How to avoid being SUED!

Staying Out Of Legal Trouble with Clients, Employees, and 3rd Party organizations

Presented by Luke Matthew Martin, MBA, JD
CAMFT Staff Attorney

Disclaimer
Presenter
Agenda

Part 1:
Avoid being sued by a client

Part 2:
Avoid being sued by an Employee

Part 3:
Avoid being sued by a 3rd Party Organization

Disclaimer

The information provided in this workshop is for educational purposes only. It is not intended to serve as legal advice or to act as a substitute for independent legal advice.

About Luke Matthew Martin, MBA, JD
CAMFT Staff Attorney

Luke Matthew Martin, Esq., a member of the State Bar of California since 2011, joined CAMFT as a Staff Attorney in 2019. He holds a Master of Business Administration with honors and a Juris Doctorate Degree specializing in Child, Family, and Elder Law with honors. Prior to coming to CAMFT, Luke ran a private practice focusing on civil litigation and represented several businesses with annual revenues in the millions. He has been recognized by the State Bar of California with the Wiley E. Manuel Certificate for Pro Bono Legal Services for his legal assistance in helping victims of domestic violence. In addition to his work at CAMFT, Luke is an adjunct professor for several universities, serves as the adjunct representative on a university's faculty senate, co-chairs a dissertation committee, serves as a comissioner on his city's Police Oversight Commission, and is a member-at-large for two non-profit boards. In his free time, he likes to sleep. He is currently averaging a smidge under 5 hours of sleep a day.

Agenda for Today's Presentation

Part 1: How to Avoid Being Sued by a Client
A. Falling Below the Standard of Care Gets You into Trouble
B. Oops...I Forgot... Gets You into Trouble
C. Bad Luck Gets You into Trouble
D. Malpractice Will Save Me...Hopefully...Will It?

Part 2: How to Avoid Being Sued by an Employee
A. I Should Have Done That... Practical Considerations
B. Saying "Your Fired" Can Get an Employer into Trouble
C. Money Always Gets an Employer into Trouble
C. When Safety is Not #1 Can Get an Employer into Trouble

Part 3: How to Avoid Being Sued by 3rd Party (Such as the Board of Behavioral Science (BBS) and the Office of Civil Rights (OCR))
A. Bad Behavior Gets You into Trouble
B. Lying Gets You into Trouble
C. Not Taking Proper Care of Yourself Gets You into Trouble

This presentation will focus on how to avoid getting into trouble

Breaks for this Presentation

There will be  scheduled breaks for this presentation.

The first break will occur around 12:00pm to break for lunch.

The second break will occur around 2:00pm

Feel free to get up whenever YOU need a break. Just be mindful of those around you.

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What Can I Be Sued For?

Has anyone Sneezed today?

You can SUE for... Sneezing

A

Demmon v. Network Affiliates, Inc, W.C. 4-843-249 (March 21, 2012)

The Claimant worked at production company which, incidentally, produces commercials for attorneys. While bending over to put a compact disk into her computer, she sneezed and felt a sharp pain in her back. She later discovered that she had suffered a back injury and had a ruptured disk. The insurance carrier denied liability, asserting that the Claimant had a pre-existing back injury that was aggravated by sneezing, which could have happened anywhere and was not an incident of her employment.

The Claimant's expert, Dr. Jack Rook, testified that the Claimant did indeed have a pre-existing back condition and that sneezing while putting in the CD in a bent over position, caused the disk to rupture. The Administrative Law Judge ruled in the Claimant's favor based on a finding that the sneeze brought on the Claimant's injury with the help of her being bent over to put in the CD. The link between the job and the injury was sufficient to find the disk rupture compensable.

Claimant sued because she sneezed and hurt herself--and won.

Has anyone given Out INFORMATION ABOUT THE WEATHER TODAY?

You can Be SUED for.. Getting the Weather Wrong

In 1996, a woman from the Israeli city of Haifa sued well-known television weatherman Danny Rup for a false weather forecast. Rup had predicted sunny weather and it rained. Based on the forecast, she left her house unprepared for inclement weather, took ill, and missed work she claimed. The woman said Rup's forecasts were legally binding.

Result: She won $1,000 in an out-of-court settlement and got an apology from the weatherman.

Did anyone Use Uber To Get Here today?

You can SUE for... Using Uber

In 2017, a French businessman sued Uber for $48 million, claiming that a flaw in the ride-sharing company's app played a role in the dissolution of his marriage. The businessman said he borrowed his wife's cell phone and used it to log on to the Uber app. He claimed a glitch in the app caused it to continue to send notifications of his whereabouts to his wife's phone even after he logged off, and apparently some of his movements caused a problem for his wife and their marriage ended in divorce. The result of the suit is unknown.

My favorite...Has anyone Advertised today?

You can Be SUED for... False Advertising

Beer commercials often featured beaches and good-looking men and women having fun. Most people understood this is not real, but not Richard Overton. In 1993, he sued Anheuser-Busch for $10,000 for false advertising. He claimed the beer ad caused him emotional distress, mental injury, and financial loss. Overton said the company's ads showed beer's ability to enable "scenic tropical settings [and] beautiful women and men engaged in unrestricted merriment" when this was actually not the case.

Result: He lost the suit.

How To Avoid Being SUED?

How Do you Avoid Being Sued?

You sometimes cannot
(See Previous Scenarios)

The best thing you can do is know the law to avoid easily avoidable lawsuits.

How to avoid being Sued!

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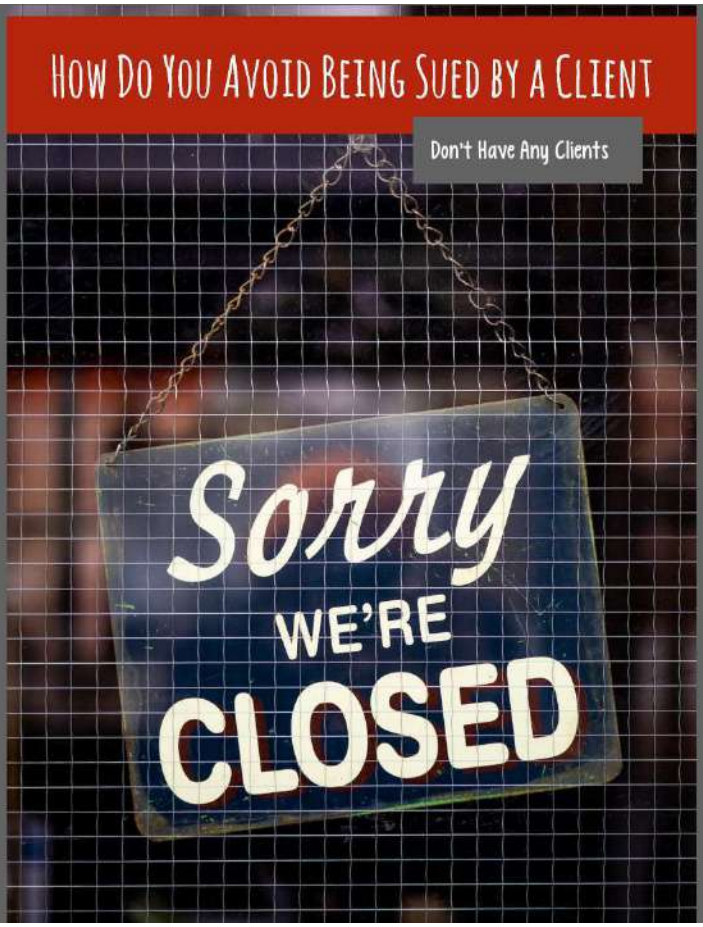
How Do You Avoid Being Sued by a Client



- Part A: Falling Below the Standard of Care... Can Get You Into Trouble
- Part B: Opps...I Forgot to Do That... Can Get You Into Trouble
- Part C: Bad Luck... Can Get You Into Trouble
- Part D: Malpractice Will Save Me...Hopefully... Will It?

Falling Below the Standard of Care = Malpractice

Origins of Malpractice

Two centuries ago, there was the initial issue of whether professional malpractice causing physical injury was a matter for criminal prosecution or for the civil courts. Once this was resolved as a civil matter due to the lack of criminal intent, standards for civil cases began to develop. Throughout the 1800s, principles regarding negligence developed into a well-established legal theory. The underlying premise was that individuals should be accountable for less than prudent conduct if it resulted in injury to innocent parties. While principles of negligence had been loosely formed in England, it was greatly broadened and defined in application in American law. Today, it is a fundamental part of the American legal system and American society as well.

Origins of Malpractice Continued...

Although negligence was initially applied to ordinary situations, it was quickly adapted to accommodate the responsibility of professionals toward their clients The basic theory advanced explained that if someone held themselves out as having special knowledge that others should rely on, then the more knowledgeable party also had a responsibility to use their skill in a reasonably careful manner so as not to cause injury as the result of the reliance of another. This was applied in virtually all professions including medicine

What is the Code for Professional Negligence (aka Malpractice)?

California Code of Civil Procedures Section 340.5

West's Annotated California Codes
Code of Civil Procedure (Refs & Annos)
Part 2. Of Civil Actions (Refs & Annos)
Title 2. Of the Time of Commencing Civil Actions (Refs & Annos)
Chapter 3. The Time of Commencing Actions Other than for the Recovery of Real Property (Refs & Annos)

West's Ann.Cal.C.C.P. § 340.5

§ 340.5. Action against health care provider; three years from injury or one year from discovery; exceptions; minors

Currentness

In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person. Actions by a minor shall be commenced within three years from the date of the alleged wrongful act except that actions by a minor under the full age of six years shall be commenced within three years or prior to his eighth birthday whichever provides a longer period. Such time limitation shall be tolled for minors for any period during which parent or guardian and defendant's insurer or health care provider have committed fraud or collusion in the failure to bring an action on behalf of the injured minor for professional negligence.

For the purposes of this section:

(1) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider;

(2) "Professional negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

What does the CODE say?

225 Cal.App.4th 279
Court of Appeal, Second District, Division 4, California.

Guadalupe **ARROYO** et al., Plaintiffs and Appellants,
v.
John J. **PLOSAY** III et al., Defendants and Respondents.

B245659
Filed April 2, **2014**

Synopsis
Background: Patient's family members brought action against physician and hospital for medical negligence, wrongful death, and negligence. The Superior Court, Los Angeles County, No. BC484024, Rolf M. Treu, J., sustained demurrers without leave to amend. Family members appealed.

"Section 340.5 defines 'professional negligence' as 'a negligent act or omission by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.'

The term 'professional negligence' encompasses actions in which 'the injury for which damages are sought is directly related to the professional services provided by the health care provider' or directly related to 'a matter that is an ordinary and usual part of medical professional services.'

'[C]ourts have broadly construed "professional negligence" to mean negligence occurring during the rendering of services for which the health care provider is licensed.' " (Arroyo v. Plosay (2014) 225 Cal.App.4th 279, 297

What are the Elements of Malpractice?

239 Cal.App.4th 959
Court of Appeal, Sixth District, California.

Yvonne **LATTIMORE**, Plaintiff and Appellant,
v.
James W. **DICKEY** III et al., Defendants and Respondents.

H040126
Filed August 21, **2015**

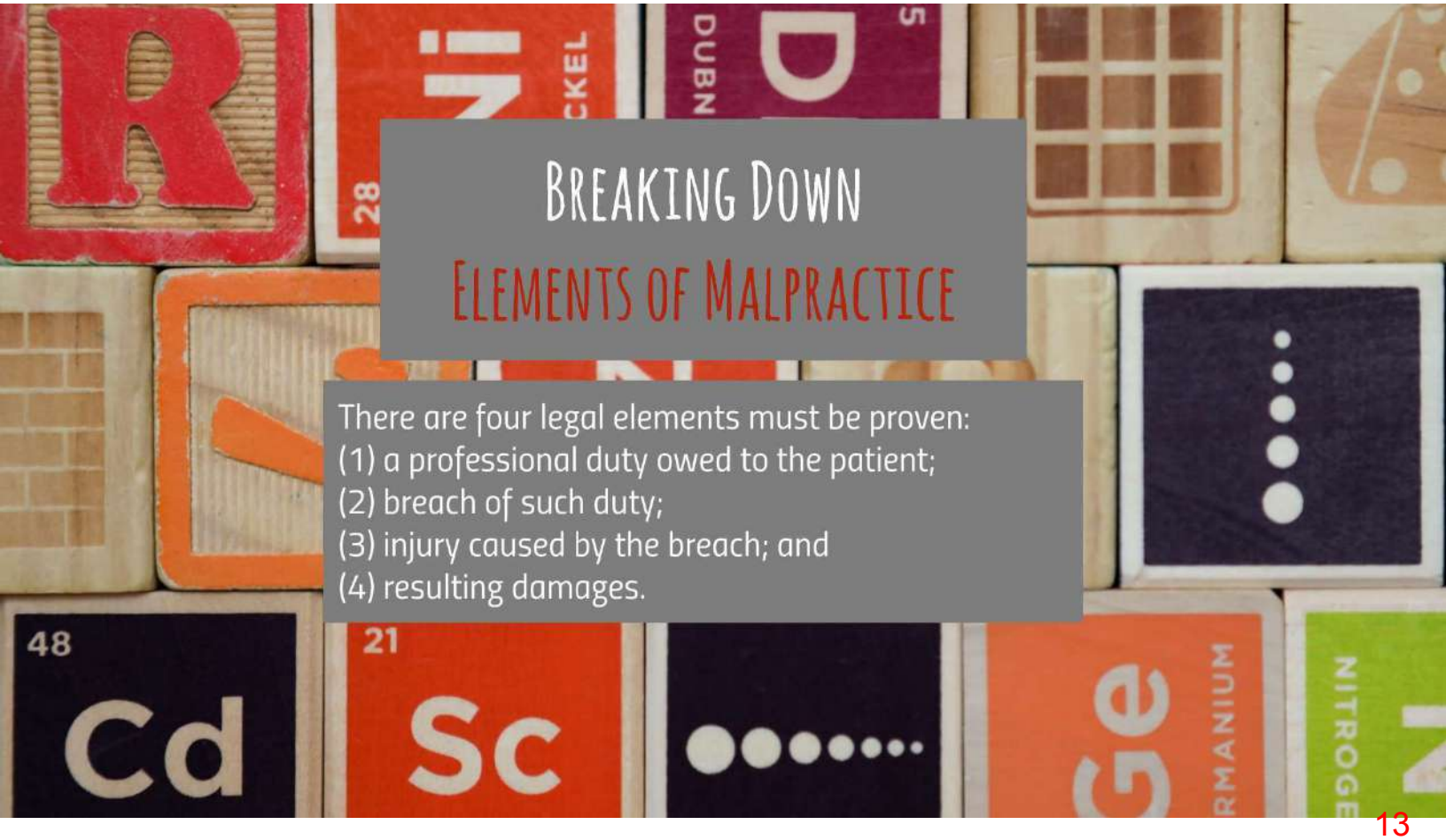
Synopsis
Background: Deceased patient's daughter brought wrongful death action against physicians and hospital arising from their care and treatment of patient. The Superior Court, Monterey County, No. M115880, Lydia Villarreal, J., granted summary judgment for physicians and hospital, and daughter appealed.

Holdings: The Court of Appeal, Márquez, J., held that:
1 expert physician was competent to opine on the standard of care for physicians;

In any civil lawsuit, the plaintiff has the burden of a prima facie case. They must produce at least some evidence in support of each and every element of the legal cause of action advanced against the defendant.

"The elements of a cause of action for medical malpractice are: (1) a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a breach of the duty; (3) a proximate causal connection between the negligent conduct and the injury; and (4) resulting loss or damage."

(Lattimore v. Dickey (2015) 239 Cal.App.4th 959, 968 [191 Cal.Rptr.3d 766].)



Breaking Down Elements of Malpractice

There are four legal elements must be proven:
(1) a professional duty owed to the patient;
(2) breach of such duty;
(3) injury caused by the breach; and
(4) resulting damages.

Element #1 of Malpractice: Duty of Care

The duty of care has been expanded somewhat in recent years but the basic premise has remained the same. Each individual is obligated to be aware of the effect of their actions on others.

Consequently, all persons owe a duty or obligation to act or omit from acting in such a way that endangers those around them of whom they should be reasonably aware. Some jurisdictions apply a broader area than others with regard to whom the actor must take into consideration. But generally, the rule is that one must act, or refrain from acting, when the action could endanger others in a reasonably foreseeable area.

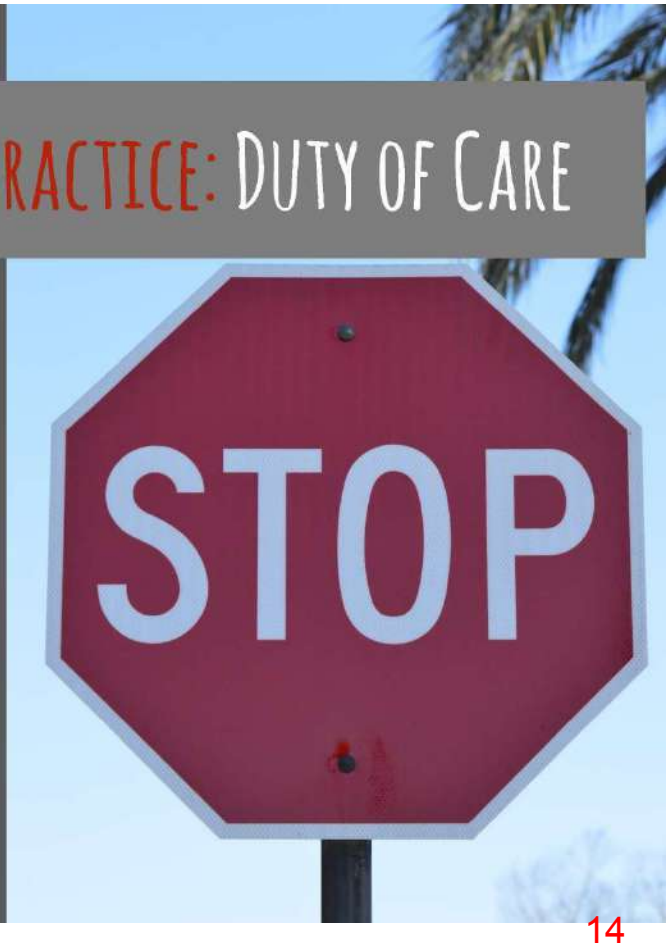
Thus, foreseeability is a key element of the extent of one's duty. Essentially, the question must always be asked "was the danger to the injured person the reasonably foreseeable result of the defendant's action or omission?" If the answer is in the affirmative, it is likely a duty was owed by the defendant to the plaintiff.

Simplifying Element #1 of Malpractice: Duty of Care

Hypothetical:

Luke is driving his automobile. He sees a stop sign. What is Luke's duty in this situation?

To stop the car.



What is the Standard of Care* for a Therapist?

Building off the duty of care—we have to view what is the "standard of that care." The standard of care varies dramatically from case to case. In the case of a medical professional accused of malfeasance, the professional would be held accountable to the level of knowledge and skill as one similarly situated within the profession.

Historically, one was held to a standard of other medical professionals in the same geographic area. The rationale was that medical professionals in small, rural communities did not have access to the advanced training available in large, urban areas. However, with technological advances, the majority rule was changed. Now, all medical professionals have access to essentially the same level of training and are thus held accountable to the same standard of care on a national scale. This places the burden on healthcare professionals to keep abreast of research and technological advances.

*More to follow

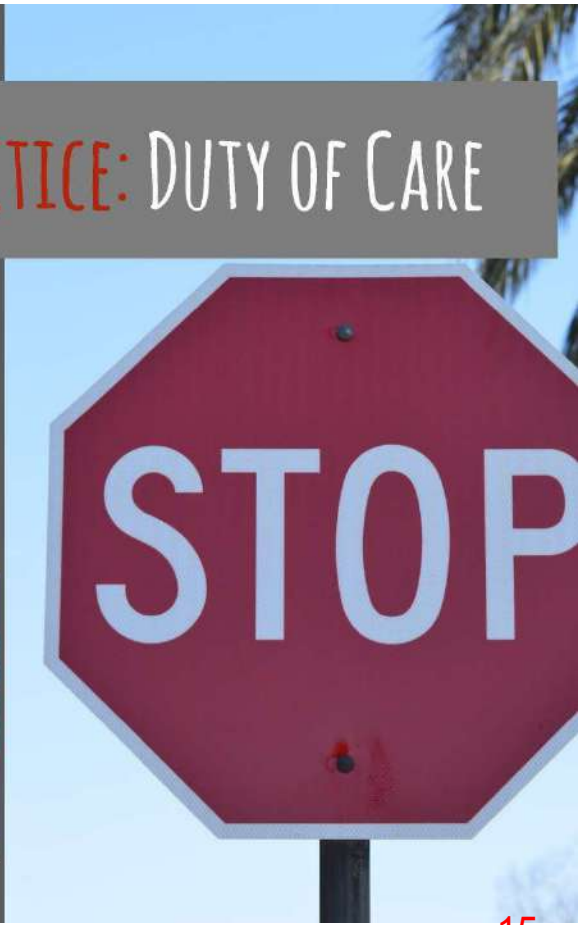
Simplifying Element #1 of Malpractice: Duty of Care

Hypothetical:

Luke is newly licensed driver and is driving his automobile. He sees a stop sign.

What is Luke's duty in this situation?

To stop the car.
16 or 600 years old-- does not matter.



Applying Element #1 of Malpractice: Duty of Care to Therapists

Hypothetical:

Mike is newly licensed therapist and is seeing high-risk clients. Kristin has been licensed for 30 years and is seeing low-risk clients.

Both have the same duty of care. Although Mike is new, he would be held to the same standard as someone who has been licensed for 30 years.

Likewise, even though Kristin is seeing low-risk clients, she would be obligated to provide the same level that Mike provides with high-risk clients.

Element #2 of Malpractice: Breaching the Duty of Care

Breach is the failure to perform a legal obligation or duty.

With this element, you are looking for the wrongful act or mistake made.

- Misfeasance is the improper performance of some lawful act.

- Nonfeasance is the failure or omission to perform some act which there is an obligation to perform.

Simplifying Element #2 of Malpractice: Breach of the Duty of Care

Hypothetical:

Luke is driving his automobile. He sees a stop sign and decides to not stop. Has Luke breached his duty in this situation?

Absolutely, Luke has an obligation to stop the car and he did not do so.

Element #3 of Malpractice: Causation

Once it has been established that a duty of care was owed, and that the wrongful actor breached the required standard of care, there is still the element of causation left to establish before damages or compensation can even be considered.

In cases of medical malpractice this is often the most difficult hurdle for a "plaintiff" who wants to sue a provider to overcome.

The test requires both factual and legal causal links to be established between the defendant's conduct and the plaintiff's injury.

Breaking Down Element #3 of Malpractice: Causation

Part A: Proximate Cause or Cause in Fact looks if the defendant's conduct caused a foreseeable injury to the Plaintiff.
-This element looks to see if it is fair to assess liability.
-If Foreseeable then proximate cause can be met.
-If Unforeseeable then proximate cause cannot be met.

Part B: Actual Cause or Cause in Fact or Legal Cause means that the defendant's conduct was the actual cause of the plaintiff's injury.
-But-For Test: But for the action of the Defendant the Plaintiff would not have been injured.

Simplifying Element #3 of Malpractice: Causation

Hypothetical:

Luke is newly licensed driver and is driving his automobile. He sees a stop sign and decides to not stop. Luke runs his car into Grant's automobile that was in the intersection lawfully.

Is Luke the cause of the car accident?

Proximate Cause-- Yes, it is forseeable that Luke failing to stop at a stop sign could cause an accident.

Actual Cause-- Yes, But for Luke failing to stop Grant's car would not have been hit.

Applying Element #3 of Malpractice: Causation to Therapists

Hypothetical:

Frank is a licensed therapist and is seeing high-risk clients. Frank's wife calls him and tells him that she has won a radio contest that will fly both of them to Bermuda if they leave now. Wanting to be more spontaneous, Frank packs a bag and heads to the airport without letting anyone know. In all of the excitment, Frank forgets about his 3:00pm appointment with his actively suicidal client. The client upset about Frank's no-show attempts to die by suicide. The client was unsuccessful, but does have harm from the attempt. The client decides to sue Frank due to his professional negligence.

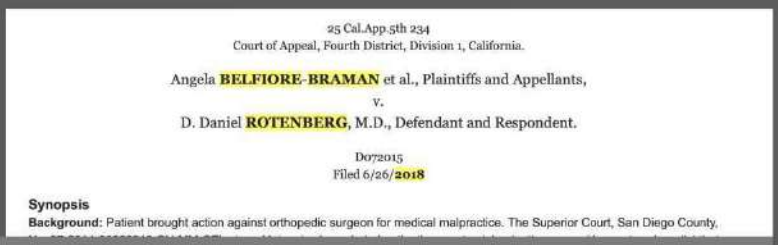
Applying Element #3 of Malpractice: Causation to Therapists

Part A: Proximate Cause
Is it forseeable that a high-risk client that is actively suicidal may attempt their own life? Yes.
Is it forseeable that a therapist skipping a session with an actively sucidial client may cause some sort of harm to the client? Yes.

Part B: Actual Cause
But for Frank going on vacation, would the client have attempted suicide? Maybe, but there is not enough facts here to tell. Experts would have to weigh in to be able to determine if Frank's absence caused the injury.

What if the client planned on doing this no matter what Frank had said? In a situation like this one--Frank's presence or absence doesn't change anything.

How is Causation Proved?



25 Cal.App.5th 234
Court of Appeal, Fourth District, Division 1, California.

Angela **BELFIORE-BRAMAN** et al., Plaintiffs and Appellants,
v.
D. Daniel **ROTENBERG**, M.D., Defendant and Respondent.

D072015
Filed 6/26/**2018**

Synopsis
Background: Patient brought action against orthopedic surgeon for medical malpractice. The Superior Court, San Diego County,

On causation, the plaintiff must establish 'it is more probable than not the negligent act was a cause-in-fact of the plaintiff's injury.' '

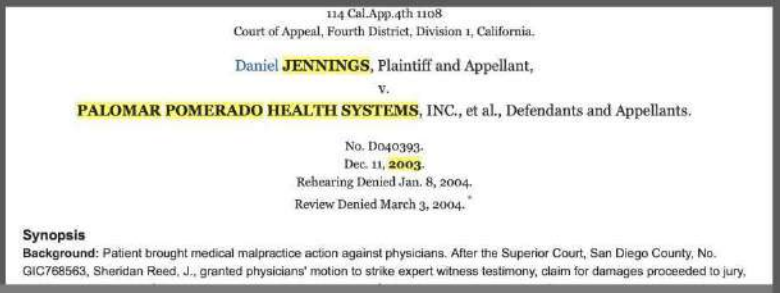
"A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action." '

'[C]ausation in actions arising from medical negligence must be proven within a reasonable medical probability based on competent expert testimony, i.e., something more than a "50-50 possibility." '

'[T]he evidence must be sufficient to allow the jury to infer that in the absence of the defendant's negligence, there was a reasonable medical probability the plaintiff would have obtained a better result.' "

Belfiore-Braman v. Rotenberg (2018) 25 Cal.App.5th 234, 247

How is Causation Proved Continued?



114 Cal.App.4th 1108
Court of Appeal, Fourth District, Division 1, California.

Daniel **JENNINGS**, Plaintiff and Appellant,
v.
PALOMAR POMERADO HEALTH SYSTEMS, INC., et al., Defendants and Appellants.

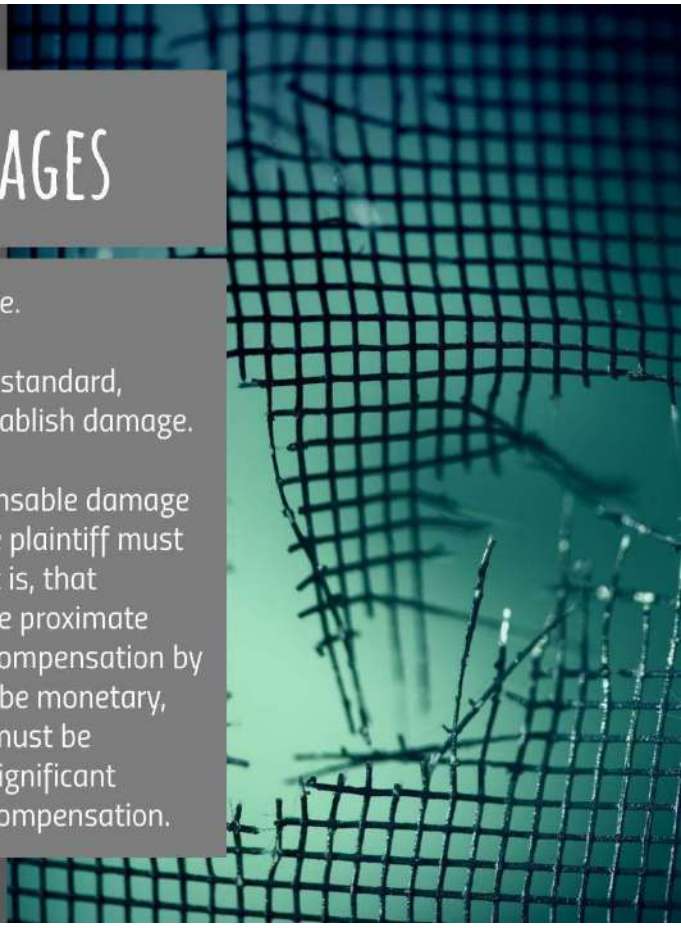
No. D040393.
Dec. 11, **2003**.
Rehearing Denied Jan. 8, 2004.
Review Denied March 3, 2004.

Synopsis
Background: Patient brought medical malpractice action against physicians. After the Superior Court, San Diego County, No. GIC768563, Sheridan Reed, J., granted physicians' motion to strike expert witness testimony, claim for damages proceeded to jury.

"That there is a distinction between a reasonable medical 'probability' and a medical 'possibility' needs little discussion. There can be many possible 'causes,' indeed, an infinite number of circumstances which can produce an injury or disease. A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action. This is the outer limit of inference upon which an issue may be submitted to the jury."

Jennings v. Palomar Pomerado Health Systems, Inc. (2003) 114 Cal.App.4th 1108, 1118 [8 Cal.Rptr.3d 363

Element #4 of Malpractice: Damages



The final element in any action for professional negligence is damage.

Damage is the legal term used to describe the injury. After the duty, standard, breach, and causal links are established, it remains necessary to establish damage.

A defendant's conduct can be utterly reprehensible, but if no compensable damage has occurred there is no basis for an action at law in negligence. The plaintiff must prove that he or she suffered some type of compensable injury; that is, that something happened to the plaintiff or the plaintiff 's property as the proximate result of the defendant's breach of standard of care that warrants compensation by the defendant to the plaintiff. Damage comes in many forms. It can be monetary, physical, mental, and emotional. However, in a negligence action it must be something that the courts recognize as compensable and must be significant enough under the circumstances to warrant a monetary award as compensation.

Simplifying Element #4 of Malpractice: Damages

Hypothetical:

Luke is newly licensed driver and is driving his automobile. He sees a stop sign and decides to not stop. Luke runs his car into Grant's automobile that was in the intersection lawfully. As a result of the crash, Grant's vehicle was totaled.

Did Grant have damages?

Absolutely, Grant is unable to use his vehicle any longer.

Applying All Element of Malpractice

Judicial Council of California Civil Jury Instructions (2023 edition) VF-500 Medical Negligence

When a civil lawsuit goes to trial, a jury usually decides whether the defendant is liable to the plaintiff and, if so, the amount of damages. However, most jurors do not know the nuances of the law. The judge presiding over the trial thus must describe the law to the jury so that they can apply it to the facts of the case. These descriptions are called jury instructions.

To promote accuracy and uniformity statewide, the Judicial Council of California provides a standardized set of civil jury instructions. Under California Rule of Court 2.1050, judges are strongly encouraged to use them.

VF-500. Medical Negligence

We answer the questions submitted to us as follows:

1. **Was [*name of defendant*] negligent in the diagnosis or treatment of [*name of plaintiff*]?**

   _____ Yes _____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [*name of defendant*]'s negligence a substantial factor in causing harm to [*name of plaintiff*]?**

   _____ Yes _____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **What are [*name of plaintiff*]'s damages?**

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Specific Types of Malpractice for Therapists

Most claims grounded in allegations of medical malpractice arise from situations in which a patient received medical care and for some reason the result was unacceptable. The possible things to go wrong are as different and varied as the individuals involved in them. While some cases have received a certain notoriety in the media, the fact remains that the practice of medicine involves an infinite number of variables that can cause an equally limitless number of potential outcomes.

The BIG SIX we are going to discuss today are:

1. Falling Below the Standard of Care for the Profession

2. Performing Services Outside Scope of Practice and/or Scope of Compentency

3. Client Abandonment

4. Improper Consent

5. Breaching Confidentiality

6. Falling Below the Ethical Standard in the Profession

Falling Below the Standard of Care

Falling Below the Standard of Care for the Profession

CACI No. 501. Standard of Care for Health Care Professionals

Judicial Council of California Civil Jury Instructions (2023 edition)

Download PDF

501. Standard of Care for Health Care Professionals

[A/An] [*insert type of medical practitioner*] is negligent if [he/she/*nonbinary pronoun*] fails to use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful [*insert type of medical practitioners*] would use in the same or similar circumstances. This level of skill, knowledge, and care is sometimes referred to as "the standard of care."

[You must determine the level of skill, knowledge, and care that other reasonably careful [*insert type of medical practitioners*] would use in the same or similar circumstances, based only on the testimony of the expert witnesses [including [*name of defendant*]] who have testified in this case.]

New September 2003; Revised October 2004, December 2005, December 2010

Define: Standard of Care

Original Image of 551 P.2d 389 (PDF)
View Cal./Cal.App. version

17 Cal.3d 399
Supreme Court of California

Gita **LANDEROS**, a minor, etc., Plaintiff and Appellant,
v.
A. J. **FLOOD** et al., Defendants and Respondents.

S.F. 23359.
June 30, **1976**.

Standard of care, a term used in medical and mental health treatment, refers to the usual and customary practices within the field. The standard of care is designed to protect consumers of health services by setting a minimum standard for what is considered acceptable behavior by treatment providers.

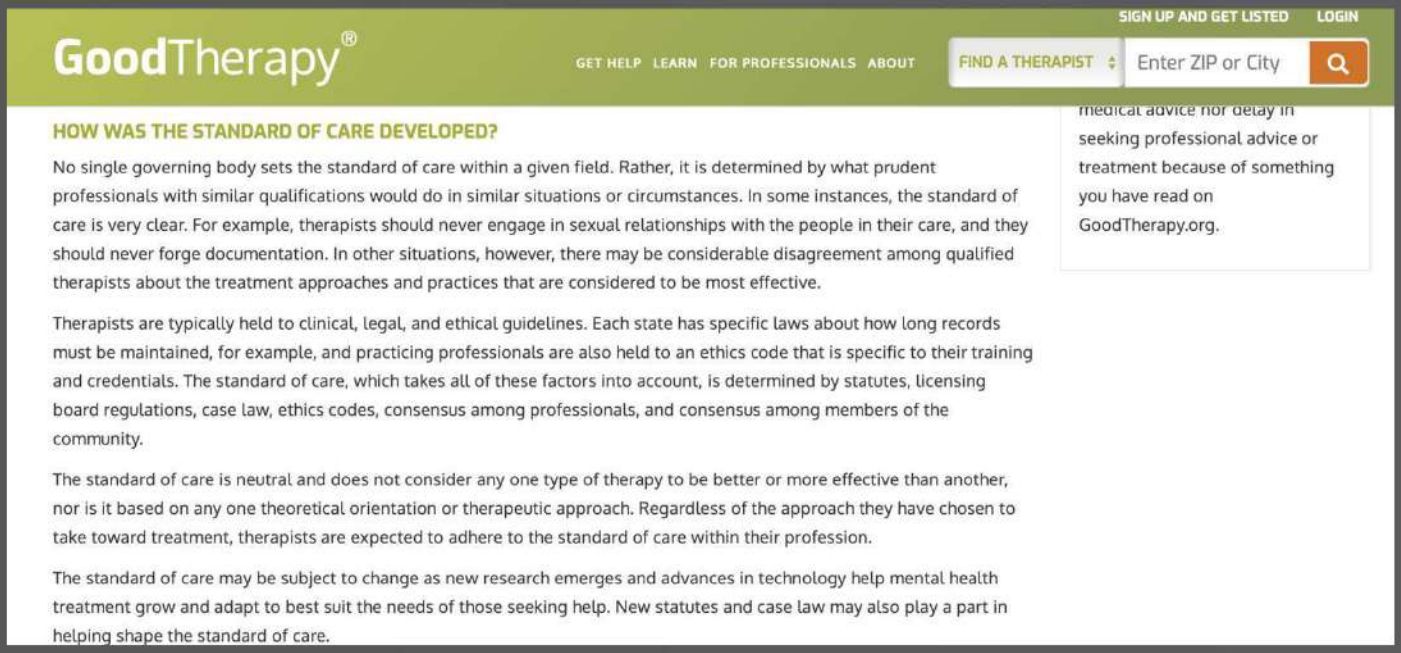
It has been described as the "qualities and conditions which prevail, or should prevail, in a particular mental health service, and that a reasonable and prudent practitioner follows."
[Zur, O. (2015). The standard of care in psychotherapy and counseling: Bringing clarity to an illusive standard. Retrieved from http://www.zurinstitute.com/standardofcaretherapy.html]

"With unimportant variations in phrasing, we have consistently held that a [practioner] is required to possess and exercise, in both diagnosis and treatment, that reasonable degree of knowledge and skill which is ordinarily possessed and exercised by other members of his profession in similar circumstances."
[Landeros v. Flood (1976) 17 Cal.3d 399, 408 [131 Cal.Rptr. 69, 551 P.2d 389]

You Know It When You See It

However, sometimes its hard to determine. For example, you should know what a cake is and what a hamburger is, right? But sometimes its not so easy.

How Was Standard of Care developed?



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medical advice nor delay in seeking professional advice or treatment because of something you have read on GoodTherapy.org.

HOW WAS THE STANDARD OF CARE DEVELOPED?

No single governing body sets the standard of care within a given field. Rather, it is determined by what prudent professionals with similar qualifications would do in similar situations or circumstances. In some instances, the standard of care is very clear. For example, therapists should never engage in sexual relationships with the people in their care, and they should never forge documentation. In other situations, however, there may be considerable disagreement among qualified therapists about the treatment approaches and practices that are considered to be most effective.

Therapists are typically held to clinical, legal, and ethical guidelines. Each state has specific laws about how long records must be maintained, for example, and practicing professionals are also held to an ethics code that is specific to their training and credentials. The standard of care, which takes all of these factors into account, is determined by statutes, licensing board regulations, case law, ethics codes, consensus among professionals, and consensus among members of the community.

The standard of care is neutral and does not consider any one type of therapy to be better or more effective than another, nor is it based on any one theoretical orientation or therapeutic approach. Regardless of the approach they have chosen to take toward treatment, therapists are expected to adhere to the standard of care within their profession.

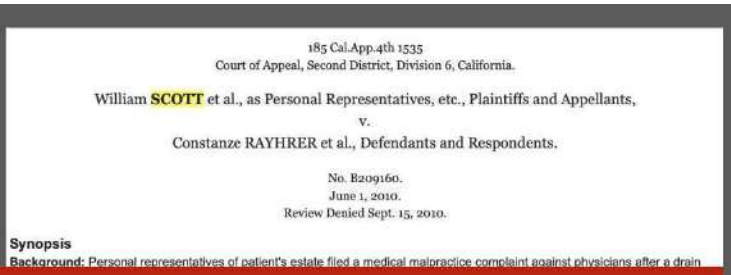
The standard of care may be subject to change as new research emerges and advances in technology help mental health treatment grow and adapt to best suit the needs of those seeking help. New statutes and case law may also play a part in helping shape the standard of care.

