



Board of Behavioral Sciences

Memo

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To: Board Members **Date:** August 7, 2023

From: Christy Berger
Regulatory Analyst

Subject: **Discussion of Proposed Changes to Regulations: Unprofessional Conduct and Amount of Fines**

The Policy and Advocacy Committee has recommended revisions to to Title 16, California Code of Regulations (16 CCR) sections 1845, 1858, 1881, 1886.30 and 1886.40 related to Unprofessional Conduct, as well as the amount of fines that may be levied for a citation or order of abatement.

Proposed Changes

1. Amendments to 16 CCR Sections 1845 (LMFT), 1858 (LEP), and 1881 (LCSW) (Unprofessional Conduct)

The proposed amendments simply strike language that duplicates statute, and is therefore unnecessary. The amendments are provided in the Attachment.

2. Amendments to 16 CCR Sections 1886.30 and 1886.40 and (Citation Factors; Amount of Fines: Confidentiality of Medical Information Act)

“Failure to maintain confidentiality” is listed as unprofessional conduct in statute for each of the Board’s license types. The Confidentiality of Medical Information Act (CMIA) begins with Civil Code section 56, and specifies the amount of fines that may be levied for disclosing confidential information, and the factors that must be considered when levying a fine or issuing an order of abatement.

Section 1886.30 defines the factors the Board must consider in assessing an administrative fine or issuing an order or abatement. The proposal would add language to this section that requires consideration of the factors provided in the CMIA for violation of the CMIA. Section 1886.40 defines a “citable offense” and lists the amount of fines the Board may levy for unlawful or unauthorized breach of confidentiality. The proposal would add language which specifies that the fine for violating the CMIA shall not exceed the amount specified in the CMIA to this section.

The proposed amendments are provided in the Attachment.

Recommendation

Staff recommends that the Board review the proposed regulatory text and consider whether to approve it as written, or to suggest changes to the proposed text. After review and discussion, consider one of the following motions:

Motion Option A: (To be used if the Board has NO suggested changes for the proposed regulatory text)

Approve the proposed regulatory text as presented in the meeting materials, and submit the approved text to the Director of the Department of Consumer Affairs and the Business, Consumer Services, and Housing Agency for review, and if no adverse comments are received, authorize the Executive Officer to take all steps necessary to initiate the rulemaking process, make any non-substantive changes to the text and the package, and set the matter for a hearing if requested. If after the 45-day public comment period, no adverse comments are received and no public hearing is requested, authorize the Executive Officer to take all steps necessary to complete the rulemaking, and adopt the proposed regulations for Title 16, California Code of Regulations sections 1845, 1856, 1881, 1886.30 and 1886.40.

Motion Option B: (To be used if the Board DOES have suggested changes for the proposed regulatory text)

Approve the proposed regulatory text with the following changes: *(specify the proposed changes to the proposed text)*. In addition, submit the approved text to the Director of the Department of Consumer Affairs and the Business, Consumer Services, and Housing Agency for review, and if no adverse comments are received, authorize the Executive Officer to take all steps necessary to initiate the rulemaking process, make any non-substantive changes to the text and the package, and set the matter for a hearing if requested. If after the 45-day public comment period, no adverse comments are received and no public hearing is requested, authorize the Executive Officer to take all steps necessary to complete the rulemaking, and adopt the proposed regulations for Title 16, California Code of Regulations sections 1845, 1856, 1881, 1886.30 and 1886.40.

Attachment

Proposed regulatory text

Attachment

PROPOSED LANGUAGE

Title 16, Division 18, California Code of Regulations Sections 1845, 1856, 1881, 1886.30 and 1886.40

Proposed amendments to the regulatory language are shown in single underline for text to be added and ~~single strikethrough~~ for text to be deleted.

AMEND §1845. UNPROFESSIONAL CONDUCT

As used in Section 4982 of the eCode, unprofessional conduct includes, but is not limited to:

~~(a) Performing or holding himself or herself out as able to perform professional services beyond his or her field or fields of competence as established by his or her education, training and/or experience.~~

~~(b) Permitting a trainee or associate under his or her supervision or control to perform or permitting the trainee or associate to hold himself or herself out as competent to perform professional services beyond the trainee's or associate's level of education, training and/or experience.~~

~~(c) Failing to comply with the child abuse reporting requirements of Penal Code section 11166.~~

~~(d) Failing to comply with the elder and dependent adult abuse reporting requirements of Welfare and Institutions Code section 15630.~~

(ea) Failure to provide to the board, as authorized by law, copies of records within 15 days of receipt of the request or within the time specified in the request, whichever is later, unless the licensee or registrant is unable to provide the records within this time period for good cause. Good cause includes, but is not limited to, physical inability to access the records in the time allowed due to illness or travel, or inability to obtain the necessary patient release authorization, if applicable. This subsection shall not apply to a licensee or registrant who does not have access to, and control over, medical records.

