

## **CMA Objects to Public Disclosure of Medical Board Citations Without Due Process**

At the Medical Board of California's quarterly meeting, CMA objected to the public disclosure of citations before physicians have been given the opportunity to appeal. The board issues approximately 500 citations each year. Currently, all citations are posted on the medical board's website before physicians have had a chance to exercise their legal right to dispute the allegations through either an informal interview with investigators or a full administrative hearing.

"It is clearly not fair for a physician who makes a timely objection to the

citation and asks for a full due process hearing on the matter to have the citation nonetheless disclosed to the public without any qualification as to its validity," wrote CMA President Robert E. Hertzka, M.D., in an earlier letter to the medical board on this matter.

The board's Division of Medical Quality agreed that the process should be fair to physicians and has agreed to revise its procedures.

For more information, visit <http://www.calphys.org>.

Contact: Sandra Bressler, 415/882-5171 or [sbressler@cmanet.org](mailto:sbressler@cmanet.org).

*CMA - Alert - February 21, 2005*



**California Medical Association**  
*Physicians dedicated to the health of Californians*

February 11, 2005

Ron Wender, MD  
Members of the Division of Medical Quality  
1426 Howe Avenue  
Sacramento, CA 995825

Dear Dr. Wender and Members of the Division:

At your last regular meeting you asked that the procedure for posting citations on the Medical Board Web site be reviewed and asked me to summarize CMA's concerns in writing. I attach past correspondence between the MBC and CMA on this subject so that the Division has the benefit of that discourse. Here, I will simply summarize the main points.

Currently, when staff decides that a citation and/or fine is warranted, a letter is sent to the physician informing him/her of the citation and it is concurrently posted on the Web. Before the letter is sent, the physician usually has been contacted and asked for an explanation of the allegations, but no "interview" or "hearing" has occurred. The physician still has the right to dispute the citation through an "informal interview" and, if he/she chooses, a full administrative hearing.

We continue to believe that there is no issue of public safety in delaying disclosure of minor violations until the physician has an opportunity to contest them. Furthermore, given the considerable stigma attached to Web disclosure of Medical Board actions and that there is no system of public disclosure of traffic violations, we maintain that past analogies to traffic tickets is particularly inapt.

As a matter of fairness, CMA believes that a physician should be entitled to formally dispute the citation before it is posted on the Web. We also believe that this is possible under current law by simply declaring that the letter sent about the citation is a "notice" that a citation will be "issued" or "imposed" unless the physician contests the citation within a stipulated amount of time. If that time elapses without a contest, the citation can automatically be considered "issued" or "imposed." We find no language in law or regulation that prohibits such a procedure.

Should the Division conclude that current regulation does not permit the above procedure, we urge you to amend regulations to accomplish this proposed fair disposition of citations.

Sincerely,

Sandra E. Bressler, JD  
Vice President, Medical and Regulatory Policy

cc: Robert E. Hertzka, MD  
Dave Thornton; Joan Jerzak



## California Medical Association

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July 2, 2004

Ronald Wender, MD  
President, Division of Medical Quality  
Medical Board of California  
1426 Howe Avenue, Suite 54  
Sacramento, CA 95825

Dear Dr. Wender

This is in response Joan Jerzak's May 25 letter (attached) regarding CMA's concerns about the citation and fine procedures of the Medical Board. We are encouraged that the Board will no longer "issue" citations or fines without giving the subject physician the opportunity to respond and happy that the matter of the two physicians whose cases brought this matter to our attention have been resolved to their satisfaction.

Having said that, I pursue this matter with you because we do not believe that the procedure Ms. Jerzak describes going forward either addresses or resolves our concerns. This is a matter both of law and basic fairness. With respect to the law, as noted in my previous letter:

The public disclosure of citations and fines that have not yet been finalized constitutes a violation of the Business & Professions Code. Business & Professions Code §803.1 sets forth the categories of information that the Medical Board may make publicly available, either by public inquiry or on the Internet. The list includes, under subsection (a)(5), "Infractions, citations and fines imposed." A citation and fine issued, and subject to an informal conference or formal hearing to contest the citation is not one that is "imposed." We believe, therefore, that the Legislature never intended these non-quality cite and fines that have not been finalized to be included in the public disclosure program of the Medical Board. While they may be "issued" by the Medical Board, they cannot be final or "imposed" by the Medical Board until the physician waives or exercises the lawful right provided in the Business & Professions Code and the California Code of Regulations to challenge them. [*Emphasis added*]

The regulation that Ms. Jerzak cites [16 CCR § 1364.15], which provides for disclosure upon "issuance" of a citation and the procedure for "issuance" she describes, are inconsistent with B & P Code Section 803.1 as noted above. In such instances, the statute not the regulation prevails.

Furthermore, from the standpoint of basic fairness, it is clearly not fair for a physician who makes a timely objection to the citation and asks for a full due process hearing on the matter (as provided for in B & P Code Section 125.9 (4)) to have the citation nonetheless disclosed to the public without any qualification as to its validity and before there is any opportunity for due process to occur.