From Good Therapy
https://www.goodtherapy.org/blog/psychpedia/standard-of-care

So It's This Magical Standard that Everyone Knows,
but is NOT Written Down Anywhere...and I am held to it...
Yet, if I am unsure there is really no way for me to be sure...
if I am wrong it will cost me a lot of money...
this feels like I am playing a game that I have no way of winning

Yep! Welcome to Malpractice. Fun, right?

Who Has Final Say of What the Correct Standard of Proof is...?



185 Cal.App.4th 1535
Court of Appeal, Second District, Division 6, California.

William SCOTT et al., as Personal Representatives, etc., Plaintiffs and Appellants,
v.
Constanze RAYHRER et al., Defendants and Respondents.

No. B209160.
June 1, 2010.
Review Denied Sept. 15, 2010.

Synopsis
Background: Personal representatives of patient's estate filed a medical malpractice complaint against physicians after a drain

As a general rule, the testimony of an expert witness is required in every professional negligence case to establish the applicable standard of care, whether that standard was met or breached by the defendant, and whether any negligenceby the defendant caused the plaintiff's damages.

A narrow exception to this rule exists where' " '. . . the conduct required by the particular circumstances is within the common knowledge of the layman.' . . . [Citations.]" ' This exceptionis, however, a limited one. It arises when a foreign object such as a sponge or surgical instrument, is left in a patient following surgery...The "common knowledge" exception is generally limited to situations in which . . . a layperson ". . . [can] say as a matter of common knowledge . . . that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised." . . .' "

Scott v. Rayhrer, 185 Cal.App.4th 1535

Any Help Here?

When dealing with malpractice, the therapist is often alone. Maybe a 'he-said/she-said situation.' The therapist's individual opinion and work will be placed under a microscope to be scrutinized. Outside 3rd parties will be brought in to evaluate what they did. This may be done by just reviewing their notes. One voice has to be loud enough to defend themself against all of this scrutiny.

But, if there is more than one voice, it may be easier to prove you are winthin standard of care. There is strength in numbers so look to add numbers to support your side:

-Seek Colleague Consultation
-Participate in Peer Groups
-Communicate on CAMFT List-Serves
-Contact CAMFT Legal Staff
-Read Peer Reviewed Resources
-Utilize Reference Tools such as the DSM-5 for mental health professionals.

It is much harder for one expert to prove a therapist acted outside standard of care when that therapist has several therapists or resources supporting the actions taken.

Example of a Malpractice Lawsuit Re: Outside the Standard of Care: Nielsen v. Kazarian

2019 WL 1253602
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
Only the Westlaw citation is currently available.

California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.

Court of Appeal, Second District, Division 3, California.

Kimberly NEILSEN, Plaintiff and Appellant,
v.
Scott KAZARIAN, Defendant and Respondent.

B284287
|
B287623
|
Filed 3/19/2019

APPEAL from a judgment of the Superior Court of Los Angeles County, Dan T. Oki, Judge. Reversed in part and affirmed in part. (Los Angeles County Super. Ct. No. BC636514)

Attorneys and Law Firms

Alan Charles Dell'Ario; Winer, McKenna & Burritt, John Douglas Winer and Shawn D. Tillis for Plaintiff and Appellant.

Callahan, Thompson, Sherman & Caudill, O. Brandt Caudill, Jr., and Joan E. Trimble for Defendant and Respondent.

Opinion

DHANIDINA, J.

*1 Kimberly Neilsen (Neilsen) appeals from a judgment after the trial court sustained without leave to amend Scott Kazarian's (Kazarian) demurrer to Neilsen's first amended complaint. Neilsen sued Kazarian, her former therapist, for negligent and intentional torts, alleging that Kazarian engaged in inappropriate nonsexual and sexual contact with Neilsen under the guise of treatment. The trial court found that all of Neilsen's causes of action were barred by the Medical Injury Compensation Reform Act's (MICRA) (Code Civ. Proc., § 340.5) one-year statute of limitations governing professional negligence claims against healthcare providers. In addition to being time-barred, the trial court also found that the statements and omissions underlying Neilsen's fraud causes of action were nonactionable opinion; that there was no private right of action under Business and Professions Code section 729; and that Neilsen had not alleged any unfair, unlawful, or fraudulent business practice under Business and Professions Code section 17200. For the reasons set forth below, we reverse the judgment in part and affirm in part.

FACTUAL AND PROCEDURAL BACKGROUND

Because this appeal arises from a demurrer, we summarize the facts as they are alleged in the operative pleading. (*Lamkin Sereens, LLC v. Morgan, Lewis & Bockius, LLP* (2010) 183 Cal.App.4th 238, 240.)

Neilsen sought mental health treatment from Kazarian in 2013 in order to address her depression, issues related to her childhood adoption, and her relationship with her son's father. Kazarian advertised himself as an expert in the area of treating people with adoption issues, informing his patients that he himself was adopted. Neilsen alleged that, during her therapy with Kazarian, he used what Neilsen characterized as "cuddling sessions" or a "cuddling technique" under the guise of a special adoptive and attachment treatment. Kazarian told Neilsen that the cuddling would "rewire" her brain and led her to believe that the full body contact was part of her treatment. Around the time Kazarian initiated these cuddling sessions, he also asked Neilsen if she wanted to make out, whether she was attracted to him, whether she thought about him sexually, and whether she was willing to have sex with him as part of treatment. When Neilsen asked Kazarian about his wife, he replied, "My wife understands the kind of work that I do and is [okay] that I do whatever I need to do to help people." Neilsen alleged that she felt "uncomfortable" during the cuddling sessions. Neilsen's last therapy session with Kazarian was in December 2014.

On September 29, 2015, at a custody hearing involving Neilsen's son, a child custody evaluator testified as to information she received from Kazarian about Neilsen's therapy and mental condition. Kazarian did not invoke the physician-patient privilege or notify Neilsen that he was divulging her medical information. Kazarian told the child custody evaluator that Neilsen was erratic, prone to extremes, that the child's father was the more rational parent, that Neilsen's complaints of domestic violence were baseless,[1] and that Neilsen suffered from borderline personality disorder, a diagnosis that Neilsen alleged never came

up during therapy. Neilsen further alleged that Kazarian's statements to the child custody evaluator contradicted earlier positive assessments and were made to discredit her and undermine any claim she may bring against him. Neilsen alleged that as a result of Kazarian's statements, she lost custody of her son.

*2 At the end of 2015, Neilsen began treatment with another therapist. Neilsen alleged that, during this treatment, she gradually began to realize that Kazarian's treatment may have been unethical. Finally, in 2016, Neilsen realized her therapy with Kazarian had been harmful to her. Prior to this realization, Neilsen was unaware that Kazarian's actions were potentially actionable.

On October 6, 2016, Neilsen filed a complaint against Kazarian. Kazarian demurred. The trial court found that Neilsen's claims were barred by MICRA's one-year statute of limitations and that Neilsen had not alleged an actionable misrepresentation. However, the trial court granted Neilsen leave to amend and Neilsen filed her first amended complaint, alleging causes of action for (1) negligence, (2) intentional infliction of emotional distress, (3) fraud, (4) constructive fraud, (5) negligent misrepresentation, (6) sexual battery by a therapist in violation of Civil Code section 43.93, (7) sexual contact by a therapist in violation of Business and Professions Code section 729, (8) breach of fiduciary duty, and (9) violation of Business and Professions Code section 17200.[2] Neilsen's first amended complaint also included new allegations about Neilsen's delayed discovery that Kazarian's conduct was harmful. Once again, Kazarian demurred. The trial court sustained the demurrer without leave to amend. Neilsen filed this timely appeal.

DISCUSSION

I. Standard of review

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]' [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966–967.) We review the legal sufficiency of a complaint de novo. (*Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.)

II. Neilsen has sufficiently alleged her delayed discovery of her injury

When it ruled on Kazarian's demurrer, the trial court did not make express findings as to each of Neilsen's causes of action. Instead, the trial court concluded that Neilsen's entire complaint was barred by MICRA's one-year statute of limitations (Code Civ. Proc., § 340.5) because the allegations underlying each of Neilsen's causes of action arose within her treatment relationship with Kazarian. The trial court also found Neilsen's allegations of delayed discovery were insufficient to toll the statute.

*3 We disagree and find Neilsen's allegations of delayed discovery sufficient to toll the one-year limitations period. Because we find Neilsen has successfully pleaded her delayed discovery, we need not resolve whether Kazarian's alleged intentional torts are also subject to MICRA's one-year statute for professional negligence rather than the longer limitation periods for battery or intentional infliction of emotional distress (Code Civ. Proc., § 335.1 [two years]), fraud (*id.*, § 338, subd. (d) [three years]), or breach of fiduciary duty (*id.*, § 343 [four years]). That is, even if the one-year limitations period applies to them, they are timely under the delayed discovery rule.

"[U]nder the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause, unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action. In that case, the statute of limitations for that cause of action will be tolled until such time as a reasonable investigation would have revealed its factual basis." (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 803.) In order to rely on the discovery rule for delayed accrual of a cause of action, a "plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence." (*Id.* at p. 808, italics omitted.)

"[C]onclusory assertions that [the] delay in discovery was reasonable are insufficient and will not enable the complaint to withstand [a] general demurrer." (*Saliter v. Pierce Brothers Mortuaries* (1978) 81 Cal.App.3d 292, 297.) "A plaintiff is held to [his or] her actual knowledge as well as knowledge that could reasonably be discovered through investigation of sources open to [him or] her." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109.)

The trial court concluded here that Neilsen's allegations that she felt uncomfortable during her treatment should have alerted her to any wrongdoing or negligence on the part of Kazarian. The trial court reasoned that Neilsen's complaint was essentially a claim for sexual battery that accrued, at the very latest, when her treatment concluded in December 2014. Although a cause of action for battery generally accrues at the time of physical contact (*Sombergh v. MacQuarrie* (1952) 112 Cal.App.2d 771, 774), Neilsen has alleged a type of battery accomplished through deception. The trial court did not consider the incremental nature of Kazarian's advances combined with his assurances that the physical contact was part of treatment. Thus, for the battery cause of action to accrue at the time of physical contact, Neilsen would also need to be aware, or at least be on notice, of the nature of the false treatment.

Moreover, a patient who is uncomfortable during treatment may reasonably rely upon her physician's soothing disclaimers and not suspect she has been wronged. (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 899.) Even the best medical treatment may require a long and difficult recuperation period, have negative side effects, or cause discomfort. (*Ibid.*) For these and other reasons, one often has no prompt means of learning that she has been hurt by medical malpractice because the injuries are not always immediately apparent. (*Brown v. Bleiberg* (1982) 32 Cal.3d 426, 434.) This may be even more true in the context of a malpractice suit for substandard mental health treatment, rather than, for example, an action for a botched surgery. A mental health injury is potentially more obscured because there may be no physical manifestation or pain to serve as impetus for a plaintiff to investigate a potential claim. Similarly, given the unique relationship between psychotherapist and patient which arguably involves a higher degree of intimacy and trust than, say, between patient and surgeon, the patient's reasonable reliance on the psychotherapist's assessment of her own reaction to therapy makes the patient particularly susceptible to her psychotherapist's assurances.

*4 Here, Neilsen alleged that she began to realize that Kazarian's actions may have been wrong when she saw another therapist at the end of 2015, and that during 2016, she realized the behavior might be inappropriate and actionable. Neilsen filed her complaint in October 2016, within one year of discovering a potential claim. Thus, Neilsen's complaint was timely even under MICRA's strict one-year statute. " 'In order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows merely that the action may be barred.' " (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315–1316.) The question of when there has been a delayed discovery, especially in malpractice cases, is a question of fact and " 'only where reasonable minds can draw but one conclusion from the evidence that the question becomes a matter of law.' " (*Brown v. Bleiberg, supra*, 32 Cal.3d at p. 436.) Neilsen's allegations that she felt "uncomfortable" or even "very uncomfortable" do not establish as a matter of law that she should have been on notice of a potential professional malpractice claim against Kazarian, especially, in the context of his assurances that the treatment was legitimate.

We find that Neilsen's allegations were sufficient to invoke the delayed discovery rule and toll MICRA's one-year statute of limitations. Accordingly, Neilsen's complaint was timely.

III. Neilsen's third, fourth, and fifth causes of action for fraud, constructive fraud, and negligent misrepresentation

In addition to concluding that Neilsen's complaint was time-barred, the trial court also found that Neilsen's third, fourth, and fifth causes of action based on fraud failed for the additional reason that Neilsen had not alleged an actionable misrepresentation. Again, we disagree.

Neilsen alleged, among other things, that Kazarian represented "his kissing, cuddling, and cupping her breasts were a necessary component of her therapy, part of some special adoptive therapy technique that would help re-wire her brain[,] help her form better attachments and cure her depression." This statement falls squarely within the elements necessary to plead a cause of action for fraud which are: " ' "(a) misrepresentation (false representation, concealment, or nondisclosure), (b) knowledge of falsity ...; (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." ' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974.) Neilsen alleged that Kazarian misrepresented that the cuddling was a therapeutic technique designed to treat Neilsen's issues stemming from

Outside Standard of Care

Practices that lie outside the standard of care's guidelines are generally considered to be negligent or otherwise sub-standard, and these generally include practices that are illegal and/or unethical. If a therapist does what any other therapist would have done in similar circumstances, then they are practicing within the standard of care, regardless of the outcome

Think of it like a target.

If you are in the target-- then you are within standard of care.

If you are outside of the target-- they you may have a negligent claim brought against you.

What if There Are Two Approaches?

Sometimes there are two paths to go down. If both methods of care are recognized, and the one you choose is unsuccessful--the law will not penalize you for selecting that path.

CACI No. 506. Alternative Methods of Care

Judicial Council of California Civil Jury Instructions (2023 edition)

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506. Alternative Methods of Care

[A/An] [*insert type of medical practitioner*] is not necessarily negligent just because [he/she/*nonbinary pronoun*] chooses one medically accepted method of treatment or diagnosis and it turns out that another medically accepted method would have been a better choice.

New September 2003

Sources and Authority

- "A difference of medical opinion concerning the desirability of one particular medical procedure over another does not . . . establish that the determination to use one of the procedures was negligent." (*Clemens v. Regents of Univ. of California* (1970) 8 Cal.App.3d 1, 13 [87 Cal.Rptr. 108].)
- "Medicine is not a field of absolutes. There is not ordinarily only one correct route to be followed at any given time. There is always the need for professional

What If It Is Unsuccessful?

If you are within standard of care and are unsuccessful in therapy, it does not mean you committed malpractice.

For example, if you provided appropriate theraputic techniques and interventions to stop a client from completing suicide, the interventions are unsuccessful and the client dies by suicide -- the therapist is not automatically guilty of malpractice.

CACI No. 505. Success Not Required

Judicial Council of California Civil Jury Instructions (2023 edition)

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505. Success Not Required

[A/An] [*insert type of medical practitioner*] is not necessarily negligent just because [his/her/*nonbinary pronoun*] efforts are unsuccessful or [he/she/*nonbinary pronoun*] makes an error that was reasonable under the circumstances. [A/An] [*insert type of medical practitioner*] is negligent only if [he/she/*nonbinary pronoun*] was not as skillful, knowledgeable, or careful as other reasonable [*insert type of medical practitioners*] would have been in similar circumstances.

New September 2003

Directions for Use

Plaintiffs have argued that this type of instruction "provides too easy an 'out' for malpractice defendants." (*Fraijo v. Hartland Hospital* (1979) 99 Cal.App.3d 331, 343 [160 Cal.Rptr. 246].) Nevertheless, in California, instructions on this point have been sustained when challenged. (*Rainer v. Community Memorial Hospital* (1971) 18 Cal.App.3d 240, 260 [95 Cal.Rptr. 901].)

Sources and Authority

- "While a physician cannot be held liable for mere errors of judgment or for erroneous conclusions on matters of opinion, he must use the judgment and form the opinions of one possessed of knowledge and skill common to medical men practicing, in the same or like community and that he may have done his best is no answer to an action of this sort." (*Sim v. Weeks* (1935) 7 Cal.App.2d 28, 36 [45 P.2d 350].)
- "The 'law has never held a physician or surgeon liable for every untoward result which may occur in medical practice' but it 'demands only that a physician or surgeon have the degree of learning and skill ordinarily possessed by practitioners of the medical profession in the same locality and that he exercise ordinary care in applying such learning and skill to the treatment of his patient.' " (*Huffman v. Lindquist* (1951) 37 Cal.2d 465, 473 [234 P.2d 34], internal citations omitted.)
- It is appropriate to instruct a jury that "they do not necessarily adjudge whether there was negligence in terms of the result achieved . . . ." (*Dincau v. Tamayose* (1982) 131 Cal.App.3d 780, 800 [182 Cal.Rptr. 855].)
- "[A] physician and surgeon is not required to make a perfect diagnosis but is only required to have that degree of skill and learning ordinarily possessed by physicians of good standing practicing in the same locality and to use ordinary care and diligence in applying that learning to the treatment of his patient." (*Ries v. Reinard* (1941) 47 Cal.App.2d 116, 119 [117 P.2d 386].)
- "A doctor is not a warrantor of cures nor is he required to guarantee results and

447

2

Performing Services Outside Scope of Practice and/or Scope of Compentency

Donald Rumsfeld

Official portrait, 2001

13th and 21st United States Secretary of Defense

In office

January 20, 2001 – December 18, 2006

"There are known knowns. These are things we know that we know. There are known unknowns. That is to say, there are things that we know we don't know. But there are also unknown unknowns. There are things we don't know we don't know."

--Donald Rumsfeld answered this way when describing terrorism intelligence in a briefing.

What Is Scope of Practice of an LMFT?

The legal authority for an LMFT to practice comes from the Business and Professions Code, Attorney General Opinions, and other legislative and regulatory authority. A "scope of practice" is the definition provided in law that delineates what the profession does and places limits upon or confines the breadth of functions persons within a profession may lawfully perform.

Cal. Bus. & Prof. Code § 4980.02

(a) For the purposes of this chapter, the practice of marriage and family therapy shall mean the application of psychotherapeutic and family systems theories, principles, and methods in the delivery of services to individuals, couples, or groups in order to assess, evaluate, and treat relational issues, emotional disorders, behavioral problems, mental illness, alcohol and substance use, and to modify intrapersonal and interpersonal behaviors.

(b) The application of marriage and family therapy principles and methods includes, but is not limited to, all of the following:

(1) Assessment, evaluation, and prognosis.

(2) Treatment, planning, and evaluation.

(3) Individual, relationship, family, or group therapeutic interventions.

(4) Relational therapy.

(5) Psychotherapy.

(6) Client education.

(7) Clinical case management.

(8) Consultation.

(9) Supervision.

(10) Use, application, and integration of the coursework and training required by Sections 4980.36, 4980.37, and 4980.41, as applicable.

(c) The amendments to this section made by the act adding this subdivision do not constitute a change in, but are declaratory of, existing law. It is the intent of the Legislature that these amendments shall not be construed to expand or constrict the existing scope of practice of a person licensed pursuant to this chapter.

Ca. Bus. and Prof. Code § 4980.02

What Is Scope of Compentency of an LMFT?

Scope of competence defines or limits what the individual within the profession may do and is determined by one's education, training and experience.

Difference Between Practice vs. Competency

These two scopes tend to overlap, and in some cases, go hand in hand. One, when practicing marriage and family therapy, has a duty to work within one's scope of practice, but is also limited by scope of competence.

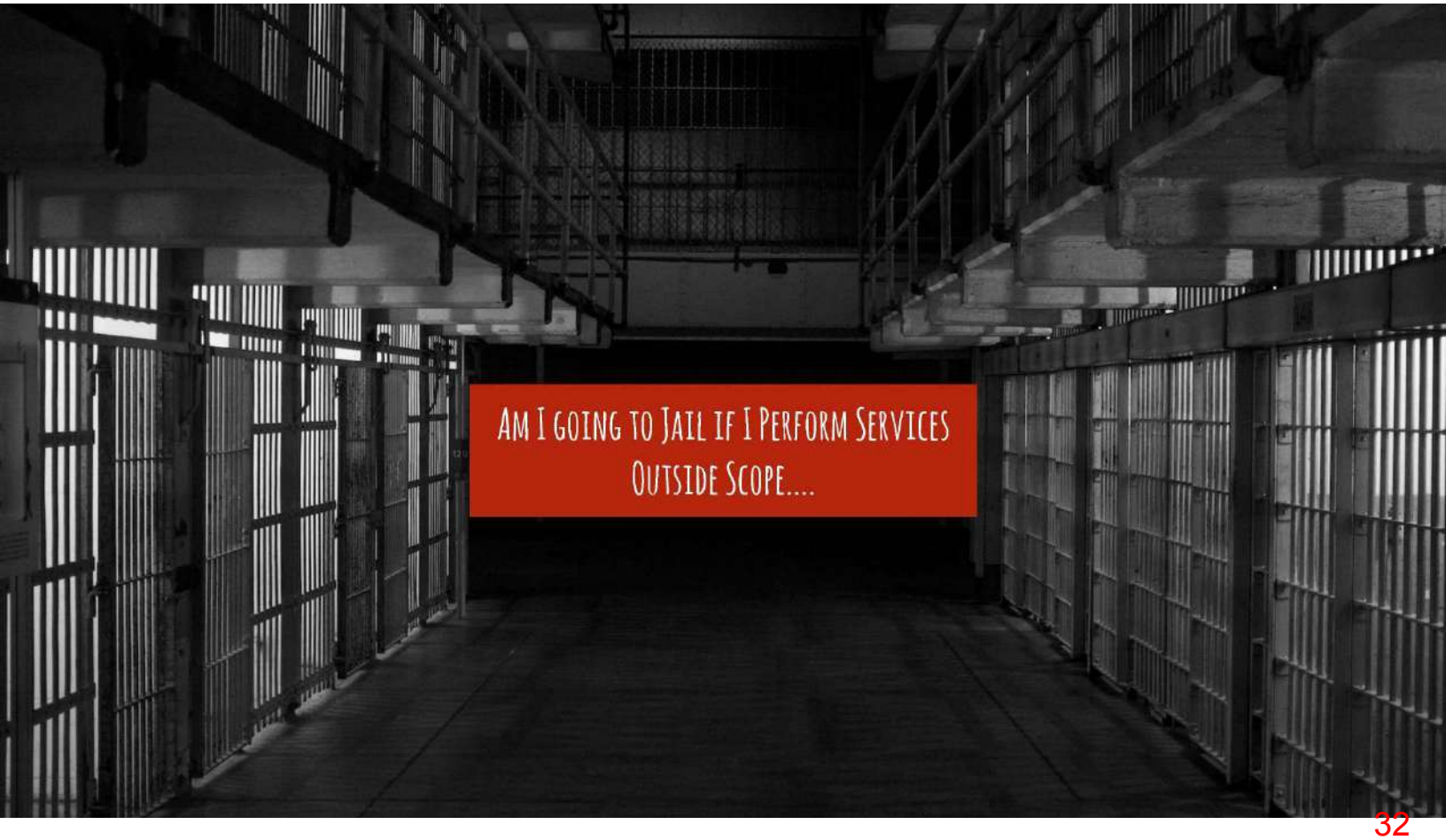
Scope of practice is defined for the profession as a whole; scope of competence is individually defined/determined for each marriage and family therapist.

Therefore, even though it may be within one's scope of practice to work with a person diagnosed with borderline personality disorder, for example, it may be outside of that LMFT's scope of competence if he or she has never worked with an individual with such a diagnosis, or, if he or she has limited education or training in working with such a disorders.

Can I Increase my Comptency?

Absolutely! You didn't know immediately how to ride a bike or drive a car, but your learned.

Simply stated, in order to expand one's repertoire, the LMFT may acquire continuing education, take additional coursework, read relevant literature, watch relevant videos, read relevant information online, seek clinical consultation or obtain training or supervised



Obligation to Refer Out

While not directly on point, if a therapist perfoms services that is not within scope of compentence, they are held to the standard of someone who does.

Example:

- Physicians who elect to treat a patient even though the patient should have been referred to a specialist will be held to the standard of care of that specialist. If the physician meets the higher standard of care, he or she is not negligent. (*Simone v. Sabo* (1951) 37 Cal.2d 253, 257 [231 P.2d 19].)

CACI No. 508. Duty to Refer to a Specialist

Judicial Council of California Civil Jury Instructions (2023 edition)

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508. Duty to Refer to a Specialist

If a reasonably careful [*insert type of medical practitioner*] **in the same situation would have referred** [*name of patient*] **to a** [*insert type of medical specialist*], **then** [*name of defendant*] **was negligent if** [**he/she**/*nonbinary pronoun*] **did not do so.**

However, if [*name of defendant*] **treated** [*name of patient*] **with as much skill and care as a reasonable** [*insert type of medical specialist*] **would have, then** [*name of defendant*] **was not negligent.**

New September 2003

Sources and Authority

- Physicians who elect to treat a patient even though the patient should have been referred to a specialist will be held to the standard of care of that specialist. If the physician meets the higher standard of care, he or she is not negligent. (*Simone v. Sabo* (1951) 37 Cal.2d 253, 257 [231 P.2d 19].)
- If the evidence establishes that the failure of a nurse to consult the attending physician under the circumstances presented in the case is not in accord with the standard of care of the nursing profession, this instruction may be applicable. (*Fraijo v. Hartland Hospital* (1979) 99 Cal.App.3d 331, 344 [160 Cal.Rptr. 246].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1066, 1067

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.6

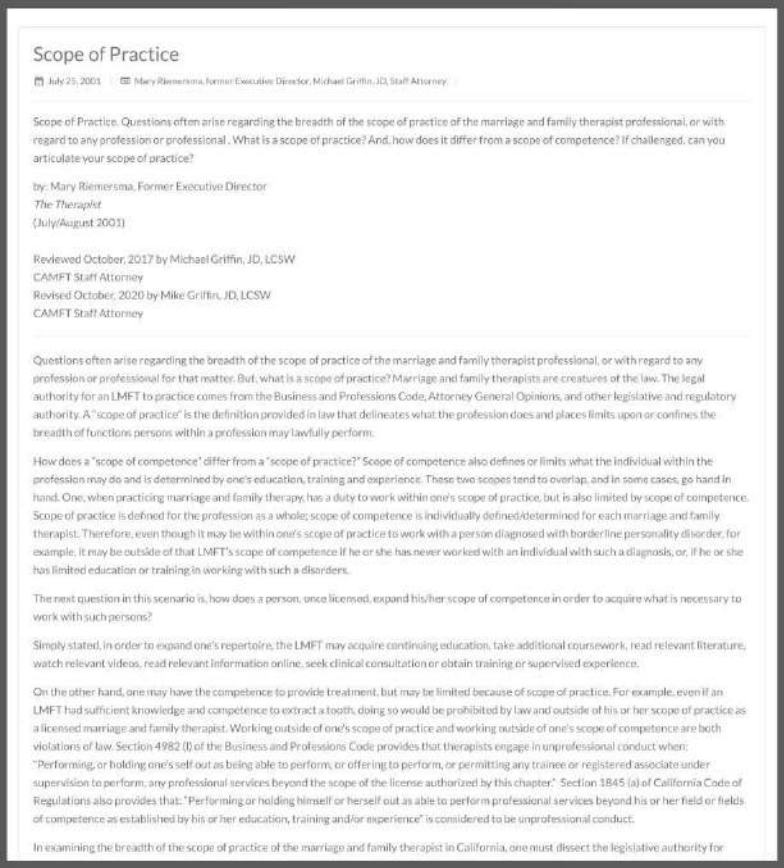
3 Levy et al., California Torts, Ch. 30, *General Principles of Liability of Professionals*, § 30.12, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.13 (Matthew Bender)

17 California Forms of Pleading and Practice, Ch. 209, *Dentists*, § 209.11 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.11 (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons*, §§ 175.20 (Matthew Bender)

For More Information on Scope of Practice and Comptency CAMFT has an Article



Scope of Practice

July 25, 2001 | Mary Riemersma, former Executive Director, Michael Griffin, JD, Staff Attorney

Scope of Practice. Questions often arise regarding the breadth of the scope of practice of the marriage and family therapist professional, or with regard to any profession or professional. What is a scope of practice? And, how does it differ from a scope of competence? If challenged, can you articulate your scope of practice?

by: Mary Riemersma, Former Executive Director
The Therapist
(July/August 2001)

Reviewed October, 2017 by Michael Griffin, JD, LCSW
CAMFT Staff Attorney
Revised October, 2020 by Mike Griffin, JD, LCSW
CAMFT Staff Attorney

Questions often arise regarding the breadth of the scope of practice of the marriage and family therapist professional, or with regard to any profession or professional for that matter. But, what is a scope of practice? Marriage and family therapists are creatures of the law. The legal authority for an LMFT to practice comes from the Business and Professions Code, Attorney General Opinions, and other legislative and regulatory authority. A "scope of practice" is the definition provided in law that delineates what the profession does and places limits upon or confines the breadth of functions persons within a profession may lawfully perform.

How does a "scope of competence" differ from a "scope of practice?" Scope of competence also defines or limits what the individual within the profession may do and is determined by one's education, training and experience. These two scopes tend to overlap, and in some cases, go hand in hand. One, when practicing marriage and family therapy, has a duty to work within one's scope of practice, but is also limited by scope of competence. Scope of practice is defined for the profession as a whole; scope of competence is individually defined/determined for each marriage and family therapist. Therefore, even though it may be within one's scope of practice to work with a person diagnosed with borderline personality disorder, for example, it may be outside of that LMFT's scope of competence if he or she has never worked with an individual with such a diagnosis, or, if he or she has limited education or training in working with such a disorders.

The next question in this scenario is, how does a person, once licensed, expand his/her scope of competence in order to acquire what is necessary to work with such persons?

Simply stated, in order to expand one's repertoire, the LMFT may acquire continuing education, take additional coursework, read relevant literature, watch relevant videos, read relevant information online, seek clinical consultation or obtain training or supervised experience.

On the other hand, one may have the competence to provide treatment, but may be limited because of scope of practice. For example, even if an LMFT had sufficient knowledge and competence to extract a tooth, doing so would be prohibited by law and outside of his or her scope of practice as a licensed marriage and family therapist. Working outside of one's scope of practice and working outside of one's scope of competence are both violations of law. Section 4982 (j) of the Business and Professions Code provides that therapists engage in unprofessional conduct when: "Performing, or holding one's self out as being able to perform, or offering to perform, or permitting any trainee or registered associate under supervision to perform, any professional services beyond the scope of the license authorized by this chapter." Section 1845 (a) of California Code of Regulations also provides that: "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" is considered to be unprofessional conduct.

In examining the breadth of the scope of practice of the marriage and family therapist in California, one must dissect the legislative authority for

Special Consideration: Letter Writing...

- "My client wants me to write a letter so they can get time off of work..."
  - aka Workplace Accommodations Letter
- "My client wants me to write a letter to receive disability benefits..."
  - aka Disability Letter
- "My client wants me to write a letter so they can have their Great Dane in their 200 square foot apartment"
  - aka Emotional Support Animal Letter
- "My client wants me to write a letter to receive surgery gender affirming..."
  - aka Gender Affirming Surgery Letter

Do you think you are Qualified to Write All of These Letters? Any of these Letters?

Great...Prove It...

First Look at Scope of Practice...Is This Something You Can Do...

Can you write the letter? -- Well...yes...physically you may be able to do so.

Can you write the letter for the specific purpose or organization? Well...that depends...

Example: Social Security Disability Insurance (SSDI)
An applicant is required to provide medical evidence from an "Acceptable Medical Source" (AMS) to establish that they have a medically determinable physical or mental disorder.

For all claims, the AMS list includes licensed: Physicians, Psychologists, School psychologists (for impairments of intellectual disability, learning disabilities, and borderline intellectual functioning only), Optometrists, Podiatrists, Speech-language pathologists, Certified Nurse Midwife (CNM), Nurse Practitioner (NP), Certified Registered Nurse Anesthetist (CRNA), Clinical Nurse Specialist (CNS), Audiologists, and Physician Assistants

20 CFR § 416.902. (a)(1)-(8)]

Another Example....

Example: Family and Medical Leave Act (FMLA)

Under the FMLA, an individual's serious health condition must be substantiated by a certification issued by a qualified health care provider. The Act defines a health care provider as the following:

A doctor of medicine or osteopath who is authorized to practice medicine; podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse-midwives, clinical social workers and physician assistants and any health care provider an employer's group health plan's benefits manager will accept certification from to substantiate a claim for benefits (which does not necessarily preclude MFT's, but it would have to be verified)

[29 CFR § 825.125 (a)-(c)]

How Would I Know About All of This?

If You Have to Ask...Then this may be outside of your Scope of Compentency. Your writing this as an expert so you should be Extremely knowledgable in this area.

What Does An Expert Look Like?

No One Shape or Size, but they have to be persuasive.

Imagine you are on the stand...An Opposing Attorney asks you...."How Are You An Expert?"
Your answer should consider What training, education, and experience you have.

Say it out loud.

If you were not involved. Would you be persuaded? Ask a Colleague.

For More Information on Letter writing CAMFT has a Presentation

Guidelines for Writing Letters and Offering Professional Opinions

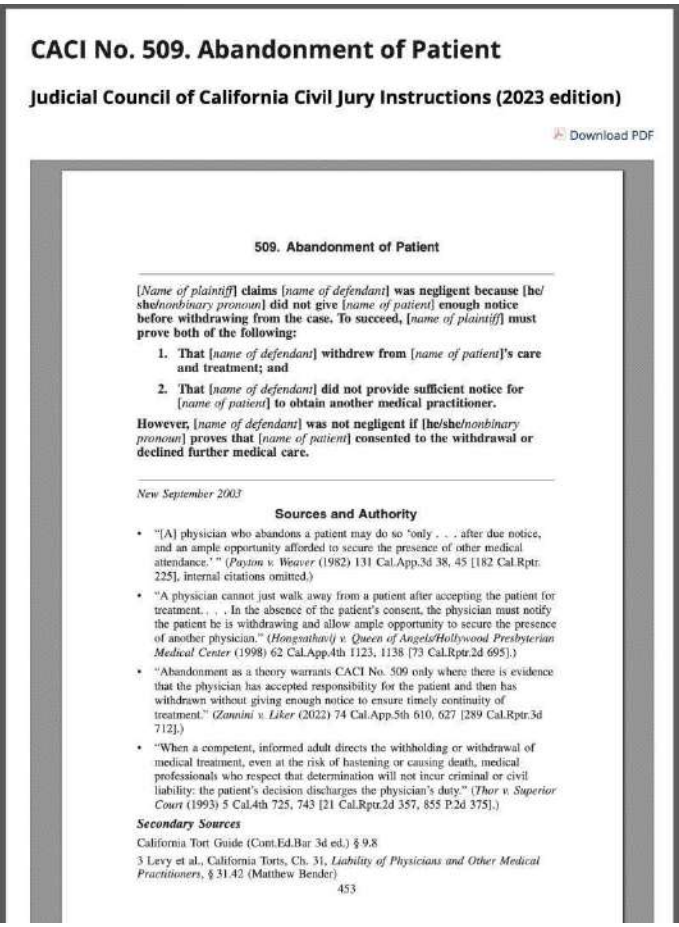
By Alain Montgomery, JD
CAMFT Staff Attorney

Client Abandonment

What Is the Duty of Confidentiality?

The term abandonment at first might invoke thoughts of someone being left alone in an area where they are unable to provide for their own needs. In more ordinary circumstances one might think of leaving a child unattended. The medical malpractice definition of patient abandonment is no different in theory. A cause of action for abandonment occurs when a provider is actively providing care, treatment, or services to a patient and ceases without proper notice and opportunity for the patient to make other arrangements and transfer records. The courts have long encouraged providers to give patients adequate time and opportunity to seek alternative sources of care as a matter of public interest

How Does One Legally Prove It?



CACI No. 509. Abandonment of Patient

Judicial Council of California Civil Jury Instructions (2023 edition)

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509. Abandonment of Patient

[*Name of plaintiff*] claims [*name of defendant*] was negligent because [he/she/*nonbinary pronoun*] did not give [*name of patient*] enough notice before withdrawing from the case. To succeed, [*name of plaintiff*] must prove both of the following:

1. **That [*name of defendant*] withdrew from [*name of patient*]'s care and treatment; and**
2. **That [*name of defendant*] did not provide sufficient notice for [*name of patient*] to obtain another medical practitioner.**

However, [*name of defendant*] was not negligent if [he/she/*nonbinary pronoun*] proves that [*name of patient*] consented to the withdrawal or declined further medical care.

New September 2003

Sources and Authority

- "[A] physician who abandons a patient may do so 'only . . . after due notice, and an ample opportunity afforded to secure the presence of other medical attendance.' " (*Payton v. Weaver* (1982) 131 Cal.App.3d 38, 45 [182 Cal.Rptr. 225], internal citations omitted.)
- "A physician cannot just walk away from a patient after accepting the patient for treatment. . . . In the absence of the patient's consent, the physician must notify the patient he is withdrawing and allow ample opportunity to secure the presence of another physician." (*Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center* (1998) 62 Cal.App.4th 1123, 1138 [73 Cal.Rptr.2d 695].)
- "Abandonment as a theory warrants CACI No. 509 only where there is evidence that the physician has accepted responsibility for the patient and then has withdrawn without giving enough notice to ensure timely continuity of treatment." (*Zannini v. Liker* (2022) 74 Cal.App.5th 610, 627 [289 Cal.Rptr.3d 712].)
- "When a competent, informed adult directs the withholding or withdrawal of medical treatment, even at the risk of hastening or causing death, medical professionals who respect that determination will not incur criminal or civil liability: the patient's decision discharges the physician's duty." (*Thor v. Superior Court* (1993) 5 Cal.4th 725, 743 [21 Cal.Rptr.2d 357, 855 P.2d 375].)

Secondary Sources

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.8

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.42 (Matthew Bender)

453

Specific Court Cases on the Topic....

- "A physician cannot just walk away from a patient after accepting the patient for treatment. . . . In the absence of the patient's consent, the physician must notify the patient he is withdrawing and allow ample opportunity to secure the presence of another physician." (*Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center* (1998) 62 Cal.App.4th 1123, 1138 [73 Cal.Rptr.2d 695].)

- "Abandonment as a theory warrants CACI No. 509 only where there is evidence that the physician has accepted responsibility for the patient and then has withdrawn without giving enough notice to ensure timely continuity of treatment." (*Zannini v. Liker* (2022) 74 Cal.App.5th 610, 627 [289 Cal.Rptr.3d 712].)

Best Way to Avoid Charges of Abandonment...

The client quits.

A client cannot argue abandonment if they were the one that lead termination.

- "When a competent, informed adult directs the withholding or withdrawal of medical treatment, even at the risk of hastening or causing death, medical professionals who respect that determination will not incur criminal or civil liability: the patient's decision discharges the physician's duty." (*Thor v. Superior Court* (1993) 5 Cal.4th 725, 743 [21 Cal.Rptr.2d 357, 855 P.2d 375].)

Most Common Scenario....

Therapist has a relationship with a client and one of a few things happen:

1. Conflict comes up
2. Client is not making progress
3. Client needs a higher level of care
4. Client is behind in payment
5. Client wants a different modality

This is not exhaustive...

What Can I Do to Avoid Abandonment Charges?

First, assess to see if the client is in crisis. Think harm to self or others.
If the client is stable then termination may be appropraite.