(fb) Failure to cooperate and participate in any board investigation pending against the licensee or registrant. This subsection shall not be construed to deprive a licensee, registrant, or a consumer of any rights or privilege guaranteed by the Fifth Amendment to the Constitution of the United States, or any other constitutional or statutory rights or privileges. This subsection shall not be construed to require a licensee or registrant to cooperate with a request that would require the licensee, registrant, or a consumer to waive any constitutional or statutory rights or privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the licensee's or registrant's practice. Any exercise by a licensee or registrant of any constitutional or statutory rights or privilege shall not be used against

the licensee or registrant in a regulatory or disciplinary proceeding against the licensee or registrant.

(gc) Failure to report to the board within 30 days any of the following:

- (1) A conviction of any felony or misdemeanor, which is not subject to Health & Safety Code sections 11357(b), (c), (d), (e) or 11360(b). A conviction includes any verdict of guilty, or plea of guilty or no contest.
- (2) Any disciplinary action taken by another licensing entity or authority of this state or of another state or an agency of the federal government or the United States military.

(hd) Failure to provide, within 30 days of a request, documentation to the Board regarding the arrest of the licensee or registrant, except for records of convictions or arrests protected under Penal Code section 1000.4, or Health and Safety Code sections 11361.5 and 11361.7.

(ie) Failure or refusal to comply with a court order, issued in the enforcement of a subpoena, mandating the release of records to the board.

NOTE: Authority cited: Sections 4980.60 and 4990.20, Business and Professions Code. Reference: Sections ~~4980.03~~, 4980.60 and 4982, Business and Professions Code; Sections ~~1000.4 and 11166~~, Penal Code; and Sections 11357, 11360, 11361.5 and 11361.7, Health and Safety Code, ~~and Section 15630, Welfare and Institutions Code.~~

AMEND §1858. UNPROFESSIONAL CONDUCT

As used in Section 4989.54 of the eCode, unprofessional conduct includes, but is not limited to:

(a) Impersonates a licensee or allows another person to use ~~his or her~~ their license.

~~(b) Permits a person under his or her supervision or control to perform or permits such person to hold himself or herself out as competent to perform professional services beyond the level of education, training and/or experience of that person.~~

(eb) Failure to provide to the board, as authorized by law, copies of records within 15 days of receipt of the request or within the time specified in the request, whichever is later, unless the licensee or registrant is unable to provide the records within this time period for good cause. Good cause includes, but is not limited to, physical inability to access the records in the time allowed due to illness or travel, or inability to obtain the necessary patient release authorization, if applicable. This subsection shall not apply to a licensee or registrant who does not have access to, and control over, medical records.

(dc) Failure to cooperate and participate in any board investigation pending against the licensee or registrant. This subsection shall not be construed to deprive a licensee, registrant, or a consumer of any rights or privilege guaranteed by the Fifth Amendment

to the Constitution of the United States, or any other constitutional or statutory rights or privileges. This subsection shall not be construed to require a licensee or registrant to cooperate with a request that would require the licensee, registrant, or a consumer to waive any constitutional or statutory rights or privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the licensee's or registrant's practice. Any exercise by a licensee or registrant of any constitutional or statutory rights or privilege shall not be used against the licensee or registrant in a regulatory or disciplinary proceeding against the licensee or registrant.

(ed) Failure to report to the board within 30 days any of the following:

(1) A conviction of any felony or misdemeanor, which is not subject to Health & Safety Code sections 11357 (b), (c), (d), (e), or 11360 (b). A conviction includes any verdict of guilty, or plea of guilty or no contest.

(2) Any disciplinary action taken by another licensing entity or authority of this state or of another state or an agency of the federal government or the United States military.

(fe) Failure to provide, within 30 days of a request, documentation to the Board regarding the arrest of the licensee or registrant, except for records of convictions or arrests protected under Penal Code section 1000.4, or Health and Safety Code sections 11361.5 and 11361.7.

(gf) Failure or refusal to comply with a court order, issued in the enforcement of a subpoena, mandating the release of records to the board.

NOTE: Authority cited: Sections s 4989.18 and 4990.20, Business and Professions Code. Reference: Sections 4989.18 and 4989.54, Business and Professions Code; Section 1000.4, Penal Code; and Sections 11357, 11360, 11361.5 and 11361.7, Health and Safety Code.