It is a simple matter for the board to have a policy of notifying a physician of its intent to impose a citation, giving the physician 30 days to request a hearing (also as provided for in B & P Code Sectin 129.5) and, if

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no hearing is requested in the time allowed, then to impose and disclose the citation. This is how we request that the board proceed. Since citations are issued for minor infractions, we do not believe there is a serious issue of consumer protection involved and Ms Jerzak assures us that the vast majority of citations are uncontested.

I would be happy to discuss this with you personally, and someone from CMA leadership will be happy to appear before the Board on this matter at an upcoming public meeting. I would appreciate hearing directly from you what your thoughts are on this matter.

At the very least, we are asking that this matter be discussed before the Division of Medical Quality. Clearly your legal counsel will have to weigh in about the current state of the law, but whatever the legal judgment, the Board can resolve this matter in favor of fairness if it determines to do so, even if that requires a change in regulation. We urge you to follow that course.

Sincerely,

ORIGINAL SIGNED

Robert E. Hertzka  
President

Cc: CMA Executive Committee  
Jack Lewin, MD  
Sandra Bressler  
Dave Thornton  
Joan Jerzak



# California Medical Association

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May 3, 2004

Ronald Wender, MD  
President  
Division of Medical Quality  
Medical Board of California  
1426 Howe Avenue, Suite 54  
Sacramento, CA 95825

Dear Dr. Wender:

It has come to the attention of the California Medical Association that the Medical Board, in some instances, is issuing citations and fines to physicians on the basis of information gathered by the Central Complaint Unit (CCU) without ever contacting the physician for an explanation of circumstances or other information that might mitigate against the citation. In these cases, the physician's first indication that the Medical Board is actively reviewing some issue about the physician occurs when the notice of a citation and fine is received in the mail. In that notice, the physician is told about the opportunity to have an "informal" meeting to discuss the matter. By that time, however, the citation has already been posted on the physician's online Medical Board profile and constitutes a formal action of the Medical Board commenced before any discussion takes place with the physician—indeed before the physician even knows about the Medical Board's concerns underlying the citation.

CMA is very concerned about this practice as it imposes a public Medical Board sanction on a physician before the physician is made aware of a potential problem or learns any details about the matter, much less is allowed to provide information in defense against the citation. Very recently, two physicians were simply notified that they were being cited for "aiding and abetting in the unlicensed practice of medicine" and were being fined \$2,500. They were provided with no indication of the circumstances warranting citation and no documentation or any other explanatory material supporting the citation. The citation appeared on the Web site the day following the date of the letter. Aiding and abetting the unlicensed practice of medicine is a serious charge, and this unilateral public pronouncement about the physician on the Web is a serious violation of a physician's due process rights.

In discussions with Enforcement staff regarding this procedure, it was likened to and justified as a "traffic ticket." This is not an apt analogy. It is true that neither a traffic ticket nor a Medical Board Citation constitutes a *finding* of wrongdoing, but the analogy stops there. At least with a traffic ticket, a person knows *before* it is issued that it is going to be issued, understands what the ticket is about at the time it is issued, and has an opportunity to explain his or her position to the ticket issuer before it is issued. Further, when a traffic ticket is issued, it is not posted on the Web next to the person's name. With issuance of a citation, words posted on the Web describing the nature of the citation impugn the very integrity and professionalism of the physician, in stark contrast to the effects of a traffic ticket. Words describing the citation posted by the Medical Board on

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the physician's web page such as "aiding and abetting the unlawful practice of medicine" accompanied by a proposed monetary fine of "\$2500" cause a Medical Board citation to have profoundly more serious consequences for the professional than a mere traffic ticket. Underlying the issuance of a citation is simply an allegation unrelated to the quality of care that, if undisputed, warrants some (perhaps) corrective action and/or a monetary fine.

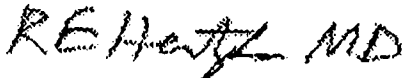
The public disclosure of citations and fines that have not yet been finalized constitutes a violation of the Business & Professions Code. Business & Professions Code §803.1 sets forth the categories of information that the Medical Board may make publicly available, either by public inquiry or on the Internet. The list includes, under subsection (a)(5), "Infractions, citations and fines imposed." A citation and fine issued, and subject to an informal conference or formal hearing to contest the citation is not one that is "imposed." We believe, therefore, that the Legislature never intended these non-quality cite and fines that have not been finalized to be included in the public disclosure program of the Medical Board. While they may be "issued" by the Medical Board, they cannot be final or "imposed" by the Medical Board until the physician waives or exercises the lawful right provided in the Business & Professions Code and the California Code of Regulations to challenge them.

Enforcement staff also suggest that large numbers of such citations have been issued in this manner where no response from the physician has occurred, so to offer an opportunity to respond before the citation is issued would be a waste of time and money. We beg to differ with this view. As set forth above, the consequences for the physician's practice of posting issued citations/fines is significant. The Medical Board should, at the very least, comply with the disclosure statute and not post citations and fines until such time as they are final and can actually be imposed upon the physician.

We strongly urge the Board to change this procedure immediately, so that physicians have appropriate notice and opportunity to be heard before being cited by the Board. Further, we request that the Board cease posting citations and fines until they are imposed upon the physician.

Please advise us of your response as soon as possible. Thank you.

Sincerely,



Robert E. Hertzka, MD  
President

cc: Dave Thornton, Interim Executive Director, MBC  
CMA Executive Committee  
Sandra Bressler