Unfortunately, there is no magic formula to combat abandonment. You can try and lessen your exposure by:

1. Providing ample notice
2. Creating a termination plan
3. Providing referrals and resources (3 to 5)
4. Providing care during termination process
5. Follow-up Care or After Care

Each situation is different and so it is up to the clinican to use their best judgement. Consult if unsure.

What Does CAMFT Code of Ethics Say in this Situation?

1.7 ABANDONMENT: Marriage and family therapists do not abandon or neglect clients/patients in treatment. If a therapist is unable or unwilling to continue to provide professional services, the therapist will assist the client/patient in making clinically appropriate arrangements for continuation of treatment.

Improper Consent

Before Seeing a Client...Consent

The treating practioner must have valid consent.

Consent to treatment is the agreement that an individual makes to receive medical treatment, care, or services.

Consent is only valid if it is voluntary and informed and comes from an individual who is capable of consenting to treatment. Voluntary consent means that the person decides whether to consent to treatment. Healthcare professionals, friends, or family cannot influence or pressure the person to make a decision

How Does One Legally Prove It?

Sorta on point...

CACI No. 533. Failure to Obtain Informed Consent - Essential Factual Elements

Judicial Council of California Civil Jury Instructions (2023 edition)

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533. Failure to Obtain Informed Consent - Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] was negligent because [he/she/*nonbinary pronoun*] performed [a/an] [*insert medical procedure*] on [*name of plaintiff*] without first obtaining [his/her/*nonbinary pronoun*] informed consent. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] performed [a/an] [*insert medical procedure*] on [*name of plaintiff*];**
2. **That [*name of defendant*] did not disclose to [*name of plaintiff*] the important potential results and risks of[and alternatives to] the [*insert medical procedure*];**
3. **That a reasonable person in [*name of plaintiff*]'s position would not have agreed to the [*insert medical procedure*] if that person had been adequately informed; and**
4. **That [*name of plaintiff*] was harmed by a result or risk that [*name of defendant*] should have explained.**

New September 2003; Revised June 2014, May 2020

Directions for Use

This instruction should be read in conjunction with CACI No. 532, *Informed Consent-Definition*. See also the Directions for Use and Sources and Authority to that instruction.

If the patient is a minor or is incapacitated, tailor the instruction accordingly.

Also, see CACI No. 531, *Consent on Behalf of Another*.

This Normally Comes Up with Children...

A parent alleges that the therapist should not have seen their child.

The Best Way to Avoid This Is To Understand Terminology...

When dealing with minor consent, it is critical to understand the difference between the two types of custody: physical and legal. The law includes multiple variations of these terms, defined as such:

- "Joint legal custody" means that parents shall share the right and the responsibility to make the decisions relating to the health, education, and welfare of a child.
- "Joint physical custody" means that each parent shall have significant periods of physical custody and that physical custody shall be shared in such a way as to assure that a child has frequent, continuing contact with each parent.
- "Sole legal custody" means that one parent shall have the right and the responsibility to make the decisions relating to the health, education, and welfare of a child.
- "Sole physical custody" means that a child shall reside with and be under the supervision of one parent, subject to the power of the court to order visitation with the other parent.

Parents Are Married...

If the child is born to a married couple and both parents names appear on the birth certificate-- the custody arrangment is likely joint legal custody. In a scenario where the parents are married when a child is born, there is generally no question about parentage. The law assumes that married persons are the child's legal parents, so joint custody is automatically established in most cases.

In this scenario, it is likely that *either parent may consent* unless there is something unique about this situation.

Parents Are UnMarried...

If the child is born to an unmarried couple, the parent seeking serivices will likely need to provide documentation to support their legal right to consent. When a child is born to unmarried parents, the parentage of the child may need to be established by the courts for the non-natural (non-birthing) partner to gain legal rights. The birthing parent will likely have legal rights established immediately.

If the legal relationship of a guardian to the minor is in doubt, the clinician can at their discretion request a copy of the birth certificate or the child custody agreement/order, which should include a judge's signature, for further clarification.

In this scenario, the facts will dictate if there is sole legal custody or joint legal custody.

Parents Are Divorced...

If a parent, who is divorced or separated, is seeking services for their minor-- the clinican should obtain documentation from that parent to confirm what consent is required.

In most situations, both parents have joint legal custody and *either parent* would be able to consent. However, the therapist would need to review the documentation to see if a provision was placed in the custody documentation that would require both parents to consent. This is not common.

Parents Are Adoptive...

Adoption is the process of establishing a legal parent-child relationship when the adopting parent is not the child's biological or birth parent. This means that once the adoption is final, the adoptive parent(s) have all the legal rights and responsibilities of a parent-child relationship.

In this scenario, the facts will dictate if there is sole legal custody or joint legal custody.

Stepparent is Seeking Treatment for Child...

A stepparent requesting therapeutic services from the therapist may need to provide documentation to support their legal right to consent to the treatment of a minor. With limited exceptions, stepparents do not have any legal rights to their stepchildren unless they have legally adopted them. Because the stepparent(s) have no legal custody over the child, they are not permitted to make legal or medical decisions on the minor's behalf, including consenting for treatment.

When confronted with this situation, the therapist should review with all relevant parties if a Caregiver's Authorization Affidavit is appropriate.

Consent for a Minor Who is 12 or Older

A minor who is 12 years of age or older may consent to mental health treatment if, in the opinion of the clinician, the minor is mature enough to participate intelligently in their treatment. The standard of review is based on a reasonableness standard, so the treating clinician should document why they believe the minor meets the requirements to consent on their own

When confronted with this situation, the therapist may not need to receive consent from the legal guardians.

For More Information on Letter Writing CAMFT has a Article

Understanding Minor Consent Within Different Parental Relationship Structures

January 19, 2021 | Luke Martin, MBA, JD, Staff Attorney

There are many complexities surrounding the consent laws for the treatment of minors. CAMFT Staff Attorney Luke Martin, MBA, JD, reviews the relevant legal terminology with examples, paying special attention to who is eligible to consent for a minor's therapeutic services, while keeping the clinical perspective in mind.

Luke Martin, MBA, JD
Staff Attorney
The Therapist
January/February 2021

Given the complexities surrounding the consent laws for the treatment of minors, some therapists are under the impression that the law requires them to receive consent from both parents or guardians when introducing a minor into their practice. However, the minor consent laws are generally a bit more flexible and do not always require the therapist to receive consent from all parties.

Understanding Legal Terms

When dealing with minor consent, it is critical to understand the difference between the two types of custody: physical and legal. The law includes multiple variations of these terms, defined as such:

- This is the traditional arrangement for biological parents.
- "Joint legal custody" means that parents shall share the right and the responsibility to make the decisions relating to the health, education, and welfare of a child.[2]
- "Joint physical custody" means that each parent shall have significant periods of physical custody and that physical custody shall be shared in such a way as to assure that a child has frequent, continuing contact with each parent.[3]
- "Sole legal custody" means that one parent shall have the right and the responsibility to make the decisions relating to the health, education, and welfare of a child.[4]
- "Sole physical custody" means that a child shall reside with and be under the supervision of one parent, subject to the power of the court to order visitation with the other parent.[5]

Not Adhering to the Duty of Confidentiality

What Is the Duty of Confidentiality?

An therapist's duty of confidentiality is an ethical duty that a therapist owes to their clients, both in the continuing process of the therapist-client relationship, and afterward. The duty of confidentiality is in effect at all times, not just in the face of legal demands (e.g., by a court) for client information. According to this duty, therapists must not affirmatively disclose information about a client's representation. This representation refers to information that a client shares in confidence with a therapist, and the information is privileged because of the therapist-client relationship.

Evidence Codes That Establishes and Requires Privilege be Invoked

1014. Subject to Section 912 and except as otherwise provided in this article, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist if the privilege is claimed by:

(a) The holder of the privilege.

(b) A person who is authorized to claim the privilege by the holder of the privilege.

(c) The person who was the psychotherapist at the time of the confidential communication, but the person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure.

The relationship of a psychotherapist and patient shall exist between a psychological corporation as defined in Article 9 (commencing with Section 2995) of Chapter 6.6 of Division 2 of the Business and Professions Code, a marriage and family therapist corporation as defined in Article 6 (commencing with Section 4987.5) of Chapter 13 of Division 2 of the Business and Professions Code, a licensed clinical social workers corporation as defined in Article 5 (commencing with Section 4998) of Chapter 14 of Division 2 of the Business and Professions Code, or a professional clinical counselor corporation as defined in Article 7 (commencing with Section 4999.123) of Chapter 16 of Division 2 of the Business and Professions Code, and the patient to whom it renders professional services, as well as between those patients and psychotherapists employed by those corporations to render services to those patients. The word "persons" as used in this subdivision includes partnerships, corporations, limited liability companies, associations, and other groups and entities.

1015. The psychotherapist who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 1014.

What Does the CAMFT Code of Ethics Say?

2. CONFIDENTIALITY

Marriage and family therapists respect the confidences of their client(s)/patient(s). Marriage and family therapists have unique confidentiality responsibilities because the client/patient in a therapeutic relationship may include more than one person.

2.1 DISCLOSURES OF CONFIDENTIAL INFORMATION: Marriage and family therapists do not disclose client/patient confidences, (including the names or identities of their clients/patients), to anyone except as mandated by law, as permitted by law, when the marriage and family therapist is a defendant in a civil, criminal, or disciplinary action arising from the therapy (in which case client/patient confidences may only be disclosed in the course of that action), or if there is an authorization previously obtained in writing. Such information may only then be revealed in accordance with the terms of the authorization.

2.2 SIGNED AUTHORIZATIONS— RELEASE OF INFORMATION: When there is a request for information related to any aspect of psychotherapy or treatment, each member of the unit receiving such therapeutic treatment must sign an authorization before a marriage and family therapist will disclose information received from any member of the treatment unit.

2.3 MAINTENANCE OF CLIENT/PATIENT RECORDS—CONFIDENTIALITY: Marriage and family therapists store, transfer, transmit, and/or dispose of client/patient records in ways that protect confidentiality.

2.4 EMPLOYEES—CONFIDENTIALITY: Marriage and family therapists take appropriate steps to ensure, insofar as possible, that the confidentiality of clients/patients is maintained by their employees, supervisees[4], assistants, volunteers, and business associates.

2.5 USE OF CLINICAL MATERIALS—CONFIDENTIALITY: Marriage and family therapists use clinical materials in teaching, writing, and public presentations only if a written authorization has been previously obtained in accordance with 2.1, or when appropriate steps have been taken to protect patient identity.

2.6 GROUPS—CONFIDENTIALITY: Marriage and family therapists, when working with a group, educate the group regarding the importance of maintaining confidentiality, and are encouraged to obtain written agreement from group participants to respect the confidentiality of other members of the group.

2.7 THIRD-PARTY PAYER DISCLOSURES: Marriage and family therapists advise clients/patients of the information that will likely be disclosed (such as dates of treatment, diagnosis, prognosis, progress, and treatment plans) when submitting claims to managed care companies, insurers, or other third-party payers.

What Does The Law State?

CACI No. 4103. Duty of Confidentiality - Essential Factual Elements

Judicial Council of California Civil Jury Instructions (2023 edition)

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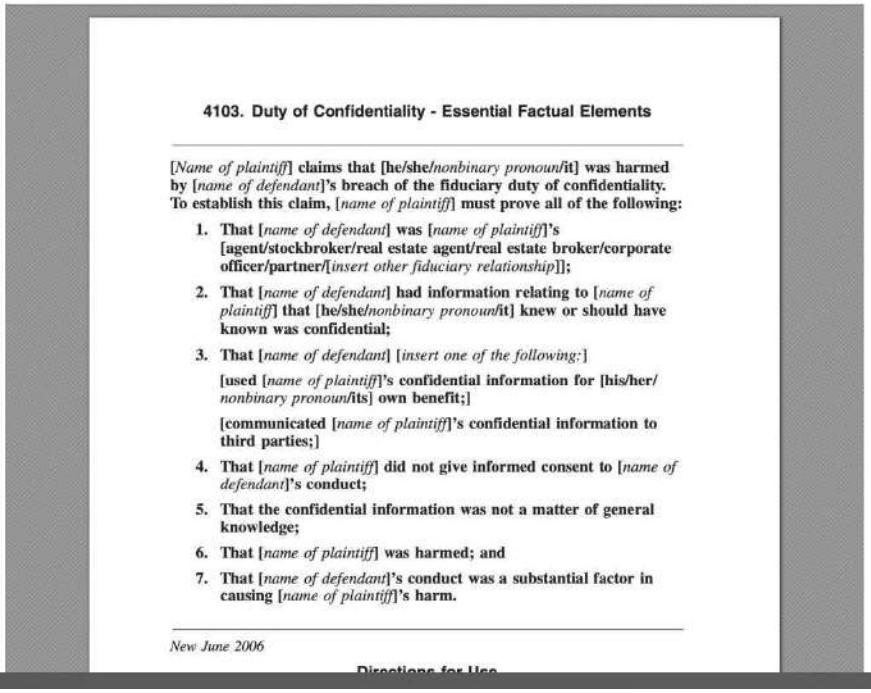


4103. Duty of Confidentiality - Essential Factual Elements

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*/it] was harmed by [*name of defendant*]'s breach of the fiduciary duty of confidentiality. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of defendant*] was [*name of plaintiff*]'s [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[*insert other fiduciary relationship*]];
2. That [*name of defendant*] had information relating to [*name of plaintiff*] that [he/she/*nonbinary pronoun*/it] knew or should have known was confidential;
3. That [*name of defendant*] [*insert one of the following:*]

   [used [*name of plaintiff*]'s confidential information for [his/her/*nonbinary pronoun*/its] own benefit;]

   [communicated [*name of plaintiff*]'s confidential information to third parties;]
4. That [*name of plaintiff*] did not give informed consent to [*name of defendant*]'s conduct;
5. That the confidential information was not a matter of general knowledge;
6. That [*name of plaintiff*] was harmed; and
7. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.

New June 2006

Directions for Use

4103. Duty of Confidentiality - Essential Factual Elements

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*/it] was harmed by [*name of defendant*]'s breach of the fiduciary duty of confidentiality. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of defendant*] was [*name of plaintiff*]'s [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[*insert other fiduciary relationship*]];
2. That [*name of defendant*] had information relating to [*name of plaintiff*] that [he/she/*nonbinary pronoun*/it] knew or should have known was confidential;
3. That [*name of defendant*] [*insert one of the following:*]

   [used [*name of plaintiff*]'s confidential information for [his/her/*nonbinary pronoun*/its] own benefit;]

   [communicated [*name of plaintiff*]'s confidential information to third parties;]
4. That [*name of plaintiff*] did not give informed consent to [*name of defendant*]'s conduct;
5. That the confidential information was not a matter of general knowledge;
6. That [*name of plaintiff*] was harmed; and
7. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.

Element 1: Relationship

The first requirement is that a theraputic relationship existed.

Was the person suing you a client of not?
Who is your client?
Was there multiple clients involved?

Relationship based on client's reasonable perception not therapists.

CAMFT has Several Articles on This...

Confidentiality and Privilege Group Conjoint Family and Collateral Therapy Issues

June 30, 2009 | Catherine Atkins, JD, Deputy Executive Director

Although individual group therapy members have no legal duty of confidentiality to one another, therapy cannot be effective unless confidentiality is respected.

The Therapist
July/August 2009

Issues regarding confidentiality in individual therapy can be confusing and complicated. Adding the dynamic of group, conjoint, family, or collateral therapy can make confidentiality an even more complicated concept to navigate. This article will review the various dynamics that generally occur when dealing with therapy outside the individual therapeutic situation.

Group Therapy Sessions:
Confidentiality If you do group therapy you know that each member of the group has a right to confidentiality. You cannot release the records of that group session unless you get authorization from each individual within the group. If records are requested or subpoenaed for any of the individual members of the group, you must maintain confidentiality of all the members of the group. Therefore, without consent from each member of the group or a court order, you will need to protect the group file in its entirety. This is also mandated by CAMFT Ethical Standard 2.2: *When there is a request for information related to any aspect of psychotherapy or treatment, each member of the unit receiving such therapeutic treatment must sign an authorization before a marriage and family therapist will disclose information received from any member of the treatment unit.*

4103. Duty of Confidentiality - Essential Factual Elements

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*/it] was harmed by [*name of defendant*]'s breach of the fiduciary duty of confidentiality. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] was [*name of plaintiff*]'s [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[*insert other fiduciary relationship*]];**
2. **That [*name of defendant*] had information relating to [*name of plaintiff*] that [he/she/*nonbinary pronoun*/it] knew or should have known was confidential;**
3. **That [*name of defendant*] [*insert one of the following:*]**

   [used [*name of plaintiff*]'s confidential information for [his/her/*nonbinary pronoun*/its] own benefit;]

   [communicated [*name of plaintiff*]'s confidential information to third parties;]
4. **That [*name of plaintiff*] did not give informed consent to [*name of defendant*]'s conduct;**
5. **That the confidential information was not a matter of general knowledge;**
6. **That [*name of plaintiff*] was harmed; and**
7. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

Element 2: Confidential or Not?

Communication provided to a therapist should be viewed as confidential as long as within scope.

If you are talking to a friend, as a friend, the communication is not protected. However, if the friend is speaking to you, as a therapist, then the communition is protected.

Be sure to know what "hat" you are wearing when speaking to individuals.

4103. Duty of Confidentiality - Essential Factual Elements

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*/it] was harmed by [*name of defendant*]'s breach of the fiduciary duty of confidentiality. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] was [*name of plaintiff*]'s [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[*insert other fiduciary relationship*]];**
2. **That [*name of defendant*] had information relating to [*name of plaintiff*] that [he/she/*nonbinary pronoun*/it] knew or should have known was confidential;**
3. **That [*name of defendant*] [*insert one of the following:*]**

   [used [*name of plaintiff*]'s confidential information for [his/her/*nonbinary pronoun*/its] own benefit;]

   [communicated [*name of plaintiff*]'s confidential information to third parties;]
4. **That [*name of plaintiff*] did not give informed consent to [*name of defendant*]'s conduct;**
5. **That the confidential information was not a matter of general knowledge;**
6. **That [*name of plaintiff*] was harmed; and**
7. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

Element 3: Breach

Protected communication shared with 3rd parties.

4103. Duty of Confidentiality - Essential Factual Elements

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*/it] was harmed by [*name of defendant*]'s breach of the fiduciary duty of confidentiality. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] was [*name of plaintiff*]'s [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[*insert other fiduciary relationship*]];**
2. **That [*name of defendant*] had information relating to [*name of plaintiff*] that [he/she/*nonbinary pronoun*/it] knew or should have known was confidential;**
3. **That [*name of defendant*] [*insert one of the following:*]**

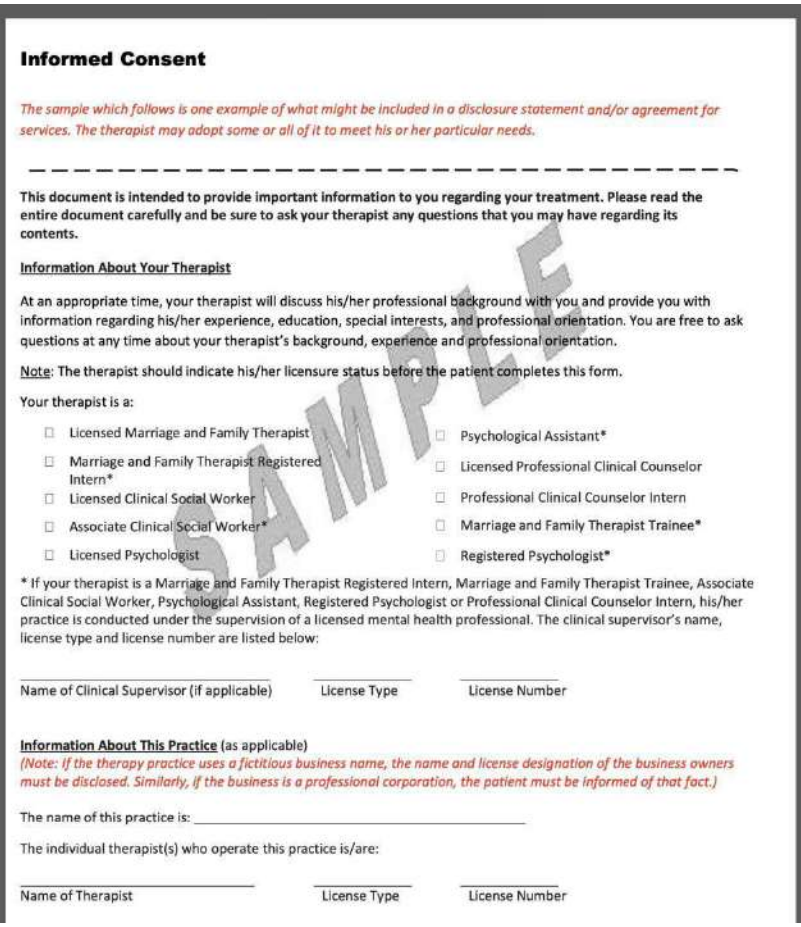
   [used [*name of plaintiff*]'s confidential information for [his/her/*nonbinary pronoun*/its] own benefit;]

   [communicated [*name of plaintiff*]'s confidential information to third parties;]
4. **That [*name of plaintiff*] did not give informed consent to [*name of defendant*]'s conduct;**
5. **That the confidential information was not a matter of general knowledge;**
6. **That [*name of plaintiff*] was harmed; and**
7. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

Element 4: Not Permitted to Share

The therapist did not have permission to share the information with the 3rd party.

Safest Route is Written Release of Information



Informed Consent

The sample which follows is one example of what might be included in a disclosure statement and/or agreement for services. The therapist may adopt some or all of it to meet his or her particular needs.

This document is intended to provide important information to you regarding your treatment. Please read the entire document carefully and be sure to ask your therapist any questions that you may have regarding its contents.

Information About Your Therapist

At an appropriate time, your therapist will discuss his/her professional background with you and provide you with information regarding his/her experience, education, special interests, and professional orientation. You are free to ask questions at any time about your therapist's background, experience and professional orientation.

Note: The therapist should indicate his/her licensure status before the patient completes this form.

Your therapist is a:

- ☐ Licensed Marriage and Family Therapist
- ☐ Marriage and Family Therapist Registered Intern*
- ☐ Licensed Clinical Social Worker
- ☐ Associate Clinical Social Worker*
- ☐ Licensed Psychologist
- ☐ Psychological Assistant*
- ☐ Licensed Professional Clinical Counselor
- ☐ Professional Clinical Counselor Intern
- ☐ Marriage and Family Therapist Trainee*
- ☐ Registered Psychologist*

SAMPLE

* If your therapist is a Marriage and Family Therapist Registered Intern, Marriage and Family Therapist Trainee, Associate Clinical Social Worker, Psychological Assistant, Registered Psychologist or Professional Clinical Counselor Intern, his/her practice is conducted under the supervision of a licensed mental health professional. The clinical supervisor's name, license type and license number are listed below:

Name of Clinical Supervisor (if applicable) _____ License Type _____ License Number _____

Information About This Practice (as applicable)
(Note: If the therapy practice uses a fictitious business name, the name and license designation of the business owners must be disclosed. Similarly, if the business is a professional corporation, the patient must be informed of that fact.)

The name of this practice is: _____

The individual therapist(s) who operate this practice is/are:

Name of Therapist _____ License Type _____ License Number _____

If not in writing you can potentially rely on Exceptions to Confidentiality

1016. There is no privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by:

(a) The patient;

(b) Any party claiming through or under the patient;

(c) Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or

(d) The plaintiff in an action brought under Section 376 or 377 of the Code of Civil Procedure for damages for the injury or death of the patient.

(Enacted by Stats. 1965, Ch. 299.)

1018. There is no privilege under this article if the services of the psychotherapist were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort.

Most Used: 56.10 (c) (1-24)

These exceptions include:

(1) The information may be disclosed to providers of health care for the purposes of diagnosis and treatment

(2) The information may be disclosed to an insurer, employer...or other entity responsibile for paying for health care, to th extent necessary to allow responsbility for payment to be determined

(6) The information may be disclosed to a medical examiner...coroner...

(c) A provider of health care or a health care service plan may disclose medical information as follows:

(1) The information may be disclosed to providers of health care, health care service plans, contractors, or other health care professionals or facilities for purposes of diagnosis or treatment of the patient. This includes, in an emergency situation, the communication of patient information by radio transmission or other means between emergency medical personnel at the scene of an emergency, or in an emergency medical transport vehicle, and emergency medical personnel at a health facility licensed pursuant to Chapter 2 (commencing with Section 1250) of Division 2 of the Health and Safety Code.

(2) The information may be disclosed to an insurer, employer, health care service plan, hospital service plan, employee benefit plan, governmental authority, contractor, or other person or entity responsible for paying for health care services rendered to the patient, to the extent necessary to allow responsibility for payment to be determined and payment to be made. If (A) the patient is, by reason of a comatose or other disabling medical condition, unable to consent to the disclosure of medical information and (B) no other arrangements have been made to pay for the health care services being rendered to the patient, the information may be disclosed to a governmental authority to the extent necessary to determine the patient's eligibility for, and to obtain, payment under a governmental program for health care services provided to the patient. The information may also be disclosed to another provider of health care or health care service plan as necessary to assist the other provider or health care service plan in obtaining payment for health care services rendered by that provider of health care or health care service plan to the patient.

(3) The information may be disclosed to a person or entity that provides billing, claims management, medical data processing, or other administrative services for providers of health care or health care service plans or for any of the persons or entities specified in paragraph (2). However, that disclosed information shall not be further disclosed by the recipient in a way that would violate this part.

(4) The information may be disclosed to organized committees and agents of professional societies or of medical staffs of licensed hospitals, licensed health care service plans, professional standards review organizations, independent medical review organizations and their selected reviewers, utilization and quality control peer review organizations as established by Congress in Public Law 97-248[1] in 1982, contractors, or persons or organizations insuring, responsible for, or defending professional liability that a provider may incur, if the committees, agents, health care service plans, organizations, reviewers, contractors, or persons are engaged in reviewing the competence or qualifications of health care professionals or in reviewing health care services with respect to medical necessity, level of care, quality of care, or justification of charges.

(5) The information in the possession of a provider of health care or a health care service plan may be reviewed by a private or public body responsible for licensing or accrediting the provider of health care or a health care service plan. However, no patient-identifying medical information may be removed from the premises except as expressly permitted or required elsewhere by law, nor shall that information be further disclosed by the recipient in a way that would violate this part.

4103. Duty of Confidentiality - Essential Factual Elements

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*/it] was harmed by [*name of defendant*]'s breach of the fiduciary duty of confidentiality. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] was [*name of plaintiff*]'s [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[*insert other fiduciary relationship*]];**
2. **That [*name of defendant*] had information relating to [*name of plaintiff*] that [he/she/*nonbinary pronoun*/it] knew or should have known was confidential;**
3. **That [*name of defendant*] [*insert one of the following:*]**

   [used [*name of plaintiff*]'s confidential information for [his/her/*nonbinary pronoun*/its] own benefit;]

   [communicated [*name of plaintiff*]'s confidential information to third parties;]
4. **That [*name of plaintiff*] did not give informed consent to [*name of defendant*]'s conduct;**
5. **That the confidential information was not a matter of general knowledge;**
6. **That [*name of plaintiff*] was harmed; and**
7. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New June 2006

Element 5: Not common knowledge

Just because it was said in therapy does not make it confidential. The communication must not be commonly known.

For example, if a client says the sky is blue. The therapist tells someone that the sky is blue. This doesn't mean that the therapist has breached their duty of confidentiality.

4103. Duty of Confidentiality - Essential Factual Elements

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*/it] was harmed by [*name of defendant*]'s breach of the fiduciary duty of confidentiality. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] was [*name of plaintiff*]'s [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[*insert other fiduciary relationship*]];**
2. **That [*name of defendant*] had information relating to [*name of plaintiff*] that [he/she/*nonbinary pronoun*/it] knew or should have known was confidential;**
3. **That [*name of defendant*] [*insert one of the following:*]**

   [used [*name of plaintiff*]'s confidential information for [his/her/*nonbinary pronoun*/its] own benefit;]

   [communicated [*name of plaintiff*]'s confidential information to third parties;]
4. **That [*name of plaintiff*] did not give informed consent to [*name of defendant*]'s conduct;**
5. **That the confidential information was not a matter of general knowledge;**
6. **That [*name of plaintiff*] was harmed; and**
7. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

Element 6 and 7: Client was Harmed because of Breach

There must be a harm!

Just because there is a breach does not mean the client is going to be compensated.

Breaches happen all the time. :(

Example

Ex. Therapist sends a file that has a current client's information instead of a blank.

Breach-- absolutely.
Lawsuit-- potentially...most likely hinges on what harm was experienced.

Ex. Therapist has record stored in car. Therapist stops to grab a bit to eat. Car broken into and records stolen.

Breach-- absolutely
Lawsuit-- proably not. See Sutter.

Sutter Health v. Superior Court, 227 Cal.App.4th 1546 (2014)
174 Cal.Rptr.3d 653, 14 Cal. Daily Op. Serv. 8146, 2014 Daily Journal D.A.R. 9464

227 Cal.App.4th 1546
Court of Appeal, Third District, California.

SUTTER HEALTH et al., Petitioners,
v.
The SUPERIOR COURT of Sacramento County, Respondent;
Dorothy Atkins et al., Real Parties in Interest.

C072591
Filed 7/21/2014
Review Denied October 15, 2014*

Synopsis

Background: Patients brought putative class action against health care provider for nominal damages under Confidentiality of Medical Information Act. The Superior Court, Sacramento County, No. JCCP4698, David De Alba, J., overruled demurrer and denied provider's motion to strike class allegations. Provider petitioned for writ of mandate.

The Court of Appeal, Nicholson, Acting P.J., held that nominal damages were not available for theft of medical information under the Act absent any allegation that anyone viewed the information.

Petition granted.

**654 ORIGINAL PROCEEDING in mandate. Petition granted. David De Alba, Judge. (JCCP No. 4698)

Attorneys and Law Firms

Bartko, Zankel, Tarrant & Miller, Bartko, Zankel, Bunzel & Miller, San Francisco, Robert H. Bunzel, William I. Edlund, and Michael D. Abraham for Petitioners.

Crowell & Moring and Ethan P. Schulman, San Francisco, for the California Association of Health Plans and the Lois J. Richardson, Sacramento, for California Hospital Association as Amicus Curiae on behalf of Petitioners.

**655 Munger, Tolles & Olson, Los Angeles, Bradley S. Phillips, Michelle A. Friedland, and Amelia L.B. Sargent for the Regents of the University of California as Amici Curiae on behalf of Petitioners.

Sedgwick, San Francisco, Stephanie Sheridan, Kelly Savage Day, and Alison Andre for Alere Home Monitoring, Inc., as Amici Curiae on behalf of Petitioners.

No appearance for Respondent.

Ahdoot & Wolfson, Los Angeles, Robert Ahdoot, Tina Wolfson, West Hollywood, Theodore W. Maya, Bradley King; Kershaw Cutter & Ratinoff, Sacramento, C. Brooks Cutter, William A. Kershaw, John R. Parker, Jr., Atlanta; Ram, Olson, Cereghino & Kopczynski, San Francisco, Michael F. Ram, Jeffrey B. Cereghino, Matt J. Malone; Dreyer Babich Buccola Wood Campora, Sacramento, Robert A. Buccola, Steven M. Campora; Audet & Partners, William M. Audet, San Francisco, Joshua C. Ezrin; Keller Grover, San Francisco, Eric A. Grover, Carey G. Been; Law Offices of Scot D. Bernstein, Mather Field, Scot Bernstein; Harris & Ruble, Los Angeles, Alan Harris, Abigail A. Treanor, Priya Mohan, Los Angeles; The Law Office of Darryl A. Stallworth, Oakland, Darryl A. Stallworth; Clayeo C. Arnold, Sacramento, Clifford L. Carter, Kirk J. Wolden, Clayeo C. Arnold, Sacramento; Meiselman, Denlea, Packman, Carton & Eberz, James R. Denlea, Jeffrey I. Carton, Jeremiah Frei-Pearson; Trial Law Offices of Bradley I. Kramer, M.D., Beverly Hills, Bradley I. Kramer; Mastagni, Holstedt, Amick, Miller & Johnsen, Sacramento, David P. Mastagni, and David E. Mastagni for Real Parties in Interest.

Kabateck Brown Kellner, Los Angeles, Brian S. Kabateck, Richard L. Kellner, and Scott M. Malzahn for Consumer Attorneys of California, Consumer Federation of California, Consumer Action, Privacy Rights Clearinghouse, Privacy Activism, California Alliance for Retired Americans, and California Advocates for Nursing Home Reform as Amici Curiae on behalf of Real Parties in Interest.

Opinion

NICHOLSON, Acting P.J.

Sutter Health v. Superior Court, 227 Cal.App.4th 1546 (2014)
174 Cal.Rptr.3d 653, 14 Cal. Daily Op. Serv. 8146, 2014 Daily Journal D.A.R. 9464

Here, there is no dispute that the computer was stolen by, not given to, the unauthorized person. Sutter Health did not intend to disclose the medical information to the thief, so there was no affirmative communicative act by Sutter Health to the thief. As a result, section 56.10 does not apply to the facts of this case.

Section 56.101

Unlike section 56.10, which prohibits *disclosure* of medical information except under specified circumstances, section 56.101 refers to the broader duties of the health care provider with respect to the confidentiality of the medical information. The language of section 56.101, subdivision (a) makes it clear that *preserving the confidentiality* of the medical information, not necessarily preventing others from gaining possession of the paper-based or electronic information itself, is the focus of the legislation. Therefore, if the confidentiality is not breached, the statute is not violated.

The first sentence of subdivision (a) of section 56.101 provides: "Every provider of health care ... who creates, maintains, preserves, stores, abandons, destroys, or disposes of medical information shall do so in a manner that *preserves the confidentiality* of the information contained therein." (§ 56.101, subd. (a), italics added.)

This sentence allows for change of possession as long as confidentiality is preserved. For example, the subdivision imposes on the health care provider the duty to maintain confidentiality in the manner in which the medical information is abandoned or disposed of. Therefore, it cannot be said that section 56.101 imposes liability if the health care provider simply loses possession of the medical records. Something more is necessary--that is, breach of confidentiality.

The California Supreme Court recognized this legislative intent to protect the confidentiality of medical information in a case dealing with the Confidentiality Act. (*Brown, supra*, 51 Cal.4th 1052, 126 Cal.Rptr.3d 428, 253 P.3d 522.) Although *Brown* was a disclosure case, not a release case, the Supreme Court's recognition of the intended protection is still helpful. "The Confidentiality Act (... § 56 et seq.) 'is intended to protect the confidentiality of individually identifiable medical **1557** information obtained from a patient by a health care provider....' [Citations.]" (*Id.* at p. 1070, 126 Cal.Rptr.3d 428, 253 P.3d 522.) " 'The basic scheme of the [Confidentiality Act], as amended in 1981, is that a provider of health care must not disclose medical information without a written authorization from the patient.' [Citation.]" (*Ibid.*) "It follows that 'in order to violate the [Confidentiality Act], a provider of health care must make an unauthorized, unexcused disclosure of privileged medical information.' [Citation.]" (*Id.* at p. 1071, 126 Cal.Rptr.3d 428, 253 P.3d 522.)

No breach of confidentiality takes place until an unauthorized person views the medical information. It is the medical information, not the physical record (whether in electronic, paper, or other form), that is the focus of the Confidentiality Act. While there is certainly a connection between the information and its physical form, possession of the physical form without actually viewing the information does not offend the basic public policy advanced by the Confidentiality Act. This is evident in section 56.101, subdivision (a), which allows, in effect, abandoning or disposing of medical records "in a manner that preserves the confidentiality of the information contained therein."

**661 Here, the plaintiffs argue that Sutter Health negligently stored the medical information and that the negligent storage resulted in a change of possession of the information to an unauthorized person. This change of possession increased the risk of a confidentiality breach. But the Confidentiality Act does not provide for liability for increasing the risk of a confidentiality breach. It provides for liability for failing to "preserve[ ] the confidentiality" of the medical records. (§ 56.101, subd. (a).) There is no allegation that Sutter Health's actions with respect to the records on the stolen computer did not preserve their confidentiality because there is no allegation that an unauthorized person has viewed the records. Without an actual breach of confidentiality, the loss of possession is not actionable under section 56.101.

The legislation at issue is the Confidentiality of Medical Information Act, not the "Possession of Medical Information Act." (§ 56.) While loss of possession may result in breach of confidentiality, loss of possession does not necessarily result in a breach of confidentiality. For that reason, a plaintiff must allege a breach of confidentiality, not just a loss of possession, to state a cause of action for nominal or actual damages under section 56.101. (Accord, *Regents, supra*, 220 Cal.App.4th at p. 570, 163 Cal.Rptr.3d 205, which arrives at the same conclusion by a different analytical route.)

The second sentence of section 56.101, subdivision (a) does not change this analysis. Although it does not repeat the language requiring the health care provider to preserve the

Sutter Health v. Superior Court, 227 Cal.App.4th 1546 (2014)
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confidentiality of the medical information, it makes the health care provider liable for negligence. "Any provider of **1558 health care ... who *negligently* creates, maintains, preserves, stores, abandons, destroys, or disposes of medical information shall be subject to the remedies and penalties provided under subdivisions (b) and (c) of Section 56.36." (§ 56.101, subd. (a), italics added.) An essential element of negligence is that the tortfeasor's breach caused the injury protected against. (*Federico v. Superior Court* (1997) 59 Cal.App.4th 1207, 1210–1211, 69 Cal.Rptr.2d 370.) The duty is to preserve confidentiality, and a breach of confidentiality is the injury protected against. Without an actual confidentiality breach there is no injury and therefore no negligence under section 56.101. That the records have changed possession even in an unauthorized manner does not mean they have been exposed to the view of an unauthorized person.

Interpreting section 56.101 to provide $1,000 in damages to every person whose medical information came into the possession of an unauthorized person without that person viewing the information would lead to unintended results. For example, if a thief grabbed a computer containing medical information on four million patients, but the thief destroyed the electronic records to reformat and wipe clean the hard drive and sell the computer without ever viewing the information or even knowing it was on the hard drive, the health care provider would still be liable, at least potentially, for $4 billion. For all we know, that may have happened here. We cannot interpret a statute to require such an unintended result. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 77, 124 Cal.Rptr.2d 519, 52 P.3d 695 [statutes interpreted to avoid unintended results]; *Regents, supra*, 220 Cal.App.4th at p. 570, 163 Cal.Rptr.3d 205.)

Section 56.36

The plaintiffs assert that section 56.36 provides a remedy for violation of section 56.101. Since we conclude that Sutter **662 Health did not violate section 56.101, there is no occasion to look to section 56.36 for a remedy. In any event, section 56.36 provides remedies when a health care provider has "*negligently released* confidential information or records concerning [the plaintiff] *in violation of this part*...." (§ 56.36, subd. (b), italics added.) For the reasons given, there is no "negligent[ ] release[ ] ... in violation of [the Confidentiality Act]," if there is no actual breach of confidentiality. Because Sutter Health has not negligently released information or records in violation of the Confidentiality Act, there is no remedy.

The nominal damages provision of section 56.36, subdivision (b)(1) does not change this analysis. It provides for $1,000 in nominal damages and adds: "In order to recover under this paragraph, it shall not be necessary that the plaintiff suffered or was threatened with actual damages." (§ 56.36, **1559 subd. (b)(1).) No damages, not even nominal damages, are available unless the injury protected against is suffered. (*Huntsman v. Owens–Corning Fiberglas Corp.* (1997) 16 Cal.4th 520, 535, 66 Cal.Rptr.2d 438, 941 P.2d 71.) Once an actual breach of confidentiality is established, the plaintiff in an action under the Confidentiality Act may be entitled to $1,000 in nominal damages without establishing any pecuniary loss or threat of pecuniary loss. But nominal damages are not available if the injury--the confidentiality breach--has not occurred.

