, but is not limited to, license type, licensee's history, documented length of sobriety, scope and pattern of substance abuse, treatment history, and medical history. The Board further proposes to require that the Board take into consideration certain factors when determining if the licensee should be required to participate in inpatient, outpatient or other type of treatment. These factors, include, but are not limited to, the recommendation of the clinical diagnostic evaluation, license type, licensee's history, length of sobriety, scope and pattern of substance abuse, treatment history, medical history, current medical condition, nature, duration, and severity of substance abuse and whether the licensee is a threat to himself or herself or others. Because of the complexity of an addictive disease, professional substance abuse evaluations are needed to assist the Board in making informed decisions regarding a licensee. An evaluation by a professional, experienced in substance abuse and approved by the Board, can provide valuable information to assist the Board in evaluating a case. The Board needs the opinion of professional evaluators to help it determine the possible basis for the identified behavior. Many individuals who have substance abuse issues also have other mental health problems/diagnoses. The evaluator can present recommendations for a therapeutic plan. Any disciplinary action should be based on the behavior and the resulting harm or risk of harm. Treatment recommendations may be incorporated into a contract or Board order as elements for monitoring or criteria toward re-entry requirements. By specifying that the Board be provided with expert recommendations for treatment and practice restrictions, the standard also ensures that licensees who have undergone treatment and have made steps towards recovery can safely return to practice.

The Board has current statutory authority over licensees and a mandate to protect the public; however, the Board's ability to remove licensees immediately from the work place is limited. There are requirements of due process, which require clear and convincing evidence in some cases, the preponderance of evidence, or proof of immediate, imminent danger to the public in others. These requirements are necessary in order for the Board to legitimately, prevent someone from practicing in the livelihood for which they are licensed. In some cases an Interim Suspension Order (ISO or Penal Code 23 (PC 23) is required. The ISO has a tendency to be expensive, labor intensive, and require time to process. These are part of a disciplinary process and are usually temporary until an accusation is filed and a decision rendered. The PC 23 is the result of criminal action taking place and allows for suspension of the license based on criminal filings. In each case, the cause for the suspension must be proven or found, and there must be sufficient evidence to warrant the action. However, after a notice and hearing and a probationary order is issued, the Board lacks the current authority to remove a substance abusing licensee immediately upon a finding of a substance abuse problem. This new proposal is necessary to permit the Board to quickly intervene when a licensee is presented as having a substance abuse issue without resorting to an ISO or PC 23 orders.

3. Supervised Practice (Work Site Monitor Requirements): (Uniform Standard #7)

In consideration of the uniform standards of the SACC, the Board proposes that if the Board determines that supervised practice is necessary for a particular licensee, the supervisor must meet specified requirements to be considered for approval by the Board. These requirements include, but are not limited to, (1) no current or former financial, personal or familial relationship with the licensee or other relationships that could reasonably be expected to compromise the ability of the supervisor to render impartial and unbiased

reports to the Board; (2) have an active unrestricted license with no disciplinary action within the last five (5) years; (3) adhere to specified methods of supervising the licensee. In addition, the Board proposes to require reporting requirements of the supervisor as follows:

- Any suspected substance abuse must be orally reported to the Board and the licensee's employer within one (1) business day of occurrence. If occurrence is not during the Board's normal business hours the oral report must be within one (1) hour of the next business day. A written report shall be submitted to the Board within 48 hours of occurrence.
- Complete and submit a written report monthly or as directed by the Board. The report shall include: the licensee's name; license number; worksite monitor's name and signature; monitor's license number; worksite location(s); dates licensee had face-to-face contact with monitor; worksite staff interviewed, if applicable; attendance report; any change in behavior and/or personal habits; any indicators that can lead to suspected substance abuse.
- Complete the required consent forms and sign an agreement with the monitor and the Board to allow the Board to communicate with the monitor.

As directed in SB 1441 in consideration of the uniform standards of the SACC, the Board is proposing to establish worksite monitoring requirements and standards, including, but not limited to, (1) required qualifications of monitors, (2) required methods of monitoring by monitors, and (3) required reporting by monitors. The Board currently utilizes a probationary condition for supervised practice in cases involving incompetence, negligence, and sexual misconduct. The Board is proposing to amend the probationary condition of supervised practice to include cases relating to substance abuse and if a licensee is placed on probation due to substance or alcohol abuse then the supervisor is required to meet the same worksite monitoring requirements as directed by the SACC's uniform standards. The supervisor's role is to supervise a licensee who is chemically impaired and to ensure that the licensee is not abusing drugs and/or alcohol. The supervisor is also responsible for reporting to the Board whether patient safety may be at risk and any change in the licensee's behavior that may be cause for suspected substance abuse. The supervisor should not have any financial or personal relationship with the licensee. This will ensure that the supervisor is providing impartial evaluations. Frequent face-to-face contact with the licensee is important in order to assess the licensee's appearance, eye contact, and behavior. The supervisor needs to interview the staff in the office on the licensee's behavior and review the attendance records in order to adequately report to the Board the licensee's overall performance. The reporting criteria would identify a timeline for reporting to the Board of possible substance abuse by the licensee, what information must be included in the supervisor report, and the timeline the report is to be submitted to the Board. Also, included in the standard is language to require the licensee and supervisor to sign and submit the required consent forms and affirmations in order for the Board to communicate with the supervisor. Implementing this standard would provide (1) ongoing documentation of the licensee's behavior and help ensure the public's safety and (2) immediate notification to the Board if a licensee is suspected of working under the influence of drugs and/or alcohol.

