

BOARD OF BEHAVIORAL SCIENCES INITIAL STATEMENT OF REASONS

Hearing Date: May 1, 2012

Subject Matter of Proposed Regulations: Enforcement Regulations

Section(s) Affected: Amend Sections 1803, 1845, 1858, and 1881 of Division 18 of Title 16 of the California Code of Regulations. Add Sections 1823 and 1888.1 to Division 18 of Title 16 of the California Code of Regulations.

Introduction

The Board of Behavioral Science's (Board's) highest priority is consumer protection, as mandated by Business and Professions Code (BPC) Section 4990.16. In order to meet this mandate, the Board issues licenses to eligible applicants to practice marriage and family therapy (LMFT), educational psychology (LEP), clinical social work (LCSW), and professional clinical counseling (LPCC). The Board also investigates complaints against its licensees and registrants, disciplines licensees and registrants for violation of state licensing laws, and monitors licensees and registrants whose licenses have been placed on probation.

BPC Section 4990.20 authorizes the Board to adopt rules and regulations as necessary to administer and enforce the provisions of the Chapters of the Business and Professions Code for which it is responsible. Division 18 of Title 16 of the California Code of Regulations (CCR) includes numerous sections relating to education requirements, supervised experience requirements, fees, administrative actions, and disciplinary guidelines of BBS-regulated licensees and registrants.

Over the past three years, there have been several legislative efforts to streamline the enforcement processes for healing arts boards within the Department of Consumer Affairs (DCA). Currently, many boards take an average of three years to investigate and prosecute violations of the law, leaving consumers unprotected against potentially dangerous practitioners during this timeframe.

SB 1111 (Negrete McLeod) was introduced in 2010 as part of DCA's Consumer Protection Enforcement Initiative (CPEI). The goal of this bill was to provide healing arts boards under DCA with additional authority and resources to make the enforcement process more efficient. SB 1111 failed passage in the Senate Business, Professions and Economic Development Committee.

The Senate Business, Professions, and Economic Development Committee then introduced SB 544 (Price) in 2011. This bill contained many of the same provisions as SB 1111, with the intent of improving efficiency and increasing accountability for boards within DCA. SB 544 also failed passage in the Senate Business, Professions and Economic Development Committee.

Identification of the Problem

Currently, many boards take an average of three years to investigate and prosecute violations of the law. Due to the urgent need to protect consumers by streamlining the enforcement process, the Senate Business, Professions, and Economic Development Committee and DCA have asked healing arts boards to individually seek regulations to implement those provisions of SB 1111 and SB 544 that do not require new statutory authority. DCA's goal in requesting healing arts boards to seek these proposed regulatory amendments is to reduce discipline case processing timelines to an average of 12 to 18 months.

Specific Changes and Factual Basis/Rationale:

Delegation of Certain Functions – Amend Section 1803

Proposed Change: The proposed change is to delegate to the Board's Executive Officer the authority to approve settlement agreements for revocation, surrender, and interim suspension of a license, or allow the Executive Officer to delegate this function to another designee.

Rationale: The Board currently has the authority to render decisions on proposed decisions prepared by Administrative Law Judges (ALJ) and settlement agreements prepared by the deputy attorney general (DAG).

In the event of a disciplinary case against a Board licensee, the ALJ issues a proposed decision after a licensee has had an opportunity to dispute the charges at an administrative hearing. However, the licensee and ALJ may negotiate a settlement agreement to resolve the case prior to the hearing. In this case, the licensee admits specific charges and agrees to proposed disciplinary action. Board members must vote to approve all proposed decisions and settlement agreements.

In a case that is resolved with a settlement agreement, a licensee has voluntarily admitted to charges and agreed to the revocation, surrender, or suspension of their license. Therefore, there is little discretion for the Board not to adopt the agreement. Allowing the Executive Officer to approve such an agreement, instead of requiring a full board vote, will shorten the timeframe for these cases, allowing them to take effect more quickly.

Anticipated Benefit: This proposed change will increase public protection by expediting some enforcement agreements.