Conclusion

Because the plaintiffs have not alleged an actual breach of confidentiality, the trial court should have sustained Sutter Health's demurrer. We also conclude that the demurrer must be sustained without leave to amend and the action must be dismissed because the plaintiffs have not demonstrated, either in the trial court or on appeal, that there is a reasonable possibility they can amend the complaint to allege an actual breach of confidentiality. (*Regents, supra*, 220 Cal.App.4th at p. 570, fn. 15, 163 Cal.Rptr.3d 205; *Schultz v. Harney* (1994) 27 Cal.App.4th 1611, 1623, 33 Cal.Rptr.2d 276.)

DISPOSITION

The petition is granted. Let a peremptory writ of mandate issue directing the superior court to vacate its order overruling the petitioners' demurrer and to enter a new order sustaining the demurrer without leave to amend and dismissing the real parties in interests' action. The stay imposed when we issued the alternative writ is vacated. The petitioners are awarded their costs in this writ proceeding. (Cal. Rules of Court, rule 8.936.)

We concur:

MAURO, J.

DUARTE, J.

CAMFT has Several Articles on This...

Confidentiality Issues in Agency and Private Practice Settings

September 10, 2008 | Michael Griffin, JD, Staff Attorney

Confidentiality is the cornerstone of therapy. Learn more about the essential element of therapist-patient confidentiality through numerous sections of law and ethical standards.

By: Michael Griffin, JD, LCSW
Staff Attorney
The Therapist
(September/October 2008)
Reviewed November 2021 by Bradley J. Muldrow, JD (CAMFT Staff Attorney)

Confidentiality Issues in Agency and Private Practice Settings

The confidential nature of the therapist-patient relationship is an essential element of psychotherapy.[1] Confidentiality, therefore, is of considerable importance to psychotherapists, regardless of where they may practice. Yet, treatment settings are not identical and the confidentiality-related issues and concerns which arise in one setting may differ from those which exist in another. This article discusses a variety of legal and ethical issues concerning confidentiality in agency and private practice treatment settings.[2]

California law

Confidentiality is both a legal and an ethical concept involving a restriction on the release of private information that is defined by various state and federal laws and ethical standards.[3][4][5] Section 56 of the California Civil Code, otherwise known as the Confidentiality of Medical Information Act, describes confidentiality and its various exceptions, under California law.[6] According to this statute, any information that a therapist maintains, whether electronically or in some other form, that documents or describes his or her assessment and/or treatment of a patient, (whether or not still living) including information that contains any personal identifying information that would be sufficient to identify a patient, is confidential.[7] The unauthorized disclosure of confidential information by a psychotherapist is designated as a form of unprofessional conduct under the California Business and Professions Code.[8][9][10]

HIPAA

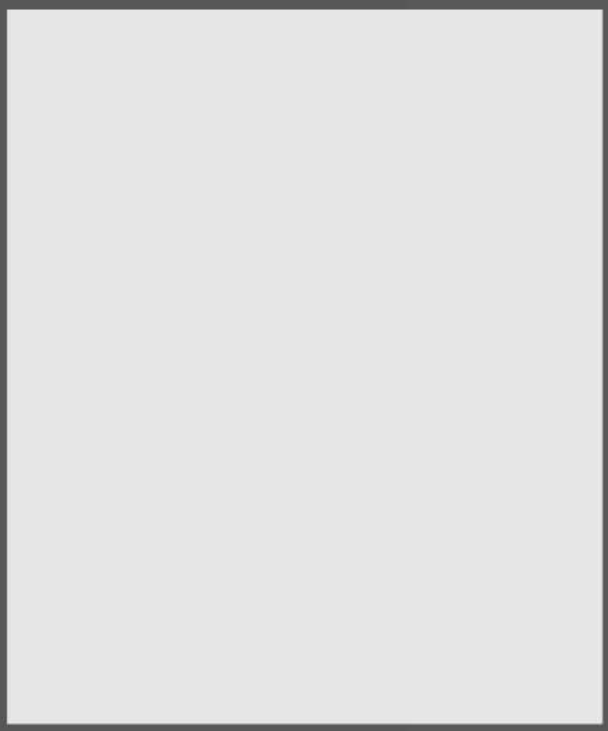
The Health Insurance Portability and Accountability Act of 1996 ("HIPAA")[11] is a Federal law which provides patients of providers who are "covered entities"[12] under HIPAA, with specific rights concerning the use and disclosure of their private health information. As of April 14, 2003, a therapist who is a covered entity is expected to be familiar with the rights of his or her patients under the HIPAA Privacy Rule,[13] and is required to provide every patient with a "Notice of Privacy Practices" at the start of treatment.[14] Although the therapist is not required to obtain the patient's signature on the Privacy Notice, he or she must make a good faith effort to obtain the patient's written acknowledgment of receiving it.[15]

Ethical Standards

The ethical standards that are published by professional organizations such as CAMFT, NASW, APA and AAMFT offer substantial guidance to their respective members on the various aspects of confidentiality.[16][17][18][19]

Requests to Provide Confidential Information

Depending on the particular treatment setting, a therapist is likely to encounter a wide variety of requests to disclose confidential information about his or her patients. There are many examples of such requests, including, but not limited to: a subpoena[20] to produce patient records or to attend a deposition or hearing; a phone call from a foster parent, social worker, probation officer, or attorney, asking the therapist to discuss his or her patient's treatment plan, or; a request from a child's parent to produce a copy of the child's treatment record. Because each of these scenarios is



Falling Below the Ethical Standard in the Profession

How Would Doing Something Unethical Equate to Malpractice?

Healthcare fields have certain codes of ethics. Essentially, any ethical violation that results in harm to a patient could potentially support a malpractice judgment

Dual Relationships

4. DUAL/MULTIPLE RELATIONSHIPS

Marriage and family therapists establish and maintain professional relationship boundaries that prioritize therapeutic benefit and safeguard the best interest of their clients/patients against exploitation. Marriage and family therapists engage in ethical multiple relationships with caution and in a manner that is congruent with their therapeutic role.

4.1 DUAL/MULTIPLE RELATIONSHIPS:Dual /multiple relationships occur when a therapist and his/her client/patient concurrently engage in one or more separate and distinct relationships. Not all dual/multiple relationships are unethical, and some need not be avoided, including those that are due to geographic proximity, diverse communities, recognized marriage and family therapy treatment models, community activities, or that fall within the context of culturally congruent relationships. Marriage and family therapists are aware of their influential position with respect to clients/patients, and avoid relationships that are reasonably likely to exploit the trust and/or dependence of clients/patients, or which may impair the therapist's professional judgment.

4.2 ASSESSMENT REGARDING DUAL/MULTIPLE RELATIONSHIPS: Prior to engaging in a dual/multiple relationship, marriage and family therapists take appropriate professional precautions which may include, but are not limited to the following: obtaining the informed consent of the client/patient, consultation or supervision, documentation of relevant factors, appraisal of the benefits and risks involved in the context of the specific situation, determination of the feasibility of alternatives, and the setting of clear and appropriate therapeutic boundaries to avoid exploitation or harm.

4.3 UNETHICAL DUAL/MULTIPLE RELATIONSHIPS: Acts that could result in unethical dual relationships include, but are not limited to, borrowing money from a client/patient, hiring a client/patient, or engaging in a business venture with a patient, or engaging in a close personal relationship with a client/patient. Such acts with a client's/patient's spouse, partner or immediate family member are likely to be considered unethical dual relationships.

Sex With a Client

4.5 SEXUAL CONTACT: Sexual contact includes, but is not limited to sexual intercourse, sexual intimacy, and sexually explicit communications without a sound clinical basis and rationale for treatment. Sexual contact with a client/patient, or a client's/patient's spouse or partner, or a client's/patient's immediate family member, during the therapeutic relationship, or during the two years following the termination of the therapeutic relationship, is unethical. Prior to engaging in sexual contact with a former client/patient or a client's/patient's spouse or partner, or a client's/patient's immediate family member, following the two years after termination or last professional contact, the therapist shall consider factors which include, but are not limited to, the potential harm to or exploitation of the former client/patient or to the client's/patient's family, the potential continued emotional vulnerability of the former client/patient, and the anticipated consequences of involvement with that person. (See also section 7.2 Sexual Contact with Supervisees and Students.)

4.6 PRIOR SEXUAL RELATIONSHIP: A marriage and family therapist does not enter into a therapeutic relationship with a person with whom the therapist has had a sexual relationship or knowingly enter into a therapeutic relationship with a partner or immediate family member of a person with whom the therapist has had a sexual relationship.

Gifts

5.8 GIFTS: Marriage and family therapists carefully consider the clinical and cultural implications of giving and receiving gifts or tokens of appreciation. Marriage and family therapists take into account the value of the gift, the effect on the therapeutic relationship, and the client/patient and the psychotherapist's motivation for giving, receiving, or declining, the gift.

Bartering

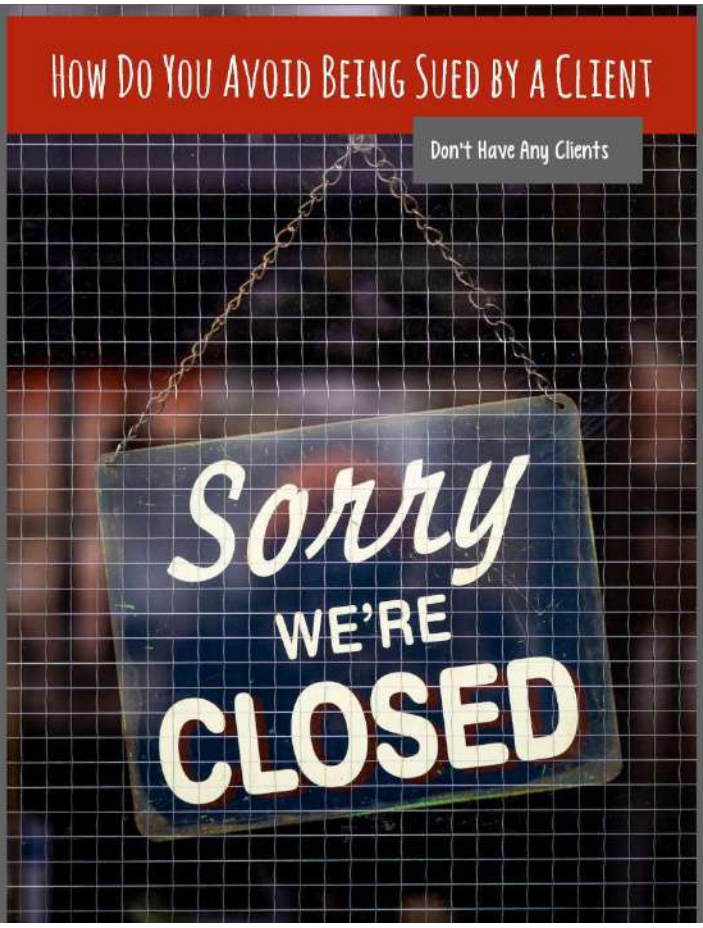
12.5 BARTERING: Marriage and family therapists ordinarily refrain from accepting goods or services from clients/patients in return for services rendered due to the potential for conflicts, exploitation, and/or distortion of the professional relationship. Bartering should only be considered and conducted if the client/patient requests it, the bartering is not otherwise exploitive or detrimental to the therapeutic relationship, and it is negotiated without coercion. Marriage and family therapists are responsible to ensure that such arrangements are not exploitive and that a clear written agreement is created. Marriage and family therapists are encouraged to consider relevant social and/or cultural implications of bartering including whether it is an accepted practice among professionals within the community. (For bartering with supervisees, see also section 7.12 Bartering with Supervisees.)

Multiple Therapists Doing Same Thing

5.12 DUPLICATION OF THERAPY: Marriage and family therapists do not generally duplicate professional services to a prospective client/patient receiving treatment from another psychotherapist. When making a determination to provide services, marriage and family therapists carefully consider the client's/patient's needs, presenting treatment issues, and the welfare of the client/patient to minimize potential confusion and/or conflict. Prior to rendering services, marriage and family therapists discuss these issues with the prospective client/patient, including the nature of the client's/patient's current relationship with the other treating psychotherapist and whether consultation with the other psychotherapist is appropriate.

Creates Mom/Dad Situation

How Do You Avoid Being Sued by a Client



- Part A: Falling Below the Standard of Care... Can Get You Into Trouble
- Part B: Opps...I Forgot to Do That... Can Get You Into Trouble
- Part C: Bad Luck... Can Get You Into Trouble
- Part D: Malpractice Will Save Me...Hopefully... Will It?

Opps...I forgot to Do that...Gets You Into Trouble As a therapist

Opps...I forgot to Do that...Gets You Into Trouble As a therapist

Therapist Get Sued For failing to Complete Required Tasks

Therapists have legal duties created by legal precedent, laws or regulations. It's sometimes hard to remember all of your obligations.

There are THREE we are going to discuss today :

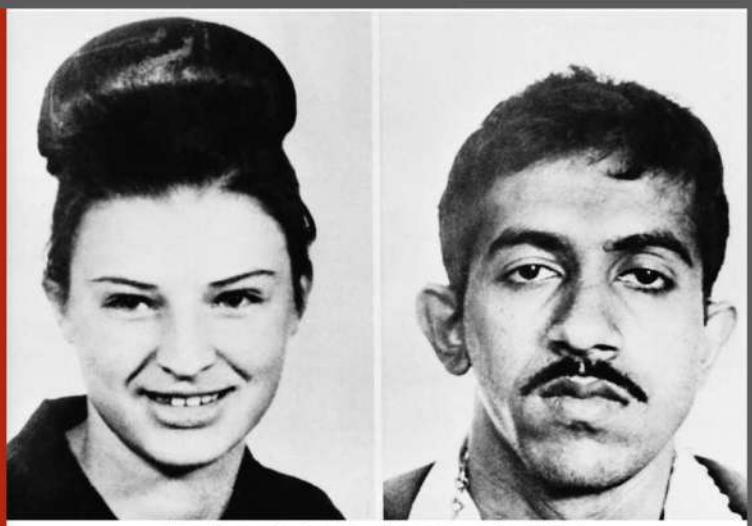
1. Not Completing Mandatory Duties

2. Not Complying with Subpoenas

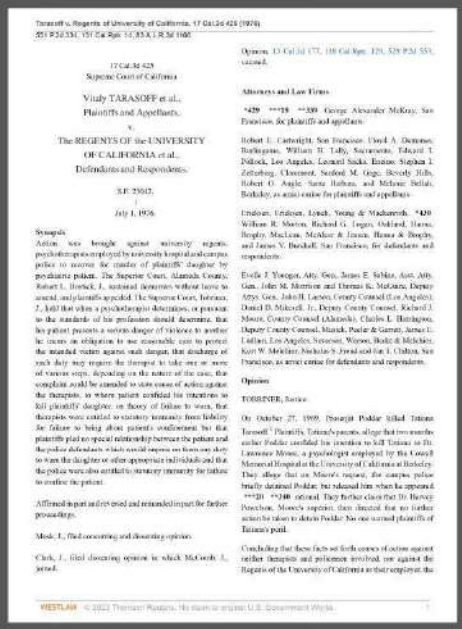
3. Not Keeping Notes

Duty to Take Reasonable Care to Protect the Intended Victim (AKA Tarasoff Duty)

Action was brought against university regents, psychotherapists employed by university hospital and campus police to recover for murder of plaintiffs' daughter by psychiatric patient. The Supreme Court, Tobriner, J., held that when a psychotherapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another he incurs an obligation to use reasonable care to protect the intended victim against such danger, that discharge of such duty may require the therapist to take one or more of various steps, depending on the nature of the case...



University of California junior Tatiana Tarasoff (left) was stabbed to death by Prosenjit Poddar in 1968. Poddar had previously confessed his intentions to a psychiatrist. (AP)



Tarasoff v. Regents of University of California, 17 Cal.3d 425 (1976)
551 P.2d 334, 131 Cal.Rptr. 14, 83 A.L.R.3d 1060

17 Cal.3d 425
Supreme Court of California

Vitaly TARASOFF et al.,
Plaintiffs and Appellants,
v.
The REGENTS OF the UNIVERSITY OF CALIFORNIA et al.,
Defendants and Respondents.

S.F. 23042.

July 1, 1976.

Synopsis

Action was brought against university regents, psychotherapists employed by university hospital and campus police to recover for murder of plaintiffs' daughter by psychiatric patient. The Superior Court, Alameda County, Robert L. Overholt, J., sustained demurrers without leave to amend, and plaintiffs appealed. The Supreme Court, Tobriner, J., held that when a psychotherapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another he incurs an obligation to use reasonable care to protect the intended victim against such danger, that discharge of such duty may require the therapist to take one or more of various steps, depending on the nature of the case, that complaint would be amended to state causes of action against the therapists in which patient confided his intentions to kill plaintiffs' daughter on theory of failure to warn, that therapists were entitled to statutory immunity from liability for failure to bring about patient's confinement but that plaintiffs pled no special relationship between the patient and the police defendants which would impose on them any duty to warn the daughter or other appropriate individuals and that the police were also entitled to statutory immunity for failure to confine the patient.

Affirmed in part and reversed and remanded in part for further proceedings.

Mosk, J., filed concurring and dissenting opinion.

Clark, J., filed dissenting opinion in which McComb, J., joined.

Opinion, 13 Cal.3d 177, 118 Cal.Rptr. 129, 529 P.2d 553, vacated.

Attorneys and Law Firms

*429 **18 **330 George Alexander McKray, San Francisco, for plaintiffs and appellants.

Robert L. Cartwright, San Francisco, Lloyd A. Demetras, Burlingame, William H. Tully, Sacramento, Edward T. Pollock, Los Angeles, Leonard Sacks, Erastus Stephen J. Zellerbach, Claremont, Sanford M. Gage, Beverly Hills, Robert D. Angle, Santa Barbara, and Mehanic Bellah, Berkeley, as amici curiae for plaintiffs and appellants.

Erickson, Erickson, Lynch, Young & Markarian, *430 William R. Morton, Richard G. Logan, Oakland, Harris, Brophy, MacLean, McAliser & Jennie, Hanna & Brophy, and James V. Burdhall, San Francisco, for defendants and respondents.

Evelle J. Younger, Atty. Gen., James E. Sahlos, Asst. Atty. Gen., John M. Morrison and Thomas K. McGuire, Deputy Attys. Gen., John H. Larson, County Counsel (Los Angeles), Daniel D. Mikesell, Jr., Deputy County Counsel, Richard J. Moore, County Counsel (Alameda), Charles L. Hutchinson, Deputy County Counsel, Minick, Poulet & Garrett, James L. Lillian, Los Angeles, Severson, Werson, Berke & Melchior, Kent W. Mewhirter, Nicholas S. Freud and Jan I. Dalton, San Francisco, as amici curiae for defendants and respondents.

Opinion

TOBRINER, Justice.

On October 27, 1969, Prosenjit Poddar killed Tatiana Tarasoff.[1] Plaintiffs, Tatiana's parents, allege that two months earlier Poddar confided his intention to kill Tatiana to Dr. Lawrence Moore, a psychologist employed by the Cowell Memorial Hospital at the University of California at Berkeley. They allege that on Moore's request, the campus police briefly detained Poddar, but released him when he appeared **331 *340 rational. They further claim that Dr. Harvey Powelson, Moore's superior, then directed that no further action be taken to detain Poddar. No one warned plaintiffs of Tatiana's peril.

Concluding that these facts set forth causes of action against neither therapists and policemen involved, nor against the Regents of the University of California as their employer, the

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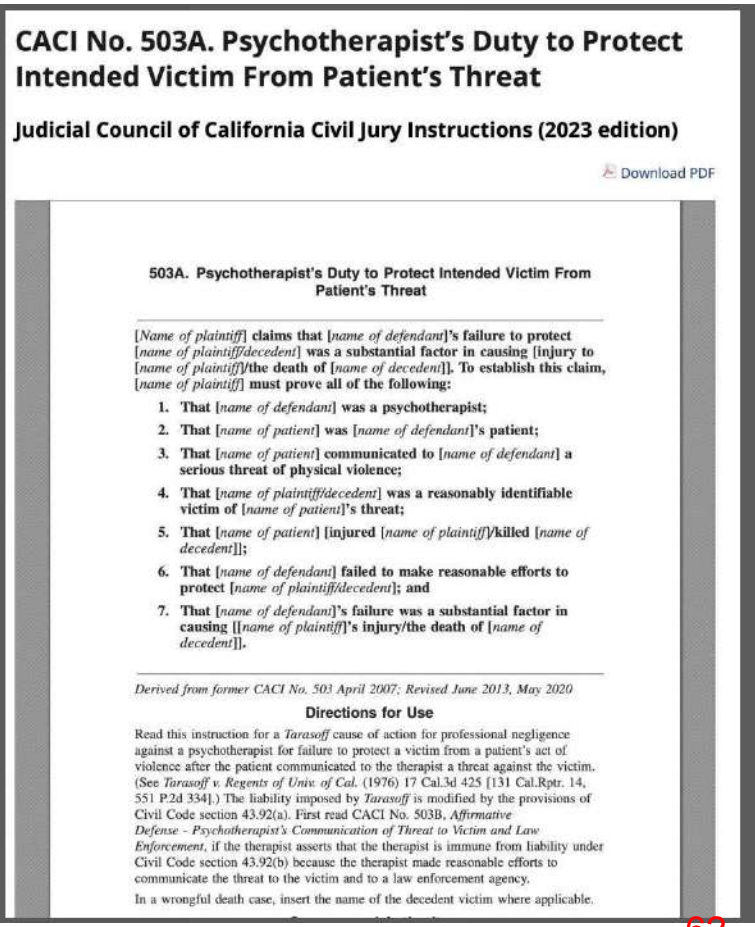
Court case created legal duty. If therapist forgets to complete duty then can be sued for malpractice.



CACI No. 503A. Psychotherapist's Duty to Protect Intended Victim From Patient's Threat

Judicial Council of California Civil Jury Instructions (2023 edition)

Download PDF

503A. Psychotherapist's Duty to Protect Intended Victim From Patient's Threat

[*Name of plaintiff*] claims that [*name of defendant*]'s failure to protect [*name of plaintiff/decedent*] was a substantial factor in causing [injury to [*name of plaintiff*]/the death of [*name of decedent*]]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] was a psychotherapist;**
2. **That [*name of patient*] was [*name of defendant*]'s patient;**
3. **That [*name of patient*] communicated to [*name of defendant*] a serious threat of physical violence;**
4. **That [*name of plaintiff/decedent*] was a reasonably identifiable victim of [*name of patient*]'s threat;**
5. **That [*name of patient*] [injured [*name of plaintiff*]/killed [*name of decedent*]];**
6. **That [*name of defendant*] failed to make reasonable efforts to protect [*name of plaintiff/decedent*]; and**
7. **That [*name of defendant*]'s failure was a substantial factor in causing [[*name of plaintiff*]'s injury/the death of [*name of decedent*]].**

Derived from former CACI No. 503 April 2007; Revised June 2013, May 2020

Directions for Use

Read this instruction for a *Tarasoff* cause of action for professional negligence against a psychotherapist for failure to protect a victim from a patient's act of violence after the patient communicated to the therapist a threat against the victim. (See *Tarasoff v. Regents of Univ. of Cal.* (1976) 17 Cal.3d 425 [131 Cal.Rptr. 14, 551 P.2d 334].) The liability imposed by *Tarasoff* is modified by the provisions of Civil Code section 43.92(a). First read CACI No. 503B, *Affirmative Defense - Psychotherapist's Communication of Threat to Victim and Law Enforcement*, if the therapist asserts that the therapist is immune from liability under Civil Code section 43.92(b) because the therapist made reasonable efforts to communicate the threat to the victim and to a law enforcement agency.

In a wrongful death case, insert the name of the decedent victim where applicable.

How do I stay Out of Trouble?

The discharge of the duty to protect may require the therapist to take one or more steps, depending upon the nature of the case.

Thus, the therapist may elect to warn the intended victim, or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances."

What About California Civil Code 43.92?

From Barry v. Turek, "Section 43.92, subdivision (a) was enacted to limit the liability of psychotherapists under Tarasoff v. Regents of University of California (1976) The legislative history to Civil Code section 43.92, subdivision (a) states: "[C]ase law has held that a psychiatrist may be liable for negligently failing to protect a person when a patient presents a serious danger to that person. This bill would provide for immunity from liability for a psychotherapist who fails to warn of and protect from, or predict and warn of and protect from a patient's threatened violent behavior, except where the patient has communicated to the psychotherapist a serious threat of violence against a reasonably identifiable victim."

Barry v. Turek, 218 Cal.App.3d 1241 (1990)
267 Cal.Rptr. 553

218 Cal.App.3d 1241
Court of Appeal, First District, Division 2, California.

Margaret C. BARRY, Plaintiff and Appellant,
v.
Peter TUREK, M.D.,
Defendant and Respondent.

No. A043977.
1
March 20, 1990.

Synopsis
Sexual assault victim filed action for damages against psychiatrist whose patient perpetrated assault. The San Francisco Superior Court, No. 876371, Maxine Mackler Chesney, J., found psychiatrist immune from liability, and victim appealed. The Court of Appeal, Kline, P.J., held that although plaintiff was clearly member of identifiable group of potential victims of patient, patient's past behavior did not amount to a "serious threat of physical violence" within meaning of exception to psychotherapist immunity.

Affirmed.

Benson, J., filed concurring and dissenting opinion.

Attorneys and Law Firms

**553 *1242 Aubrey W.A. Weldon, Daly City, for plaintiff and appellant.

Janet L. Grove, William B. McCoy, O'Connor, Cohn, Dillon & Barr, San Francisco, for defendant and respondent.

Opinion

*1243 KLINE, Presiding Justice.

Appellant Margaret Barry appeals the grant of summary judgment against her. She asserts the trial court erroneously found that respondent psychiatrist, Dr. Peter Turek, was immune from liability under Civil Code section 43.92, subdivision (a).

I. STATEMENT OF THE FACTS[1]

Respondent provided psychological care to Bismillah Jan at St. Mary's Hospital (St. Mary's) in San Francisco starting on May 14, 1986. Jan, a male Afghani, suffered severe injuries to the head and neck in the Afghanistan war, and was brought to St. Mary's for reconstructive surgery by the California Committee for a Free Afghanistan. At that time, Jan was 17 or 18 years old, five feet four inches tall, and weighed approximately 105 pounds. He wore a mask which covered most of his face. He spoke no English and communicated through interpreters.

Jan roamed freely on the seventh floor of St. Mary's. On a number of occasions, he followed nurses in "inappropriately close ways" and "grab[ed] nurses and [tried] to **554 kiss and fondle them." These incidents appear to have occurred between May 15 and May 25 of 1986.[2] Respondent and his assistants instructed Jan not to touch the nursing staff and, on at least one occasion, Jan nodded affirmatively after such instructions were given.

Jan never made verbal threats of violence within the hearing of respondent or his assistants, and appellant does not point to any evidence that respondent knew Jan had any violent tendencies.

Appellant worked on the seventh floor of St. Mary's as office manager in the social services department. Jan entered her office on a number of occasions, leaned over her and touched her with his shoulder. On each occasion, Jennifer Root, a clerical worker in the same office, had been present.

On the afternoon of June 6, 1986, Jan again came into appellant's office when she and Root were there. Appellant was on the telephone and Jan stood at her shoulder. Root left the office to run an errand. When appellant hung up the phone and stood up, Jan pushed his body against her and pinned her against the wall. He attempted to simultaneously fondle her *1244 breast and force her legs open while he masturbated. Appellant was wearing a pants outfit at the time; none of her clothes were removed during the assault. Root returned to the office while the assault was still occurring and Jan ran out of the room.

The assault aggravated appellant's bursitis of the shoulder and caused her to suffer psychological trauma.

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What does the court think of 43.92?

- "Section 43.92 strikes a reasonable balance in that it does not compel the therapist to predict the dangerousness of a patient. Instead, it requires the therapist to attempt to protect a victim under limited circumstances, even though the therapist's disclosure of a patient confidence will potentially disrupt or destroy the patient's trust in the therapist. However, the requirement is imposed upon the therapist only after he or she determines that the patient has made a credible threat of serious physical violence against a person." (*Calderon v. Glick* (2005) 131 Cal.App.4th 224, 231 [31 Cal.Rptr.3d 707].)

Ewing v. Goldstein, 120 Cal.App.4th 807 (2004)
15 Cal.Rptr.3d 864, 04 Cal. Daily Op. Serv. 6427, 2004 Daily Journal D.A.R. 8707

120 Cal.App.4th 807

Editor's Note: Additions are indicated by Text and deletions by Text .

Court of Appeal, Second District, Division 8.

Cal EWING et al., Plaintiffs and Appellants,
v.
David GOLDSTEIN, Ph.D., Defendant and Respondent.

No. B163112
|
July 16, 2004.
|
Review Denied Nov. 10, 2004.*

Synopsis
Background: Parents of victim killed by therapist's patient sued therapist for wrongful death based on therapist's failure to warn victim after therapist received communication from patient's father that patient threatened to kill or cause serious physical harm to victim. The Superior Court, Los Angeles County, No. BC267552, Frances Rothschild, J., granted therapist summary judgment. Parents appealed.

Holdings: The Court of Appeal, Boland, J., held that:

communication from patient's family member to therapist, was a "patient communication" within meaning of statute imposing duty on psychotherapist to warn of threatened violent behavior of patient;

statutory duty to warn arose with credible threat of murder or serious bodily injury; and

triable issue of fact remained whether therapist believed patient intended to kill or cause serious physical injury to victim.

Reversed.

Attorneys and Law Firms

****866 *810** Stark, Rasak & Clarke and Edmund Willcox Clarke, Jr., Manhattan Beach, for Plaintiffs and Appellants.

Callahan, McCune & Willis and Christopher J. Zopatti, Tustin, for Defendant and Respondent.

BOLAND, J.

SUMMARY

The parents of a victim killed by a therapist's patient sued the therapist for wrongful death based on the therapist's failure to warn the victim after the therapist received a communication that the patient threatened to kill or cause serious physical harm to the victim. The trial court granted the therapist's motion for summary judgment on the ground he was immune from liability under Civil Code section 43.92[1] because the threat was communicated to the therapist by the patient's father rather than by the patient himself.

***811** We conclude the trial court too narrowly construed section 43.92. First, a communication from a family member to a therapist, made for the purpose of advancing a patient's therapy, is a "patient communication" within the meaning of section 43.92. Second, a therapist's duty to warn a victim arises if the information communicated leads the therapist to believe or predict that the patient poses a serious risk of grave bodily injury to another.

Summary judgment was erroneously granted inasmuch as the communication to the therapist by a member of the patient's family of the patient's threat to kill or cause grave bodily injury to the victim raised a triable issue concerning the therapist's duty to warn the victim.

FACTUAL AND PROCEDURAL BACKGROUND

Respondent Dr. David Goldstein is a marriage and family therapist. Between 1997 and June 2001, Goldstein provided personal therapeutic services to Geno Colello, a former member of the Los Angeles Police Department. Goldstein treated Colello for work-related emotional problems and problems concerning his former girlfriend, Diana Williams.

What if the threat is communicated by a family member?

- "When the communication of the serious threat of physical violence is received by the therapist from a member of the patient's immediate family and is shared for the purpose of facilitating and furthering the patient's treatment, the fact that the family member is not technically a 'patient' is not crucial to the statute's purpose." (*Ewing v. Goldstein* (2004) 120 Cal.App.4th 807, 817 [15 Cal.Rptr.3d 864].)

Calderon v. Glick, 131 Cal.App.4th 224 (2005)
31 Cal.Rptr.3d 707, 05 Cal. Daily Op. Serv. 6419, 2005 Daily Journal D.A.R. 8816

131 Cal.App.4th 224
Court of Appeal, Second District, Division 6, California.

Maria del Rosario CALDERON, et al., Plaintiffs and Appellants,
v.
Howard Norman GLICK, etc., et al., Defendants and Respondents.

No. B177040
|
July 21, 2005.

Synopsis
Background: Individuals who sustained injuries during shooting spree by deranged gunman who committed suicide two days after shooting, and surviving relatives of those killed by gunman, sued gunman's psychotherapists, alleging causes of action for wrongful death and personal injuries based on failure to warn and professional malpractice. The Superior Court, Ventura County, No. SC036162, Kent M. Kellegrew, J., granted psychotherapists' motions for summary judgment. Plaintiffs appealed.

Holdings: The Court of Appeal, Yegan, J., held that:

psychotherapists had no statutory duty to warn plaintiffs, in absence of concrete threats of violence communicated to them by gunman, and

psychotherapists owed no duty of care in negligence to plaintiffs.

Affirmed.

Attorneys and Law Firms

****708** Ajalat & Ajalat, Sol P. Ajalat and Stephen P. Ajalat, Burbank, for Plaintiffs and Appellants.

Herzfeld & Rubin, Michael A. Zuk, Los Angeles, and Daniel Abrahamian, for Howard Norman Glick, M.D., and Jerry Bruns–Garcia, M.D., Defendants and Respondents.

Rushfeldt, Shelley & Drake; Kenneth W. Drake and Erica A. Levitt, Sherman ****709** Oaks, for Thomas Wright, Ph.D., Defendant and Respondent.

Opinion

YEGAN, J.

***227** A deranged and suicidal gunman shot and killed three members of his former girlfriend's family. He wounded two more. The gunman had been the patient of psychotherapists but he had not communicated any threats of physical violence against the former girlfriend or members of her family. We empathize with the remaining members of the family but the Legislature has expressly precluded monetary recovery from psychotherapists in this situation.

This is an appeal from the judgment entered following the grant of respondents' motion for summary judgment. Respondents are psychotherapists.[1] Their patient shot Reynoldo Rodriguez (Rodriguez) and killed three members of appellants' family and injured more relatives.[2] Appellants' ***228** complaint alleged causes of action for wrongful death and personal injuries based on failure to warn and professional malpractice. We affirm.

Facts

Dr. Bruns–Garcia was the owner of La Mer Medical group (hereafter La Mer). On June 28 and 29, 2001, Rodriguez went to La Mer for mental health reasons. He was evaluated by a psychiatrist, Dr. Howard Glick, and a licensed marriage and family therapist, Dr. Thomas Wright. Dr. Wright had a master's degree and a Ph.D. in psychology.

Rodriguez said that his problems began in March 2001 when he donated blood to the American Red Cross. His blood tested positive for HTLV (human T-cell lymphotropic virus). The Red Cross sent him a fact sheet stating that "only a small number (less than 2%) of individuals having a positive supplemental test for HTLV will ever develop a health problem, and if they do, it may take 20–40 years for the disease to appear." Nevertheless, Rodriguez told Dr. Wright and Dr. Glick that he was afraid that the virus would kill him. He falsely believed that his former girlfriend, Maria Calderon (Maria), had transmitted the disease to him. He "was upset" with her for having given him the disease. He thought that Maria knew she was infected and had "infected him

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Do I have to Be Reasonable? Can I err on the Side of Caution and Overreport? -- NO!

Defendant Rivera (Psychiatrist) believed she had a "Tarasoff" duty when Plaintiff Turner's (PTSD / Ex-Military/ Forest Worker) made a hypothetical statement about killing his boss. Turner claimed this was a "hypothetical" situation and that he did not have the "intent" to act upon the statement. Rivera ultimately decided to "err on the side of caution" and reported to law enforcement and Turner's boss about the incident relying on Civil Code 43.92 as justification for the permissive disclosure. Turner sued successfully, the jury awarded 2.75 million, but was reduced to 1 million based on the Medical Injury Compensation Reform Act of 1975 (MIRCA).

Turner v. Rivera, 835 Fed.Appx. 273 (2021)

835 Fed.Appx. 273 (Mem)
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

Ronald TURNER, Plaintiff-Appellee/Cross-Appellant,
v.
Tracie B. RIVERA, Defendant-Appellant/Cross-Appellee,
and
United States of America; et al., Defendants.

Nos. 19-16497, 19-16571
Argued and Submitted January 11, 2021 San Francisco, California
FILED February 2, 2021

Attorneys and Law Firms

Bree Hann, Esquire, Fred Norton, Attorney, Matthew W. Turetzky, Attorney, The Norton Law Firm PC, Oakland, CA, for Plaintiff - Appellee

Timothy T. Coates, Attorney, Greines, Martin, Stein & Richland LLP, Los Angeles, CA, Nancy K. Delaney, Mitchell, Brisso, Delaney & Vrieze, Eureka, CA, William Forrest Mitchell, Esquire, Attorney, The Mitchell Law Firm, LLP, Eureka, CA, for Defendant - Appellant

Scott Matthew Klausner, Attorney, Cole Pedroza LLP, San Marino, CA, for Amici Curiae California Psychiatric Association, California Marriage and Family Therapists Association, California Medical Association, California Dental Association, California Hospital Association

Appeal from the United States District Court for the Northern District of California, William Horsley Orrick, District Judge, Presiding, D.C. No. 3:17-cv-02265-WHO

Before: BYBEE and R. NELSON, Circuit Judges, and WHALEY,* District Judge.

*274 MEMORANDUM**

Following a civil jury trial, psychiatrist Dr. Tracie Rivera was found liable to patient Ronald Turner for professional negligence in the wrongful disclosure of Turner's supposed threat to kill his supervisor. Rivera appeals, and Turner cross-appeals. Finding no error, we affirm the judgment of the district court.

The parties are familiar with the facts, so we do not recite them here.

1. We review de novo a ruling on the appropriate statute of limitations. *Johnson v. Lucent Techs. Inc.*, 653 F.3d 1000, 1005 (9th Cir. 2011). Here, Turner alleged that he diligently pursued his claims against Rivera and that he acted reasonably and in good faith. *See Addison v. State*, 21 Cal. 3d 313, 319, 146 Cal.Rptr. 224, 578 P.2d 941 (1978) (setting forth elements of California's equitable tolling doctrine). Rivera does not contend that she was prejudiced by Turner's delay in filing the action. Under these circumstances, the district court properly concluded that Turner's allegations were sufficient to survive a motion to dismiss. *See Cervantes v. City of San Diego*, 5 F.3d 1273, 1276–77 (9th Cir. 1993) (a dismissal under the statute of limitations is generally disfavored where the complaint adequately alleges facts showing that equitable tolling may apply); *see also Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131, 1140 (9th Cir. 2001).

2. Whether a psychotherapist actually believed or predicted a patient posed a serious risk of inflicting grave bodily harm on a reasonably identifiable victim is a question of fact for the finder of fact. *Ewing v. Northridge Hosp. Med. Ctr.*, 120 Cal.App.4th 1289, 16 Cal. Rptr. 3d 591, 600 (2004) (citing Cal. Civ. Code §§ 43.92(a), (b)). The jury's finding that Rivera did not actually believe Turner posed a serious threat is supported by substantial evidence in the record. *See Harper v. City of Los Angeles*, 533 F.3d 1010, 1021 (9th Cir. 2008) ("A jury's verdict must be upheld if it is supported by substantial evidence....") (citation and internal quotation marks omitted). Rivera was not entitled to immunity under California Civil Code Section 43.92(b) which provides immunity for psychotherapists who properly discharge their duty to warn because they believe the patient poses "a serious risk of inflicting grave bodily injury upon a reasonably identifiable victim." *Ewing*, 16 Cal. Rptr. 3d at 600 (citing Cal. Civ. Code §§ 43.92(a), (b)). Because the jury

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How Do I Not Get Sued for This?

