

# TITLE 16. CALIFORNIA BOARD OF BEHAVIORAL SCIENCES

## INITIAL STATEMENT OF REASONS

**Hearing Date:** The Board of Behavioral Sciences (Board) has not scheduled a hearing on the proposed changes. However, a hearing will be scheduled upon request by any interested party if the request is received no later than 15 days prior to the close of the written comment period.

**Subject Matter of Proposed Regulations:** Unprofessional Conduct

**Sections Affected:** Sections 1845, 1858, 1881, 1886.30 and 1886.40 of Division 18 of Title 16 of the California Code of Regulations (CCR)<sup>1</sup>.

### Introduction and Problem Statement

The Board of Behavioral Sciences (Board) licenses and regulates Licensed Marriage and Family Therapists (LMFTs) (Bus. & Prof. Code (BPC), §§ 4980 et seq.), Licensed Educational Psychologists (LEPs) (BPC §§ 4989.10 et seq.), Licensed Clinical Social Workers (LCSWs) (BPC §§ 4991 et seq.), and Licensed Professional Clinical Counselors (LPCCs) (BPC §§ 4999.10 et seq.).

The Board also registers and regulates individuals gaining supervised experience toward meeting the requirements for licensure. This includes registered Associate Marriage and Family Therapists (AMFTs), Associate Professional Clinical Counselors (APCCs) and Associate Clinical Social Workers (ASWs), and applicants pending registration.

The Board's highest priority is public protection when exercising its licensing, regulatory, and disciplinary functions (BPC § 4990.16). The Board is authorized to adopt rules and regulations as necessary to administer and enforce the provisions of law that it administers and enforces (BPC § 4990.20).

The Board is authorized to investigate allegations of unprofessional conduct, including violations of consumer confidentiality, by its licensees or registrants and to deny applications, discipline or cite licensees or registrants for such unprofessional conduct in accordance with BPC sections 108, 4982, 4989.54, 4992.3, and CCR section 1886. The Board's original unprofessional conduct statutes for LMFTs, LEPs, and LCSWs did not specify all grounds considered unprofessional conduct by the Board. The Board then adopted implementing regulations to further specify what it considered "unprofessional conduct" as used in BPC sections 4982, 4989.54 and 4992.3 at CCR sections 1845, 1858 and 1888.

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<sup>1</sup> All CCR references are to Title 16 unless otherwise noted.

However, since that time, certain provisions of the Board's unprofessional conduct regulations have been codified at BPC sections 4982, 4989.54 and 4992.3 (Stats. 2008, ch. 33 (SB 797), (Stats. 2006, ch. 659 (SB 1475) and (Stats. 1987, ch. 826)). This renders the corresponding Board regulations redundant and unnecessary. As a result, the regulations need to be updated for clarity and transparency and to repeal subsections that duplicate provisions of the BPC.

The Confidentiality of Medical Information Act (commencing with section 56 of the Civil Code -- CMIA) prohibits a provider of health care from disclosing medical information regarding a patient of the provider of health care or an enrollee or subscriber of a health care service plan without first obtaining an authorization as specified. Section 56.36 of the CMIA authorizes licensing agencies to issue administrative fines for violations of the CMIA, as specified, and requires licensing agencies to consider specified factors before issuing said fines. The Board's current regulations that specify its authority to issue citations, the grounds for such issuance, and citation factors and fine amounts, do not refer to this CMIA authority, nor do they list the required factors the Board must consider, or the amount of the fines authorized by the CMIA to be issued. This proposal would update those sections of the Board's regulations to add those provisions consistent with the authority to issue such fines in accordance with the CMIA.

The proposal would make other non-substantive changes including grammatical changes, renumbering sections affected by the repeal or adoption of others, the addition of gender-neutral pronouns, and changes to the authority and reference note sections to revise or repeal outdated and changed statutory references.

### **Anticipated Benefits From This Regulatory Action:**

The objectives of the amendments in this regulatory proposal are intended to achieve the following:

- Increase clarity and conciseness in regulation by removing unnecessary language that duplicates statute.
- Increase clarity and transparency in regulation by citing the source of the statutory authority for a citation and fine for a breach of confidentiality violation.
- Increase awareness of, and compliance with, the CMIA among Board licensees, thus benefitting consumers of mental health services, as it may lead to fewer confidentiality violations by the Board's licensees.