AMEND §1881. UNPROFESSIONAL CONDUCT

As used in Section 4992.3 of the Code, unprofessional conduct includes, but is not limited to:

~~(a) Misrepresents the type or status of license held by such person or otherwise misrepresents or permits the misrepresentation of his or her professional qualifications or affiliations.~~

~~(ba) Impersonates Impersonating a licensee or who allows allowing another person to use his or her their license.~~

~~(c) Aids or abets an unlicensed person to engage in conduct requiring a license.~~

~~(d) Intentionally or recklessly causes physical or emotional harm to a client.~~

- ~~(e) Commits any dishonest, corrupt, or fraudulent act which is substantially related to the qualifications, functions or duties of a licensee.~~
- ~~(f) Has sexual relations with a client, or who solicits sexual relations with a client, or who commits an act of sexual abuse, or who commits an act of sexual misconduct, or who commits an act punishable as a sexual related crime if such act or solicitation is substantially related to the qualifications, functions or duties of a Licensed Clinical Social Worker.~~
- ~~(g) Performs or holds himself or herself out as able to perform professional services beyond his or her field or fields of competence as established by his or her education, training and/or experience.~~
- ~~(hb) Permits Permitting a person under ~~his or her~~ their supervision or control to perform or ~~permits-permitting~~ such person to hold ~~himself or herself~~ themselves out as competent to perform professional services beyond the level of education, training and/or experience of that person.~~
- ~~(i) Fails to maintain the confidentiality, except as otherwise required or permitted by law, of all information that has been received from a client during the course of treatment and all information about the client which is obtained from tests or other such means.~~
- ~~(j) Prior to the commencement of treatment, fails to disclose to the client, or prospective client, the fee to be charged for the professional services, or the basis upon which such fee will be computed.~~
- ~~(k) Advertises in a manner which is false or misleading.~~
- ~~(l) Reproduces or describes in public or in publications subject to general public distribution, any psychological test or other assessment device, the value of which depends in whole or in part on the naivete of the subject, in ways that might invalidate such test or device. The licensee shall limit access to such test or device to persons with professional interest who are expected to safeguard their use.~~
- ~~(m) Commits an act or omission which falls sufficiently below that standard of conduct of the profession as to constitute an act of gross negligence.~~
- ~~(n) Pays, accepts or solicits any consideration, compensation or remuneration for the referral of professional clients. All consideration, compensation or remuneration must be in relation to professional counseling services actually provided by the licensee. Nothing in this section shall prevent collaboration among two or more licensees in a case or cases. However, no fee shall be charged for such collaboration except when disclosure of such fee is made in compliance with subparagraph (j) above.~~
- ~~(o) Fails to comply with the child abuse reporting requirements of Penal Code Section 11166.~~
- ~~(p) Fails to comply with the elder and dependent adult abuse reporting requirements of Welfare and Institution Code Section 15630.~~

(~~ec~~) Failure to provide to the board, as authorized by law, copies of records within 15 days of receipt of the request or within the time specified in the request, whichever is later, unless the licensee or registrant is unable to provide the records within this time period for good cause. Good cause includes, but is not limited to, physical inability to access the records in the time allowed due to illness or travel, or inability to obtain the necessary patient release authorization, if applicable. This subsection shall not apply to a licensee or registrant who does not have access to, and control over, medical records.

(~~fd~~) Failure to cooperate and participate in any board investigation pending against the licensee or registrant. This subsection shall not be construed to deprive a licensee, registrant, or a consumer of any rights or privilege guaranteed by the Fifth Amendment to the Constitution of the United States, or any other constitutional or statutory rights or privileges. This subsection shall not be construed to require a licensee or registrant to cooperate with a request that would require the licensee, registrant, or a consumer to waive any constitutional or statutory rights or privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the licensee's or registrant's practice. Any exercise by a licensee or registrant of any constitutional or statutory rights or privilege shall not be used against the licensee or registrant in a regulatory or disciplinary proceeding against the licensee or registrant.

(~~se~~) Failure to report to the board within 30 days any of the following:

(1) A conviction of any felony or misdemeanor, which is not subject to Health & Safety Code sections 11357 (b), (c), (d), (e), or 11360 (b). A conviction includes any verdict of guilty, or plea of guilty or no contest.

(2) Any disciplinary action taken by another licensing entity or authority of this state or of another state or an agency of the federal government or the United States military.

(~~tf~~) Failure to provide, within 30 days of a request, documentation to the Board regarding the arrest of the licensee or registrant, except for records of convictions or arrests protected under Penal Code section 1000.4, or Health and Safety Code sections 11361.5 and 11361.7.