4. Major and Minor Violations: (Uniform Standard #10) In consideration of the uniform standards of the SACC, the Board proposes to include the following definitions for major and minor violations: Major Violations include, but are not limited to, the following:

1. Failure to complete a Board-ordered program;
2. Failure to undergo a required clinical diagnostic evaluation;
3. Committing multiple minor violations of probation conditions and terms;
4. Treating a patient while under the influence of drugs or alcohol;
5. Committing any drug or alcohol offense that is a violation of the Business and Professions Code, or other state or federal law;
6. Failure to obtain biological testing for substance abuse when ordered;
7. Testing positive for a banned substance;
8. Knowingly using, making, altering or possessing any object or product in such a way as to defraud a drug test designed to detect the presence of alcohol or a controlled substance.

If a licensee commits a major violation, the licensee shall be subject to (1) order the licensee to cease practice, (2) inform the licensee that he or she has been so orders and that he or she may not practice unless notified by the Board, (3) require the licensee to undergo a new clinical diagnostic evaluation, (4) terminated the contract/agreement, (5) refer the matter for disciplinary action or other action as determined by the Board. Minor Violations include, but are not limited to, the following:

1. Failure to submit required documentation in a timely manner;
2. Unexcused attendance at required meetings;
3. Failure to contact a monitor as required;
4. Any other violations that do not present an immediate threat to the licensee or to the public.

If a licensee commits a minor violation, the Board would be required to determine what action is appropriate. Protection of the public is the highest priority of the Board in exercising its licensing, regulatory and disciplinary functions. The Board protects the public through the Physical Therapy Practice Act, regulations and related statutes. Getting standards for major violations would enable the Board to notify licensees of the consequences that would be the maximum allowed by current law under the Board's Practice Act and regulations. Minor violations could result in consequences determined appropriate by the Board, i.e., increased biological testing, increased meeting attendance.

5. Drug Testing Standards: (Standard #4) In consideration of the uniform standards of the SACC, the Board proposes that if a licensee tests positive for a banned substance, the licensee shall be subject to cease any practice, and contact the licensee to inform him or her that the licensee has been ordered to cease practice and the licensee may not practice until the Board determines that he or she is able to safely practice. The proposed amendments require the Board to notify the licensee's employer that the licensee has been ordered to cease practice, and that the licensee may not practice until the Board determines that the licensee is able to safely practice. The Board is required to determine whether the positive alcohol or drug test is, in fact, evidence of prohibited use, a major violation. If not, the Board shall immediately lift the cease practice order. If the Board files a petition to revoke probation or an accusation based upon the positive drug screen, the licensee shall be automatically suspended from practice pending the final decision on the petition to revoke probation or accusation. In addition, the following drug testing standards would be required to apply to each licensee subject to drug testing:

- Licensees shall be randomly alcohol or drug tested at least 104 times per year for the first year and at any time as directed by the Board. After the first year, licensees who are practicing, shall be randomly alcohol or drug tested at least 50 times per year, and at any time as directed by the Board.
- Alcohol or drug testing may be required on any day, including weekends and holidays.
- Except when directed, the scheduling of alcohol or drug tests shall be done on a random basis, preferably by a computer program.
- Licensees shall be required to make daily contact as directed to determine if alcohol or drug testing is required.
- Licensees shall be alcohol or drug tested on the date of notification as directed by the Board.
- Specimen collectors must either be certified by the Drug and Alcohol Testing Industry Association or have completed the training required to serve as a collector for the U.S. Department of Transportation.
- Specimen collectors shall adhere to the current U.S. Department of Transportation Specimen Collection Guidelines.
- Testing locations shall comply with the Urine Specimen Collection Guidelines published by the U.S. Department of Transportation, regardless of the type of test administered.
- Collection of specimens shall be observed.
- Prior to vacation or absence, alternative alcohol or drug testing location(s) must be approved by the board.
- Laboratories shall be certified and accredited by the U.S. Department of Health and Human Services.