## **Specific Changes: Purpose and Rationale for Each Adoption, Amendment, or Repeal:**

The Board proposes the following changes:

### **A. Amend Sections 1845, 1858 and 1881. Unprofessional Conduct: Strike Provisions Duplicated in Statute**

#### **Proposed Changes**

##### Section 1845

- **Purpose:** Subsections (a) – (d): Strike provisions duplicated in BPC sections 4982(s) (which is current CCR section 1845(a)), 4982 (t) (which is current CCR section 1845(b)), 4982 (w) (which is current CCR section 1845(c)) and 4982(x) (which is current CCR section 1845(d)).

**Rationale:** As noted above, these existing regulations have been superseded by provisions enacted in BPC section 4982 and are therefore proposed to be repealed as unnecessary.

- **Authority and Reference Citations Purpose and Rationale:** Add BPC section 4990.20, which provides the Board with authority to promulgate regulations, and strike unnecessary references to BPC section 4980.03 (relating to the practice act's definitions), Penal Code section 11166 (relating to the Child Abuse Neglect and Reporting Act) and Welfare and Institutions Code section 15630 (Mandatory and Nonmandatory Reports of Elder Abuse), which are no longer relevant or needed in light of the proposed repeal of related provisions.

##### Section 1858

- **Purpose:** Subsection (b): Strike a provision duplicated in BPC section 4989.54(ab).

**Rationale:** As noted above, this existing regulation has been superseded by provisions enacted in BPC section 4989.54(ab) and are therefore proposed to be repealed as unnecessary.

- **Authority Citation Purpose and Rationale:** Add BPC section 4990.20 as an additional authority citation since that provision also provides the Board with authority to promulgate regulations.

##### Section 1881:

#### Purpose:

- Subsection (a): Strike this provision since it is duplicated in BPC section 4992.3(g).
- Subsections (b) and (h) (renumbered to (a) and (b)): Make grammatical changes to revise “impersonates” to “impersonating” and “who allows” to “allowing” in subsection (b) and “permits” to “permitting” in subsection (h). The proposal would

also remove gendered pronouns “his or her” and “himself or herself” and replace them with “their” or “themselves”.

- Subsections (c) – (g): Strike the following subsections as duplicative:
  - subsection (c) duplicates BPC section 4992.3(i),
  - subsection (d) duplicates BPC section 4992.3(j),
  - subsection (e) duplicates BPC section 4992.3(k),
  - subsection (f) duplicates BPC section 4992.3(l), and,
  - subsection (g) duplicates BPC section 4992.3(t).
- Subsections (i) and (j): Strike these provisions duplicated in BPC sections 4992.3(n) and (o).
- Subsections (k) and (l): Strike these provisions duplicated in BPC sections 4992.3(q) and (r).
- Subsection (m): Strike this provision duplicated in BPC section 4992.3(e).
- Subsection (n): Strike this provision duplicated in BPC section 4992.3(p).
- Subsections (o) and (p): Strike these provisions duplicated in BPC sections 4992.3(x) and (y).
- Update reference citations to strike unnecessary sections 4992.33, Penal Code section 11166, and Welfare and Institutions Code section 15630, which are no longer relevant or needed in light of the proposed repeal of related provisions.
- The Board also proposes to renumber existing sections that the Board proposes to retain after other sections are repealed.

Rationale: For changes to subsections (a), (c)-(g), and (i)-(p), these amendments are necessary because provisions that are already in statute do not need to be repeated in regulation. This helps to ensure that the Board’s licensing law is clear and concise. Striking language duplicated in statute achieves the nonduplication standard of the Administrative Procedure Act (*Government Code section 11349(f); Title 1, California Code of Regulations, section 12*). Updating reference citations clarify the Board’s authority to promulgate the regulations, and the statutes that the regulation implement, interpret, and make specific the laws under the jurisdiction of this Board.

In compliance with Assembly Concurrent Resolution No. 260 of 2018, the Board is also updating its regulatory language at existing subsections (b) and (h) (newly renumbered subsections (a) and (b)) to comply with Resolution No. 260 that state agencies should use gender neutral pronouns and avoid the use of gendered pronouns throughout this proposal.

