

**BOARD OF BEHAVIORAL SCIENCES
INITIAL STATEMENT OF REASONS**

HEARING DATE: November 17, 2005

SUBJECT MATTER OF PROPOSED REGULATIONS: CITATIONS AND FINES

SECTIONS AFFECTED: Section 1886.40 of Division 18 of Title 16 of the California Code of Regulations

SPECIFIC PURPOSE OF EACH ADOPTION, AMENDMENT, OR REPEAL:

Section 1886.40 currently permits the issuance of a citation for a violation of the Marriage and Family Therapist (MFT), Licensed Clinical Social Worker (LCSW), or Licensed Educational Psychologist (LEP) practice acts and sets the range of fines from a minimum of \$100 to a maximum of \$2,500 per investigation. Business and Professions Code Section 125.9 was recently amended via Senate Bill 362 (Chapter 788, Statutes of 2003) to increase the maximum citation amount from \$2,500 to \$5,000.

The proposed regulation would amend this section to allow fines of up to \$5,000 in certain exceptional circumstances, listed below. The proposal is derived from language suggested by the Department of Consumer Affairs with some important additions noted in items 1, 3, 4, and 5 below:

1. The cited person has a history of two or more citations for *similar* violations.
2. The citation involves multiple violations that demonstrate willful disregard of the law.
3. The violation is perpetrated against a senior citizen, *minor*, or disabled person.
4. ***The violation involves unlicensed activity***
5. ***The violation involved an impermissible breach of confidentiality.***

The proposal also includes language consistent with Business and Professions Code Section 125.9(a)(3) that allows the Board to issue a fine not to exceed \$5,000 if the violation involves fraudulent billing submitted to an insurance company, the Medi-Cal program, or Medicare.

The proposal also makes some minor additions including providing definitions for “disabled person” and “senior citizen.” It also defines “citable offense” which allows the elimination of the list of violations included in the current version to ensure clarity and consistent application of the regulation to all laws enforced by the Board.

FACTUAL BASIS/NECESSITY

The Board’s citation program is based on two statutes (Business and Professions Code Sections 125.9 and 148) that permit boards and bureaus in the Department of Consumer Affairs to implement such a program through regulations. Those statutes were originally created with a maximum fine of \$2,500 per investigation. However, that amount was recently increased to \$5,000 via legislation, in order to preserve the deterrent effect of the fine.

As a general matter, citations are issued for violations of sufficient severity to warrant an enforcement action by the Board, but which are not severe enough to warrant disciplinary action by the Board, or in the case of unlicensed practice where the Board does not have the authority to pursue disciplinary action.

In assessing an administrative fine, the Board is currently required to give consideration to the following factors as described under Title 16, California Code of Regulations (CCR) Section 1886.30:

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

The Board is required to inform cited persons of the right to contest the citation or fine. The cited person may request a hearing or informal telephone conference (Title 16, CCR § § 1886.20, 1886.70).

For the Board of Behavioral Sciences, the most common violations subject to citation and fine are:

1. Failure to Comply with Continuing Education Requirements
2. Unlicensed Practice
3. Breach of Confidentiality

The proposed amendments do not deviate significantly from Departmental policy and are reserved for only the most serious offenses. The Board does not intend to use the proposed regulations for revenue raising purposes. The Board is not in need of additional revenue as it has sufficient revenue to meet budget needs. Expenditures do not exceed budget allotments, and the Board has an adequate reserve. Additionally, the Board does not project a future need for an increase in revenue.

Board of Behavioral Sciences Fiscal Condition			
	04/05	05/06*	06/07*
Budget	4,738,033	4,809,000	\$4,905,180
Revenue	5,048,000	5,218,000	\$5,227,000
Reserve	3,861,000	4,270,000	\$4,592,000

*Projected

A higher penalty would be imposed on persons who have a history of two or more citations for similar violations, or when the citation involves multiple violations that demonstrate willful disregard of the law. This option is needed in order to create a more effective deterrent, as well as to provide the Board with the flexibility to issue a fine commensurate with the nature of the violations.

Violations involving a senior citizen, minor, or disabled person would be subject to a higher fine because these individuals may be more vulnerable, and less able to protect themselves. Violations against our most vulnerable citizens typically place more culpability on the part of the licensee, and would therefore warrant a larger fine.

An impermissible breach of confidentiality violation would be subject to a higher fine because it is a serious issue and a relatively common violation. Confidentiality is central to therapy. A great deal of private information is necessary in order to establish an accurate diagnosis and treatment plan for the client. Even the possibility of a breach can seriously jeopardize the quality of the information communicated by the client and compromise the trust and confidence necessary for effective therapy to occur. For example, clients who have suffered a trauma, such as childhood abuse, often have a hard time trusting others, and it can be difficult for them to engage in therapy. In order to overcome the client's resistance, confidence is required. A break in confidence with such a client can be devastating. A case involving a breach of confidentiality may not be appropriate for discipline because of the nature of the disclosure, but still may be serious enough to warrant a larger fine. This change would provide the flexibility to deal with such cases in the most appropriate manner.

Unlicensed practice would be subject to a higher fine because it poses a real and immediate threat to the health and welfare of the public. The Board cannot (by definition) pursue disciplinary action against unlicensed practice. Therefore, a higher fine is warranted in light of the Board's mandate to protect the public.

The list of citable offenses was deleted because the list adds little meaning to the regulation and could mislead a reader by implying a narrower authority to issue citations than currently exists. Additionally, the existing regulation permits the issuance of a citation and fine for any violation of the Board's statutes and regulations.

A definition of "citable offense" was added for clarification purposes, and because the list of citable offenses is proposed to be deleted.

Sections 1804, 1811, 1833.1, 1845, 1850.6, 1850.7, 1850.8, 1858, 1880, 1880.1 and 1881 of the California Code of Regulations were deleted from the Reference citation because it is not appropriate to reference regulations in this instance where the regulation clarifies that the Board has authority to issue citations and fines for violations of any of the regulations under its jurisdiction.

UNDERLYING DATA / MATERIALS RELIED UPON:

Draft board meeting minutes dated May 20, 2005, citation and fine program data from fiscal years 00/01 through 04/05, and citation appeal data.

BUSINESS IMPACT

The proposed regulations will not have a significant adverse economic impact on businesses.

SPECIFIC TECHNOLOGIES OR EQUIPMENT

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

CONSIDERATION OF ALTERNATIVES

No reasonable alternative which was considered or that has otherwise been identified and brought to the attention of the Board would be either more effective in carrying out the purpose for which the action is proposed or would be as effective as and less burdensome to affected private persons than the proposed regulation.