A collection site must submit a specimen to the laboratory within one (1) business day of receipt. A chain of custody shall be used on all specimens. The laboratory shall process results and provide legally defensible test results within seven (7) days of receipt of the specimen. The Board will be notified of non-negative test results within one (1) business day and will be notified of negative test results within seven (7) business days. Many of the standards specific to testing collection and specimen handling are consistent with or based upon the guidelines established by the U.S. Department of Transportation. Requiring the certification of laboratories through the National Laboratories Certification Program ensures consistent handling and processing of test results. The minimum number of tests provided will help to identify relapse and allow for licensees to be randomly tested. Requiring a licensee to submit a specimen on the same day as directed will eliminate the ability of a licensee to “flush” their system overnight. Further, the established certification of the laboratory will include creatine and pH levels, which can be a sign of a licensee “flushing” their system. Further, the standard is broad enough to allow the Board to determine on a

case-by-case basis if a licensee should be required to submit a specimen more quickly, e.g., before 10:00 a.m. or within six (6) hours of notice.

- Providing the Board with a professional opinion as to whether the licensee has a substance abuse problem, and whether the licensee is a threat to himself/ herself or others.
- Prohibiting personal, financial and business relationships between the evaluator and licensee, thereby ensuring objectivity in assessments.

By specifying that the Board be provided with expert recommendations for treatment and practice restrictions, the standard also ensures that licensees who have undergone treatment and have made steps towards recovery can safely return to practice.

6. Clinical Diagnostic Evaluation Report: (Uniform Standard #1) In consideration of the uniform standards of the SACC, the Board proposes to require what the Clinical Diagnostic Evaluation Report (Report) would contain, including but not limited to, the evaluator's opinion, whether the licensee has a substance abuse problem and recommendations for substance abuse treatment. The Board also proposes to require that (1) the evaluator not have a financial, personal or business relationship with the licensee in the last five years; (2) if the evaluator determines during the process that a licensee is a threat to himself or herself or others, the evaluator is to notify the Board with 24 hours of such a determination; and (3) the final written Report is to be provided to the Board no later than 10 days from the date the evaluator is assigned the matter unless the evaluator requests additional information to complete the evaluation, not to exceed 30 days. In addition, the Board proposes to require a review of the evaluation to determine whether or not the licensee is safe to return to either part-time or full-time practice and what restrictions or recommendations should be imposed on the licensee based on the specified criteria that includes, but is not limited to, license type, licensee's history, documented length of sobriety, scope and pattern of substance abuse, treatment history, and medical history. The Board further proposes to require that the Board take into consideration certain factors when determining if the licensee should be required to participate in inpatient, outpatient or other type of treatment. These factors, include, but are not limited to, the recommendation of the clinical diagnostic evaluation, license type, licensee's history, length of sobriety, scope and pattern of substance abuse, treatment history, medical history, current medical condition, nature, duration, and severity of substance abuse and whether the licensee is a threat to himself or herself or others. Because of the complexity of an addictive disease, professional substance abuse evaluations are needed to assist the Board in making informed decisions regarding a licensee. An evaluation by a professional, experienced in substance abuse and approved by the Board, can provide valuable information to assist the Board in evaluating a case. The Board needs the opinion of professional evaluators to help it determine the possible basis for the identified behavior. Many individuals who have substance abuse issues also have other mental health problems/diagnoses. The evaluator can present recommendations for a therapeutic plan. Any disciplinary action should be based on the behavior and the resulting harm or risk of harm. Treatment recommendations may be incorporated into a contract or Board order as elements for monitoring or criteria toward re-entry requirements. By specifying that the Board be provided with expert recommendations for treatment and practice restrictions, the

standard also ensures that licensees who have undergone treatment and have made steps towards recovery can safely return to practice. The Board has current statutory authority over licensees and a mandate to protect the public; however, the Board's ability to remove licensees immediately from the work place is limited. There are requirements of due process, which require clear and convincing evidence in some cases, the preponderance of evidence, or proof of immediate, imminent danger to the public in others. These requirements are necessary in order for the Board to legitimately, prevent someone from practicing in the livelihood for which they are licensed. In some cases an Interim Suspension Order (ISO or Penal Code 23 (PC 23) is required. The ISO has a tendency to be expensive, labor intensive, and require time to process. These are part of a disciplinary process and are usually temporary until an accusation is filed and a decision rendered. The PC 23 is the result of criminal action taking place and allows for suspension of the license based on criminal filings. In each case, the cause for the suspension must be proven or found, and there must be sufficient evidence to warrant the action. However, after a notice and hearing and a probationary order is issued, the Board lacks the current authority to remove a substance abusing licensee immediately upon a finding of a substance abuse problem. This new proposal is necessary to permit the Board to quickly intervene when a licensee is presented as having a substance abuse issue without resorting to an ISO of PC 23 orders.