Unprofessional Conduct – Amend Sections 1845, 1858, and 1881; Add Section 1823

BPC Sections 4982 (LMFTs), 4989.54 (LEPs), 4992.3 (LCSWs), and 4999.90 (LPCCs) define acts that constitute unprofessional conduct. This regulatory change specifies additional acts that constitute unprofessional conduct. The proposed change and rationale for defining each act as unprofessional conduct are as follows:

1. **Proposed Change:** This proposal would further define "Unprofessional Conduct" to prohibit the inclusion of provisions in agreements to settle civil disputes that would forbid another party to the dispute from contacting, cooperating with, or filing a complaint with the Board, or that would require another party to the dispute to attempt to withdraw a complaint the party has filed with the Board, either before or after the filing of an action to which the licensee or registrant is or expects to be named as a party.

Rationale: The increasing use of provisions in civil dispute settlements prohibiting the other party from contacting, cooperating with, or filing complaints with the Board, hereafter, an "agreement not to pursue," denies consumers the right to file complaints and prevents the Board from investigating and disciplining licensees or registrants who present a danger to consumers. These licensees or registrants may continue to practice and harm the public because the Board is not aware of civil dispute settlements. This proposal would prevent licensees or registrants who have violated the law from avoiding disciplinary action against their licenses or registrations.

"Agreements not to pursue" can delay and thwart the Board's effort to investigate possible cases of misconduct, thereby preventing the Board from protecting the public. These clauses delay action by the Board and tarnish the reputation of competent and reputable licensed and registered health care professionals. By allowing repeat offenders who injure patients to hide their legal acts from the Board further prevents the Board from protecting consumers.

It has been argued that a licensee or registrant should not be subject to review by the Board after a civil settlement has been reached. Protection from license or registration disciplinary action does not attach to civil proceedings or subsequent administering proceedings. Criminal, civil, and administrative proceedings each serve entirely different legal functions. No ordinary citizen can claim immunity from one proceeding because he or she already underwent the other. It necessarily follows that Board licensees and registrants should not enjoy any exception to the rule of legal process.

Anticipated Benefit: This regulatory change will increase public protection by protecting consumer's right to file complaints.

2. Proposed Change: This proposal would also define as "Unprofessional Conduct" failure to provide the Board with lawfully requested copies of documents within 15 days of receipt of the request or within the time specified in the request, whichever occurs later unless the licensee or registrant is unable to comply for good cause. "Good cause" is specified to include physical inability to access the requested records in the time allowed due to an illness or travel.

Rationale: Failure of a licensee or registrant to provide lawfully requested documents delays the Board's investigation of consumer complaints. The obtaining and inspection of documents is crucial in investigating consumer complaints and taking appropriate action against a licensee or registrant who may cause patient harm.

Anticipated Benefit: This regulatory change will increase public protection by requiring timely delivery of requested documents.

3. Proposed Change: The proposed change is to define as unprofessional conduct the failure to cooperate and participate in a Board investigation, as long as such action does not infringe upon the licensee's or consumer's constitutional or statutory rights or privilege.

Rationale: Failing to cooperate or participate in a Board investigation obstructs the investigative process and therefore prevents the Board from protecting the public. The proposed amendment includes language that ensures a licensee would not be deprived of any constitutional or statutory rights or privileges.

Anticipated Benefit: This regulatory change will protect the public by enabling the Board to take action against licensees who refuse to cooperate in Board investigations or licensees who actively subvert Board investigations.

4. Proposed Change: The proposed change is to define as unprofessional conduct the failure to notify the Board within 30 days of felony charges or indictment, conviction, or of disciplinary action by another licensing entity, or failure to provide Board-requested arrest documentation.

Rationale: All Board licensees must submit fingerprints to the Board for the purpose of conducting criminal history background checks through the California Department of Justice (DOJ) and Federal Bureau of Investigation (FBI). Typically, the DOJ sends the Board any subsequent arrest and conviction reports. The Board also requires that its licensees report any professional license discipline by another governmental agency and any convictions at the time of biennial license renewal.

Although this system typically allows the Board to find out about convictions and discipline of a licensee, there are some flaws to this system. Sometimes, the Board does not receive the subsequent arrest or conviction notifications from DOJ. In addition, licensees are only required to self-report convictions or disciplinary action on their license renewal form every two years. By

requiring a licensee to self-report this information within a 30 day period, the Board will have more current disciplinary information and will be better able to protect the public.