(~~ug~~) Failure or refusal to comply with a court order, issued in the enforcement of a subpoena, mandating the release of records to the board.

Note: Authority cited: Section 4990.20, Business and Professions Code. Reference: Sections 4990.20, 4992.3, ~~4992.33~~ and 4996.11, Business and Professions Code; Sections 1000.4 ~~and 11166~~, Penal Code; and Sections 11357, 11360, 11361.5 and 11361.7, Health and Safety Code, ~~and Section 15630, Welfare and Institution Code.~~

AMEND §1886.30. CITATION FACTORS

(a) In assessing an administrative fine or issuing an order of abatement, except for violations of the Confidentiality of Medical Information Act as provided in subsection (b), the executive officer of the board shall give due consideration to the following factors:

- (a1) The gravity of the violation.
- (b2) The good or bad faith exhibited by the cited person.
- (c3) The history of previous violations of the same or similar nature.
- (d4) Evidence that the violation was or was not willful.
- (e5) The extent to which the cited person has cooperated with the board's investigation.
- (f6) The extent to which the cited person has mitigated or attempted to mitigate any damage or injury caused by the violation.
- (g7) Any other factors as justice may require.

(b) In assessing an administrative fine or issuing an order of abatement for violations of the Confidentiality of Medical Information Act (commencing with section 56 of the Civil Code), the executive officer of the board shall consider the factors listed in section 56.36(d) of the Civil Code.

NOTE: Authority cited: Sections 125.9, 148, 149, 4980.60 and 4990.20, Business and Professions Code; and Section 56.36, Civil Code. Reference: Sections 125.9, 148 and 149, Business and Professions Code; and Section 56.36, Civil Code.

AMEND §1886.40. AMOUNT OF FINES

(a) For purposes of this section, a “citable offense” is defined as any violation of the statutes and regulations enforced by the Board of Behavioral Sciences, including Chapters 13, 13.5, 14, and 16 of Division Two of the Business and Professions Code, ~~and~~ Title 16, Division 18, California Code of Regulations, and the Confidentiality of Medical Information Act (commencing with section 56 of the Civil Code).

(b) The fine for violating the Confidentiality of Medical Information Act shall not exceed the amount specified in section 56.36 of the Civil Code.

(bc) The executive officer of the board may assess fines for citable offenses which shall not exceed two thousand five hundred dollars (\$2,500) for each investigation except as otherwise provided in this section. The executive officer shall not impose any duplicate fines for the same violation.

(ed) The executive officer of the board may assess fines for citable offenses which shall not exceed five thousand (\$5,000) for each investigation if the violation or count includes one or more of the following circumstances:

(1) The cited person has a history of two or more prior citations for similar violations, except for citations withdrawn or dismissed after appeal.

(2) The citation involves multiple violations that demonstrate a willful disregard of the statutes or regulations.

(3) The citation is for a violation or violations involving a minor, elder or dependent adult, or a person with a physical or mental disability as defined in Section 12926 of the Government Code.

(4) The citation involves unlicensed practice.

(5) The citation involves an unlawful or unauthorized breach of confidentiality.

(6) The citation is for failure to submit fingerprints to the Department of Justice as required by the Board.

(de) The executive officer of the board may assess fines which shall not exceed five thousand dollars (\$5,000) for each violation or count if the violation or count involves fraudulent billing submitted to an insurance company, the Medi-Cal program, or Medicare.

NOTE: Authority cited: Sections 125.9, 148, 149, 4980.60, 4989.18 and 4990.20, Business and Professions Code; and Section 56.36, Civil Code. Reference: Sections ~~123, 125, 125.9, 136, 141, 148, 149, 480, 702, 651, 654.2, 703, 728, 4980, 4980.02, 4980.30, 4980.43, 4980.44, 4980.45, 4980.46, 4980.48, 4982, 4982.25, 4984, 4987.7, 4987.8, 4988, 4988.1, 4989.10, 4989.12, 4989.14, 4989.20, 4989.22, 4989.24, 4989.26, 4989.28, 4989.34, 4989.54, 4992.3, 4992.36, 4996, 4996.5, 4996.7, 4996.8, 4996.9, 4996.16, 4996.18, 4996.19, 4996.22, 4996.23, 4998.2, 4998.3, 4998.4, 4998.1, 4998.5, 4999.20, 4999.24, 4999.30, 4999.32, 4999.33, 4999.42, 4999.44, 4999.45, 4999.46, 4999.54, 4999.58, 4999.60, 4999.90, 4999.124 and 4999.128 4999.76~~, Business and Professions Code; Section 56.36, Civil Code; and Section 15630, Welfare and Institutions Code.