## **B. Amend Sections 1886.30 and 1886.40: Citation Factors and Amount of Fines for Violation of the Confidentiality of Medical Information Act**

### **Proposed Changes**

#### **Section 1886.30:**

**Purpose:** Add a new provision to the introduction of this section (renumbered for clarity as “subsection a”) that excepts the Executive Officer from considering the Board’s citation factors listed in existing subsections (a)-(g) (renumbered for clarity as (1)-(7)) for violations of the CMIA as provided in subsection (b). This proposal would also add a new subsection (b) to this section that specifies that in assessing an administrative fine or issuing an order of abatement for violations of the CMIA, the executive officer of the Board shall consider the factors listed in section 56.36(d) of the Civil Code.

**Rationale:** Section 56.36 of the CMIA authorizes this Board as a licensing agency of a health care provider (Board licensees) to issue citations as specified for violations of the CMIA. It also mandates, pursuant to subdivision (d) of Section 56.36(d) of the CMIA, that the Board consider “relevant circumstances” (called “factors” for consistency with the Board’s existing criteria in this section) when issuing these fines. These criteria are not currently covered by the Board’s existing regulation at Section 1886.30, rendering the Board’s requirements potentially inconsistent with the requirements of the CMIA. These changes are therefore necessary to provide notice and clarify that the Board’s Executive Officer must consider the factors listed in the CMIA(Civil Code section 56 et seq.) when assessing an administrative fine or issuing an order of abatement for violations of the CMIA, and update authority and reference sections to include Civil Code section 56.36.

#### **Section 1886.40:**

##### **Purpose:**

- Subsection (a): Add a provision that states that a violation of the CMIA to the definition of a “citable offense.”
- Subsection (b): Add this new subsection that specifies that the fine for violating the CMIA shall not exceed the amount specified in Section 56.36 of the Civil Code.
- Authority and Reference citations: Renumber existing provisions to accommodate proposed changes to this section, add new authority sections for adopting these regulations at BPC section 4989.18 and Civil Code section 56.36; strike unnecessary and outdated references as no longer applicable to the implementation of this section, and add pertinent references to the note to reflect the Board’s current enforcement policy and authorities. Additions to the note would include: BPC sections 702 (inactive licenses prohibitions), 4989.54 (grounds for denial, suspension or revocation for LEPs), 4998.1 (unprofessional

conduct and violations of the Moscone-Knox Professional Corporation Act for LCSWs), 4998.5 (unprofessional conduct violations by LCSW corporations), 4999.90 (grounds for denial, suspension or revocation for LPCCs), 4999.124 (unprofessional conduct and violations of the Moscone-Knox Professional Corporation Act for LPCCs), 4999.128 (unprofessional conduct violations by LPCC corporations) and the CMIA authority at Civil Code section 56.36.

Rationale: “Failure to maintain confidentiality” is listed as unprofessional conduct in statute for each of the Board’s license types (BPC sections 4982(m), 4989.54(q), 4992.3(n) and 4999.90(m)). The CMIA specifies how health care providers, including Board licensees, may and may not disclose confidential medical information. It also specifies the amount of fines that may be levied for disclosing confidential information, and the factors that must be considered when assessing an administrative fine or issuing an order of abatement (Civil Code sections 56.36(c) and (d)).

Existing CCR section 1886.30 defines the factors the Board must consider in assessing an administrative fine or issuing an order or abatement. As noted above, the proposal would add language to this section that also requires consideration of the factors provided in the CMIA for violation of the CMIA to make the Board’s citation program consistent with the CMIA requirements. Similarly, existing CCR Section 1886.40 defines a “citable offense” and lists the amount of fines the Board may levy, which include citations for unlawful or unauthorized breach of confidentiality but fails to acknowledge that the CMIA authorizes the Board to issue fines for violating the CMIA or the fine amounts authorized to be issued. The proposal would add language those references, which specify that the fine for violating the CMIA shall not exceed the amount specified in Section 56.36 of the Civil Code (in the CMIA) to this section.

Failure to maintain client confidentiality is listed as unprofessional conduct in statute for each of the Board’s license types (BPC sections 4982(m), 4989.54(q), 4992.3(n), and 4999.90(m)). Referencing the CMIA in regulation will clarify and make transparent that licensees may be cited and fined on a sliding scale beginning at \$2,500 for negligent disclosures of medical information and up to \$250,000 for violations of the CMIA if the licensed health professional “knowingly and willfully obtains, discloses, or uses medical information in violation of this part [CMIA] for financial gain” for a third and subsequent violation (Civil Code section 56.36(c)(3)(B)).