Other Standards incorporated where appropriate into the individual probationary conditions in the hope that they would not be overlooked or omitted in proposed decisions and would reduce the likelihood of an increased need for non-adoption of proposed decisions to include the necessary conditions as follows:

- Uniform Standard #2 – have been incorporated as part of probationary term ~~WF~~
- Uniform Standard #3 – incorporated as part of probationary term 10 (Standard Probation Condition)
- Uniform Standard #7/ incorporated in as part of the probationary term ~~FH~~

The Board is not adding the following uniform standards as indicated above since some of the standards are specific to the Board's expectation of the vendor and are not consistent with the purpose for the Guidelines; or other reasons as documented; however, the document as a whole will be incorporated by reference.

- Uniform Standard #5
This standard is currently being worked into the contract with the current Vendor, Maximus
- Uniform Standard 11
The requirements for Petitioning as used in the Uniform Standards is an internal review by PTBC staff
- Uniform Standard 12
Same as Uniform Standard 11
- Uniform Standard 13
Same as Standard #5

- Uniform Standard #14
Same as Standard #5
- Uniform Standard #15
Same as Standard #5
- Uniform Standard #16
The reporting requirement is an internal process by PTBC

Authority to Examine Due to Mental Illness and/or Physical Impairment

Business and Professions Code, section 820 authorizes the Board to order the licentiate to be examined by a physician(s) if it appears that the licentiate may be unable to practice physical therapy safely due to mental illness, or physical illness affecting competency. This section was added as reference to ensure that licentiates are given a fair opportunity to provide evidence of their stability to practice and also for the Board to use as direct evidence in the administrative proceedings.

Definition of Diversion

Language was added to clarify the difference between the two type of participants in the “diversion” program. 1) Self- referrals, which are licensees that self- refer themselves in to the diversion program. While the participant is considered confidential, the diversion program is required to report to the Board if and when the participant fails to comply with the program and may result in termination of participation in the program. The Board may investigate for administrative action. The terms and conditions described in the guidelines are not applicable to the self-referred but the licensee is subject to the contractual terms of participation. 2) Probationary Participants are also considered participants; however, since the word “diversion” means to “divert from”, and probationers are not diverted from participating in a recovery program in lieu of discipline, the use of the word “diversion” has been revised to “recovery monitoring program” so that there is no confusion of what “diversion” actually is with regard to probationary participants.

Drug and Alcohol Recovery Monitoring Program Requirements and Costs

This proposed language was added as a reference tool to provide information of costs that can be incurred when participating in a drug and alcohol recovery program.

Denial of Licensure & Issuance of an Initial Probationary License

Language was added as reference to provide the statutory authority the Board has to deny an application for licensure based on mandatory and permissive based convictions.

Citation and Fine Order

Grammatical changes for to current language for clarity. In 2) - “Executive Officer” was deleted and “citation” was added. This change is based on the delegation authorized in CCR 1398.4 which is currently going through the rulemaking process and should be in effect when this document goes into effect.

Public Reprovals or Reprimands

Grammatical changes to current language for clarity. The current language does not specify the difference between the Public Reapproval and the Public Letter of Reprimand. Therefore, the statutory authority for both was added and were separated for clarification. Although both are considered disciplinary action, the Public Reapproval is issued as part of a disciplinary order that may be considered for an act constituting grounds for suspension or revocation of a license. Whereas the Public Letter of Reprimand is issued upon agreement by the licensee, in lieu of filing a formal accusation for minor violations.

Guidelines Specific to Violation

Grammatical changes for clarity.

Business and Profession Codes

- 1) These changes were made for consistency throughout to include:
 - A) Adding or deleting commas
 - B) Deleted the word “that” where unnecessary; deleted the word “the” in front of “Respondent”; changed “Respondent from lower case to upper case where needed; changed “Board” from lower case to upper case where needed
 - C) Changed format of “Conditions of Probation” to clarify all Standard Probation Conditions should be used and added language to clarify “Probation Conditions Specific to Violation” for consideration are:” Also included language to clarify that the specific probationary conditions should be considered individually on a case by case basis to ensure the proper probationary terms are ordered.
 - D) Deleted the current language “Also may cite:” since this language did not “refer” the reader to other statutes and regulations related to the violation.
 - E) Changed titles of B&P Codes to reflect the appropriate titles as referenced in the Business and Professions Code.
 - F) Probation Conditions Specific to Violation A-W were changed accordingly to reflect the changes made in the Probation Conditions Specific to Violation. See pages 77.
 - G) For consistency, the word “Penalty” was deleted from the Minimum, Maximum
 - H) This language below was added to violations of B&P codes where substance and/or alcohol related violations may be a factor to ensure that the Uniform Standards Related to Substance Abuse are imposed as required by SB 1441 (Uniform Standards Regarding Substance-Abusing Healing Arts Licensees).

Note: If the conviction relates to the use or abuse (i.e. possession, possession for sale, trafficking, etc.) of a controlled substance for DUI or related offenses, or if the conviction was attributed to the use of a controlled substance or alcohol (i.e. disorderly conduct) then imposition of the "Uniform Standards Related to Substance Abuse" shall be imposed.