To meet your obligation:

1. Make reasonable efforts to communicate the threat to the intended victim,

AND,

2. Report this information to a law enforcement agency.

CACI No. 503B. Affirmative Defense - Psychotherapist's Communication of Threat to Victim and Law Enforcement

Judicial Council of California Civil Jury Instructions (2023 edition)

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503B. Affirmative Defense - Psychotherapist's Communication of Threat to Victim and Law Enforcement

[*Name of defendant*] is not responsible for [[*name of plaintiff*]'s injury/the death of [*name of decedent*]] if [*name of defendant*] proves that [he/she/*nonbinary pronoun*] made reasonable efforts to communicate the threat to [*name of plaintiff/decedent*] and to a law enforcement agency.

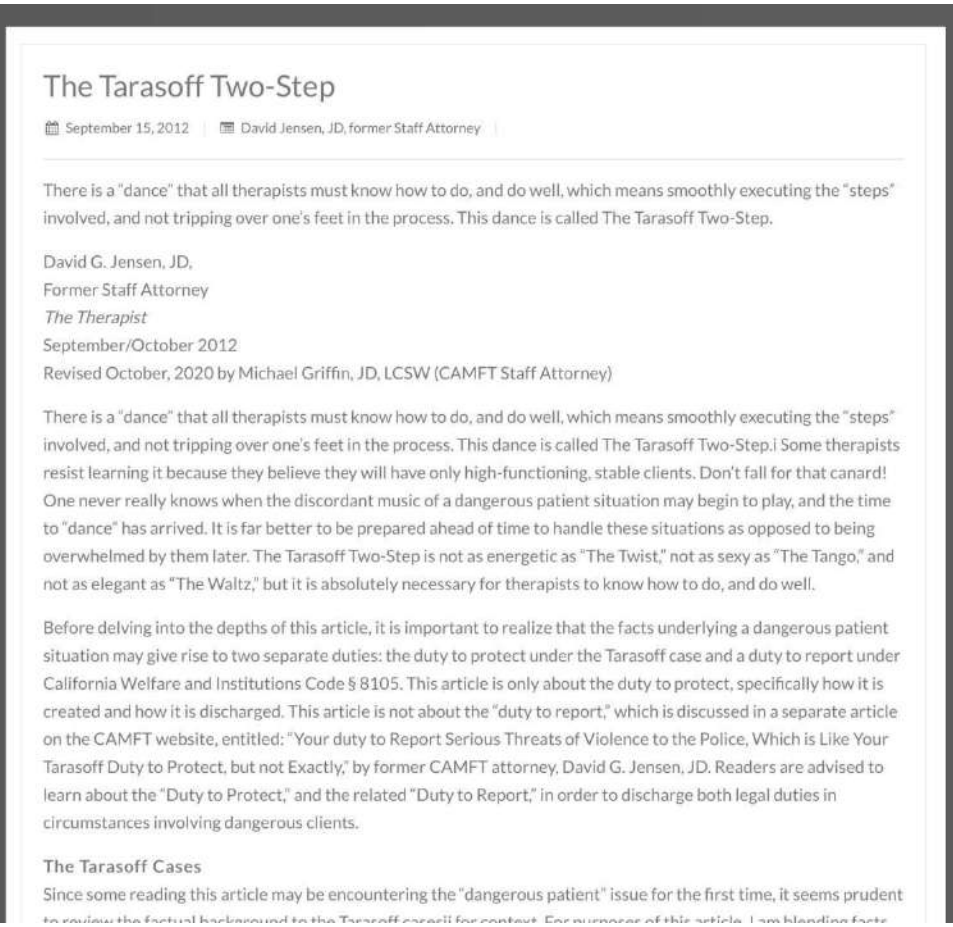
Derived from former CACI No. 503 April 2007; Revised June 2013, May 2020

Directions for Use

Read this instruction for a *Tarasoff* cause of action for professional negligence against a psychotherapist (*Tarasoff v. Regents of Univ. of Cal.* (1976) 17 Cal.3d 425 [131 Cal.Rptr. 14, 551 P.2d 334]) if there is a dispute of fact regarding whether the defendant made reasonable efforts to communicate to the victim and to a law enforcement agency a threat made by the defendant's patient. The therapist is immune from liability under *Tarasoff* if the therapist makes reasonable efforts to communicate the threat to the victim and to a law enforcement agency. (Civ. Code, § 43.92(b).) CACI No. 503A, *Psychotherapist's Duty to Protect Intended Victim From Patient's Threat*, sets forth the elements of a *Tarasoff* cause of action if the defendant is not immune.

In a wrongful death case, insert the name of the decedent victim where applicable.

For More Information on This Topic CAMFT has an Article



The Tarasoff Two-Step

September 15, 2012 | David Jensen, JD, former Staff Attorney

There is a "dance" that all therapists must know how to do, and do well, which means smoothly executing the "steps" involved, and not tripping over one's feet in the process. This dance is called The Tarasoff Two-Step.

David G. Jensen, JD,
Former Staff Attorney
The Therapist
September/October 2012
Revised October, 2020 by Michael Griffin, JD, LCSW (CAMFT Staff Attorney)

There is a "dance" that all therapists must know how to do, and do well, which means smoothly executing the "steps" involved, and not tripping over one's feet in the process. This dance is called The Tarasoff Two-Step.i Some therapists resist learning it because they believe they will have only high-functioning, stable clients. Don't fall for that canard! One never really knows when the discordant music of a dangerous patient situation may begin to play, and the time to "dance" has arrived. It is far better to be prepared ahead of time to handle these situations as opposed to being overwhelmed by them later. The Tarasoff Two-Step is not as energetic as "The Twist," not as sexy as "The Tango," and not as elegant as "The Waltz," but it is absolutely necessary for therapists to know how to do, and do well.

Before delving into the depths of this article, it is important to realize that the facts underlying a dangerous patient situation may give rise to two separate duties: the duty to protect under the Tarasoff case and a duty to report under California Welfare and Institutions Code § 8105. This article is only about the duty to protect, specifically how it is created and how it is discharged. This article is not about the "duty to report," which is discussed in a separate article on the CAMFT website, entitled: "Your duty to Report Serious Threats of Violence to the Police, Which is Like Your Tarasoff Duty to Protect, but not Exactly," by former CAMFT attorney, David G. Jensen, JD. Readers are advised to learn about the "Duty to Protect," and the related "Duty to Report," in order to discharge both legal duties in circumstances involving dangerous clients.

The Tarasoff Cases

Since some reading this article may be encountering the "dangerous patient" issue for the first time, it seems prudent to review the factual background to the Tarasoff cases[ii] for context. For purposes of this article, I am blending facts

Duty to Disclose Information to Other Providers (AKA Gross Duty)

In Gross v. Allen (1994) 22 Cal. App. 4th 354.

A Psychiatrist, who had been treating patient for three years and intended to continue treating her, had duty to inform hospital's admitting psychiatrist, who requested patient's psychiatric history, of patient's history of suicide attempts.

"Dr. Gross presented evidence that Dr. Allen was negligent in several respects. We need consider only one: his failure on June 25, 1985, to inform Dr. Gross of Ms. Scancarello's past suicide attempts and present suicide risk. Dr. Allen contends he had no duty to so inform Dr. Gross. We disagree."

Thus, the Court of Appeal affirmed the jury's verdict that Dr. Allen was negligent by failing to inform Dr. Gross of Ms. Scancarello's past suicide attempts and present suicide risk. In fact, the Court of Appeal in Gross concluded that Dr. Allen had a duty to do so, meaning an obligation to disclose such information.

There is an obligation on the part of the Psychotherapist to disclose relevant infromation to other providers. The information concerning patient's psychiatric history was critical because it had the capacity of dramatically affecting decisions regarding her care. The goal, after all, is to provide patients with the right care at the right time, and, given her history, the eating disorder program was probably the right care at the wrong time. It is possible that had Dr. Allen informed Dr. Gross of Ms. Scancarello's psychiatric history, Dr. Gross would have had her removed from the eating disorder program or had her supervised more closely while in the program, thereby forestalling her suicide attempt. Of course, we will never know. It is possible that she may have attempted suicide at home after discharge from the program, but such an event would have occurred on someone else's watch.

For More Information on This Topic CAMFT has an Article

Don't Fumble The Information

October 1, 2017 | David Jensen, JD, former Staff Attorney

Learn how information concerning a patient's past suicide attempts and present risk of suicide are crucial pieces of information that need to be conveyed from psychotherapist to psychotherapist.

by: David G. Jensen, JD
former Staff Attorney
The Therapist
(November/December 2005)
Revised in October, 2020 by Michael Griffin, JD, LCSW (CAMFT Staff Attorney)

With college and professional football seasons in full swing, it seems an opportune time to consider the issue of fumbling. For non-football fans, a fumble is a type of mistake that results in the opposing team acquiring control of the football. For football teams, fumbles can mean the difference between winning and losing a game. Because fumbling involves some sort of mistake, it serves as an apt metaphor for other mistakes occurring in life. Although not a football player, a therapist can fumble too.

For instance, a therapist may "fumble the ball" by doing a poor job of assessing a patient during an initial session; a therapist may "fumble the ball" by failing to keep treatment records or failing to monitor or amend a patient's treatment plan; or, a therapist may "fumble the ball" by forgetting to report child, elder, or dependent adult abuse. Moreover, a therapist may "fumble the ball" by mishandling patient information. It is this last type of fumble, i.e., the mishandling of patient information, especially a patient's suicidal tendencies, that is the focus of this article. (The CAMFT website contains various resources related to the topic of suicide, including a one-hour webinar a entitled" "Working with Suicidal Clients" by Michael Griffin, JD, CAMFT Staff Attorney, in the CAMFT "On Demand" learning library).

The Case of the Fumbled Hand-Off

The case of Gross v. Allen1 involves a female patient with a history of suicide attempts. This case ended tragically, an outcome that probably could have been averted had certain information been passed along from practitioner to

Duty to Report Serious Threats of Physical Violence to Law enforcement

The duty to protect and the duty to report tend to go hand and hand yet trigger different obligations for the therapist. Like the complicated distinction between Tarasoff and California Civil Code 43.92, the duty to report serious threats is equally as complicated because of its codification. The obligation requires a therapist to review two distinct codes found in the California Welfare & Institutions Code § 8100 (b) and 8105(c).

How Does This One Work?

Under Welfare & Institutions Code § 8105(c), a "licensed psychotherapist shall report to a local law enforcement agency, within 24 hours…the identity of a person subject to subdivision (b) of Section 8100." Under Welfare & Institutions Code § 8100(b), if a client communicates to a licensed psychotherapist "a serious threat of physical violence against a reasonably identifiable victim or victims" that client shall not have in "his or her possession or under his or her custody or control, or purchase or receive, or attempt to purchase or receive, any firearms whatsoever or any other deadly weapon for a period of five years."

Combining both Welfare & Institution Codes, when a therapist has assessed, by utilizing their training, education, and experience, that a client is reasonably likely to act on this serious threat of violence against an identifiable victim, the therapist must notify local law enforcement within 24 hours. In making the report, the client would no longer legally be able to possess or have access to weapons (i.e. firearms) from the date the report is made

For More Information on This Topic CAMFT has an Article

Your Duty to Report Serious Threats of Violence

October 1, 2017 | David Jensen, JD, former Staff Attorney

Your Duty to Report Serious Threats of Violence to the Police, Which is Like Your Tarasoff Duty to Protect, but not Exactly The duty to report is different from the Tarasoff duty to protect, both in terms of the aims of the laws and how they are discharged. This article will distinguish the two duties

David Jensen, JD
former Staff Attorney
The Therapist
January/February 2015
Revised October 2017 by David G. Jensen, JD (former CAMFT Staff Attorney)

Elliot Rodger was a very angry and troubled young man, and on the evening of May 23, 2014, we all learned just how angry and troubled he was. On that night, Rodger killed six people and injured thirteen others in Isla Vista, California. As a society, we grieve for those affected by his desperate actions, and we long for a solution to the complex phenomenon of mass shootings, school or otherwise. In the aftermath of the Isla Vista tragedy, and in an attempt to prevent another one from occurring, California took out its powerful legislative wrench and tightened its gun control laws, and such tightening has vivified a dormant reporting requirement of psychotherapists: the duty to report serious threats of physical violence to local law enforcement ("Duty to Report").

The Duty to Report is Different From the Duty to Protect Under Tarasoff

The Duty to Report is distinct from the duty to protect as set forth in Tarasoff, and the laws have very different aims in mind, although they share a common purpose of reducing violence towards individuals.

Under Tarasoff, the aim of the law is to require psychotherapists to do reasonable things to try and protect victims from physical violence committed by patients. Under the Duty to Report, however, the aim of the law is to get weapons out of the hands of patients who are dangerous to others. Hence, the laws are different, and if your patient utters a threat to harm other people, and you believe the threat is serious, you will need to comply with both laws.

The Duty to Report Serious Threats of Physical Violence to Law Enforcement

The purpose of the Duty to Report is to get firearms and other deadly weapons (collectively "Weapons"), out of the

Duty to Report to Licensing Board Sexual Abuse or Sexual Misconduct

SB425 requires any health care facility or other entity for which a healing arts licensee practices to make a report to the applicable licensing board within 15 days of receiving any written allegations of sexual abuse or sexual misconduct from a patient or a patient's representative.

-The Board must keep such a report confidential.
-A willful failure to file the report is punishable by a fine of up to $100,000 per violation. Any failure to file the report is punishable by a fine of up to $50,000 per violation.
-The Board is required to investigate the circumstances upon receiving any such report.

Code Section: BPC §805.8

Is this Reporting Requirement Applicable to all Practice Settings?

Yes, the reporting requirement applies to any setting that makes any arrangement under which a Board licensee or registrant is allowed to practice or provide care for patients.

How do I File the Required Report?

You may file the required report by visiting the following link and clicking on the "File a Complaint: button:
https://www.breeze.ca.gov/datamart/mainMenu.do;jsessionid=6krH5Ial_NPX3HsaNBPRBGFim5ygacMxsML7CnqJ.vo-4-jbspj

Subpoena

Subpoena

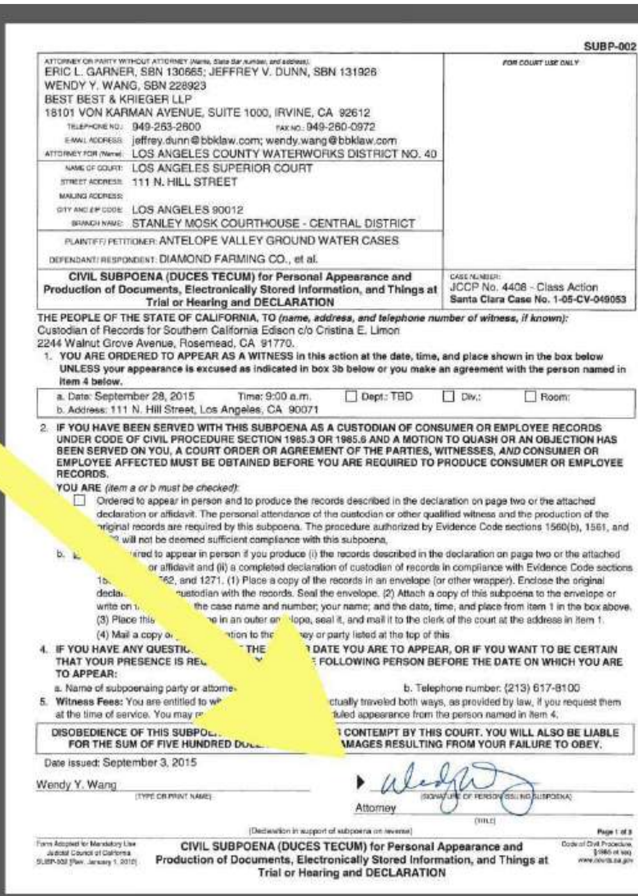
Attorney Based Subpoena

You CANNOT ignore this!

The majority of subpoenas will come from an attorney. You can tell from the signature line.

With most attorney based subpoenas, the Psychotherapist-patient privilege remains in effect. This would mean that your client would have to consent for the information to be shared.

CAMFT may be able to provide assistance if you are unsure.



SUBP-002

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):
ERIC L. GARNER, SBN 130665; JEFFREY V. DUNN, SBN 131926
WENDY Y. WANG, SBN 228923
BEST BEST & KRIEGER LLP
18101 VON KARMAN AVENUE, SUITE 1000, IRVINE, CA 92612
TELEPHONE NO.: 949-263-2600 FAX NO.: 949-260-0972
E-MAIL ADDRESS: jeffrey.dunn@bbklaw.com; wendy.wang@bbklaw.com
ATTORNEY FOR (Name): LOS ANGELES COUNTY WATERWORKS DISTRICT NO. 40

FOR COURT USE ONLY

NAME OF COURT: LOS ANGELES SUPERIOR COURT
STREET ADDRESS: 111 N. HILL STREET
MAILING ADDRESS:
CITY AND ZIP CODE: LOS ANGELES 90012
BRANCH NAME: STANLEY MOSK COURTHOUSE - CENTRAL DISTRICT

PLAINTIFF/ PETITIONER: ANTELOPE VALLEY GROUND WATER CASES
DEFENDANT/ RESPONDENT: DIAMOND FARMING CO., et al.

CIVIL SUBPOENA (DUCES TECUM) for Personal Appearance and Production of Documents, Electronically Stored Information, and Things at Trial or Hearing and DECLARATION

CASE NUMBER: JCCP No. 4408 - Class Action
Santa Clara Case No. 1-05-CV-049053

THE PEOPLE OF THE STATE OF CALIFORNIA, TO *(name, address, and telephone number of witness, if known):*
Custodian of Records for Southern California Edison c/o Cristina E. Limon
2244 Walnut Grove Avenue, Rosemead, CA 91770.

1. **YOU ARE ORDERED TO APPEAR AS A WITNESS in this action at the date, time, and place shown in the box below UNLESS your appearance is excused as indicated in box 3b below or you make an agreement with the person named in item 4 below.**

a. Date: September 28, 2015 Time: 9:00 a.m. ☐ Dept.: TBD ☐ Div.: ☐ Room:
b. Address: 111 N. Hill Street, Los Angeles, CA 90071

2. **IF YOU HAVE BEEN SERVED WITH THIS SUBPOENA AS A CUSTODIAN OF CONSUMER OR EMPLOYEE RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.3 OR 1985.6 AND A MOTION TO QUASH OR AN OBJECTION HAS BEEN SERVED ON YOU, A COURT ORDER OR AGREEMENT OF THE PARTIES, WITNESSES, *AND* CONSUMER OR EMPLOYEE AFFECTED MUST BE OBTAINED BEFORE YOU ARE REQUIRED TO PRODUCE CONSUMER OR EMPLOYEE RECORDS.**

YOU ARE *(item a or b must be checked):*
☐ Ordered to appear in person and to produce the records described in the declaration on page two or the attached declaration or affidavit. The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure authorized by Evidence Code sections 1560(b), 1561, and ... will not be deemed sufficient compliance with this subpoena.
b. ... required to appear in person if you produce (i) the records described in the declaration on page two or the attached ... or affidavit and (ii) a completed declaration of custodian of records in compliance with Evidence Code sections 15... 562, and 1271. (1) Place a copy of the records in an envelope (or other wrapper). Enclose the original decla... custodian with the records. Seal the envelope. (2) Attach a copy of this subpoena to the envelope or write on ... the case name and number; your name; and the date, time, and place from item 1 in the box above. (3) Place this ... in an outer en...lope, seal it, and mail it to the clerk of the court at the address in item 1. (4) Mail a copy o... ...tion to the ...ey or party listed at the top of this

4. **IF YOU HAVE ANY QUESTIO... THE ... DATE YOU ARE TO APPEAR, OR IF YOU WANT TO BE CERTAIN THAT YOUR PRESENCE IS RE... ...E FOLLOWING PERSON BEFORE THE DATE ON WHICH YOU ARE TO APPEAR:**

a. Name of subpoenaing party or attorne... b. Telephone number: (213) 617-8100

5. **Witness Fees:** You are entitled to w... ...ctually traveled both ways, as provided by law, if you request them at the time of service. You may r... ...duled appearance from the person named in item 4.

DISOBEDIENCE OF THIS SUBPO... ...CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF FIVE HUNDRED DO... ...AMAGES RESULTING FROM YOUR FAILURE TO OBEY.

Date issued: September 3, 2015

Wendy Y. Wang
(TYPE OR PRINT NAME)

(SIGNATURE OF PERSON ISSUING SUBPOENA)

Attorney
(TITLE)

(Declaration in support of subpoena on reverse)

Page 1 of 3

Form Adopted for Mandatory Use
Judicial Council of California
SUBP-002 [Rev. January 1, 2012]

CIVIL SUBPOENA (DUCES TECUM) for Personal Appearance and Production of Documents, Electronically Stored Information, and Things at Trial or Hearing and DECLARATION

Code of Civil Procedure, §1985 et seq.
www.courts.ca.gov

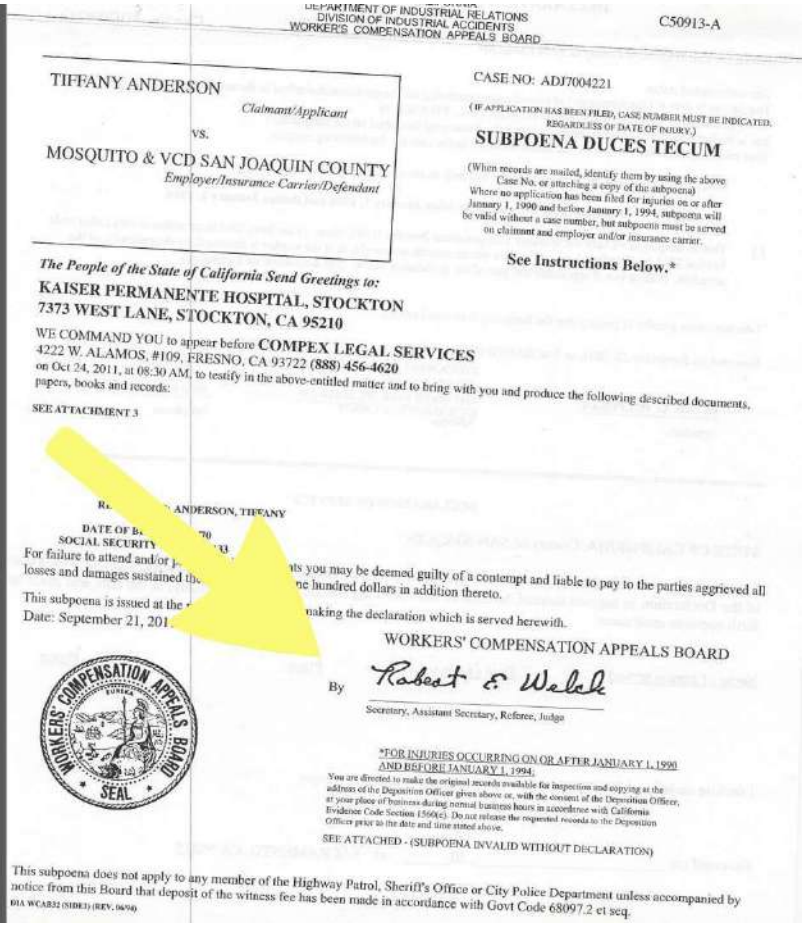
Judge Based Subpoena

You CANNOT ignore this!

This is a subpoena issued by a judge. You can tell from the signature line.

With most judge based subpoenas, the Psychotherapist-patient privilege is trumped by this court ordered subpoena. This would mean that your client would not have to consent for the information to be shared.

CAMFT may be able to provide assistance if you are unsure.



DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF INDUSTRIAL ACCIDENTS
WORKER'S COMPENSATION APPEALS BOARD

C50913-A

TIFFANY ANDERSON
Claimant/Applicant
vs.
MOSQUITO & VCD SAN JOAQUIN COUNTY
Employer/Insurance Carrier/Defendant

CASE NO: ADJ7004221

(IF APPLICATION HAS BEEN FILED, CASE NUMBER MUST BE INDICATED, REGARDLESS OF DATE OF INJURY.)

SUBPOENA DUCES TECUM

(When records are mailed, identify them by using the above Case No. or attaching a copy of the subpoena) Where no application has been filed for injuries on or after January 1, 1990 and before January 1, 1994, subpoena will be valid without a case number, but subpoena must be served on claimant and employer and/or insurance carrier.

See Instructions Below.*

The People of the State of California Send Greetings to:
KAISER PERMANENTE HOSPITAL, STOCKTON
7373 WEST LANE, STOCKTON, CA 95210

WE COMMAND YOU to appear before **COMPEX LEGAL SERVICES**
4222 W. ALAMOS, #109, FRESNO, CA 93722 **(888) 456-4620**
on Oct 24, 2011, at 08:30 AM, to testify in the above-entitled matter and to bring with you and produce the following described documents, papers, books and records:

SEE ATTACHMENT 3

RE: ANDERSON, TIFFANY
DATE OF B[illegible]70
SOCIAL SECURITY [illegible]XI

For failure to attend and/or [illegible]ts you may be deemed guilty of a contempt and liable to pay to the parties aggrieved all losses and damages sustained th[illegible] [illegible]ne hundred dollars in addition thereto.

This subpoena is issued at the [illegible] [illegible]naking the declaration which is served herewith.
Date: September 21, 201[illegible]

WORKERS' COMPENSATION APPEALS BOARD

By Robert E Walsh
Secretary, Assistant Secretary, Referee, Judge

WORKERS' COMPENSATION APPEALS BOARD SEAL

*FOR INJURIES OCCURRING ON OR AFTER JANUARY 1, 1990 AND BEFORE JANUARY 1, 1994:
You are directed to make the original records available for inspection and copying at the address of the Deposition Officer given above or, with the consent of the Deposition Officer, at your place of business during normal business hours in accordance with California Evidence Code Section 1560(c). Do not release the requested records to the Deposition Officer prior to the date and time stated above.

SEE ATTACHED - (SUBPOENA INVALID WITHOUT DECLARATION)

This subpoena does not apply to any member of the Highway Patrol, Sheriff's Office or City Police Department unless accompanied by notice from this Board that deposit of the witness fee has been made in accordance with Govt Code 68097.2 et seq.

DIA WCAB32 (SIDE1) (REV. 06/94)

What Happens If a Subpoena is Ignored?

Failure to adhere to a subpoena can subject someone to criminal or civil contempt. A person who disobeys a subpoena can be immediately punished by the court for contempt (including a $500 monetary sanction, plus other expenses caused by the failure to comply).
Contempt charges can apply until the requested information is produced and the subject of the subpoena has fulfilled his or her legal obligation to the court

Universal Citation: CA Civ Pro Code § 1991 (2022)

1991. Disobedience to a subpoena, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the court issuing the subpoena.

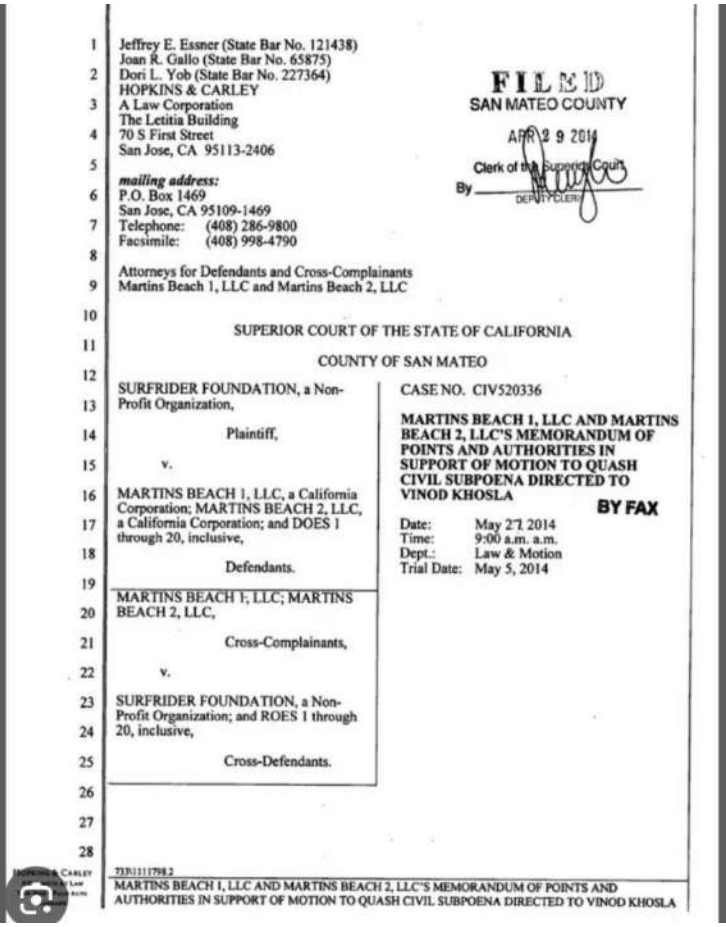
When the subpoena, in any such case, requires the attendance of the witness before an officer or commissioner out of court, it is the duty of the officer or commissioner to report any disobedience or refusal to be sworn or to answer a question or to subscribe an affidavit or deposition when required, to the court issuing the subpoena. The witness shall not be punished for any refusal to be sworn or to answer a question or to subscribe an affidavit or deposition, unless, after a hearing upon notice, the court orders the witness to be sworn, or to so answer or subscribe and then only for disobedience to the order.

Any judge, justice, or other officer mentioned in subdivision (c) of Section 1986, may report any disobedience or refusal to be sworn or to answer a question or to subscribe an affidavit or deposition when required to the superior court of the county in which attendance was required; and the court thereupon has power, upon notice, to order the witness to perform the omitted act, and any refusal or neglect to comply with the order may be punished as a contempt of court.

What About Quashing a Supoena?

Any person to whom a subpoena is directed, or any party, may file a motion to quash or limit the subpoena. The motion must be filed with the judge, and it must include the reasons why compliance with the subpoena should not be required or the reasons why the subpoena's scope should be limited.

Until this has been ruled upon-- you still have an obligation.



Jeffrey E. Essner (State Bar No. 121438)
Joan R. Gallo (State Bar No. 65875)
Dori L. Yob (State Bar No. 227364)
HOPKINS & CARLEY
A Law Corporation
The Letitia Building
70 S First Street
San Jose, CA 95113-2406

mailing address:
P.O. Box 1469
San Jose, CA 95109-1469
Telephone: (408) 286-9800
Facsimile: (408) 998-4790

Attorneys for Defendants and Cross-Complainants
Martins Beach 1, LLC and Martins Beach 2, LLC

FILED
SAN MATEO COUNTY
APR 29 2014
Clerk of the Superior Court
By _____ DEPUTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

SURFRIDER FOUNDATION, a Non-Profit Organization,

Plaintiff,

v.

MARTINS BEACH 1, LLC, a California Corporation; MARTINS BEACH 2, LLC, a California Corporation; and DOES 1 through 20, inclusive,

Defendants.

MARTINS BEACH 1, LLC; MARTINS BEACH 2, LLC,

Cross-Complainants,

v.

SURFRIDER FOUNDATION, a Non-Profit Organization; and ROES 1 through 20, inclusive,

Cross-Defendants.

CASE NO. CIV520336

MARTINS BEACH 1, LLC AND MARTINS BEACH 2, LLC'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO QUASH CIVIL SUBPOENA DIRECTED TO VINOD KHOSLA

BY FAX

Date: May 27, 2014
Time: 9:00 a.m. a.m.
Dept.: Law & Motion
Trial Date: May 5, 2014

7281111798.2

MARTINS BEACH 1, LLC AND MARTINS BEACH 2, LLC'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO QUASH CIVIL SUBPOENA DIRECTED TO VINOD KHOSLA

For More Information on This Topic CAMFT has an Article

Responding To A Subpoena

January 16, 2016 | Alain Montgomery, JD, Staff Attorney

This article explains the laws regarding subpoenas and the ethical standards pertaining to serving as a witness.

Alain Montgomery, JD, Staff Attorney
The *Therapist*
January/February 2016
Updated November, 2020 by Kristin W. Roscoe, JD (CAMFT Staff Attorney)

Being served a subpoena to produce a patient record, to testify in court at a trial or hearing, or to appear at a deposition can be unsettling. The thought of handing over a patient file, or disclosing what a patient shared in confidence, feels like the ultimate betrayal. The uninvited discomfort, resistance, and anxiety that may accompany the subpoena are quite understandable. However, keep in mind that there is a legal obligation to respond to a properly served subpoena, whether it requests the production of patient records, commands your appearance to testify as a witness, or asks you to appear at a deposition. The subpoena should not be ignored or dismissed. Understanding your role relative to the legal proceeding at hand will help you confidently navigate your way through the process of responding to a subpoena no matter what the request. This article reviews topics relevant to responding to a subpoena and also identifies specific sections in the CAMFT Code of Ethics that provide guidelines for therapists who testify in the capacity as either a percipient or expert witness.

Privilege

It is impossible to discuss the process of how to respond to a subpoena without first reviewing the matter of privilege. Privilege is a rule of evidence that refers to the right of the holder of the privilege to refuse to disclose, and to prevent someone else from disclosing, confidential communications in a legal proceeding.

Under the psychotherapist-patient privilege, the patient as the holder of the privilege has the right to allow his or her psychotherapist to disclose—or to prevent his or her psychotherapist from disclosing—confidential communications and clinical information in a court proceeding. A patient waives the protection of the psychotherapist-patient privilege when the patient authorizes his or her therapist to disclose confidential

Am I Required to Keep Records?

California Code, Health and Safety Code - HSC § 123100

The Legislature finds and declares that every person having ultimate responsibility for decisions respecting his or her own health care also possesses a concomitant right of access to complete information respecting his or her condition and care provided. Similarly, persons having responsibility for decisions respecting the health care of others should, in general, have access to information on the patient's condition and care. It is, therefore, the intent of the Legislature in enacting this chapter to establish procedures for providing access to health care records or summaries of those records by patients and by those persons having responsibility for decisions respecting the health care of others.

Not Sold...What Else You Got?

4980.49. (a) A marriage and family therapist shall retain a client's or patient's health service records for a minimum of seven years from the date therapy is terminated. If the client or patient is a minor, the client's or patient's health service records shall be retained for a minimum of seven years from the date the client or the patient reaches 18 years of age. Health service records may be retained in either a written or an electronic format.

4982. The board may deny a license or registration or may suspend or revoke the license or registration of a licensee or registrant if the licensee or registrant has been guilty of unprofessional conduct. Unprofessional conduct includes, but is not limited to, the following:

(v) Failure to keep records consistent with sound clinical judgment, the standards of the profession, and the nature of the services being rendered.

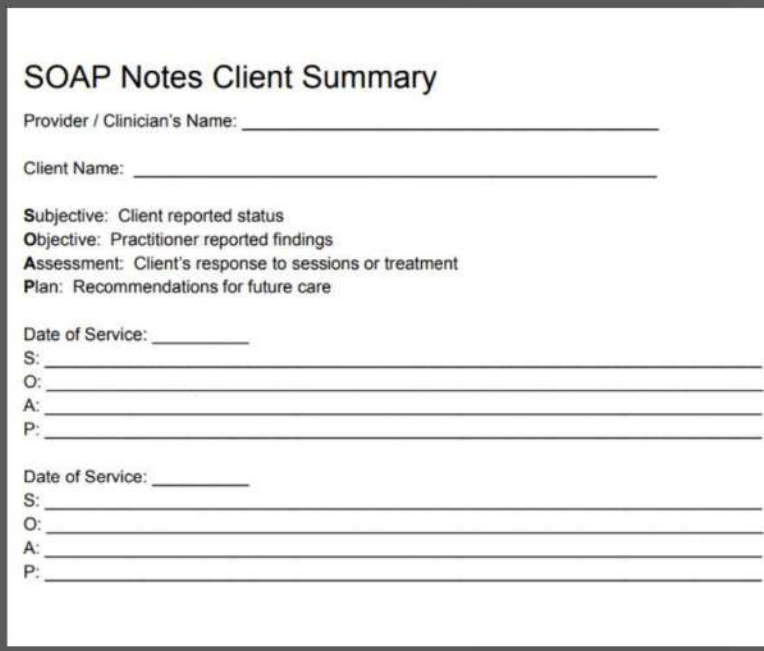
4980.43.1.

(b) As used in this chapter, the term "supervision" means responsibility for, and control of, the quality of mental health and related services provided by the supervisee. Consultation or peer discussion shall not be considered supervision and shall not qualify as supervised experience. Supervision includes, but is not limited to, all of the following:

(6) Reviewing the supervisee's progress notes, process notes, and other patient treatment records, as deemed appropriate by the supervisor.

Progress Notes

Progress notes are designed to inform staff about patient care and communicate treatment plans, medical history and other vital information. These notes are commonly in SOAP format or Subjective, Objective, Assessment, and Plan. However, there may be additional requirements designed by Medi-Cal or their employer.



SOAP Notes Client Summary

Provider / Clinician's Name: _____

Client Name: _____

Subjective: Client reported status
Objective: Practitioner reported findings
Assessment: Client's response to sessions or treatment
Plan: Recommendations for future care

Date of Service: _____
S: _____
O: _____
A: _____
P: _____

Date of Service: _____
S: _____
O: _____
A: _____
P: _____

For More Information on This Topic CAMFT has an Article

On Writing Progress Notes

April 17, 2007 | Michael Griffin, JD, Staff Attorney

Most therapists write a corresponding progress note in their patient's treatment record for every therapy session they provide. However, some therapists wonder whether or not the time that they spend writing progress notes is well-spent, or, whether progress notes are even necessary at all. Ultimately, it is difficult for any therapist to know what to include in a progress note unless he or she understands the basic function of these notes in documenting treatment.

The Therapist
March/April 2007
Michael Griffin, JD, LCSW (CAMFT Staff Attorney)
Reviewed December, 2021 by Bradley J. Muldrow, JD (CAMFT Staff Attorney)

Generally speaking, most therapists write a corresponding progress note in their patient's treatment record for every therapy session they provide. However, some therapists wonder whether or not the time that they spend writing progress notes is well-spent, or, whether progress notes are even necessary at all. Conversely, other therapists are in the habit of writing voluminous progress notes, but they worry about what they write, e.g., "Did I write too much?" "Should I write more?" Ultimately, it is difficult for any therapist to know what to include in a progress note unless he or she understands the basic function of these notes in documenting treatment.

Legal and ethical standards clearly state that therapists must maintain some kind of record of the treatment they provide.[1] This article discusses the basic purpose and function of progress notes as one component of a patient's treatment record. [2]

The Documentation Function of Progress Notes
In the simplest terms, progress notes are brief, written notes in a patient's treatment record, which are produced by a therapist as a means of documenting aspects of his or her patient's treatment. Progress notes may also be used to document important issues or concerns that are related to the patient's treatment. Depending on the case, progress

Process or Psychotherapy Note

Psychotherapy notes are also called process or private notes. Psychotherapy notes usually include the psychotherapist's hypothesis regarding diagnosis, observations and any thoughts or feelings they have about a patient's unique situation.

HIPAA states in the Code of Federal Regulations Section 164.508(a)(3)(iv)(A) that psychotherapy notes are notes recorded (in any medium) by a ...mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session. Psychotherapy notes excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: Diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.

Why Does this Matter?

Psychotherapy Notes *are NOT* discoverable via HIPAA's "right to access" *if the notes are kept separate.*

Psychotherapy Notes *ARE* discoverable with a court-ordered subpoena for the Legal Health Records even *if the notes are kept seperate.*

MC-025

SHORT TITLE:	CASE NUMBER:
Roosevelt v. Muir	21-cv-001487

ATTACHMENT *(Number):* 3

(This Attachment may be used with any Judicial Council form.)

Any and all documents, regardless of form, including but not limited to medical records, medical tests, charts, radiological reports, psychiatric, drug and/or alcohol treatment, counseling or rehabilitation records, progress notes, psychotherapy notes, intake forms, questionnaires, correspondence, office records, itemized statements of billing charges, invoices, payment and credit records, and correspondence, which pertain to the care, treatment, or examination of Theodore Roosevelt from May 15, 1903 through the present.