Existing CCR section 1886.40 defines a “citable offense” and states that the Board may assess a fine of up to \$5,000 for a violation involving unlawful or unauthorized breach of confidentiality (section 1886.40(c)(5)). This is the maximum fine amount authorized under BPC section 125.9. As noted above, the CMIA authorizes, but does not require, higher fine assessments for second and subsequent violations of the law, including up to \$250,000 (Civil Code section 56.36(c)(3)(B)).

In light of the fine cap in BPC section 125.9, and because the Board may cite a licensee for a violation of the CMIA or for unprofessional conduct, the Board proposes to reference the CMIA to establish a point of reference for where the maximum fine originates, for any breach of confidentiality, whether charged as unprofessional conduct or in violation of the CMIA. All of these changes are consistent with current Board practice, as the Board already follows the requirements specified in the CMIA. Incorporating references to the CMIA into the Board's regulations will provide clarity and transparency by citing the source of factors considered when assessing an administrative fine or issuing an order of abatement for breaches of the CMIA, and making transparent that the fine for violation of the CMIA shall not exceed the amount specified in the CMIA.

In addition, as noted above, many of the currently cited sections under authority and reference do not relate to this section, and have been updated to include only relevant sections. Civil Code section 56.36 has been added as a reference because it is referenced in the text of sections 1886.30 and 1886.40.

These proposed amendments promote clarity and transparency in the law by citing the CMIA as the source of the statutory authority for factors considered when assessing an administrative fine or issuing an order of abatement for breaches of the CMIA and specifying that the fine for violation of the CMIA shall not exceed the amount specified in the CMIA.

This may increase awareness of the CMIA among Board licensees and thus increase compliance, which will benefit consumers of mental health services as it could lead to fewer confidentiality violations by the Board's licensees.

## **Underlying Data**

Documents relied upon:

1. Policy and Advocacy Committee Meeting January 13, 2023: Agenda, Relevant Meeting Materials and Meeting Minutes
2. Policy and Advocacy Committee Meeting July 21, 2023: Agenda, Relevant Meeting Materials and Meeting Minutes
3. Board Meeting August 18, 2023: Agenda, Relevant Meeting Materials and Draft Meeting Minutes



## **Business Impact**

The Board has made an initial determination that the proposed regulatory action will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses including the ability of California businesses to compete with businesses in other states. This initial determination is based on the following facts or evidence / documents / testimony:

- Striking regulations that duplicate statute has no adverse economic effect because the statutory provisions will continue to be in effect.
- Adding references to the CMIA has no adverse economic effect because it already applies to Board licensees, and the Board already applies the requirements of the CMIA when reviewing potential violations of the CMIA and when determining citation factors, assessing an administrative fine, or issuing an order of abatement.

The rulemaking file includes the facts, evidence, documents, testimony, and other evidence which supports this determination.

## **Economic Impact Assessment**

This Board has determined that this regulatory proposal will have the following effects:

- It will not create or eliminate jobs within the State of California.
- It will not create new businesses or eliminate existing businesses within the State of California.
- It will not affect the expansion of businesses currently doing business within the State of California.

The above determinations were made for the following reasons:

- Striking language duplicated in statute has no economic effect on jobs or businesses.
- The CMIA authority, which is being added into the Board's regulations, already applies to the Board's licensees, and the Board already applies the requirements of the CMIA when reviewing potential violations of the CMIA and issuing a citation and fine or order of abatement.



## Benefits of the Regulation to the Health and Welfare of California Residents, Worker Safety, and the State's Environment

The Board has determined that this regulatory proposal will benefit the health, safety and welfare of California residents, as it may increase awareness of the CMIA among Board licensees and increase compliance, potentially leading to fewer violations of client confidentiality. The proposal would also increase clarity and conciseness in regulation by removing unnecessary language that duplicates statute.

The proposal will have no effect on worker safety or the State's environment because it does not relate to worker safety or the environment.

## Specific Technologies or Equipment

The proposed regulations do not mandate the use of specific technologies or equipment.

## Consideration of Alternatives

No reasonable alternative to the regulation 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 and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the laws being implemented or made specific.

No such alternatives have been proposed, however, the Board welcomes comments from the public.

## **Description of reasonable alternatives to the regulation that would lessen any adverse impact on small business:**

No such alternatives have been proposed, however, the Board welcomes comments from the public.