2) Changes specific to Business and Professions Code:

B&P 123 –

Changes as indicated above A-H and also deleted the reference of B&P 496 since this statute gives the authority to deny a license and is not a violation in itself.

B&P 136 –

As part of the Consumer Protection Enforcement Initiative, added CCR 1399.24. CCR 1399.24 is currently going through the rulemaking process.

B&P 141 -

Added related CCR 1399.24

B&P 490

As part of the Consumer Protection Enforcement Initiative, added CCR 1399.24(d). 1399.24 is currently going through the rulemaking process.

B&P 490.5

B&P 490.5 authorizes the suspension of a license if not compliant with a child support order or judgment. Language was added to this section to clarify the Board will take action in addition to the mandatory action requirements by B&P 490.5.

B&P 496

Deleted B&P 496 since this gives the Board the authority to deny, suspend or revoke a license for violating B&P 123 and therefore is not a violation in itself.

B&P 499

For consistency, added level of discipline. Other B&P codes of the same nature require the level of discipline as included to B&P 499.

B&P 581

For consistency, added level of discipline. Other B&P codes of the same nature require the level of discipline as included to B&P 581.

B&P 583

The levels of discipline, "Minimum and Maximum" were deleted and replaced with "Revocation or Denial of License". This type of violation is egregious enough to require the revocation or denial of a license.

B&P 651

Condition “U”, Community Service deleted since this condition was deleted from the Conditions Specific to Violation list.

B&P 680

Current language does not include the level of discipline; therefore added “Public Reprimand” as the “Minimum and Maximum” levels of discipline. “Public Reprimand” was defined as the appropriate action since this type of violation does not require probationary terms but may require discipline if violation is repetitive.

B&P 726

The discipline level was deleted and a “Note” was added that includes language indicating that there is no condition of probation that can adequately protect the public from a licensee who has engaged in sexual abuse and/or misconduct. CCR 1399.15 has also been added as a regulation to refer to since it states in part that any findings that a licensee committed a sex offense or been convicted of a sex offense, shall contain an order revoking the license and/or if a proposed decision, it shall not contain an order staying the revocation of the license. CCR 1399.15 currently in rulemaking process.

B&P 820

Deleted B&P 820 since this section gives the Board the authority to request an examination of a licensee based on mental or physical illness and is not a violation in itself.

B&P 901

Added B&P 901 as part of SB 1172 which exempts licensure requirements for services provided. This includes the steps necessary for sponsored healthcare services and allows out-of-state physical therapist/physical therapist assistant submit the requirements to practice in the State during a health care service. No level of administrative discipline identified since licensees are not licensed in California and therefore, an administrative citation is the appropriate action.

B&P 2274

Specific condition of probation Term A - Restriction of Practice, Supervision Required – deleted since this type of violation does not require supervision.

B&P 2608.5

Was not in order of B&P Codes; moved to proper order. Added CCR 1399.24 as part of the Consumer Protection Enforcement Initiative. CCR 1399.24 currently in rulemaking process.

B&P 2630 (Physical Therapist Assistant Practicing as a Physical Therapist)

Based on type of violation, the citation minimum fine amount was raised from \$100 to \$1,000. This violation is considered egregious and warrants a higher fine. Also, added Term “O” – Educational Course. This type of violation warrants educational to educate the probationer of the

B&P 2655.3

Added the discipline level of Minimum and Maximum to ensure proper action is taken. The Uniform Standards Related to Substance Abuse requirement was added as required to SB 1441.

B&P 2655.7

“Conditions of Probation in Addition to Standard Conditions” was since there are no conditions specified.

B&P 2655.11

Added discipline level of Minimum and Maximum levels for consistency with other similar title codes.

B&P 2655.75

Pursuant to B&P 2655.75, a physical therapy assistant student is authorized, as part of his or her course of study, perform physical therapy techniques in preparing the student to be approved to assist a physical therapist; therefore, this section was added as a violation could be subject to a citation.

B&P 2660.1

Added CCR 1399.15 referring reader to regulation. Pursuant to CCR 1399.15, any findings the licensee committed a sex offense or been convicted of a sex offense, the order shall not contain an order staying the revocation of the license. This note added to this section to ensure proper action is taken and order includes the revocation shall not be stayed.

B&P 2660.5

This section was added to ensure the proper action, denial of the license, is taken on an applicant if applicant is a registered sex offender.

B&P 2661

Language was added to this section to clarify the substantial relationship of a conviction to the practice of physical therapy.

B&P 2676

Recently the Board adopted regulations defining continuing competency requirements for physical therapist and physical therapist assistants based on Assembly Bill 120 (stats. 2006, chapter 540) which modified business and Professions Code section 2676 requiring demonstration of continuing competency as a condition of licensure renewal. Therefore, added B&P 2676 was added since it could be subject to citation or discipline if violated. This statute was effective November 2009.