Information Excluded from the Right of Access

An individual does not have a right to access PHI that is not part of a designated record set because the information is not used to make decisions about individuals. This may include certain quality assessment or improvement records, patient safety activity records, or business planning, development, and management records that are used for business decisions more generally rather than to make decisions about individuals. For example, a hospital's peer review files or practitioner or provider performance evaluations, or a health plan's quality control records that are used to improve customer service or formulary development records, may be generated from and include an individual's PHI but might not be in the covered entity's designated record set and subject to access by the individual.

In addition, two categories of information are expressly excluded from the right of access:

- Psychotherapy notes, which are the personal notes of a mental health care provider documenting or analyzing the contents of a counseling session, that are maintained separate from the rest of the patient's medical record. See 45 CFR 164.524(a)(1)(i) and 164.501.
- Information compiled in reasonable anticipation of, or for use in, a civil, criminal, or administrative action or proceeding. See 45 CFR 164.524(a)(1)(ii).

However, the underlying PHI from the individual's medical or payment records or other records used to generate the above types of excluded records or information remains part of the designated record set and subject to access by the individual.

How Long Do I Keep Records?

Adult patient records should be kept for 7 years after the date of separation.

-Example: If the therapist stops treatment in January 2010 your obligation is to keep those records until January 2017.

For minors or individuals under the age of 18, the obligation is that you keep the record until the child has reached the age of 25.

-Example: If the therapist stops seeing a child when he is 10 years old–the obligation is for you to keep the record for 15 years or until they reach 25.

California Business and Professions Code 4980.49 – (a) A marriage and family therapist shall retain a client's or ...

Current as of: 2019 | *Check for updates* | *Other versions*

(a) A marriage and family therapist shall retain a client's or patient's health service records for a minimum of seven years from the date therapy is terminated. If the client or patient is a minor, the client's or patient's health service records shall be retained for a minimum of seven years from the date the client or the patient reaches 18 years of age. Health service records may be retained in either a written or an electronic format.

123145. (a) Providers of health services that are licensed pursuant to Sections 1205, 1253, 1575 and 1726 have an obligation, if the licensee ceases operation, to preserve records for a minimum of seven years following discharge of the patient, except that the records of unemancipated minors shall be kept at least one year after the minor has reached the age of 18 years, and in any case, not less than seven years.

I Know this Already...How Does This Relate to a Lawsuit?

If the client needs the records to prove something and is unable to do so-- the harm that they experienced is something that may be recoverable against the practioner.

For example: A client was in a car accident. The client began to see the therapist after the accident. The client was seen 50 times and the bill for these services was $10,000.The client sues the driver of the automobile that injured her. The client would like to be compensated for the $10,000 she paid out-of-pocket. The client reaches out to the therapist for a copy of her file and billing statements. The Therapists computer crashed and is unable to provide this information to the client. The client proceeds with her court case and is not awarded the $10,000 in fees because she is unable to prove that the therapy took place. The client has a legitimate claim against the therapist for failure to keep notes and has $10,000 worth of harm.

For More Information on This Topic CAMFT has an Article

Patient Records Under California Law The Basics

May 5, 2015 | Alain Montgomery, JD, Staff Attorney

This article explains California law and relevant CAMFT ethical standards which pertain to record keeping. More specifically, the article discusses California's new record retention law and answers questions about an adult patient rights.

The Therapist
May/June 2015
Alain Montgomery, JD (Former CAMFT Paralegal)
Updated December 2021 by Bradley J. Muldrow (CAMFT Staff Attorney)

Everyone has a story. As a therapist, you are a biographer of sorts. By recording what occurs during the course of the therapeutic relationship, you capture one's hard fought journey of growth, empowerment, and self-discovery. You memorialize the intimate and significant moments in the arc of a patient's life. Not only does the clinical documentation in a patient's record note and archive these important milestones, the record serves a number of practical purposes. For example, a well-articulated and documented record could prove invaluable for purposes of consultation, provide the treating provider with information to inform—if not determine—a course of treatment, or serve as a defense tool in a legal or disciplinary proceeding.

While the contents of a record may feel sacrosanct to both therapist and patient, the reality is that the record is not untouchable. As a clinician, it is important to understand how a patient's record is engaged when a patient is a party in a lawsuit or asks to inspect or receive a copy of his or her record. This article will discuss recent developments in California law pertaining to an LMFTs duty to retain clinical records, ethical standards relevant to record keeping, and answer frequently asked questions about an adult patient's right of access to his or her mental health record. For information about a patient's right of access to records under federal law, please review CAMFT article, "A Patient's Right to Access Mental Health Records under HIPAA," by Ann Tran-Lien, JD [The Therapist (September/October 2014)].

How Do You Avoid Being Sued by a Client

- Part A: Falling Below the Standard of Care... Can Get You Into Trouble
- Part B: Opps...I Forgot to Do That... Can Get You Into Trouble
- Part C: Bad Luck... Can Get You Into Trouble
- Part D: Malpractice Will Save Me...Hopefully... Will It?

Bad Luck Happens Sometimes

Therapist Get Sued
For Having Bad Luck

Sometimes things happen that are outside of the Therapist's direct control. In situations like this a therapist can be sued even if the therapist themselves did nothing wrong.

There are THREE we are going to discuss today :

1. Premise Liability
2. Respondeat Superior

What is Premises Liability?

Premises liability is a broad, catch-all term. It describes a variety of legal claims that can result from a dangerous condition on another person's property. The classic example is a store owner who fails to clean a slippery substance from the floor, causing a customer to slip and fall. Falls are by far the most common of all premises liability claims, but as we'll see, there are many others

If a client randomly trips on a cord in my office I can be sued?

Absolutely.

The court will look at what your obligation is and if it is fair.

CACI No. 1001. Basic Duty of Care

Judicial Council of California Civil Jury Instructions (2023 edition)

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1001. Basic Duty of Care

A person who [owns/leases/occupies/controls] property is negligent if that person fails to use reasonable care to keep the property in a reasonably safe condition. A person who [owns/leases/occupies/controls] property must use reasonable care to discover any unsafe conditions and to repair, replace, or give adequate warning of anything that could be reasonably expected to harm others.

In deciding whether [*name of defendant*] used reasonable care, you may consider, among other factors, the following:

(a) The location of the property;

(b) The likelihood that someone would come on to the property in the same manner as [*name of plaintiff*] did;

(c) The likelihood of harm;

(d) The probable seriousness of such harm;

(e) Whether [*name of defendant*] knew or should have known of the condition that created the risk of harm;

(f) The difficulty of protecting against the risk of such harm; [and]

(g) The extent of [*name of defendant*]'s control over the condition that created the risk of harm; [and]

(h) [*Other relevant factor(s).*]

New September 2003; Revised June 2010, May 2020

What Are the Elements of Premises Liability?

To prove negligence, a slip and fall victim must prove that:

- The defendant had a duty to keep the premises reasonably safe;
- The defendant breached that duty by allowing a dangerous condition to exist on the premises;
- The dangerous condition caused the victim's accident; and
- The victim suffered injuries as a result of the accident.

Sometimes, slip and fall victims are also negligent, perhaps by running through a store or by walking on an icy road instead of on a cleared sidewalk. In that case, the amount of the damages may be reduced to account for the victim's negligence.

CACI No. 1000. Premises Liability - Essential Factual Elements

Judicial Council of California Civil Jury Instructions (2023 edition)

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1000. Premises Liability - Essential Factual Elements

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] was harmed because of the way [*name of defendant*] managed [his/her/*nonbinary pronoun*/its] property. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] [owned/leased/occupied/controlled] the property;**
2. **That [*name of defendant*] was negligent in the use or maintenance of the property;**
3. **That [*name of plaintiff*] was harmed; and**
4. **That [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised June 2005, December 2011

Directions for Use

For cases involving public entity defendants, see instructions on dangerous conditions of public property (CACI No. 1100 et seq.).

Sources and Authority

- General Duty to Exercise Due Care. Civil Code section 1714(a).
- "The elements of a negligence claim and a premises liability claim are the same: a legal duty of care, breach of that duty, and proximate cause resulting in injury. Premises liability ' "is grounded in the possession of the premises and the attendant right to control and manage the premises" '; accordingly, ' "mere possession with its attendant right to control conditions on the premises is a sufficient basis for the imposition of an affirmative duty to act." ' But the duty

The California Statute of Limitations for Slip and Fall Injuries

A statute of limitations is a state law that puts a time limit on your right to have a lawsuit heard by the state's court system. The time limits vary depending on the kind of case you want to file.

As in most states, the statute of limitations that will affect a slip and fall injury claim in California is the same as the larger one that applies to most personal injury cases filed in the state's civil court system.

Specifically, California Code of Civil Procedure section 335.1 sets a two year deadline for the filing of "an action for...injury to, or for the death of, an individual caused by the wrongful act or neglect of another." So, if you want to file a personal injury lawsuit over a slip and fall, you have two years to get the case started in California's court system.

Think About This Before You Take Client Out of Office...

Examples:

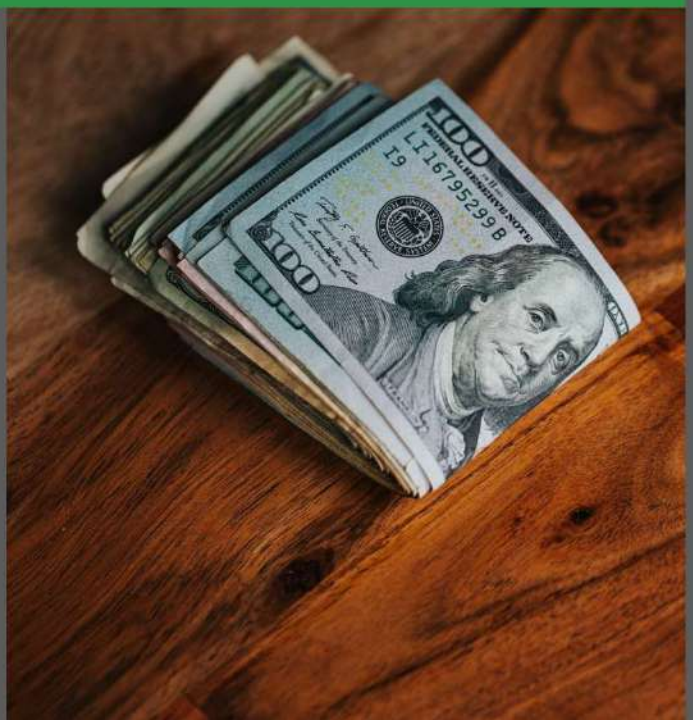
If you are doing walk and talk therapy outside and your client gets stung by a bee. You can be potentially sued.

If you are doing walk and talk therapy outside and your client trips over a tree root. You can potentially be sued.

If you are doing walk and talk therapy outside and your client gets bit by a dog off its leash. You can potentially be sued.

What is the average settlement for a slip and fall claim?

If you are curious-- A slip and fall case can prove to be costly, especially if it involves a trip to the emergency room or if personal injury attorneys get involved. The Hartford, an A+ rated business insurance carrier, puts the average cost of a slip and fall claim at $20,000. If an accident results in someone suing you, such a lawsuit can cost around $50,000.



How do I reduce the risk of a slip and fall lawsuit?

1. Inspect your workplace on a regular basis
Make a point of examining your entire workplace at least once a month to look for unsafe conditions, especially in areas that are prone to risk and where your customers are likely to be. Make sure there are no wet and slippery floors, or damaged and uneven surfaces.

2. Document all hazards
Have a maintenance log of all hazardous issues and how you eliminated them. This can keep your business safe and can help your legal defense in case of a lawsuit.

3. Use warning signs, as needed
Yellow "wet floor" warning signs and orange cones can alert your customers to any temporary hazards until the floor is dry or you've had a chance to fix the problem.

4. Install a surveillance system
A video camera system can help guard against thefts, provide a record of any accidents, and reduce the chance of a false injury claim being made against your business.

5. Record and document every accident
When an accident occurs, it's important to take down all information as to what happened and who was involved, including the victim and any eyewitnesses. Take video or photographic images where the accident happened.

6. Contact your insurance company immediately
Your insurance provider will want to know about any incidents as soon as possible, as it can help with covering expenses and your legal defense, if the injured party decides to sue you.

7. Show compassion to the injured party
After a fall injury or some other mishap, let the injured person know that you care about their well-being but don't admit any fault without consulting with your insurance provider about filing an insurance claim. Customers are less likely to file a lawsuit if the business owner shows they care about their well-being.

PROUD PARTNERS

CAMFT

cph insurance

GET A QUOTE & APPLY

CPH Insurance is proud to partner with the **California Association of Marriage and Family Therapists** in support of mental health professional growth and stability.

Having served mental health professionals for 20 years, CPH Insurance protects students, associates, and fully licensed professionals with malpractice insurance.

As a Marriage and Family Therapist, you've dedicated your career to helping others, and you should be free to focus on clinical care without worrying about a threat to your livelihood. With Malpractice Insurance for Marriage and Family Therapists, you can have peace of mind knowing you're protected in the event of a claim or suit, a grievance from a regulatory board, plus many other coverage benefits.

Respondeat Superior = Employee Does Something Wrong

What is Respondeat Superior?

This theory holds that when one is acting within the scope of their employment, the employer may be held accountable for the acts of the employee with respect to third parties. Generally, an injured third party has the right to sue either the employer or the employee if it can be proven that the defendant who was responsible for the injury was an employee and not an independent contractor

Employee or Independent Contractor?

An independent contractor is one who works on a per-job basis and is not subject to the direct supervision and control of the employer with respect to how the work is carried out. The doctrine of Respondeat Superior does not usually applies to independent contractor.

Respondeat superior requires it be shown that the employee was acting within the scope of employment and/or under the direction, supervision, or control of the employer. Simply stated, the employee must be acting subject to the ultimate supervision of the employer at the time of the alleged tortious conduct. The employee does not need to be engaged in a regular job duty as long as he or she is engaged in a task that benefits the employer in some direct manner

Example

A Supervisor has a pratice with several Associates. One of the Associates harms a client during a session. The client sues the Associate, Supervisor, and the Organization. Is this allowed?

Yes-- respondeat superior allows this.

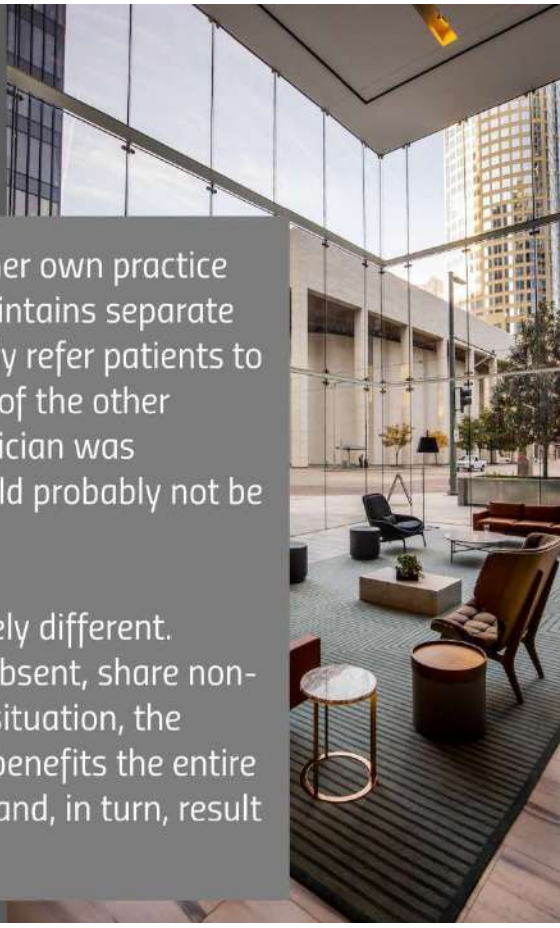
From a plaintiff 's point of view, the more defendants that can be named increases the likelihood of recovery and adequate resources among defendants to actually pay any settlement or judgment

Detour?

Frolic and Detour is a phrase describing actions taken by an employee that fall in varying degrees outside of the scope of employment. Generally, a "detour" constitutes a minor departure from an employee's duties but is still considered acting within the scope of employment, whereas a "frolic" would be a major departure from the scope of employment undertaken for that employee's own benefit.

Additionally, an employment relationship is considered suspended during commutes to and from a place of employment as there is no service rendered during this time, so Frolic and Detour is not typically implicated in these circumstances

An Example to Make You Think



Ripley shares office space with three other therapists. Each has his or her own practice and only share the physical facility and clerical staff. Each therapist maintains separate billing systems. The therapists do not share patients, and do not actively refer patients to one another. Ripley is named in a malpractice suit brought against one of the other therapist under the respondeat superior theory claiming the other physician was employed by a multitherapist practice. In this circumstance, Ripley would probably not be responsible under respondeat superior.

However, if the facts changed only slightly, the outcome might be entirely different. Assume Riple sees the other's therapist's clients when one of them is absent, share non-administrative staff, and refer to one another on various cases. In this situation, the arrangement appears to be much more of a collaborative effort which benefits the entire group and thus might subject them to the definition of a joint practice and, in turn, result in a viable claim under respondeat superior.

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I am good...I have Malpractice Insurance...

What type of coverage do you have?
-Professional Liability Insurance (Also known as Errors and Omissions Insurance), or General Liability Insurance (Also known as Slip and Fall Insurance)

What does your policy protect you against?
-What about billing issues? Probably not.

What happens when you switch insurance? Are you still covered if the incident happened under the old policy?
-It Depends

Is the interest of the insurance company alligned with my interest?
-Most likely, but not always

Quick Mention of Statue of Limitation

According to the California Code of Civil Procedure section 340.5, the plaintiff has one year from the date that they knew or should have reasonably known about the injury and up to three years when there are extenuating circumstances that prevented the plaintiff from discovering the injury sooner.

The one-year limit on filing a lawsuit for medical malpractice in California holds firm regardless of injury or death. In the event you go past the one-year or three-year time period, you may no longer bring suit against a medical provider for malpractice.

However, each situation is unique and there is precendent for emotional harm to be found outside of this timeframe.

The Insurance Company and Me

Medical malpractice coverage offer financial protection to their consumers (health care professionals and facilities) in the event of a malpractice claim.

The health care provider should always keep in mind that the primary goal of the insurance companies is always profit. They must take in more money in premiums than is paid out in judgments, settlements, and costs associated with administration of policies and litigation.

Conversely, health care professionals turn to malpractice insurance as a means to protect their own personal and professional assets in the event of litigation brought against them. While both objectives are not mutually exclusive, it is important for all parties concerned to be fully aware that they are also not always mutually supportive

The Lawyer and Me

The typical medical malpractice insurance policy furnishes monetary protection against litigation and ultimately damages for errors and omissions committed within the scope of the delivery of health care, treatment, and services.

As part of this protection, the insurer typically provides legal representation with respect to the policy.

An extremely important concept that many health care providers fail to distinguish is the role of the legal professional. The legal representation is that of the insurance company's interests with respect to the policy and any potential payout. Because the health care provider or facility holds the policy of insurance, the representation is of their rights to the insurance and not of the provider or facility personally. While both the provider and the insurance carrier have the objective of avoiding or minimizing the insurance payout, the joint interest ends there.

Example of Problem

A therapist is sued for malpractice as the result of injuries received by a client receiving therapy. The client was a middle-aged woman who was recovering from a recent stroke which had left her paralyzed on one side of her body and sometimes confused. On a particularly busy day she was first seen by one therapist. The client was then asked to go to another part of the room to work with another therapist. As she attempted to cross the room unassisted, she fell and struck her head, suffering fatal injuries.

The family sued the provider. There were no applicable medical malpractice statutory limits on damages within the jurisdiction.

The insurance company evaluated the case and determined that the possibility of a judgment at trial for the full amount of the policy was remote because the woman did not elect to use her walker when she attempted to cross the room. Thus, they were unwilling to offer a sum for the entire amount of the policy since that is the most they could be ordered to pay anyway after a trial.

At trial, a verdict was, in fact, rendered for the plaintiffs based on a lack of supervision given the patient's mental and physical condition at the time she arrived for therapy. Further, the jury awarded damages in an amount that was approximately triple the amount of the therapist's insurance of one million dollars. The provider would be accountable for amounts of an award beyond the amount of insurance. In a case such as this, the award could well be enough to destroy the provider's financial status personally and professional.

Differnt Type of Policies

We will be discussing three different type of policies:

- Occurrence Policy Coverage
- Claim Made Coverage
- Tail Coverage

Occurrence Policy Coverage

First is the "occurrence" policy. This type of insurance is frequently the most expensive. It provides insurance coverage for claims that occur against a provider for acts during the period of coverage regardless of when the claims are asserted.

This type of insurance applies even if the provider no longer has the particular policy in effect at the time the claim is made, which means that insurance companies are providing coverage for a period beyond that in which the policy was actually in effect

Example of Occurrence Policy Coverage

Therapist has an occurrence policy coverage with DQI Insurance Company. The policy is valid from January 1st, 2010 to December 31st, 2022.

On January 1st, 2023, the Therapist retired and canceled her policy.

On March 7th, 2023, the Therapist receives a lawsuit from a client that they saw between January 1st, 2015 to March 7th, 2022.

This therapist should have coverage. The occurrence policy is applicable to those claims resulting directly from medical incidents occurring on or after the effective coverage date and prior to the final coverage date as stated on the certificate of insurance.

Claims Made Policy Coverage

Another type of policy is known as "claims made." This type of insurance covers only claims made while the policy is in effect. It should be noted that it is not unusual for claims to develop well after the injury either because the plaintiff was unaware or for various reasons that could cause a delay of as much as several years. A provider would not be covered once the policy has ceased to be effective.

Example of Tail Coverage

Therapist has a claims made policy coverage with DQI Insurance Company. The policy is valid from January 1st, 2010 to December 31st, 2022.

On January 1st, 2023, the Therapist retired and canceled her policy. The Therapist elects to purchase "tail" insurance for 3-years or until 2026.

On March 7th, 2023, the Therapist receives a lawsuit from a client that they saw between January 1st, 2015 to March 7th, 2022.

This therapist would likely have coverage. The tail policy is applicable to those claims resulting directly from medical incidents that occur, and for which said claims are first made, on or after the effective coverage date and up to the length of time purchased (3 years) of the final coverage date as stated on the certificate of insurance. There shall be coverage for claims issued after the final coverage date so long as the date of the medical incident which is the subject of such claim is within the claims made coverage period and tail policy period.

Tail Coverage

A third type of policy is commonly referred to as "tail" coverage. These are supplemental policies for the "claims made" type of insurance. If a health care provider terminates a policy of insurance, for whatever reason, he or she may elect to purchase a "tail" policy. This additional policy provides coverage for a stated period of time to deal with potential allegations of malpractice arising from conduct that occurred during the term of the now-ended "claims made" policy

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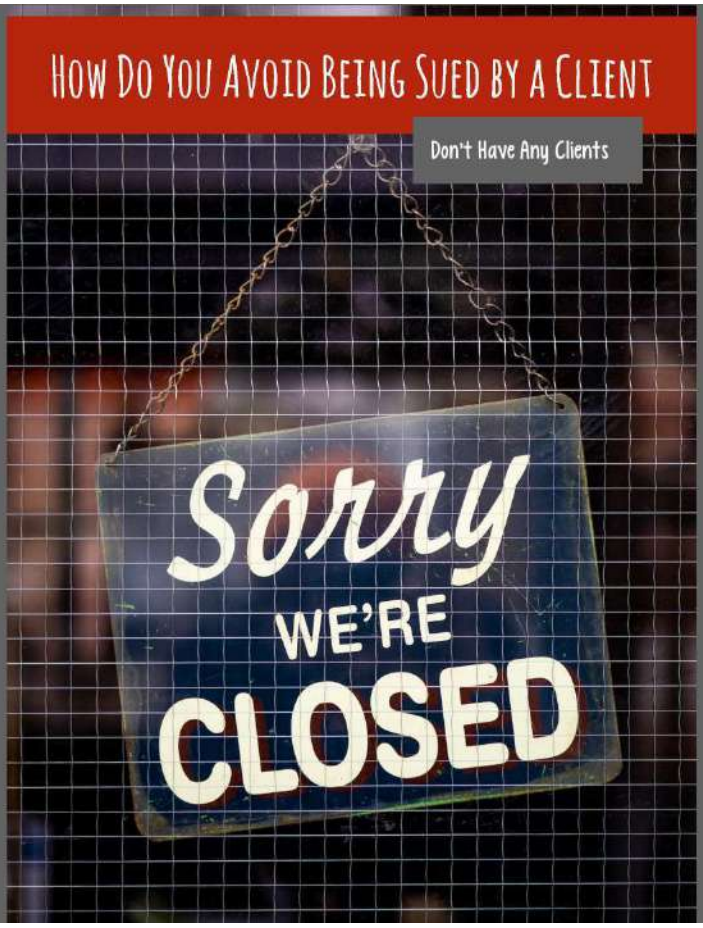

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How to Avoid Being Sued!

Staying Out Of Legal Trouble with Clients, Employees, and 3rd Party Organizations

Presented by Luke Matthew Martin, MBA, JD
CAMFT Staff Attorney

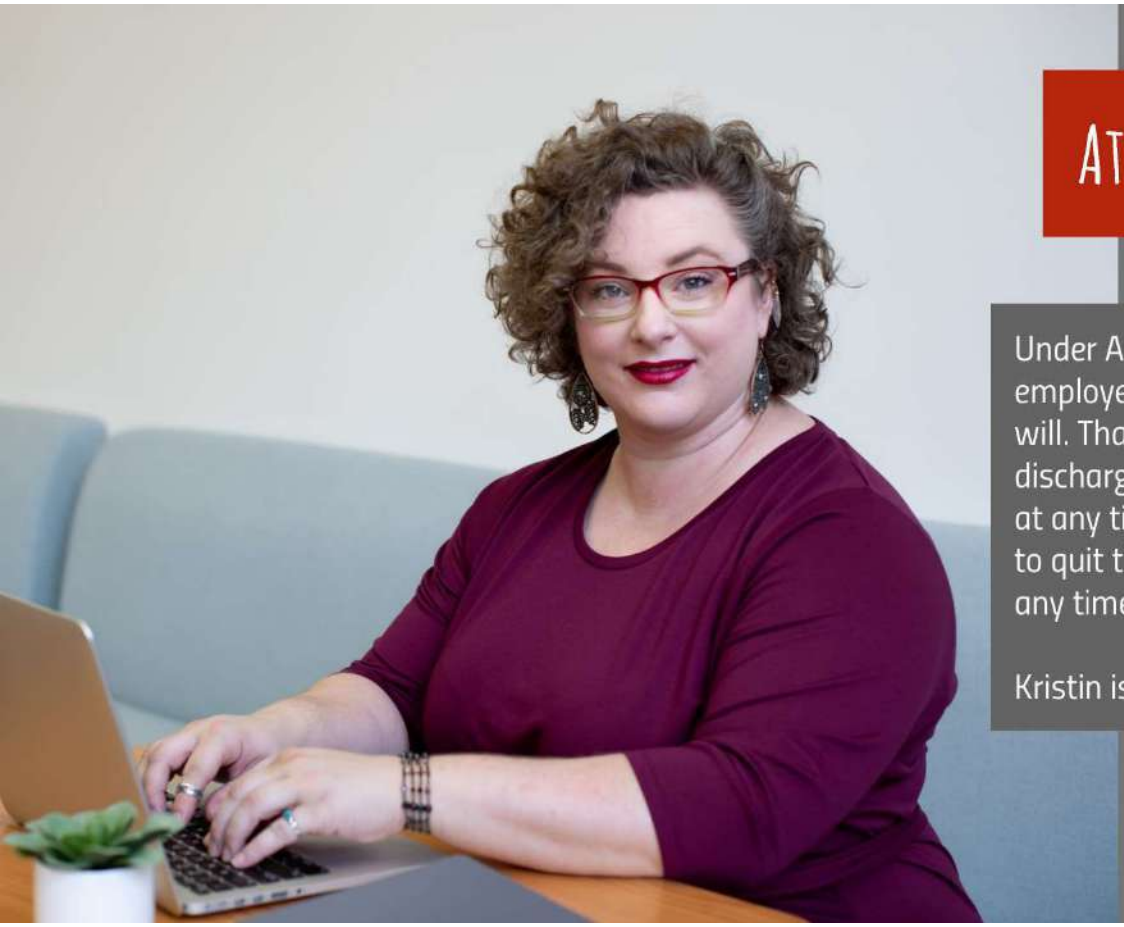
- Disclaimer Presenter Agenda
- Part 1: Avoid being sued by a client
- Part 2: Avoid being sued by an Employee
- Part 3: Avoid being sued by a 3rd Party Organization

Employee Suing Employer

At Will Employment

Kristin just got hired on by a new therapy company. On the first day of the job, Kristin realizes that she made a big mistake. The organization is disorganized, chaotic, and is not following legal and ethical rules. She is worried that if she continues that it would have a negative impact on her license and reputation.

Can Kristin leave the organization?



At Will Employment

Under American common law, employees are presumed to work at will. That is, employers are free to discharge employees for any reason at any time, and employees are free to quit their jobs for any reason at any time.

Kristin is able to leave at any time.

Wage and Hour Issues

Sara and Mike are friends from college, and they each have horrible summer jobs. They're having coffee after work and complaining about their jobs.

Sara tells Mike that that she's been getting an average of $14 an hour (before taxes) for the past two months at her job at the drug store. What's more, she's been working 50 hours a week at that same rate.

Mike orders a sandwich. He says he's famished because his boss at Target gave him three rest periods of 15 minutes in an 8 hour day- and that he didn't have time to eat.

What claims do Anna and Tyrone have?

Snap Shot of Wage and Hour Issues

Minimum Wage: As of 2023, the CA state minimum wage for most workers is $15.50 per hour. If an employer fails to pay you minimum wage, the employer may be liable for twice the amount of wages owed to you. More to come on this topic.

Overtime Pay: Most employers must pay overtime pay of 1-1/2 times your regular rate of pay for hours worked above 40 hours per week. The overtime law does not cover all workers. If an employer fails to pay you overtime, the employer may be liable for twice the amount of overtime wages owed to you.

Meal and Rest Breaks: An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than thirty minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee.

Discrimination and Retaliation

Grant starts a new job at a property management company. In the job interview, the hiring manager states that the organization has very conservative views and is family oriented. During a group meeting, Grant that his same-sex partner were planning an outing for the weekend. That afternoon, Grant was called into HR's Office and let go.

Does Grant have a case?

Discrimination and Retaliation

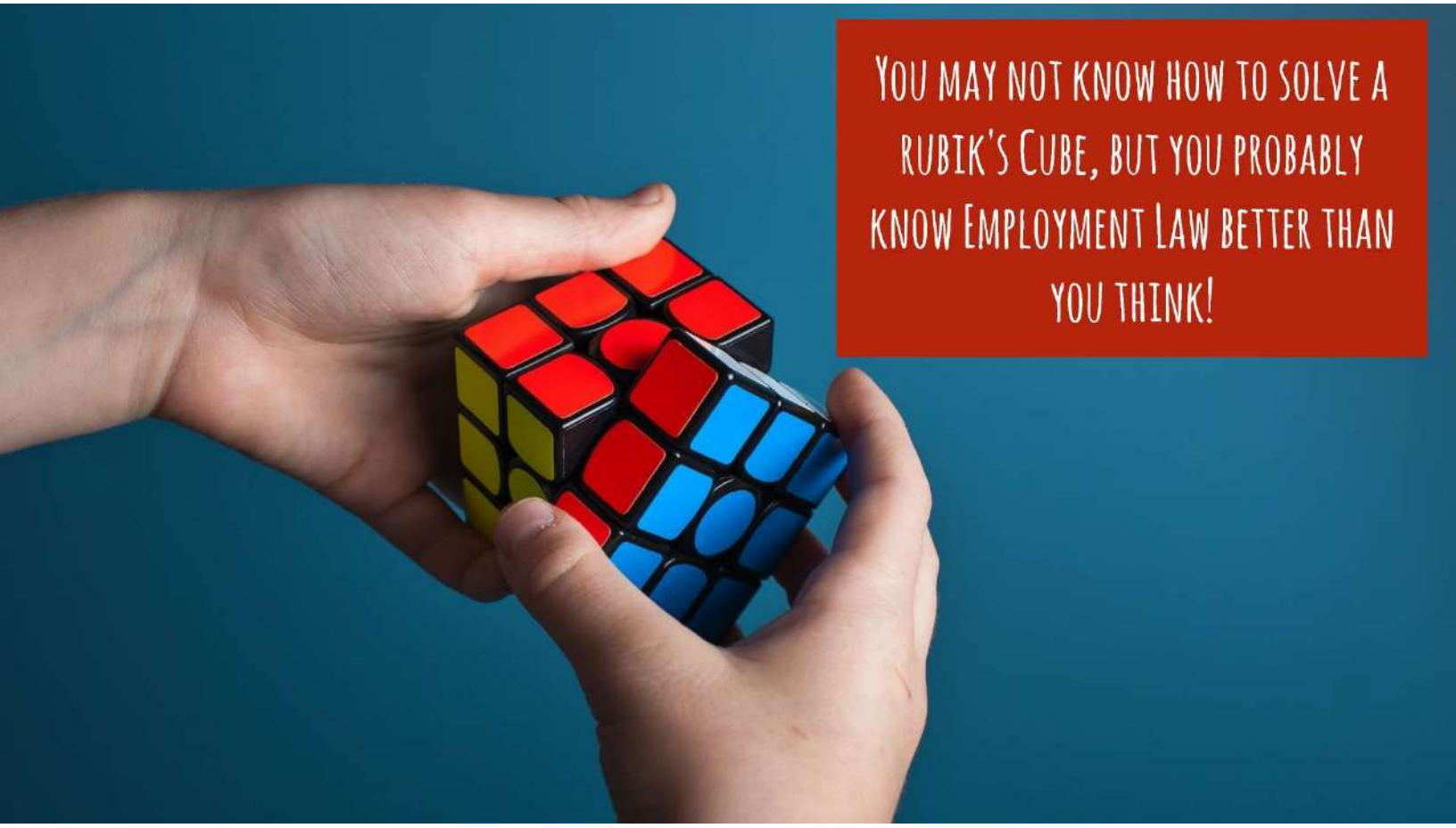
Likely, sexual orientation is a protected class. Terminating an individual because they fall under a protected class may be illegal.

Grant does likely have a case for wrongful termination.

PROTECTED CHARACTERISTICS

California law protects individuals from illegal discrimination by employers based on the following:

- Race, color
- Ancestry, national origin
- Religion, creed
- Age (40 and over)
- Disability, mental and physical
- Sex, gender (including pregnancy, childbirth, breastfeeding or related medical conditions)
- Sexual orientation
- Gender identity, gender expression
- Medical condition
- Genetic information
- Marital status
- Military or veteran status



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How Do I avoid Being SUED By Employee?

No Full Proof way to insulate you from liability but there are things that can help...

Practical Consideration

Complaints = Solutions

The earlier you learn of an employee's complaint, the better it is for you. You can not fix a problem you do not know about. Providing more than one option for employees to complain ensures that they can bring legitimate issues to management's attention and that a supervisor cannot hide issues from Human Resources and upper management. Using the chain of command is often best, but employees sometimes need a direct line to their boss's boss. It promotes accountability and transparency. It may also provide a defense to a lawsuit.

Practical Consideration

Therapists Love Notes

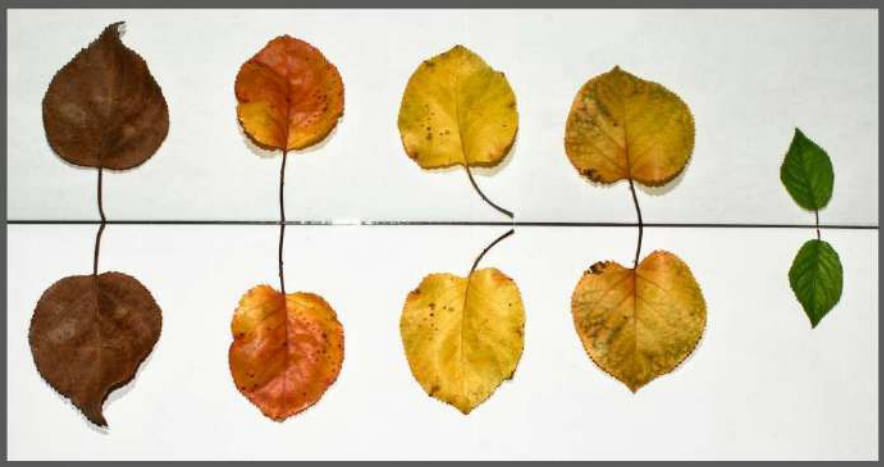
Employers Should Love them Too

Document everything. Performance problems and conduct violations are more important than other issues. If you want to avoid a lawsuit, make sure the employee you are considering to terminate for performance issues has already been written up at least twice for poor performance. Under those circumstances, proving the actual reason for her termination was their performance and not their race, gender, or disability is easy.

Practical Consideration

No One is Special

A big part of being perceived as a fair employer is consistent application of the rules. When you make an exception for one employee, you alienate the others. So, consistent application of policies regarding promotions, vacation, pay, assignments, awards, discipline, and termination is the only way to go. After all, the alleged unfair application of the rules is the basis of almost every employment lawsuit.



Practical Consideration

Choo Choo Choose Train-Ing

Training does not cost money, it saves money. As irritating as it can be to pay for training it is worth it in the end. Anyonewho interacts with employees directly needs it. This is generally Front-line managers. They handle the day-to-day gripes that, if not handled properly, become lawsuits. Train them to spot issues, to be proactive, and to be consistent. Equip them to be good managers now so they don't have to be good witnesses later.

Practical Consideration

Employee Handbook

An employee handbook is not just useful to the organization of a business, it is also a powerful text that you can refer to when policies require clarification or reference. Although you can never predict the questions that will arise during the day to day operations of a business, employees often have the reasonable expectation that they will receive a handbook dictating workplace policies. It should include statements addressing at-will employment; equal employment and harassment issues; work hours; leave and accommodation under the FMLA and the ADA; workplace violence; trade secrets and confidentiality of company information; work rules and the consequences for violating them; and other important issues.

Practical Consideration

What's the Rush?

Does it have to be today? Why not tomorrow? Imagine losing your job; it would be a life-changing event that should not be taken lightly. The decision to terminate someone's employment should therefore be done slowly if possible. It should at least (1) be reviewed by more than one manager, (2) involve someone with Human Resources training, and (3) be well documented. If you are unsure of important facts or someone is not available to review the decision, suspend the employee and wait. Get counsel. Sleep on it. A rush to judgment can be expensive.

Practical Consideration

Severing Lawsuits

If you know there is a problem it may be better to be proactive. Sometimes paying a small amount early is smart. A severance agreement usually results in the company paying an employee a few weeks (or even months) of salary in exchange for the employee releasing all claims against the company. If done correctly, this eliminates the chance of a lawsuit. If a mistake has been made, it often saves the company money

How Do You Avoid Being Sued by an Employee?

Don't Have Any Employees

- Part A: I Should Have Done That... Practical Considerations
- Part B: Saying, "Your Fired" Can Get an Employer into Trouble
- Part C: Money Always Gets an Employer into Trouble
- Part D: When Safety is Not #1 Can Get an Employer into Trouble

Types of Employment Relationships

There are three key types of employment relationships:

- employment at will,
- employment for a contracted period of time, and
- independent contractors.

In the United States, the majority of employment relationships are at will or through independent contractors.

