



Board of Behavioral Sciences

Memo

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To: Board Members **Date:** May 2, 2024
From: Christy Berger **Telephone:** (916) 574-7995
Regulatory Manager
Subject: Discussion and Consideration of Comments Received During 45-Day Public Comment Period on Proposed Revisions to Unprofessional Conduct Regulations

Background

At its August 2023 meeting, the Board approved regulatory changes pertaining to its unprofessional conduct regulations. The proposed changes would result in striking regulations that duplicate statutory law, and would provide for transparency by adding requirements related to the Confidentiality in Medical Information Act. The approved language is provided in Attachment A.

Status of the Regulation Proposal

The regulation proposal was noticed to the public on February 2, 2024, and the public comment period ended on March 25, 2024. The Board received one comment as summarized below. Staff's recommended response is also provided below.

Comment from California Association of Marriage and Family Therapists (CAMFT) (Attachment B)

CAMFT expressed concern that there is an inconsistency in the originally approved text, between subsection (b) and renumbered subsection (d)(5) of section 1886.40. Subsection (d)(5) states that the board may assess fines not exceeding \$5,000 if the violation includes an unlawful or unauthorized breach of confidentiality. Subsection (b) states that the fine for violating the Confidentiality of Medical Information Act shall not exceed the amount specified in section 56.36 of the Civil Code. CAMFT believes this may cause confusion as to whether fines involving unlawful breaches of confidentiality in violation of the CMIA would be assessed at the maximum amount specified in subdivision (b) or at the maximum amount specified in subdivision (d)(5).

Recommended Response: Board staff have reviewed the comment and recommend changes to section 1886.40 of the text based on the comments. The changes are shown on page 7 of Attachment A.

Recommended Motion

Approve the proposed responses to public comments received, approve the proposed amended regulation text for section 1886.40, and initiate a 15-day public comment period. If no relevant, adverse comments are received during the public comment period, authorize the Executive Officer to make any nonsubstantive changes to the package, and take all steps necessary to complete the rulemaking and adopt the proposed regulations at section(s) 1845, 1858, 1881, 1886.30 and 1886.40 as noticed.

Attachments

Attachment A: Board-Approved Regulatory Language (Modified text for 15-day notice)

Attachment B: Comment from the California Association of Marriage and Family Therapists

Attachment A

**TITLE 16. BOARD OF BEHAVIORAL SCIENCES
DEPARTMENT OF CONSUMER AFFAIRS**

MODIFIED TEXT

**Title 16, Division 18, California Code of Regulations
Sections 1845, 1858, 1881, 1886.30 and 1886.40**

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

Modifications to the proposed regulatory language are shown in double underline for new text and ~~double strikethrough~~ for newly proposed deletions.

AMEND §1845. UNPROFESSIONAL CONDUCT TO READ AS FOLLOWS:

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 TO READ AS FOLLOWS:

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 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 TO READ AS FOLLOWS:

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.~~
- ~~(b_a) 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.~~
- ~~(h_b) 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.~~
- (qc) 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 TO READ AS FOLLOWS:

(~~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:

(~~a~~1) The gravity of the violation.

(~~b~~2) The good or bad faith exhibited by the cited person.

(~~c~~3) The history of previous violations of the same or similar nature.

(~~d~~4) Evidence that the violation was or was not willful.

(~~e~~5) The extent to which the cited person has cooperated with the board's investigation.

(~~f~~6) The extent to which the cited person has mitigated or attempted to mitigate any damage or injury caused by the violation.

(~~g~~7) 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 TO READ AS FOLLOWS:

(~~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.

~~(cd)~~ Except as provided in subsection (b) for citable offenses where the citation alleges a violation of the Confidentiality of Medical Information Act, ~~the~~ 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, and the citation does not allege a violation of the Confidentiality of Medical Information Act.

(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.



**CONNECT
ENRICH
ACHIEVE**

California Association of Marriage and Family Therapists
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March 21, 2024

VIA EMAIL

Christy Berger
Regulatory Analyst
Board of Behavioral Sciences
1625 North Market Blvd., Suite S-200
Sacramento, CA 95834
christy.berger@dca.ca.gov

RE: Proposed changes to Unprofessional Conduct: Division 18 of Title 16, California Code of Regulations (CCR) Sections 1845, 1858, 1881, 1886.30 and 1886.40

Dear Ms. Berger:

On behalf of our more than 36,000 members, the California Association of Marriage and Family Therapists (CAMFT) would like to comment on the proposed revisions to the Unprofessional Conduct regulations as published on February 2, 2024, for public comment.

CAMFT appreciates that the Board of Behavioral Sciences (Board) is proposing language to its regulations that would provide clarity and transparency related to fines and orders of abatement for violations of the Confidentiality of Medical Information Act (CMIA).

§1886.40

The Board is proposing to amend §1886.40 by adding reference to the statutory authority of Civil Code section 56.36 when assessing fines for violation of the CMIA.

(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.

However, the language of proposed renumbered subdivision (d)(5) states:

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:...

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

Renumbered subdivision (d)(5) appears to be inconsistent with the proposed language of subdivision (b) given that the maximum fine amount stated in Civil Code §56.36 differs from that stated in renumbered subdivision (d)(5). This may cause confusion as to whether fines involving unlawful breaches of confidentiality in violation of the CMIA would be assessed at the maximum amount specified in subdivision (b) or at the maximum amount specified in subdivision (d)(5).

Thank you for considering our comments. We look forward to continuing the discussion regarding our concerns.

Sincerely,

A handwritten signature in black ink, appearing to read 'JA', with a long, sweeping horizontal flourish extending to the right.

Joy Alafia, MBA, CAE
Deputy Executive Director

A handwritten signature in black ink, appearing to read 'atranlien', written in a cursive style.

Ann Tran-Lien, JD
Managing Director Legal Affairs