B&P 2684

Add “Continuing Competency Requirement” to the title of Business and Professions Code 2684 since it is now a requirement and is referenced in B&P 2676. Add “2676” to the statutes that may also be cited in conjunction with B&P 2684.

California Code of Regulations

- 1) These changes were made for consistency throughout to include:
 - A) Adding or deleting commas
 - B) Deleted the current language “Also may cite:” since this language did not “refer” the reader to other statutes and regulations related to the violation.
 - C) For consistency, the levels of discipline/action to be taken were deleted on most of the regulations listed. The purpose of this is to ensure the appropriate action is taken and therefore, the reader is referred to the appropriate related statute for the level of action. For those few CCR’s where the level of discipline was not deleted, they do not have a statute to refer the reader for the appropriate level of discipline; therefore, no changes were made.

CCR 1398.13 was renumbered from 1399.85.

- 2) The following two regulations are being added to this document as part of the
- 3) Consumer Protection Enforcement Initiative, SB 1111. Although SB 1111 was not adopted by legislation, it was recommended to take certain components and place into regulation. Based on this recommendation, the board has reviewed and approved language to proceed with the rulemaking process. A hearing was held on May 11, 2011, and as a result, is currently proceeding with this rulemaking file.

The following violation code sections will be **added** to the guidelines since they are subject to citation or discipline if violated:

- A) Required Actions Against Registered Sex Offenders, Title 16, California Code of Regulations section 1399.23
- B) Unprofessional Conduct, Title 16, California Code of Regulations section 1399.24
CCR 1399.24 includes additional acts that constitute unprofessional conduct.
- 4) Recently the Board adopted regulations defining continuing competency requirements for physical therapist and physical therapist assistants based on Assembly Bill 120 (stats. 2006, chapter 540) which modified business and Professions Code section 2676 requiring demonstration of continuing competency as a condition of licensure renewal. The board was required to promulgate regulations to specify when, how and under what circumstance a licensee may accumulate qualifying continuing competency hours and administrative provisions for enforcing the requirement.

The following violation code sections will be **added** to the guidelines since they are subject to citation or discipline if violated:

- A) Continuing Competency Required, Title 16, California code of Regulations section 1399.91

- B) Content Standards for Continuing Competency, Title 16, California Code of Regulations section 1399.92
- C) Continuing Competency Subject Matter Requirements and other Limitations, Title 16, California Code of Regulations sections 1399.93
- D) Authorized Pathways for Obtaining Hours, Title 16, California Code of Regulations section 1399.94
- E) Standards for Approved Agencies, Title 16, California Code of Regulations section 1399.95
- F) Standards for Approved Providers, Title 16, California Code of Regulations section 1399.96
- G) Record Keeping (Continuing Competency), Title 16, California Code of Regulations section 1399.97
- H) Inactive Status (Continuing Competency), Title 16, California Code of Regulations section 1399.98
- I) Exemption from Continuing Competency Requirements, Title 16, California Code of Regulations section 1399.99
- J) A minimum and maximum citation fine were included in CCR 1399.95 & 1399.96; however, were void of a minimum or maximum level of discipline since the board does not have jurisdiction to discipline. Instead, the maximum level of action would be to revoke recognition as an approved agency.

5) On September 23, 2010, Gov. Schwarzenegger signed AB 2699, (Chapter 270, Statutes of 2010), which took effect January 1, 2011. This statute provides a regulatory framework for certain health care events at which free care is offered to uninsured or under-insured individuals who may be licensed in one or more states but are not licensed in California. Prior to this enactment, licensing laws precluded the participation of volunteers licensed outside of California. Therefore, regulations will be proposed to implement, interpret, and make specific the provisions of §901 by specifying procedures and forms to be used by sponsoring entities and out of state practitioners who desire to participate in sponsored events. The Board's highest priority is consumer protection and therefore, is including the regulations since it could be subject to a citation or discipline.

The following violation code sections will be **added** to the guidelines since they are subject to citation or discipline if violated:

- A) Sponsoring Entity Registration and Recordkeeping Requirements, Title 16, California Code of Regulations section 1400.1
- B) Out of State Practitioner Authorization to Participate in sponsored Event, Title 16, California Code of Regulations section 1400.2
- C) Termination of Authorization and Appeal (Out of State Practitioner's Authorization), Title 16, California Code of Regulations section 1400.3

Health and Safety Code

The Health and Safety Code was moved after the California Code of Regulations

Standard Probation Conditions

- 1) In the introduction, the current language divided the probation in two categories that included 1) Standard Conditions and 2) Specific Conditions; however, the language was revised to identify the two current conditions and added 3) Conditions Specific to Alcohol and/or Controlled Substance and was moved prior to the title of “Standard Probation Conditions to explain the three categories of terms of probation.
- 2) These changes were made for consistency throughout to include:
 - A) Adding commas; grammatical changes for clarity, non substantive.
 - B) Deleted the word “that” where unnecessary; deleted the word “the” in front of “Respondent”; changed from lower case to upper case the word “Respondent”; changed from lower case to upper case the word “Board”.
 - C) Changed from upper case to lower case the words “probation monitor”.
- 3) Changes specific to terms:

#2. A “Note” was added to this term to clarify that this term should not be used as a punitive means of disciplining but should be used for educational purposes when needed to ensure Respondent’s understanding of their action

#3. A “Note” was added to clarify that cost recovery is determined by actual investigative and prosecutorial costs incurred by the Board in its investigative process.

