

## FINAL STATEMENT OF REASONS

**Hearing Date: May 1, 2012**

**Subject Matter of Proposed Regulations: Enforcement**

**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.

### **Updated Information**

The Initial Statement of Reasons is included in the file (Tab III). The information contained therein is updated as follows:

1. Sections 1823(a), 1845(e), 1858(c), and 1881(q) were struck from the amendments. These sections proposed making it unprofessional conduct for a licensee or registrant to include in a civil dispute settlement a provision that prohibits another party to the dispute from contacting, cooperating, or filing a complaint with the Board, or a provision requiring the other party to the dispute to withdraw a complaint filed with the Board.

AB 2570 (Chapter 561, Statutes of 2012) was recently signed by the Governor and becomes effective on January 1, 2013. The bill puts this provision into law, making the amendments proposed in these subsections duplicative.

Subsections beneath the provisions that were deleted have been re-numbered accordingly.

2. An amendment was made to the Unprofessional Conduct sections for each of the Board's license types in order to address a concern from the California Association of Marriage and Family Therapists (CAMFT) that some of the terms used in these sections were vague and unclear. The amendment affected Sections 1823(a), 1845(e), 1858(c), and 1881(q) and is as follows:

*Failure to provide to the board, as ~~directed~~ authorized by law, lawfully requested copies of documents 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 documents records within this time period for good cause. Good cause includes, including 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.

3. An amendment was made to the Unprofessional Conduct sections for each of the Board's license types in order to address a concern from CAMFT that making it unprofessional conduct for a licensee to fail to report to the Board within 30 days the bringing of an indictment or information charging a felony against a licensee violates due process. The Board struck this clause in Sections 1823(c), 1845(g), 1858(e), and 1881(s). Subsections (2) and (3) beneath (1) were re-numbered (1) and (2), respectively.
4. A technical, clarifying amendment was made to the Unprofessional Conduct sections for each of the Board's license types. These sections make it unprofessional conduct to fail to provide within 30 days of a request, documentation to the Board regarding the arrest of the licensee or registrant. An additional amendment was also made to include registrants in this provision. The amendment affected Sections 1823(d), 1845(h), 1858(f), and 1881(t) and is as follows:

Failure to provide, within 30 days of a request, documentation requested by to the Board regarding the arrest of the licensee or registrant.

5. A technical, clarifying amendment was made to the first sentence of Section 1888.1(a). The amendment is as follows:

"Except as otherwise provided by law, if an individual is required to register as a sex offender pursuant to Section 290 of the Penal Code, or the equivalent in another state or territory, or military or federal law, the board shall:"

6. A clarifying amendment was made to all references of the terms "license", "licensee", or "licensee's" in all sections with proposed amendments in this regulatory proposal (Sections 1803, 1823, 1845, 1858, 1881, and 1888.1). Board staff found that a reference to registrants is also needed when licensees are referenced, in order to ensure it is clear that it is the intent of the Board to apply the proposed amendments not only to Board licensees but to registrants as well.
7. At the request of DCA Legal, an amendment was made to the portions of the unprofessional conduct sections (Sections 1823(c)(1) and (d), 1845(g)(1) and (h), 1858(e)(1) and (f), and 1881(s)(1) and (t)) that make it unprofessional conduct to fail to report to the Board within 30 days a conviction of any felony or misdemeanor, or to fail to provide documentation to the Board regarding an arrest.

DCA Legal notes that there are certain types of convictions or arrests that are, by law, exempt from the reporting requirement. These exemptions, found in Penal Code Section 1000.4 and Health and Safety Code Sections 11357 and 11360, apply to minor drug convictions involving marijuana, or arrests following successful completion of a deferred entry of judgment program. DCA Legal advised that the Board needed to include reference to these exceptions in the unprofessional conduct provisions.

**Objections or Recommendations/Responses to Comments:**

The Board received a written letter jointly signed by Jill Epstein, Executive Director, and Catherine Atkins, Deputy Executive Director of CAMFT. The comments in the letter, and the Board's responses, are as follows:

1. **COMMENT NO. 1: Demonstrate the Need for New Provisions:** The ISOR states that “many Boards take an average of three years to investigate and prosecute,” however no evidence is offered that indicates this statistic applies to the Board. If the statistic does apply to the Board, it is unclear if the delays are due to unavailable or evasive licenses or a lack of resources on the part of the Board's enforcement unit. In addition, it is stated that proposed changes would allow quicker resolution of disciplinary issues. CAMFT argues, however, that quick is not necessarily the best result if the resolution is not fair or effective. CAMFT points out that very few disciplinary actions are taken by the Board each year, and that the proposed changes will not make much difference in enforcement delays.