Types of Employment Relationships: At-Will Employment

Employment at Will: In California, employment is considered at-will, meaning the employer or employee can end the employment relationship at any time, with or without notice, and for no reason or any reason, so long as the employer's reason is not unlawful. Employers might ask employees to sign an offer letter, handbook acknowledgment, or other document agreeing to at-will employment, for example. These documents do not limit the employer's right to fire the employee. Instead, they affirm the employer's general right to fire at will.

Example of an At-Will Employment

Stacy applies for a job on the CAMFT job board to be an associate at a **private practice.** She meets with the employer and they agree to hire her. She is presented with an offer letter that states the employment is "at-will," she will be compensated $25 an hour plus benefits, and her start date will be in two weeks. Her employer hopes that Stacy will stay at the practice after she becomes licensed. Stacy accepts the terms and signs the offer letter.

Law Regarding At-Will Employment

STATE OF CALIFORNIA — Gavin Newsom, Governor
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT

TERMINATION OF EMPLOYMENT

Within the State of California, employment may be terminated at the will of either party. Both the employer and the employee are free to end the employment relationship at any time, with no penalty being assessed to either. Unless the parties have previously agreed to the contrary, there is no notice required to be given by either party.

Employment covered by a collective bargaining agreement (union contract) is subject to the terms and conditions of the particular agreement. The Division of Labor Standards Enforcement (DLSE) does not have jurisdiction over such employment, and an employee should contact a representative of their local union when a dispute arises.

When an employee feels that they have been terminated, harassed or discriminated against based on their race, religion, gender, color, national origin, ancestry, disability, medical condition, marital status, age (over 40), sexual orientation or denial of family medical leave, they should contact the Department of Fair Employment and Housing at 1-800-884-1684 or at www.dfeh.ca.gov.

An employee who feels that he/she has been assaulted, threatened with assault, or feel he/she is in danger, should contact their local law enforcement office. Other forms of harassment generally require the filing of a lawsuit in civil court.

The DLSE has jurisdiction when an employee has been retaliated against for participating in a protected activity. For a list of protected activities that include filing a complaint with this office, jury duty participation and complaining about safety, contact one of the DLSE's offices. (Labor Code § 98.7)

LABOR CODE - LAB
DIVISION 3. EMPLOYMENT RELATIONS [2700 - 3122.4] *(Division 3 enacted by Stats. 1937, Ch. 90.)*
CHAPTER 2. Employer and Employee [2750 - 2930] *(Chapter 2 enacted by Stats. 1937, Ch. 90.)*

ARTICLE 4. Termination of Employment [2920 - 2929] *(Article 4 enacted by Stats. 1937, Ch. 90.)*

2922. An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month.

Types of Employment Relationships: Employment Contract for Period of Time (AKA Fixed Term Contract)

Employment Contracts: At-will employment agreements are common in California; whereas, employment contracts are less common. An employer contemplating the use of an employment contract may want to consider the advantages and disadvantages. An employment contract alters this policy and limits the employer's right to fire the employee, usually by detailing the grounds for termination or setting a term of employment (for example, one or two years).

Some employers require employees to sign a written agreement stating that they are employed at-will. This document is not a contract, but rather is known as an "at-will employment agreement."

Example of an Employment Contract For Period of Time

Stacy applies for a job on the CAMFT job board to be an associate at a **private school.** She meets with the employer and they agree to hire her for the school term. She is presented with an offer letter that states the employment is from January 1st to September 31st (school year), she will be compensated $25 an hour plus benefits, and her start date will be in two weeks. Her employer hopes to bring Stacy back after this school year, but is unsure if the budget will allow this to happen. Stacy accepts the terms and signs the offer letter.

Types of Employment Relationships: Independent Contractor

Independent Contractor: The main distinction between an employee or at-will employee and an independent contractor is that the independent contractor is responsible to the employer solely for the work that is the subject of the contract between the parties. They are typically contracted to perform work by an employer and are not considered an employee.

Example of an Independent Contractor

Stacy applies for a job on a job board to be an **contractor** at a **private company.** The software company just experienced a traumatic incident at work and believes that their employees can use this resource. She meets with the company and they agree to hire her as a contractor to provide services as needed for her their employees. She is presented with a contract that states she will be compensated at a rate of $200 an hour, she may see 5 clients a week, and she should an invoice at the end of the week. Her employer does not know how long she will provide services to the software company's employees nor if any will use the service. Stacy accepts the terms and signs the contract.

Quick Breakdown of Differences Between At Will Employee and Independent Contractor

- Employment. As stated before, most employees work at will which means their employer can terminate the relationship at any time or they can quit. They work for the employer's business and only for the employer. In contrast, independent contractors are self-employed, and they typically work with multiple clients.
- Payment. Employees are paid a fixed salary or wage, typically on a weekly or monthly basis. Independent contractors work for a predetermined or agreed hourly or project rate. Depending on the agreement, they submit invoices for payment after the completion of a project or certain milestones.
- Control. Independent contractors work without oversight from the employer. In other words, they determine their own schedule and work hours and often use their own tools in their projects. Employees typically work the hours and at the location dictated by the employer.
- Taxes. Independent contractors are liable for their own taxes and tax is not withheld from any of their payments. With employees, the employer is responsible for deducting taxes from their wage or salary.
- Benefits. Employees receive benefits as part of their remuneration package from their employer. In this case, the employer is also responsible for unemployment benefits. In contrast, independent contractors typically do not receive benefits from their employer.

Assembly Bill 5: ABC Test

The ABC Test

A. The independent contractor is free from control and direction of the employer (both under contract and in fact); B. The independent contractor is performing work that is outside the usual course of the hiring entity's business; and, C. The independent contractor is engaged in an independently established business of the nature as the work performed for the hiring entity.

Similar to the "business to business" exemption above, most mental health employers will not meet the requirements of this section. However, it is worth exploring further with your employment attorney or human resources generalist if an employer feels that the contractor is able to satisfy all three prongs above.

Some questions to consider for employers when reviewing the above three prongs with your attorney or human resources specialist:

- Prong A: It is helpful to use the Borello factors with your employment attorney here as an assessment tool.
- Prong B: Is the independent contractor really performing a different type of work than the employer? Are there therapists working for the employer doing similar work as the independent contractor? For example, is the supervisor providing only supervision but not therapy services to the mental health agency? Is the therapist providing therapy to the school's students? Is the therapist providing therapy to, for example, the OBGYN's fertility clients?
- Prong C: Is the independent contractor an entity (such as a sole proprietor)? Does the independent contractor provide services to numerous different work settings? Does the independent contractor hold themselves out for hire by numerous work settings?

Tips for Success:

- Review how the work that this individual does is different than what your organization normally does
- Overflow work is not suited for independent contractors
- Reach out to a lawyer or HR professional for assistance
- If you are unsure if they should be an employee or indpendent contractor default to employee

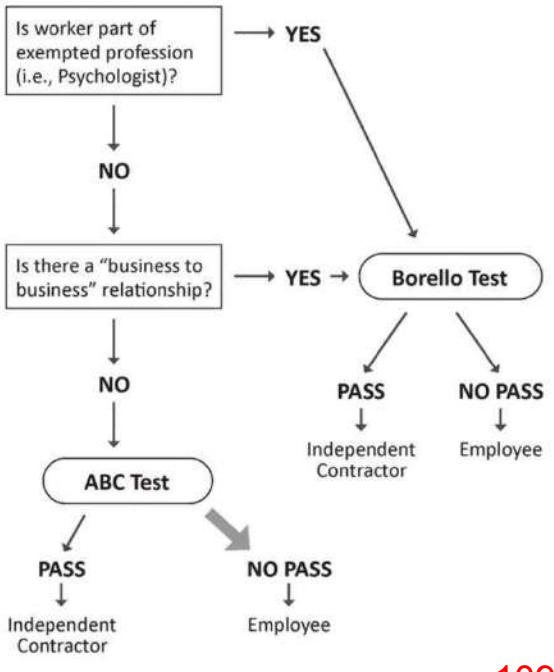
Get It Right: Misclassifcation Can Be Expensive

The penalties for misclassification of a worker (employee v. independent contractor) are significant. Under California Labor Code § 226.8, employers are subject to a civil penalty between $5,000 to $15,000 for each violation for willful misclassification of an individual as an independent contractor. If it is found to be a pattern (i.e., numerous employees misclassified), the civil penalty is between $10,000 and $25,000 for each violation.

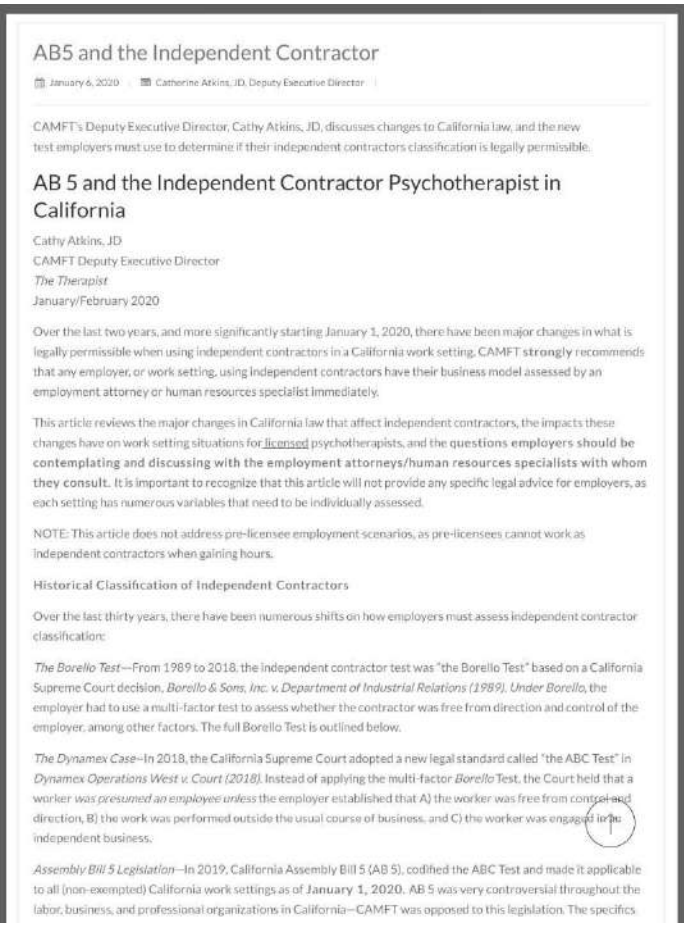
Independent contractors could also be entitled to recover all expenses or damages incurred because they were improperly classified as independent contractors, such as additional tax liability, benefits, wages, meal break penalties, rest break penalties, wage statement penalties, waiting time penalties, unpaid overtime, minimum wage and expense reimbursements related to operating personal vehicles for business purposes and operating personal cell phones for business purposes. Contractors would also be entitled to recover interest, costs and attorneys' fees.

In addition to the costly monetary penalties, employers who misclassify are required to post a "prominent" notice on their public website stating, among other things, that they have "committed a serious violation of the law" by willfully misclassifying employees, and directing any other employees who feel they have been misclassified to contact the Labor and Workforce Development Agency.

QUESTIONS FOR EMPLOYERS



For More Information on Independent Contractors CAMFT has an Article



AB5 and the Independent Contractor

January 6, 2020 | Catherine Atkins, JD, Deputy Executive Director

CAMFT's Deputy Executive Director, Cathy Atkins, JD, discusses changes to California law, and the new test employers must use to determine if their independent contractors classification is legally permissible.

AB 5 and the Independent Contractor Psychotherapist in California

Cathy Atkins, JD
CAMFT Deputy Executive Director
The Therapist
January/February 2020

Over the last two years, and more significantly starting January 1, 2020, there have been major changes in what is legally permissible when using independent contractors in a California work setting. CAMFT **strongly** recommends that any employer, or work setting, using independent contractors have their business model assessed by an employment attorney or human resources specialist immediately.

This article reviews the major changes in California law that affect independent contractors, the impacts these changes have on work setting situations for licensed psychotherapists, and the **questions employers should be contemplating and discussing with the employment attorneys/human resources specialists with whom they consult.** It is important to recognize that this article will not provide any specific legal advice for employers, as each setting has numerous variables that need to be individually assessed.

NOTE: This article does not address pre-licensee employment scenarios, as pre-licensees cannot work as independent contractors when gaining hours.

Historical Classification of Independent Contractors

Over the last thirty years, there have been numerous shifts on how employers must assess independent contractor classification:

The Borello Test—From 1989 to 2018, the independent contractor test was "the Borello Test" based on a California Supreme Court decision, *Borello & Sons, Inc. v. Department of Industrial Relations (1989)*. *Under Borello*, the employer had to use a multi-factor test to assess whether the contractor was free from direction and control of the employer, among other factors. The full Borello Test is outlined below.

The Dynamex Case—In 2018, the California Supreme Court adopted a new legal standard called "the ABC Test" in *Dynamex Operations West v. Court (2018)*. Instead of applying the multi-factor *Borello* Test, the Court held that a worker *was presumed an employee unless* the employer established that A) the worker was free from control and direction, B) the work was performed outside the usual course of business, and C) the worker was engaged in an independent business.

Assembly Bill 5 Legislation—In 2019, California Assembly Bill 5 (AB 5), codified the ABC Test and made it applicable to all (non-exempted) California work settings as of **January 1, 2020.** AB 5 was very controversial throughout the labor, business, and professional organizations in California—CAMFT was opposed to this legislation. The specifics

How Do I Get Rid of This Individual...LEGALLY?

Example of an At-Will Employment

Larry is hired to be a therapist at a private practice. Larry starts great but has a bad habit of always being late. Larry's chaotic schedule causes his appointments to start late and has a negative impact on his therapeutic relationships. Larry's supervisor Othello has coached Larry on the importance of being on-time, wrote Larry up twice, and created a performance improvement plan. Sadly, Larry is unable to correct the problem and is let go.

5 Steps to Fire an At-Will Employee

From US Chamber of Commerce

Five legal steps to fire an employee

If you're ready to fire an employee, here are some steps to guide you through the process:

1. **Review your employee handbook and its firing policies.** Every employer should have a formal employee handbook that details disciplinary policies, including potential reasons for termination. All employees should receive a copy during their onboarding period, and you should have a written confirmation of receipt. Before you begin the process of firing someone, review your handbook to ensure that policies are, in fact, clearly spelled out, and hold yourself accountable to enforcing all consequences outlined in the handbook.

2. **Document violations.** If an employee violates company policy, document it in writing and ensure it is acknowledged by the worker. Create a performance improvement plan and give the employee the opportunity to rectify their errors. Store any documentation in their personnel file for future reference so you can support your claims when it comes time to terminate the employee.

3. **Investigate grounds for termination.** If you feel you're ready to fire someone, investigate the situation and collect interviews, documents and evidence associated with your case. The more evidence you have, the stronger your case for firing that employee will be.

4. **Be brief and factual (but don't sugarcoat it).** Once you have everything organized, sit down with the employee and explain—carefully—why you're choosing to let them go. Keep the discussion brief and clear. If you sugarcoat your reasoning, you're potentially misleading the employee, which could come back to bite you down the line.

5. **Fulfill all legal requirements.** Employers must fulfill certain legal obligations and provide a terminated employee with information about their benefits, including COBRA, their last paycheck, unemployment options and transportability of other insurance. You might be tempted to deny unemployment benefits, but if you proceed, be prepared to fight claims of discrimination or wrongful termination.

Example of an Employment Contract for Period of Time

Larry is hired to be a therapist to at a school for the school year. Larry starts great but has a bad habit of always being late. Larry's chaotic schedule causes his appointments to start late and has a negative impact on his therapeutic relationships. Larry's supervisor Othello has coached Larry on the importance of being on-time, wrote Larry up, and created a performance improvement plan. Sadly, Larry is unable to correct the problem and is let go.

How to Lawfully Fire an Employee Contracted for Period of Time

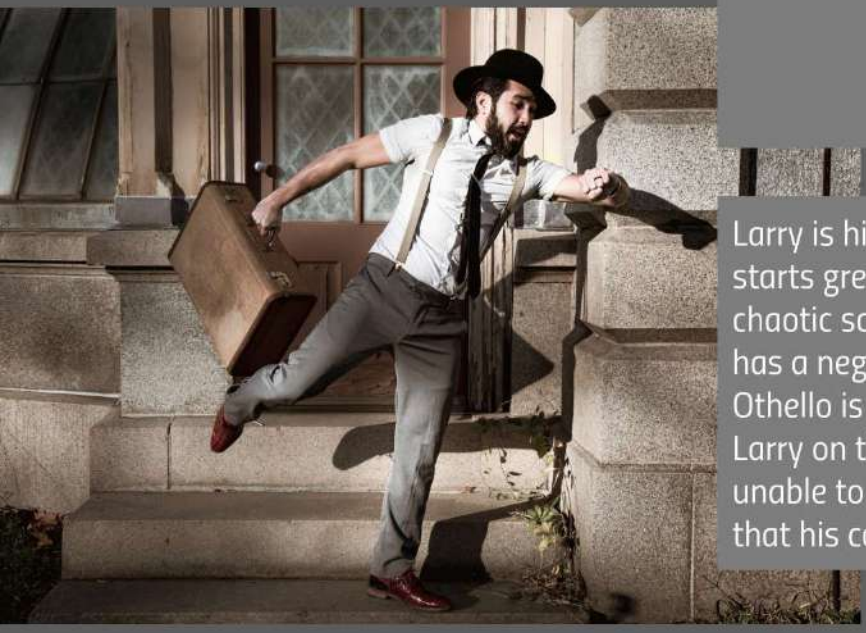
Employees with an express written contract must abide by the terms of the agreement. These contracts should be iron-clad. Seek legal consultation to make sure you are not missing anything.

The most common way an employeed contract for a period of time is discharged is actually by mutual agreement between the employer and employee. This is often done by way of a deed of release which both parties sign. This releases the employer from any further obligations under the contract and allows the employee to seek alternative employment

Another way a Fixed Term Contract can be terminated is if the contract itself contains a clause which allows for termination under certain conditions. Most employment contracts only allow an employee to be terminated for "good cause." Good cause can include things like poor work performance, violating company rules and threats of violence. For example, if the company has an attendance policy that is constantly being violated.

Finally, a Fixed Term Contract can be terminated by operation of law. This usually occurs when the contract expires or is frustrated (e.g. because of changes in circumstances beyond either party's control).

Example of an Independent Contractor



Larry is hired to be a therapist at a software company. Larry starts great but has a bad habit of always being late. Larry's chaotic schedule causes his appointments to start late and has a negative impact on his therapeutic relationships. Othello is made aware of these issues and is has coached Larry on the importance of being on-time. Sadly, Larry is unable to correct the problem and is given 30 day notice that his contract will be discontinued.

How to Lawfully Terminate an Independent Contractor

You can't fire a contractor like you would an employee because they are self-employed, not your employee. Independent contractors do not sign full-time employee contracts and do not receive employee benefits like social security or medicare. But businesses should sign written agreements for independent contracts that spell out the contractor's scope of work, the quality of work expected, termination provisions, and notice provisions. You then can terminate the relationship if the contractor fails to deliver according to the terms of your contract.

If you have concerns about your contractor's performance, the first step is to have a conversation telling the contractor they are underperforming. Give the contractor an opportunity to improve if possible before termination. If the contractor does improve, great. If not it's in your best legal interest to leave a paper trail of your good-faith effort to make the relationship work.

Termination provisions are guidelines and conditions under which the contractor or the hiring company can terminate the working relationship. You should clearly state termination provisions in the written contract both parties sign at the beginning of the engagement.

Most contractors will want to include a notice provision. Notice provisions specify the number of days of warning each side must provide before terminating a contract. Most notice provisions require 10-14 days notice, but others require a month or more. This should be done in accordance with the terms of the notice and in writing.

How Do I Get Rid Of This Individual...Illegally?

Illegal Terminations of At-Will Employee

Examples of Wrongful Terminations of At-Will Employment

Below is a list of 15 common examples of wrongful termination:

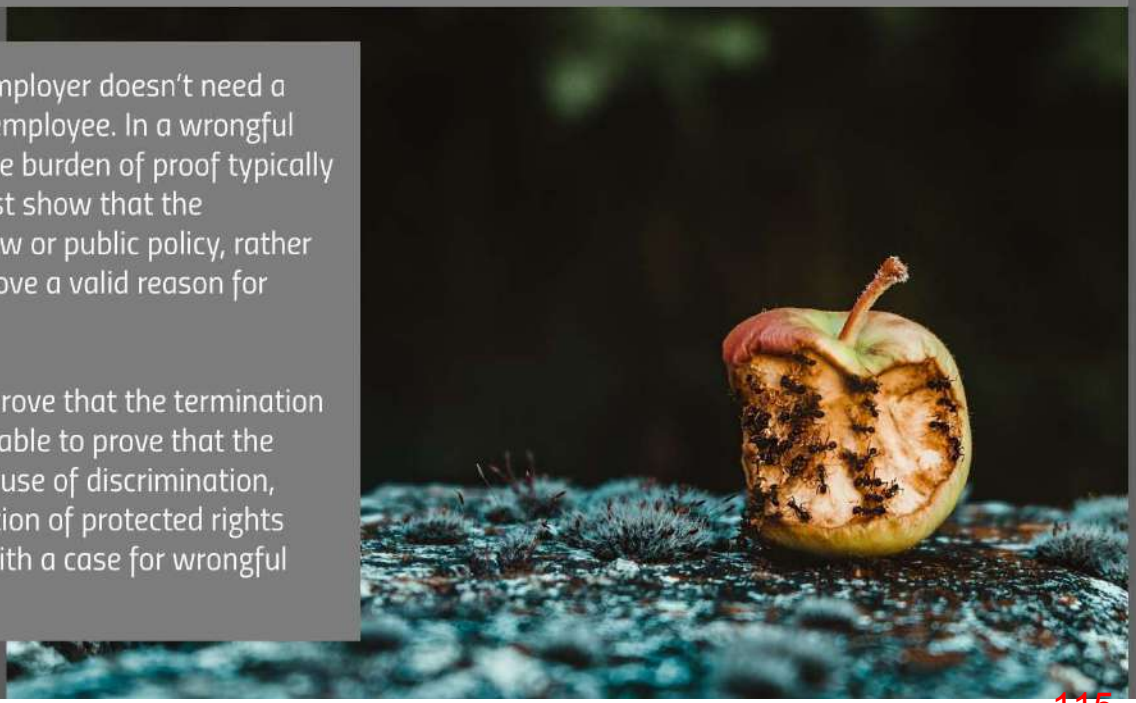
1. Termination based on an employee's race or ethnicity.
2. Firing an employee because of their gender or sexual orientation.
3. Wrongful termination due to an employee's religion or religious practices.
4. Retaliatory termination for reporting **workplace harassment** or discrimination.
5. Firing an employee for taking legally protected medical leave or requesting reasonable accommodations for a disability.
6. Termination as a **form of retaliation** for participating in a union or engaging in collective bargaining activities.
7. Wrongful termination based on an employee's age (**age discrimination**).
8. Firing an employee because they blew the whistle on illegal activities or violations of law within the company.
9. Termination due to an employee's political beliefs or affiliation.
10. Retaliatory termination for asserting rights under the Family and Medical Leave Act (FMLA).
11. Wrongful termination based on an **employee's pregnancy** or related medical conditions.
12. Firing an employee because they requested overtime pay or complained about **wage and hour** violations.
13. Termination due to an employee's military service or obligations.
14. Retaliatory termination for taking legally protected actions, such as filing a workers' compensation claim.
15. Wrongful termination based on an employee's national origin or immigration status.

From: https://www.lawling.com/wrongful-termination-california/

Burden of Proof in Illegal Terminations of At-Will Employment

Under at-will employment, an employer doesn't need a specific reason to terminate an employee. In a wrongful termination case in California, the burden of proof typically rests on the employee. They must show that the termination violated a specific law or public policy, rather than the employer needing to prove a valid reason for termination.

This can make it challenging to prove that the termination was wrongful. If an employee is able to prove that the reason for termination was because of discrimination, harassment, retaliation, or violation of protected rights they would be able to proceed with a case for wrongful termination.



Basic Overview of Laws: At-Will Employment

California law (called the Fair Employment and Housing Act or FEHA) prohibits harassment, discrimination, and retaliation.

The law also requires that employers "take reasonable steps to prevent and correct wrongful (harassing, discriminatory, retaliatory) behavior in the workplace (Cal. Govt. Code §12940(k)).

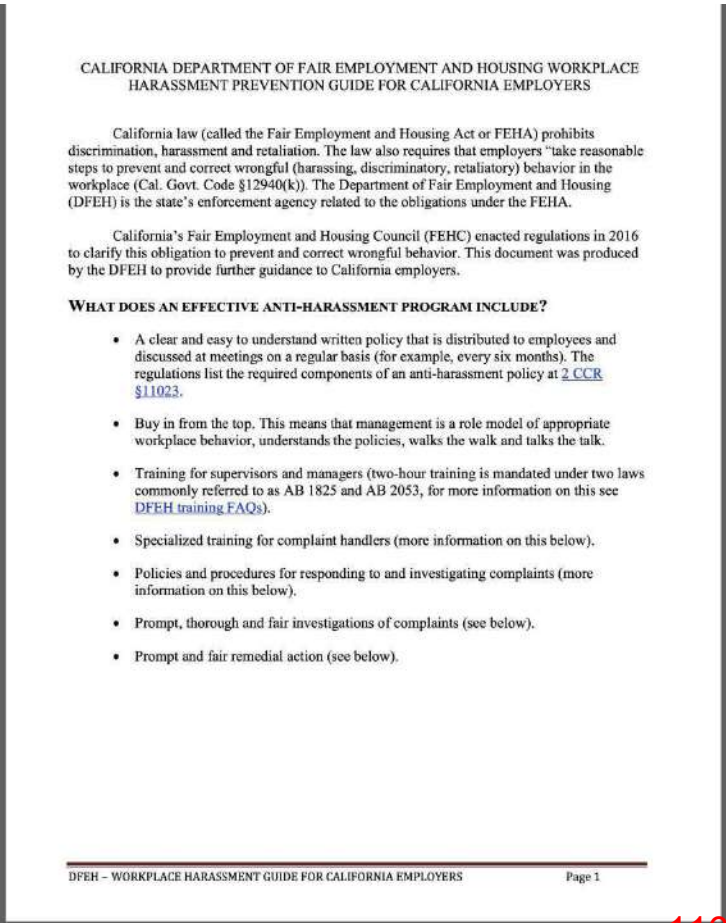
The Department of Fair Employment and Housing (DFEH) is the state's enforcement agency related to the obligations under the FEHA.

Keep California fair for everyone.

CALCIVILRIGHTS.CA.GOV

For More Information the California Department of Fair Employment and Housing has a Workplace Harassment Prevention Guide

From: https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2017/06/DFEH-Workplace-Harassment-Guide.pdf



CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING WORKPLACE HARASSMENT PREVENTION GUIDE FOR CALIFORNIA EMPLOYERS

California law (called the Fair Employment and Housing Act or FEHA) prohibits discrimination, harassment and retaliation. The law also requires that employers "take reasonable steps to prevent and correct wrongful (harassing, discriminatory, retaliatory) behavior in the workplace (Cal. Govt. Code §12940(k)). The Department of Fair Employment and Housing (DFEH) is the state's enforcement agency related to the obligations under the FEHA.

California's Fair Employment and Housing Council (FEHC) enacted regulations in 2016 to clarify this obligation to prevent and correct wrongful behavior. This document was produced by the DFEH to provide further guidance to California employers.

WHAT DOES AN EFFECTIVE ANTI-HARASSMENT PROGRAM INCLUDE?

- A clear and easy to understand written policy that is distributed to employees and discussed at meetings on a regular basis (for example, every six months). The regulations list the required components of an anti-harassment policy at 2 CCR §11023.
- Buy in from the top. This means that management is a role model of appropriate workplace behavior, understands the policies, walks the walk and talks the talk.
- Training for supervisors and managers (two-hour training is mandated under two laws commonly referred to as AB 1825 and AB 2053, for more information on this see DFEH training FAQs).
- Specialized training for complaint handlers (more information on this below).
- Policies and procedures for responding to and investigating complaints (more information on this below).
- Prompt, thorough and fair investigations of complaints (see below).
- Prompt and fair remedial action (see below).

DFEH – WORKPLACE HARASSMENT GUIDE FOR CALIFORNIA EMPLOYERS Page 1

Harassment is Illegal

What is Workplace Harassment?

Workplace harassment might or might not have any kind of physical evidence, but we can't deny it exists. As per the Equal Employment Opportunity Commission (EEOC), harassment includes offensive jokes, bullying, slurs, epithets, physical assaults, intimidation, ridicule, insults, offensive objects or pictures, and interference in work performance.

Harassment at the workplace can be of any type, whether verbal or physical harassment, sexual favors, psychological, emotional, etc. There are five major types of workplace harassments that we will be discussing:

- **Verbal harassment**
- **Psychological harassment**
- **Cyberbullying**
- **Physical harassment**
- **Sexual harassment**

What is Verbal Harassment?

Victims of verbal harassment often face an ongoing battle of destruction that threatens their health and career equally. Verbal harassment consists of demeaning slurs, offensive gestures, and unwarranted criticisms.

Since this is a non-physical form of violence, it includes insults like fat-shaming/body shaming jokes, hurtful comments, and unwanted taunting, thus, often challenging to recognize. As it is a gray area, HR managers and leaders must be vigilant to notice such harassing behaviors.

What is Psychological Harassment?

Psychological harassment is somewhat similar to verbal harassment, but it is more covert and consists of tactics like withholding information. Victims who face such harassment are more likely to suffer mental breakdowns, low self-esteem, and tend to undermine themselves.

Psychological harassment includes taking credits for others' achievement, making impossible demands, imposing impossible deadlines on an employee, forcing someone to work outside their job scope, etc. This is a form of deliberate psychological bullying.

What is Digital Harassment or Cyberbullying?

Digital harassment or cyberbullying is the newest form of harassment. Digital harassment includes posting threats or demeaning comments on social media, creating a fake persona to bully someone online, creating a webpage about the victim to mock and belittle them, and making false allegations online.

Usage of social media has become a norm in any workplace. Hence in the name of free speech, anyone can harass anyone digitally. People can make fake personas to demean or bully their colleagues. But, there is also good news about digital harassment- victims can document it. Someone who faces such bullying and discrimination can document these incidents in screenshots, saved e-mails, etc. Doing so, victims of workplace harassment can easily report such offensive behaviors.

What is Sexual Harassment?

Sexual harassment at the workplace is a heinous crime and more common than you might think. It is an offense that is not specific to women only. A person belonging to any gender can be the victim or the perpetrator of sexual harassment.

According to a ZipRecruiter survey, 40% of female respondents and 14% of male respondents have experienced sexual harassment in the workplace.Unwanted touching, sending obscene messages and videos, asking for sexual favors, comments including vulgar gestures are a few signs of sexual harassment.

Most of the time, these incidents go unnoticed and unreported, and because of this, offenders often get away with their conduct. Many victims do not want to speak only about this as they think it will get better, unfortunately it often only worsens.

What is Physical Harassment?

Physical harassment in the workplace has many degrees. Such harassments include improper touching of clothing, skin, physical assaults, threats, or damaging personal property.

People belonging to gender minorities and LGBTQIA+ communities are more likely to face such kinds of harassment at work. Offenders can downplay some harassments in the form of jokes, not causing physical harm; in such cases, it gets difficult to identify physical harassments.

Even if there is no severe physical harm, it can still be considered physical harassment. If a situation becomes violent, employees must file a complaint and take strict actions against the offenders.

Sexual Harassment Continued...

Sexual harassment in the workplace is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964 and California's Fair Employment and Housing Act. Briefly, sexual harassment refers to both unwelcome sexual advances, or other visual, verbal, or physical conduct of a sexual nature and actions that create an intimidating, hostile, or offensive work environment based on an employee's sex. Under California law, the offensive conduct need not be motivated by sexual desire, but may be based upon an employee's actual or perceived sex or gender-identity, actual or perceived sexual orientation, and/or pregnancy, childbirth, or related medical conditions. This definition includes many forms of offensive behavior and includes gender-based harassment of a person of the same sex as the harasser, and actions that subject co-workers to a hostile work environment* (which we will address shortly).

Employers of 5 or more employees are required to provide sexual harassment prevention training to all supervisory and nonsupervisory employees.

Sexual Harassment Continued...

There are two main forms of prohibited sexual harassment at work: hostile work environment harassment, and quid pro quo harassment.

Hostile Work Environment: The law prohibits sexual harassment that is severe or pervasive enough so as to create a hostile workplace and, or interfere with an employee's ability to work. Harassment is considered severe if it is egregious to the point that one occurrence of the harassing behavior makes the environment hostile. Harassment is considered pervasive if it occurs repeatedly, so as to create a hostile workplace environment. Harassing conduct may include unwanted sexual advances, sexual comments, lewd and offensive comments, sexual assault, physical conduct of a sexual nature, innuendos

Quid Pro Quo: The law prohibits representing participation in any sexual behavior as a condition of employment. It is unlawful for an employer to require or suggest that an employee engage in any sexual behavior as part of their job. For example, a supervisor suggesting that you may receive a promotion if you go on a date with them, or a manager telling you that they will hire you in exchange for a sexual favor, are both considered illegal quid pro quo harassment. One event of explicit or implied quid pro quo harassment is unlawful.

Sexual Harassment Continued... Hostile Workplace Behaviors

According to the US Equal Employment Opportunity Commission (EEOC), harassment violates the Civil Rights Act, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA).

Hostile work environment behaviors are defined as offensive to any reasonable person. While these behaviors may present in different ways in real-time interactions, some examples include:

- Unwelcome conduct based on race, color, religion, sex (including sexual orientation, gender identity, or pregnancy)
- Unwelcome conduct based on national origin, age, or genetic information
- Unwanted touching or sexual harassment
- Offensive jokes (often with protected categories of people as targets)
- Discussing sex or sexual acts (including usually sexually suggestive language)
- Unwanted commentary on physical appearance
- Racist or offensive terms, photos, or slurs
- Inappropriate gestures
- Unwanted physical contact or touch
- Workplace bullying or gaslighting
- Intentionally sabotaging an employee's work or career
- Other discriminatory behavior against categories protected by the EEOC

What are the elements needed to prove Quid Pro Quo in California?

CACI No. 2520. Quid pro quo Sexual Harassment - Essential Factual Elements

Judicial Council of California Civil Jury Instructions (2023 edition)

Download PDF

2520. Quid pro quo Sexual Harassment - Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] subjected [him/her/*nonbinary pronoun*] to sexual harassment. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] [was an employee of [*name of defendant*]/ applied to [*name of defendant*] for a job/was a person providing services pursuant to a contract with [*name of defendant*]];**
2. **That [*name of alleged harasser*] made unwanted sexual advances to [*name of plaintiff*] or engaged in other unwanted verbal or physical conduct of a sexual nature;**
3. **That terms of employment, job benefits, or favorable working conditions were made contingent, by words or conduct, on [*name of plaintiff*]'s acceptance of [*name of alleged harasser*]'s sexual advances or conduct;**
4. **That at the time of [his/her/*nonbinary pronoun*] conduct, [*name of alleged harasser*] was a supervisor or agent for [*name of defendant*];**
5. **That [*name of plaintiff*] was harmed; and**
6. **That [*name of alleged harasser*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised December 2015

What are the elements needed to prove Hostile Work Enviornment in California?

CACI No. 2521A. Work Environment Harassment - Conduct Directed at Plaintiff - Essential Factual Elements - Employer or Entity Defendant (Gov. Code, §§ 12923,

Judicial Council of California Civil Jury Instructions (2023 edition)

Download PDF

2521A. Work Environment Harassment - Conduct Directed at Plaintiff - Essential Factual Elements - Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] was subjected to harassment based on [his/her/*nonbinary pronoun*] [*describe protected status, e.g., race, gender, or age*] at [*name of defendant*] and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive.

To establish this claim, [*name of plaintiff*] and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive.

1. **That [*name of plaintiff*] was [an employee of/an applicant for a position with/a person providing services under a contract with/ an unpaid intern with/a volunteer with] [*name of defendant*];**
2. **That [*name of plaintiff*] was subjected to harassing conduct because [he/she/*nonbinary pronoun*] was [*protected status, e.g., a woman*];**
3. **That the harassing conduct was severe or pervasive;**
4. **That a reasonable [*e.g., woman*] in [*name of plaintiff*]'s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**
5. **That [*name of plaintiff*] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**
6. **[*Select applicable basis of defendant's liability:*]**

   [That a supervisor engaged in the conduct;]

   [*or*]

   [That [*name of defendant*] [or [his/her/*nonbinary pronoun*/its] supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]
7. **That [*name of plaintiff*] was harmed; and**
8. **That the conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

Derived from former CACI No. 2521 December 2007; Revised June 2013, December 2015, May 2018, July 2019, May 2020, November 2021

I May Have A Problem...What do I do?

As an employer, any case of workplace harassment in your organization is serious. It should be treated with the utmost respect and integrity and investigated thoroughly. Here's how to handle any incidents of hostile workplace behavior in your company.

- Establish written guidelines and policies. Every organization should have an employee handbook and code of conduct. With written guidelines and policies reinforcing positive behavior, it should be extremely clear how employees can and can't act in the workplace.
- Hold mandatory trainings. Consider ways you can further educate your employees through training sessions. For example, organizations implement mandatory workplace harassment and discriminatory trainings for all employees (not just managers). It's especially important to ensure your HR and legal teams are familiar with employment law and reinforce thorough training.
- Investigate every complaint. Failure to investigate a complaint can result in negative consequences for your organization. No matter what, take each complaint seriously and do your due diligence.
- Hold people accountable. Addressing any misconduct is critical to preserving the integrity of your organization and protecting your employees. Take action and hold those accountable who have perpetuated bad behavior.

I Don't Have a Problem Now...But I want to Keep It That Way...

As an employer, proactively preventing a harassment is one of the best things you can do for your organization. Here are some strategies to implement:

- Create a zero-tolerance policy. By creating a zero-tolerance policy, you're showing your employees you care. You're also showing that you're serious about workplace harassment and hostile behavior. Clearly define how your employees should behave. Any violation of those guidelines should result in immediate action.
- Train and educate your employees — often. Trainings and awareness programs should happen at every level of your workforce. Trainings aren't just for new hire orientation, either. Make sure you're educating and driving awareness within your employee base often.
- Address culture across the workforce. Consider how coaching can help. Coaching will uncover hidden biases and reinforce more positive and productive behaviors. Group coaching sessions help employees try out new approaches. Employees who work with a coach report better overall performance, motivation, creativity, focus, and innovation. A coach will also be able to help guide employees through difficult situations and, in some cases, prevent them.
- Take action. When something is wrong, take action. Failure to do so can result in negative consequences both for your employees and your business.

Discrimination is Illegal

What is Discrimination in the Workplace?

Discrimination in the workplace happens when a person or a group of people is treated unfairly or unequally because of specific characteristics. These protected characteristics include race, ethnicity, gender identity, age, disability, sexual orientation, religious beliefs, or national origin. Discrimination in the workplace can happen between coworkers, with job applicants, or between employees and their employers. Whether on purpose or by accident, discrimination, regardless of intention, is illegal.

What does the law say?

California Governmetn Code 12920

12920. It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, reproductive health decisionmaking, or military and veteran status.

It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for these reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interests of employees, employers, and the public in general.

Further, the practice of discrimination because of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, veteran or military status, or genetic information in housing accommodations is declared to be against public policy.

It is the purpose of this part to provide effective remedies that will eliminate these discriminatory practices.

This part shall be deemed an exercise of the police power of the state for the protection of the welfare, health, and peace of the people of this state.

Help Me Out Here...What is the Difference Between Discrimination and Harassment?