#10. Language was added to clarify what Respondent’s responsibilities are to comply with this term of probation.

#15 & 16. Additional language was added to clarify the intent of the standard. Respondent’s are required to work a certain amount of hours in order to satisfy the probationary period. However, if probationer is satisfying all other terms and conditions of probation but cannot work the hours required to satisfy the probationary requirement, the probationer shall not be considered tolled.

Probation Conditions Specific to Violation

- 1) The introduction to this section was deleted since it is redundant to the introduction of the Standard Terms and Conditions. The introduction was moved prior to the Standard Terms of Conditions explaining the term of probation for all three categories.
- 2) These changes were made for consistency throughout to include:
 - A) Adding commas; grammatical changes for clarity.

- B) Deleted the word “that” where unnecessary; deleted the word “the” in front of “Respondent”; changed from lower case to upper case the word “Respondent”; changed from lower case to upper case the word “Board”.
 - C) Changed from upper case to lower case the words “probation monitor”.
- 3) Changes specific to terms and conditions of probation:

Current Term A: The current language was deleted and language was added to clarify the condition. This condition allows the Board to monitor the competency by using a fellow practitioner. It is most appropriate to use in those cases involving incompetence, negligence, sexual misconduct, and substance abuse. This language clarifies the type of supervision relative to the necessity for the presence of the supervisor. Direct supervision would require the physical therapist presence of the supervisor during the time physical therapy is performed. General supervision does not require the physical presence of the supervising physical therapist. The level of supervision depends on the severity of the violation(s). Also, language was added to comply with SB 1441 for those cases involving substance or alcohol abuse.

Term B: “Prohibition” was added to the title for consistency of other titles.

Term C: Term “C” was moved and is now Term “H”. The prohibition of not treating a specific patient population (Term C) should be a condition when Term G is part of probation. Moving this term next to Term G will prevent overlooking the term.

Former Term D will become C: Language was added to clarify the purpose of the condition. In past orders, it was used liberally and at times did not serve the intent of the condition.

Former Term E: This term was struck in its entirety. Language was added to Term A that includes the requirements of the presence of another physical therapist and clearly states the requirements of the supervising physical therapist.

Former Term H will become F: Current language of the first paragraph was struck and language was revised to include requirement pursuant SB 1441 (Uniform Standard #7). Additional language was added to paragraph three that requires the practice monitor to full access to all patient records of Respondent. As a practice monitor, it is detrimental that patient records are available at all times for proper review and reporting to the practice monitor. Requirements and standards are identified and also the timeframe of submitting reports to the Board. This language was added once again, for clarity and to ensure the Respondent does not obtain a practice monitor that has been disciplined.

Former Term J will become I: The title was changed to reflect the actual meaning of this condition.

Former Term L will become K: Language was added to require a course in supervising assistive personnel. This course would better serve as an educational tool for this type

of violation. The “Optional” condition was struck in its entirety since term changed to require a supervisory course in assistive personnel.

Former Term M will become L: Language was added to require a course in supervising assistive personnel. This course would better serve as an educational tool for this type of violation. The “Optional” condition was struck in its entirety since term changed to require a supervisory course in assistive personnel.

Former Term N: Term was struck in its entirety since it was renamed and moved to section 3) “Conditions Specific to Alcohol and/or Controlled Substance” .

Former Term O will become M: Changed titles referenced such as “professional practice monitor” and “physical therapist” to reference appropriately

Former Term V will become O: The number of hours required to complete a course was changed from twenty (20) to eight (8) hours of required course work hours. The required hours were reduced since it seemed excessive. Also language was added to prohibit the coursework to satisfy the Continuing Competency requirements.

Former Term U: This condition was struck in its entirety since community service does not have an educational value and is not the intent of the board to put the Respondent out of work.

Former Term W will become P: Language was added to clarify the purpose of the condition, which is to identify if the Respondent is fit to practice safely.