RESPONSE: The Board rejects this comment. The Board currently takes an average of two years to investigate and prosecute violations of the law. While this is under the three year average cited for all DCA boards, the Board acknowledges that decreasing this timeframe while maintaining proper procedures is necessary for public protection. The most effective way to do this would be to increase the number of enforcement staff, however, that is not an option in the current economic environment. This proposal provides the Board with some additional tools to expedite the enforcement process in some cases, while maintaining due process.

2. **COMMENT NO. 2: Lack of Authority:** CAMFT raised concerns with Section 1845, regarding unprofessional conduct. CAMFT states that the Board lacks the authority to add the additional unprofessional conduct provisions that are proposed in Section 1845. It states that the Board needs to get this authority from the Legislature.

RESPONSE: The Board rejected this comment, and cites Business and Professions Code (BPC) Section 4982, which defines unprofessional conduct and states in part that “Unprofessional conduct includes, but is not limited to, the following:.” Therefore, the list defining unprofessional conduct is not exclusive, and thus the Board is authorized to make the law specific via regulations. This proposal is therefore not outside the scope of the statute.

3. **COMMENT NO. 3: Settlement Agreements:** CAMFT raised concerns with Section 1845(e), stating that adding this provision to unprofessional conduct, which prohibits cooperating or filing a complaint with the Board as a term of a settlement agreement, is premature because AB 2570, which contains a similar provision, is currently under consideration at the Legislature. Therefore, CAMFT argues that it is premature to include this provision in a regulation, and doing so could result in a regulation that is inconsistent and/or duplicative.

RESPONSE: The Board accepts this comment. The Governor recently signed AB 2570 (Chapter 561, Statutes of 2012). It will become effective January 1, 2013. Therefore, this proposed amendment is now duplicative of the law and has been removed.

4. **COMMENT NO. 4: Failure to Provide Documentation:** CAMFT raised two concerns with Section 1845(f), which adds an unprofessional conduct subsection pertaining to failure to provide lawfully requested copies of documents under certain circumstances. CAMFT's two concerns are as follows:
  - a. The subsection is vague and unclear, in violation of Government Code Section 11349(c), because the terms "documents", "as directed," "lawfully requested document", and "good cause" are not clear ; and
  - b. The subsection does not demonstrate necessity, as required by Government Code Section 11349(a). CAMFT states it has seen no evidence from the Board that failure to provide requested documents is a cause for or related to any delays in the enforcement process.

RESPONSE: Regarding CAMFT's first concern, (outlined in (a) above), the Board accepted this portion of the comment and made modifications to clarify the terms that CAMFT identified as vague and unclear. These changes were made in Sections 1845, (licensed marriage and family therapists), 1823 (licensed professional clinical counselors), 1858 (licensed educational psychologists), and 1881 (licensed clinical social workers).

The Board rejected CAMFT's second concern (outlined in (b) above). The Board has had cases in which it had difficulty obtaining lawfully requested records. If the information is not obtained in the three year timeframe allowed by law, then the case must be closed, and this has happened occasionally. Making it unprofessional conduct for failure to provide records gives the Board an additional tool to obtain the records, as the licensee or registrant now has an incentive to provide the records in order to avoid an unprofessional conduct finding.

5. **COMMENT NO. 5: Failure to Cooperate:** CAMFT raised concerns with Section 1845(g), which makes a licensee's or registrant's failure to cooperate and participate in an investigation against that licensee or registrant unprofessional conduct. CAMFT argues that this subsection is vague, unclear, and does not demonstrate necessity, violating Government Code Section 11349(a) and (c). CAMFT cites concern that the Board is granted too much latitude in this provision, and that the terms "cooperation" and "participation" are not defined clearly.

CAMFT also notes that the BBS has provided no evidence that failure to cooperate or participate in investigations has delayed the enforcement process. CAMFT also argues that this provision would best be done legislatively.

RESPONSE: The Board rejected this comment. As established in the response to Comment Number 2 above, the Board does have the authority to establish this unprofessional conduct provision through regulations.

As written, the amendment allows the Board to assess all reasonable circumstances in determining the legitimacy of any excuses provided for not cooperating or participating in an investigation.