Anticipated Benefit: This proposed regulatory change will increase public protection by requiring that the Board receive notification from the licensee or registrant of any criminal history or disciplinary actions.

5. Proposed Change: The proposed change is to define as unprofessional conduct the failure to comply with a court order, issued in the enforcement of a subpoena, to release records.

Rationale: Failing to comply with a court order to release records hinders the Board's ability to conduct an investigation, and therefore prevents the Board from protecting the public.

Anticipated Benefit: This regulatory change will increase public protection by requiring that the licensee or registrant complies with a court order to provide records needed for an investigation.

Required Actions Against Registered Sex Offenders –Add Section 1888.1

Proposed Change: The proposed change is to require that the Board deny or revoke a license or registration if the applicant or licensee is required to register as a sex offender pursuant to Penal Code Section 290. In addition, the Board would be required to deny any petition to reinstate or reissue a license or registration to a registered sex offender.

Rationale: The Board is already prohibited from issuing a license or registration to any person who has been convicted of a crime in this or another state or in a territory of the United States that involves sexual abuse of children or who is required to register pursuant to Section 290 of the Penal Code. This proposal would clarify that the Board must revoke a license or registration upon finding that an applicant or licensee was convicted of a sex offense, and would clarify that the Board must deny a petition for reinstatement or reissuance.

Anticipated Benefit: This regulatory change would increase public protection by clarifying actions the Board must take when discovering a licensee, registrant, or applicant is a registered sex offender.

ECONOMIC IMPACT ASSESSMENT/ANALYSIS

The Board has made an initial determination that the proposed regulatory action would have no significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. This initial determination is based on the fact that the proposed regulations do not impose any new requirements on a licensee, registrant, or applicant who is not subject to disciplinary action. The regulation only affects licensees, registrants, or applicants who are already subject to disciplinary action by the Board.

As part of its Economic Impact Analysis, the Board has determined that its proposal will not affect the ability of California businesses to compete with other states by making it more costly to produce goods or services, and that it will not create or eliminate jobs or occupations. The Board had determined that states with comparable populations place similar requirements on their mental health licensees. This proposal does not impact multiple industries.

Effect on Small Businesses: The Board has determined that the proposed regulations will not affect small businesses. The regulatory proposal affects only licensees and registrants of the Board and applicants for licensure or registration, who are disciplined by the Board. This is a limited population and will only impact approximately 10 percent or less of the Board's licensees.

Impact on Jobs/New Businesses: The Board has determined that this regulatory proposal will not have a significant impact on the creation or elimination of jobs, businesses, or the expansion of businesses in the State of California.

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 and welfare of California residents who seek the services of the Board's licensees. Health and welfare is increased by improving the efficiency of the enforcement process, and by making clarifications and additions to enforcement provisions to address current weaknesses in the regulations relating to licensees who are in the enforcement process. The proposal will have no effect on worker safety or the State's environment.

Occupations/Businesses Impacted: The Board has determined that the impact of this proposed regulation will be limited to those licensees who are the subject of disciplinary action taken by the Board. This is a low percentage of the Board's licensees overall (less than 10 percent), and therefore has little to no impact on occupations or businesses.

Reporting Requirements: None

Comparable Federal Regulations: None

Benefits: Business and Professions Code Section 4990.16 states the following:

"Protection of the public shall be the highest priority for the board in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount."

The public will benefit from the increased efficiencies and clarifications in the enforcement process that these regulatory amendments provide.

Underlying Data

None

Business Impact

This proposal will not have adverse economic impact on businesses. This proposal would only affect Board licensees or registrants who are disciplined by the Board

Specific Technologies or Equipment

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

This regulation mandates the use of specific technologies or equipment. Such mandates or prescriptive standards are required for the following reasons:

Consideration of Alternatives

No reasonable alternative which was considered or that has otherwise been identified and brought to the attention of the BBS 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.

Set forth below are the alternatives which were considered and the reasons each alternative was rejected:

1. Not adopt the regulations. This alternative was rejected because the Board has identified areas of concern regarding enhanced protection of consumers.
2. Adopt regulations. The Board determined that this alternative is the most feasible because it will assist the Board in its mandate of consumer protection.