Conditions Specific to Alcohol and Controlled Substance

- 1) The conditions specific to alcohol and controlled substance were separated and placed in their own section to locate easier and to ensure all terms and conditions related to alcohol and controlled substance abuse are used appropriately. Changes to the condition related to alcohol and substance abuse are pursuant to SB 1441 requirements.
- 2) Changes made throughout this section include:
 - A) Adding commas; grammatical changes for clarity, non substantive.
 - B) Deleted the word “that” where unnecessary; deleted the word “the” in front of “Respondent”; changed from lower case to upper case the word “Respondent”; changed from lower case to upper case the word “Board”.
 - C) Changed from upper case to lower case the words “probation monitor”.
- 3) Changes specific to each condition:

Former Term R will become U: This condition was struck in its entirety. Terms Q & R are now Term T and include SB 1441 Uniform Standards Related to Substance and Alcohol requirements.

Former Term S will become V: Language added includes SB 1441, Uniform Standards Related to Substance and Alcohol requirements.

Former Term T will become W: Title changed to reflect the appropriate use of condition and additional language added pursuant to SB 1441, Uniform Standards Related to Substance and Alcohol requirements. .

Glossary of Terms

- 1) The term “Diversion” was added to the Glossary of Terms for clarification.
- 2) The terms “Public Repeal and Public Letter of Reprimand” were separated to define the difference. A Public Letter of Reprimand is issued based on B&P Code, section 2660.3 and is issued in lieu of the normal disciplinary process of filing an Accusation; however, is still considered discipline. The Public Repeal is issued based on B&P Code, section 495 for an act constituting grounds for suspension or revocation of a license and is also considered discipline.

Alphabetical Violation Index & Index

Changes were made in both the sections to reflect the changes made throughout the document. Page numbers will be addressed appropriately upon approval of rulemaking file.

UNDERLYING DATA:

- 1) August 3, 2011 Physical Therapy Board Meeting Minutes
- 2) Consumer Protection Enforcement Initiative
- 3) Senate Bill 1441 (Chapter 548, Statutes 2008), authored by Senator Ridley-Thomas
- 4) SACC Meeting Agenda – April 11, 2011
- 5) Draft SACC Meeting Minutes – April 6, 2011
- 6) Model Guidelines for Issuing Citations and Imposing Discipline approved by the Board August 2011

BUSINESS IMPACT:

The Board has made an initial determination that the amendment of this regulation may have a significant, statewide adverse economic impact directly affecting business, including the inability of California businesses to compete with businesses in other States. The Physical Therapy Board has not considered proposed alternatives that would lessen any adverse economic impact on business and invites you to submit proposals. Submissions may include the following considerations:

- (i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to businesses.

- (ii) Consolidation or simplification of compliance and reporting requirements for businesses.
- (iii) The use of performance standards rather than prescriptive standards.
- (iv) Exemption or partial exemption from the regulatory requirements for businesses."

The following types of businesses would be affected:

Businesses owned by licensees of the Board who face disciplinary action.

Businesses that employ licensees of the Board who face disciplinary action.

The Board currently regulates a total of 31,225 licensees, including 24,984 physical therapist and 6,241 physical assistants. A license that has been revoked, suspended, reprimanded or placed on probation may cause a significant fiscal impact on the business where the licensee worked depending on the nature and severity of the violation. A business owned by a licensee who faces disciplinary action may incur a significant fiscal impact depending on the nature and severity of the violation. 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 authority to take administrative action against a licensee and not a business. Accordingly, the initial or ongoing costs for a small business owned by a licensee who is the subject of disciplinary action cannot be projected. Businesses operated by licensees who are in compliance with the law will not incur any fiscal impact. Probationers are responsible for paying the costs of the diversion program, clinical diagnostic evaluations, biological testing, and facilitated group support meetings as terms of probation. The average salary of a practicing physical therapy in California is approximately \$84,600 per year and the average salary of a physical therapist assistant in California is approximately \$57,760 per year. The cost of Biological Testing may have the most significant impact. The average current rate of a urine analysis is around \$58 per test, plus an average collection fee of \$20-\$50, for a total average cost of \$70 - 108 per urine test. A probationer ordered to comply with the Biological Testing condition would incur an expense of approximately \$8,112 for the first year (104 tests for the first year) and approximately \$3,900 per year for the duration of the probationary term (minimum of 50 tests per year for the subsequent probationary years). The average cost of the first year of biological testing is approximately 10% of a physical therapist salary and 14% of a physical therapist assistant's. If the 104-time per year testing requirement results in a probationer's inability to participate in the testing program, the Board will send the case to the Office of the Attorney General to pursue revocation for the probationer's failure to comply with the Biological Testing term and condition and will remove physical therapist and physical therapy assistants from the California market. The Board anticipates that at least half of the probationers will not be able to afford the cost of the testing frequency and will result in the Board's pursuit of revocation of the probationer's license. The Board estimates \$3,000 per case for prosecution and hearing costs associated with the revocation of the probationer's license.

SPECIFIC TECHNOLOGIES OR EQUIPMENT:

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

CONSIDERATION OF ALTERNATIVES:

No reasonable alternative which was considered or that has otherwise been identified and brought to the attention of the Board would be either more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation.

The Board is required to take this action pursuant to SB 1441.