This language is designed to improve the way healing arts boards conduct investigations. Not receiving records in a timely manner can be an obstacle to a board's completion of investigations. If an unprofessional conduct finding is made for "failure to cooperate and participate," as referenced in this amendment, then an accusation would be filed. The matter would then come before the Board and it would assess how staff arrived at that decision. The Board believes that to prove "willful noncompliance" it would have to show that the respondent acted with intent, which is difficult to prove.

6. **COMMENT NO. 6: Failure to Report Convictions:** CAMFT raised concerns with this subsection, asserting it does not demonstrate necessity. Specifically, it has concerns with Section 1845(h)(1) and (2), as follows:

- a. 1845(h)(1): CAMFT believes this provision, requiring a licensee to report to the Board within 30 days the bringing of an indictment or information charging a felony against a licensee, violates due process. They state the Board has no legal authority to require reporting prior to a conviction,
- b. 1845(h)(2): This provision requires a conviction to be reported to the Board by the licensee or registrant within 30 days. CAMFT asserts that because the Board currently has the ability to obtain this information on its own, it does not make sense to shift the reporting burden to the licensee or registrant. They argue that a licensee or registrant would have greater difficulty obtaining this information than the Board would. Additionally, they believe any deficiencies in communication between the Board and law enforcement agencies should be fixed at that level and not burden the licensee or registrant.

RESPONSE: The Board accepted CAMFT's comment regarding 1845(h)(1), requiring a licensee or registrant to report within 30 days the bringing of an indictment or information charging them with a felony. Therefore, this provision was struck from the proposed language and the subsections below it were renumbered.

The Board rejected CAMFT's comment regarding 1845(h)(2), which requires a conviction to be reported to the Board by the licensee or registrant within 30 days. The

Board currently receives this information from licensees on their renewal notices. However, renewal is only every two years. The Board does not have the resources to research convictions on every licensee and registrant as they happen. By requiring a conviction to be self-reported within 30 days, the Board can take quicker action than it can by waiting up to two years to find out on the next renewal notice, and therefore the public will be better protected.

7. **COMMENT NO. 7: Failure to Report Arrest:** CAMFT expressed concerns regarding subsection 1845(i), which makes it unprofessional conduct for a licensee or registrant to fail to provide within 30 days of a request, documentation requested by the Board regarding the arrest of the licensee or registrant. CAMFT states that this is a violation of due process and unreasonable given that BBS already has difficulty obtaining this documentation.

RESPONSE: The Board made one technical clarifying amendment to this subsection, as follows:

*“Failure to provide, within 30 days of a request, documentation requested by to the Board regarding the arrest of the licensee or registrant”*

However, the Board rejected this comment. The Board maintains that requiring the licensee or registrant to provide the arrest records does not violate due process, because the Board will already know of the arrest, as the fingerprint records are on file with the Board and therefore the Department of Justice reports the arrest to the Board. Once the Board knows of an arrest, it is part of its investigative authority to obtain the arrest records. The licensee or registrant is in a better position than the Board to obtain arrest records, because many arresting agencies require the consent of the arrested person before release. There is no violation of due process while the Board investigates the matter, as no action is taken against the licensee or registrant during the investigation. Post-investigation, if warranted, the Board would file an accusation and the resulting administrative hearing is then designed to ensure due process.

8. **COMMENT NO. 8: Delegation to Executive Officer:** CAMFT made a comment regarding the amendments to Section 1803, which propose delegating to the Executive Officer the authority to approve settlement agreements for the revocation, surrender, or interim suspension of a license or registration.

CAMFT believes that this proposal would bypass the checks and balance system of Board approval of the Executive Officer’s settlement negotiations, and would not significantly expedite the enforcement process.

RESPONSE: The Board rejects this comment. The proposed language is limited to settlement agreements where an action to revoke the license or registration has been filed and the licensee or registrant agrees to surrender the license or registration or has agreed to an interim suspension. In these stipulations, cease practice is the only relevant term. The Board itself will continue to consider all other stipulations.

## **Comments Received During the 15-Day Periods the Modified Text was Available to the Public**

**First 15-Day Notice:** Modified text was made available to the public from August 29, 2012, through September 13, 2012. No comments were received during this time.

**Second 15-Day Notice:** Modified text was made available to the public from November 15, 2012, through November 30, 2012. No comments were received during this time.

### **Small Business Impact:**

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

### **Consideration of Alternatives**

No reasonable alternative which was considered or that has otherwise been identified and brought to the attention of the Board of Behavioral Sciences would be more effective in carrying out the purpose for which it was proposed or would be as effective and less burdensome to affected private persons than the adopted regulation or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

### **Local Mandate**

The proposed regulation does not impose any mandate on local agencies or school districts.