Harassment is unpleasant and unwanted behavior. This could be something that was said or written, or it could be physical contact. The offender or offender(s) are deliberate and persistent in their conduct, which creates a hostile environment.

Discrimination, on the other hand, occurs when you are treated differently at work because you belong to a protected class. In other words, when you've been treated unfairly because of who you are or how you're perceived, you've been discriminated against.

Help Me Out Here...What does this look like?

Discrimination can take many forms. Common examples include:

- Refusing to hire, refusing to promote, demoting, or firing workers because of their protected characteristic or their membership in a protected group.
- Adopting a company policy that disproportionately affects workers who have a certain protected characteristic.
- Refusing to accommodate the religious or disability-related needs of certain employees.
- Permitting employees to be frequently and severely harassed in the workplace.

- Source: https://wrklyrs.com/DiscrimLaw#articleIntro

Is this Still an Issue? It's 2023...

The evidence is in the data.

Anti-discrimination laws have been in place for over fifty years — yet most Americans believe that they're facing discrimination in one way or another. About three in five people have experienced age discrimination in the workplace. 49% of Black human resources professionals and 35% of Black workers feel that there is discrimination in their workplaces (almost four to five times more than their white colleagues). And a 2020 study found that the LGBTQ+ community experienced significant discrimination in their personal lives, the workplace, and even in their access to health care.

Whether we want to believe it or not, employment discrimination is real and present. Even if you believe your workplace is immune, your workforce is certainly affected.

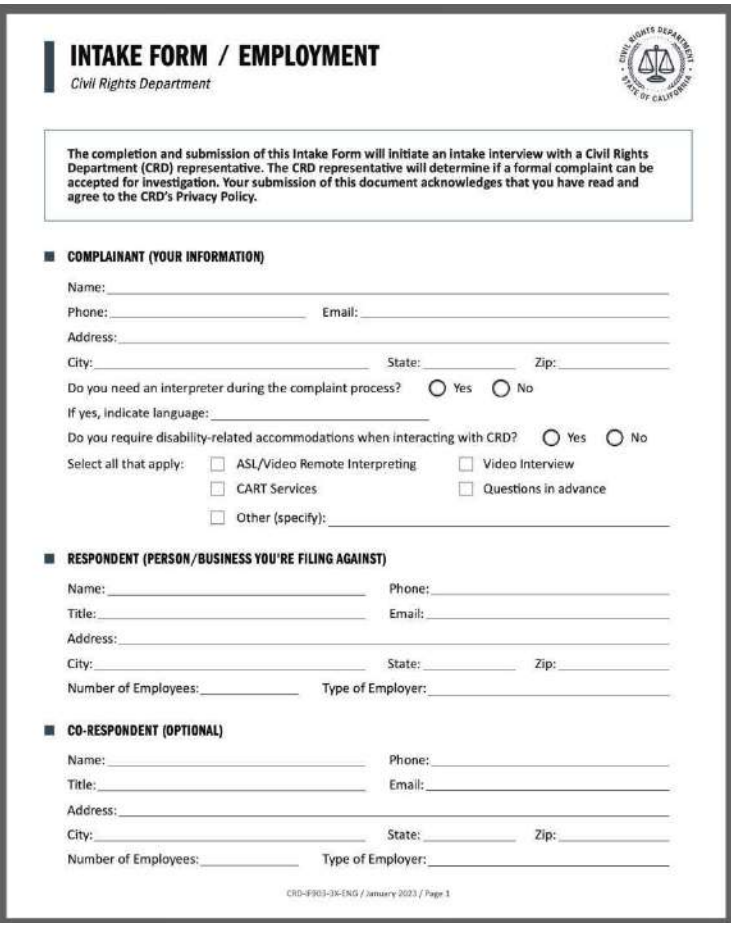
Study from: https://www.americanprogress.org/article/state-lgbtq-community-2020/

Connecting the Law to an Organization...

California has one of the most comprehensive bodies of law protecting classes of individuals from employment discrimination. The Fair Employment and Housing Act (known as "FEHA") protects California employees from discrimination based on many different factors, including race, religion, gender, disability, sexual orientation, veteran status, and age (if the employee is over 40). In Flannery v. California Highway Patrol (1998) 61 Cal.App.4th 629, 638 the court said: "The broad purpose of the FEHA is to safeguard an employee's right to seek, obtain, and hold employment without experiencing discrimination on account of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age."

The FEHA is enforced by the Department of Fair Employment and Housing (known as the "DFEH"). The DFEH acts as a first resort for many aggrieved employees by providing a process for filing complaints.

- Source: https://wrklyrs.com/DiscrimLaw#p9



INTAKE FORM / EMPLOYMENT

Civil Rights Department

The completion and submission of this Intake Form will initiate an intake interview with a Civil Rights Department (CRD) representative. The CRD representative will determine if a formal complaint can be accepted for investigation. Your submission of this document acknowledges that you have read and agree to the CRD's Privacy Policy.

COMPLAINANT (YOUR INFORMATION)

Name: _____

Phone: _____ Email: _____

Address: _____

City: _____ State: _____ Zip: _____

Do you need an interpreter during the complaint process? ◯ Yes ◯ No

If yes, indicate language: _____

Do you require disability-related accommodations when interacting with CRD? ◯ Yes ◯ No

Select all that apply: ☐ ASL/Video Remote Interpreting ☐ Video Interview ☐ CART Services ☐ Questions in advance ☐ Other (specify): _____

RESPONDENT (PERSON/BUSINESS YOU'RE FILING AGAINST)

Name: _____ Phone: _____

Title: _____ Email: _____

Address: _____

City: _____ State: _____ Zip: _____

Number of Employees: _____ Type of Employer: _____

CO-RESPONDENT (OPTIONAL)

Name: _____ Phone: _____

Title: _____ Email: _____

Address: _____

City: _____ State: _____ Zip: _____

Number of Employees: _____ Type of Employer: _____

CRD-F903-3X-ENG / January 2023 / Page 1

5

5 Or More Employees...

FEHA's protections apply generally to employers with five or more employees. It is illegal for employers of 5 or more employees to discriminate against job applicants and employees because of a protected category, or retaliate against them because they have asserted their rights under the law.

12926. As used in this part in connection with unlawful practices, unless a different meaning clearly appears from the context:

(a) "Affirmative relief" or "prospective relief" includes the authority to order reinstatement of an employee, awards of backpay, reimbursement of out-of-pocket expenses, hiring, transfers, reassignments, grants of tenure, promotions, cease and desist orders, posting of notices, training of personnel, testing, expunging of records, reporting of records, and any other similar relief that is intended to correct unlawful practices under this part.

(b) "Age" refers to the chronological age of any individual who has reached a 40th birthday.

(c) Except as provided by Section 12926.05, "employee" does not include any individual employed by that person's parent, spouse, or child or any individual employed under a special license in a nonprofit sheltered workshop or rehabilitation facility.

(d) "Employer" includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, the state or any political or civil subdivision of the state, and cities, except as follows:

"Employer" does not include a religious association or corporation not organized for private profit.

Federal Protections?

On the federal level, there are several laws that prohibit workplace discrimination. But the number of protected groups under federal law is much narrower than those provided by California law.

Currently, there are no federal laws protecting workers from discrimination based on sexual orientation or gender identity.

The U.S. Equal Employment Opportunity Commission (called the "EEOC") is a federal agency responsible for enforcing and administering many federal laws governing workplace discrimination.

U.S. Equal Employment Opportunity Commission

2 Different Claims

Discrimination claims generally fall into two broad categories:

Disparate treatment discrimination, and Disparate impact discrimination.
Each of these two types of discrimination are described below.

2

What is Disparte Treatment Discrimination?

Disparate treatment discrimination happens when an employee is specifically targeted or singled out because of their protected characteristic. In these kinds of cases, the employer's actions must be motivated by a discriminatory intent.

In the court case Caldwell v. Paramount Unified School Dist. (1995) 41 Cal.App.4th 189, 195, the court stated "[i]n order to prevail under the disparate treatment theory, an employee must show that the employer harbored a discriminatory intent."

Huh...Can you Simply This Please?

Disparate treatment might happen when the employer demotes, refuses to hire, refuses to promote, harasses, or takes some other negative action against the specific employee. Disparate treatment cases represent the most common type of discrimination that employees face.

None of My Policies Are Discriminatory...So I am Fine...Right?

Maybe not... in a disparate impact case, the employer can be held liable even if the employer had no discriminatory intent whatsoever.

In the court case, Int'l Bhd. of Teamsters v. United States (1977) 431 U.S. 324, 335, fn. 15 [97 S.Ct. 1843, 1854] the court said "[c]laims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive, we have held, is not required under a disparate-impact theory."

I am Better With Examples...

Scenario: Gender and Pregnancy Discrimination

Sara, a female employee, was terminated from her position shortly after announcing her pregnancy. Despite her consistent performance and positive reviews, her employer expressed concerns about her ability to fulfill her job duties due to pregnancy-related absences. No accommodations were offered, and Sara was abruptly let go.

This termination based on gender is a clear violation of anti-discrimination laws. Pregnant employees are protected from adverse employment actions based on their condition, and Sara's termination was unjustifiable, as it stemmed solely from her gender-related circumstance. She would have grounds for a wrongful termination claim based on gender discrimination and pregnancy discrimination.

What Has to be Done to Prove... Disparte Treatment?

In general, employees have the burden of proving that they were the victim of discrimination (see: Sandell v. Taylor-Listug, Inc. (2010) 188 Cal.App.4th 297, 307).

In cases involving disparate treatment discrimination, the elements that an employee has to provide are the following:

- The employer was an entity covered by applicable anti-discrimination laws;
- The employer took a negative employment action against the worker, like refusing to hire them, refusing to promote them, or firing them;
- The employee or job applicant's protected status—for example, their race, religion, gender, or sexual orientation—was a motivating reason for the employer's negative employment action; and
- The employee suffered some kind of harm because of the employer's negative employment action.

If the worker cannot prove all of these elements, they most likely will be unsuccessful.

What are the elements needed to prove Disparate Treatment in California?

CACI No. 2500. Disparate Treatment - Essential Factual Elements (Gov. Code, § 12940(a))

Judicial Council of California Civil Jury Instructions (2023 edition)

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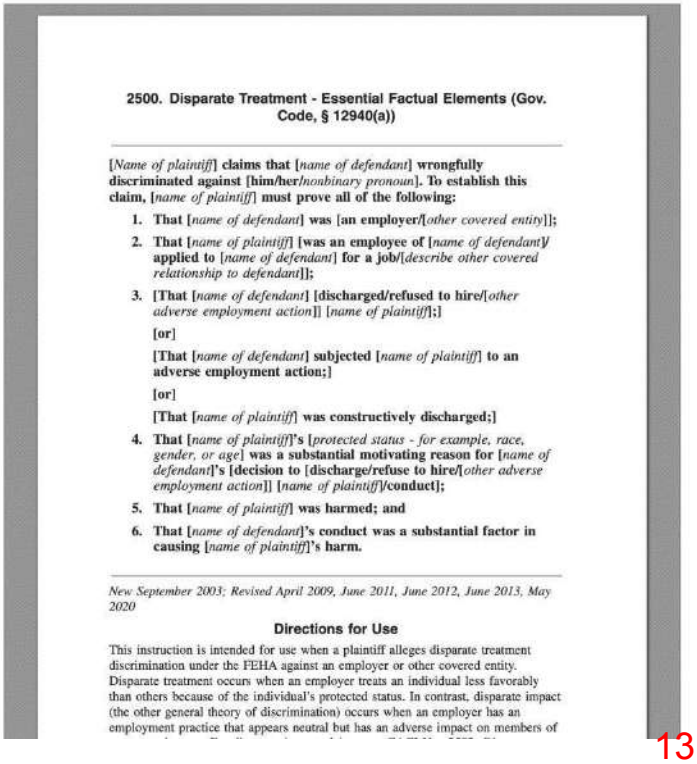


2500. Disparate Treatment - Essential Factual Elements (Gov. Code, § 12940(a))

[*Name of plaintiff*] claims that [*name of defendant*] wrongfully discriminated against [him/her/*nonbinary pronoun*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] was [an employer/[*other covered entity*]];**
2. **That [*name of plaintiff*] [was an employee of [*name of defendant*]/ applied to [*name of defendant*] for a job/[*describe other covered relationship to defendant*]];**
3. **[That [*name of defendant*] [discharged/refused to hire/[*other adverse employment action*]] [*name of plaintiff*];]**

   [or]

   [That [*name of defendant*] subjected [*name of plaintiff*] to an adverse employment action;]

   [or]

   [That [*name of plaintiff*] was constructively discharged;]
4. **That [*name of plaintiff*]'s [*protected status - for example, race, gender, or age*] was a substantial motivating reason for [*name of defendant*]'s [decision to [discharge/refuse to hire/[*other adverse employment action*]] [*name of plaintiff*]'s/conduct];**
5. **That [*name of plaintiff*] was harmed; and**
6. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised April 2009, June 2011, June 2012, June 2013, May 2020

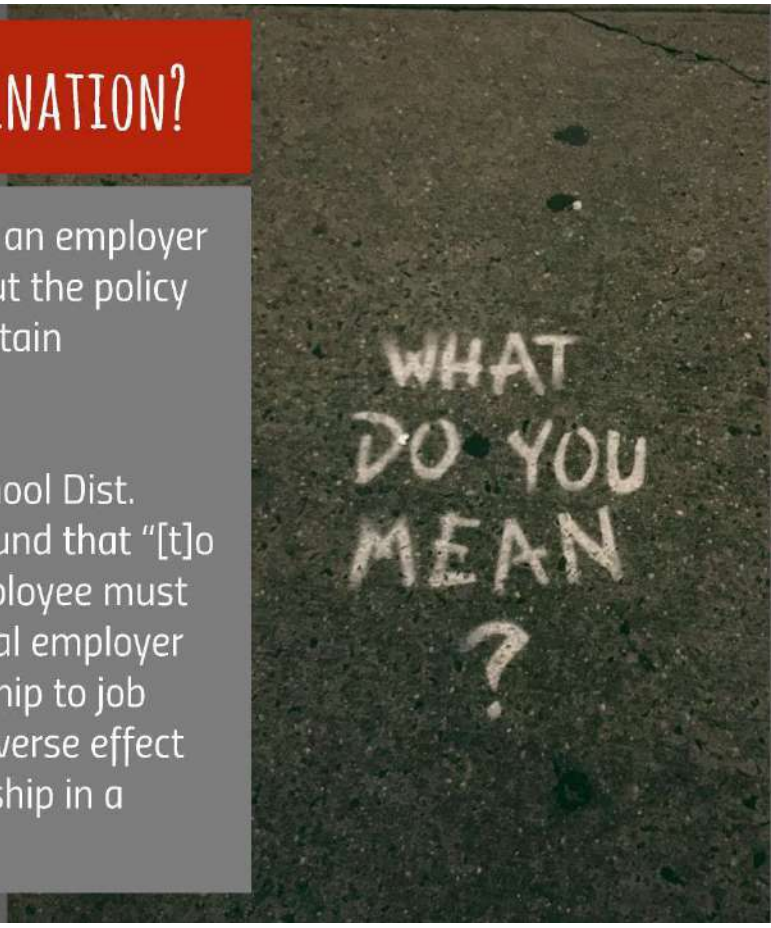
Directions for Use

This instruction is intended for use when a plaintiff alleges disparate treatment discrimination under the FEHA against an employer or other covered entity. Disparate treatment occurs when an employer treats an individual less favorably than others because of the individual's protected status. In contrast, disparate impact (the other general theory of discrimination) occurs when an employer has an employment practice that appears neutral but has an adverse impact on members of

What is Disparte Impact Discrimination?

Disparate impact discrimination happens when an employer adopts a policy that applies to all employees, but the policy has a more negative impact on those with a certain protected characteristic than those without it.

In the court case, Knight v. Hayward Unified School Dist. (2005) 132 Cal.App.4th 121, 129 the court found that "[t]o prevail on a theory of disparate impact, the employee must show that regardless of motive, a facially neutral employer practice or policy, bearing no manifest relationship to job requirements, in fact had a disproportionate adverse effect on certain employees because of their membership in a protected group."].



Huh...Can you Simply This Please?

Put another way, disparate impact claims arise when employers adopt policies that are "facially neutral," in that they don't appear to discriminate against a protected characteristic. The policy might be unlawful, however, if it nevertheless has a disproportionately adverse impact on employees with a protected characteristic.

What is Disparte Impact Discrimination?

Scenario: Medical Condition Discrimination

To encourage employees to get more exercise, a business owner rewards his employees with ten minutes off their shift whenever they take the stairs instead of the elevator. While this policy sounds positive and promotes wellness, not everyone can participate. Employees who suffer from disabilities might be disparately impacted.

What Has to be Done to Prove... Disparte Impact?

To successfully prove that an employer has engaged in disparate impact discrimination, the employee has the burden of showing:

- The employer was an entity covered by applicable anti-discrimination laws;
- The employer adopted an employment practice that had a disproportionately-adverse effect on a specific protected group—like members of a specific race, religion, gender, or sexual orientation;
- The employee or job applicant was a member of that specific protected group;
- and The employee or job applicant was harmed by the employment practice.

If the worker cannot prove all of these elements, they most likely will be unsuccessful.

What are the elements needed to prove Disparate Impact in California?

CACI No. 2502. Disparate Impact - Essential Factual Elements (Gov. Code, § 12940(a))

Judicial Council of California Civil Jury Instructions (2023 edition)

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2502. Disparate Impact - Essential Factual Elements (Gov. Code, § 12940(a))

[*Name of plaintiff*] claims that [*name of defendant*] had [an employment practice/a selection policy] that wrongfully discriminated against [him/her/*nonbinary pronoun*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] was [an employer/[*other covered entity*]];**
2. **That [*name of plaintiff*] [was an employee of [*name of defendant*]/ applied to [*name of defendant*] for a job/[*other covered relationship to defendant*]];**
3. **That [*name of defendant*] had [an employment practice of [*describe practice*]/a selection policy of [*describe policy*]] that had a disproportionate adverse effect on [*describe protected group - for example, persons over the age of 40*];**
4. **That [*name of plaintiff*] is [*protected status*];**
5. **That [*name of plaintiff*] was harmed; and**
6. **That [*name of defendant*]'s [employment practice/selection policy] was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised June 2011

Directions for Use

This instruction is intended for disparate impact employment discrimination claims. Disparate impact occurs when an employer has an employment practice that appears neutral but has an adverse impact on members of a protected group and cannot be justified by business necessity. (*Jumaane v. City of Los Angeles* (2015) 241

Bonus: Whose Actually Liable when Supervisor Discriminates?

Supervisors and coworkers are technically "agents" of an employer. For this reason, generally, employees cannot file a lawsuit directly against their supervisors or coworkers for discrimination or retaliation.

In the court case, Reno v. Baird (1998) 18 Cal.4th 640, 645, the court held that "only the employer, and not individual supervisors, may be sued and held liable under FEHA's prohibition against discriminatory hiring, firing, and personnel practices]."

It is the responmsbility of the organization to make sure that supervisors are not discriminating intentionally or unintentionally.

I Still Really Want to Sue My Supervisor...

Where there is a will, there is a way!

A supervisor may be liable for civil or criminal harassment or other legal violations when harassment is personal and unrelated to the job or job duties.

This was confirmed in the court case, Janken v. GM Hughes Electronics (1996) 46 Cal.App.4th 55, 62–63, when the court said, "it was the intent of the Legislature to place individual supervisory employees at risk of personal liability for personal conduct constituting harassment, but that it was not the intent of the Legislature to place individual supervisory employees at risk of personal liability for personnel management decisions later considered to be discriminatory. We conclude that the Legislature's differential treatment of harassment and discrimination is based on the fundamental distinction between harassment as a type of conduct not necessary to a supervisor's job performance, and business or personnel management decisions—which might later be considered discriminatory—as inherently necessary to performance of a supervisor's job. As a foundational step in our analysis, therefore, we distinguish harassment from discrimination."

Statute of Limitations

Employees are up against strict deadlines when pursuing relief for work discrimination. If the employee is bringing claims under state law, they must file a complaint against the employer with California's Department of Fair Employment and Housing (the DFEH) no later than three years from the date of the alleged discriminatory act.

Retaliation is Illegal

What is Retaliation?

Retaliation occurs when an employer (through a manager, supervisor, administrator or directly) fires an employee or takes any other type of adverse action against an employee for engaging in protected activity.

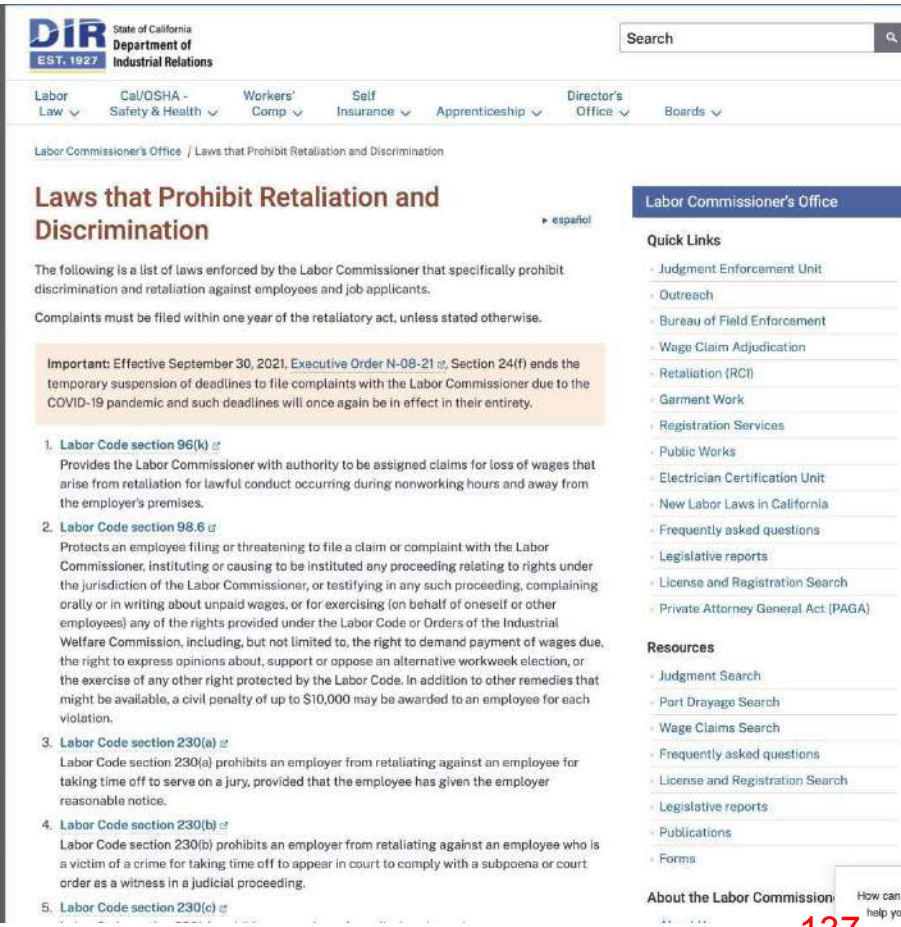
An adverse action is an action which would dissuade a reasonable employee from raising a concern about a possible violation or engaging in other related protected activity. Retaliation can have a negative impact on overall employee morale.

Huh...Can you Simply This Please?

An employer is unable to take adverse action against an employee for exercising their legal rights. If they do, this could be considered retaliation.

What are the Laws that Prohibit Retaliation...A LOT

https://www.dir.ca.gov/dlse/howtofilelinkcodesections.htm



DIR State of California Department of Industrial Relations EST. 1927

Search

Labor Law | Cal/OSHA - Safety & Health | Workers' Comp | Self Insurance | Apprenticeship | Director's Office | Boards

Labor Commissioner's Office / Laws that Prohibit Retaliation and Discrimination

Laws that Prohibit Retaliation and Discrimination

▸ español

The following is a list of laws enforced by the Labor Commissioner that specifically prohibit discrimination and retaliation against employees and job applicants.

Complaints must be filed within one year of the retaliatory act, unless stated otherwise.

Important: Effective September 30, 2021, Executive Order N-08-21, Section 24(f) ends the temporary suspension of deadlines to file complaints with the Labor Commissioner due to the COVID-19 pandemic and such deadlines will once again be in effect in their entirety.

1. **Labor Code section 96(k)**
   Provides the Labor Commissioner with authority to be assigned claims for loss of wages that arise from retaliation for lawful conduct occurring during nonworking hours and away from the employer's premises.
2. **Labor Code section 98.6**
   Protects an employee filing or threatening to file a claim or complaint with the Labor Commissioner, instituting or causing to be instituted any proceeding relating to rights under the jurisdiction of the Labor Commissioner, or testifying in any such proceeding, complaining orally or in writing about unpaid wages, or for exercising (on behalf of oneself or other employees) any of the rights provided under the Labor Code or Orders of the Industrial Welfare Commission, including, but not limited to, the right to demand payment of wages due, the right to express opinions about, support or oppose an alternative workweek election, or the exercise of any other right protected by the Labor Code. In addition to other remedies that might be available, a civil penalty of up to $10,000 may be awarded to an employee for each violation.
3. **Labor Code section 230(a)**
   Labor Code section 230(a) prohibits an employer from retaliating against an employee for taking time off to serve on a jury, provided that the employee has given the employer reasonable notice.
4. **Labor Code section 230(b)**
   Labor Code section 230(b) prohibits an employer from retaliating against an employee who is a victim of a crime for taking time off to appear in court to comply with a subpoena or court order as a witness in a judicial proceeding.
5. **Labor Code section 230(c)**

Labor Commissioner's Office

Quick Links
- Judgment Enforcement Unit
- Outreach
- Bureau of Field Enforcement
- Wage Claim Adjudication
- Retaliation (RCI)
- Garment Work
- Registration Services
- Public Works
- Electrician Certification Unit
- New Labor Laws in California
- Frequently asked questions
- Legislative reports
- License and Registration Search
- Private Attorney General Act (PAGA)

Resources
- Judgment Search
- Port Drayage Search
- Wage Claims Search
- Frequently asked questions
- License and Registration Search
- Legislative reports
- Publications
- Forms

About the Labor Commissione

How can help yo

Can you Give Me An Example of Retaliation?

Neil is a therapist at an agency and works an average of 50 hours a week. He contacts the California Department of Industrial Realtions confidentially to inquire about overtime pay. He tells another cook that he learned from California Department of Industrial Realtions, they should be earning extra pay for the overtime hours worked. Their manager overhears the conversation and terminates Neil's employment.

In this example, Neil was fired for contacting the California Department of Industrial Relations, which is prohibited as retaliation by his employer.

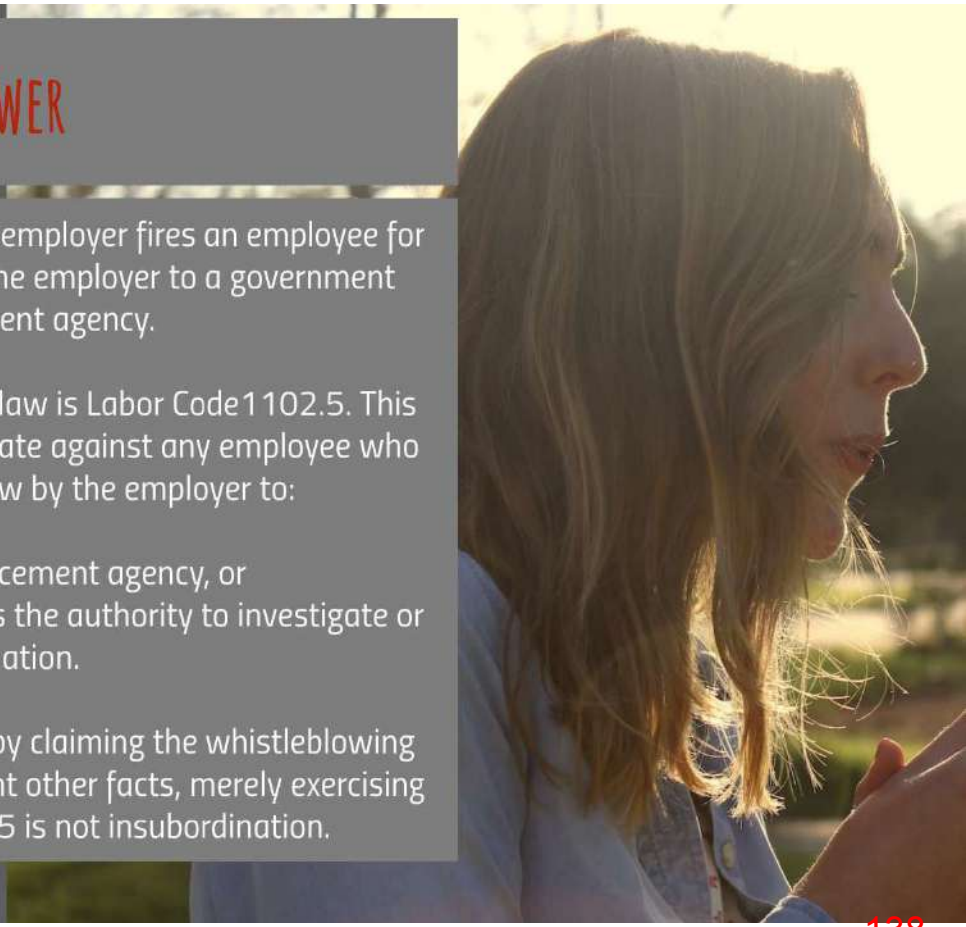
Whistleblower

Whistleblower termination occurs when an employer fires an employee for reporting a potential violation of law by the employer to a government agency or law enforcement agency.

California's main whistleblower protection law is Labor Code1102.5. This law provides that employers may not retaliate against any employee who reports a suspected violation of law by the employer to:

- a government or law enforcement agency, or
- a supervisor or other employee who has the authority to investigate or correct the violation.

Employers may try to get around this law by claiming the whistleblowing employee was insubordinate. Though absent other facts, merely exercising one's rights under Labor Code 1102.5 is not insubordination.



What are the Specific Requirements Needed to Prove Retaliation for Wrongful Discharge

CACI No. 2430. Wrongful Discharge in Violation of Public Policy - Essential Factual Elements

Judicial Council of California Civil Jury Instructions (2023 edition)

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2430. Wrongful Discharge in Violation of Public Policy - Essential Factual Elements

[*Name of plaintiff*] claims [he/she/*nonbinary pronoun*] was discharged from employment for reasons that violate a public policy. It is a violation of public policy [*specify claim in case, e.g., to discharge someone from employment for refusing to engage in price fixing*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] was employed by [*name of defendant*];**
2. **That [*name of defendant*] discharged [*name of plaintiff*];**
3. **That [*insert alleged violation of public policy, e.g., "[name of plaintiff]'s refusal to engage in price fixing"*] was a substantial motivating reason for [*name of plaintiff*]'s discharge;**
4. **That [*name of plaintiff*] was harmed; and**
5. **That the discharge was a substantial factor in causing [*name of plaintiff*] harm.**

New September 2003; Revised June 2013, June 2014, December 2014, November 2018, May 2020

Directions for Use

The judge should determine whether the purported reason for firing the plaintiff would amount to a violation of public policy. (See *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1092 [4 Cal.Rptr.2d 874, 824 P.2d 680]; overruled on other grounds

Other Examples of Retaliation

Workplace retaliation can take many different forms. While the classic retaliation case involves an employer firing an employee for an unlawful cause, termination is not the only way that an employer can engage in illegal retaliation. Any of the following conduct could constitute unlawful retaliation:

- Denying an employee a promotion
- Denying an employee a reasonable request for a transfer to a new position or more convenient location
- Denying an employee a bonus or other benefit
- Demoting an employee
- Reducing an employee's wages or salary
- Rejecting a candidate for a position
- Creating a hostile work environment in order to force the employee to quit ("constructive termination")
- Preventing the employee's access to the training, equipment, support, or other items necessary to do their job
- Switching an employee to a less desirable location, position, or shift
- Giving an employee an unjustifiably poor performance review or an unsatisfactory job reference
- Terminating an employee

Most Common Elements for a Lawsuit in This Area For All 3

CACI No. 2527. Failure to Prevent Harassment, Discrimination, or Retaliation - Essential Factual Elements - Employer or Entity Defendant (Gov. Code, § 12940(k))

Judicial Council of California Civil Jury Instructions (2023 edition)

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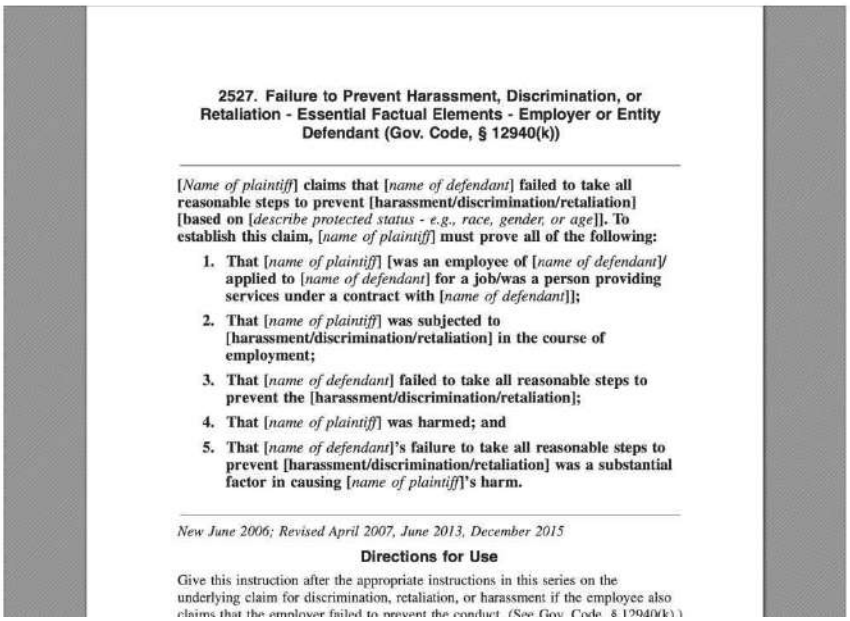

2527. Failure to Prevent Harassment, Discrimination, or Retaliation - Essential Factual Elements - Employer or Entity Defendant (Gov. Code, § 12940(k))

[*Name of plaintiff*] claims that [*name of defendant*] failed to take all reasonable steps to prevent [harassment/discrimination/retaliation] [based on [*describe protected status - e.g., race, gender, or age*]]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] [was an employee of [*name of defendant*]/ applied to [*name of defendant*] for a job/was a person providing services under a contract with [*name of defendant*]];**
2. **That [*name of plaintiff*] was subjected to [harassment/discrimination/retaliation] in the course of employment;**
3. **That [*name of defendant*] failed to take all reasonable steps to prevent the [harassment/discrimination/retaliation];**
4. **That [*name of plaintiff*] was harmed; and**
5. **That [*name of defendant*]'s failure to take all reasonable steps to prevent [harassment/discrimination/retaliation] was a substantial factor in causing [*name of plaintiff*]'s harm.**

New June 2006; Revised April 2007, June 2013, December 2015

Directions for Use

Give this instruction after the appropriate instructions in this series on the underlying claim for discrimination, retaliation, or harassment if the employee also claims that the employer failed to prevent the conduct. (See Gov. Code, § 12940(k).)

Illegal Terminations of Employment Contract for Period of Time

Example: Employment Contracts for Period of Time Example

NBA Uniform Player Contract.

BASKETBALL ASSOCIATION
UNIFORM PLAYER CONTRACT

(Rookie or Veteran -- Two or More Seasons)

THIS AGREEMENT, made this _____ day of _____, 19_____, by and between _____ (hereinafter called the "Club"), a member of the National Basketball Association (hereinafter called the "Association") and _____ _____ whose address is shown below (hereinafter called the "Player").

WITNESSETH:

In consideration of the mutual promises hereinafter contained, the parties hereto promise and agree as follows:

1. The Club hereby employs the Player as a skilled basketball player for a term of _____ year(s) from the 1st day of September, 19_____. The Player's employment during any year covered by this contract shall include attendance at any training camp, playing the games scheduled for the Club's team during any scheduled season of the Association, playing all exhibition games scheduled by the Club during and prior to any schedule season, playing (if invited to participate) in any of the Association's All-Star Games and attending every event (including, but not limited to, the All-Star Game show and/or banquet) conducted in association with such All-Star Games, and playing the playoff games subsequent to any schedule season. Players other than rookies will not be required to attend training camp earlier than 4 p.m. (local time) on the twenty-ninth day prior to the first game of any of the Association's schedule season. Rookies may be required to attend training camp at an earlier date. Exhibition games shall not be played on the three days prior to the opening of the Club's regular season schedule, nor on the day prior to a regularly scheduled game, nor on the day prior to and the day following the All-Star Game. Exhibition games prior to any schedule season shall not exceed eight (including intra-squad games for which admission is charged) and exhibition games during any regularly scheduled season shall not exceed three.

2. The Club agrees to pay the Player for rendering the services described herein the compensation described in Exhibit 1 hereto (less all amounts required to be withheld by federal, state and local authorities, and exclusive of any amount(s) which the Player shall be entitled to receive from the Player Playoff Pool). Unless otherwise provided in Exhibit 1, such compensation shall be paid in twelve equal semi-monthly payments beginning with the first of said payments on November 15th of each season above described and continuing with such payments on the first and fifteenth of each month until said compensation is paid in full; provided, however, if the Club does not qualify for the playoffs, the payments for the year involved which would otherwise be due subsequent to the conclusion of the schedule season shall become due and payable immediately after the conclusion of the scheduled season.

3. The Club agrees to pay all proper and necessary expenses of the Player, including the reasonable board and lodging expenses of the Player while playing for the Club "on the road" and during the training camp period if the Player is not then living at home. The Player, while "on the road" (and during the training camp period only if the Club does not pay for meals directly), shall be paid a meal expense allowance as set forth in the Collective Bargaining Agreement currently in effect between the Association and the National Basketball Players Association (hereinafter "the NBA/NBPA Collective Bargaining Agreement"). No deductions from such meal expense allowance shall be made for meals served on an airplane. During the training camp period (and if the Club does not pay for meals directly), the meal expense allowance shall be paid in weekly installments commencing with the first week of training camp. For the

How Do I Prove that I am in Not in an At-Will (Default) Employment Relationship?

CACI No. 2400. Breach of Employment Contract - Unspecified Term - "At-Will" Presumption

Judicial Council of California Civil Jury Instructions (2023 edition)

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2400. Breach of Employment Contract - Unspecified Term - "At-Will" Presumption

An employment relationship may be ended by either the employer or the employee, at any time, for any [lawful] reason, or for no reason at all. This is called "at-will employment."

An employment relationship is not "at will" if the employee proves that the parties, by words or conduct, agreed that [*specify the nature of the alleged agreement, e.g., the employee would be discharged only for good cause***].**

New September 2003; Revised June 2006, November 2018

Directions for Use

If the plaintiff has made no claim other than the contract claim, then the word "lawful" may be omitted. If the plaintiff has made a claim for wrongful termination or violation of the Fair Employment and Housing Act, then the word "lawful" should be included in order to avoid confusing the jury.

Sources and Authority

- At-Will Employment. Labor Code section 2922.
- Contract of Employment. Labor Code section 2750.
- "Labor Code section 2922 has been recognized as creating a presumption. The statute creates a presumption of at-will employment which may be overcome 'by evidence that despite the absence of a specified term, the parties agreed that the employer's power to terminate would be limited in some way, e.g., by a

Basic Overview of Laws: Employment Contract for Period of Time

Same laws as At-Will Employment.

California law (called the Fair Employment and Housing Act or FEHA) prohibits harassment, discrimination, and retaliation.

The law also requires that employers "take reasonable steps to prevent and correct wrongful (harassing, discriminatory, retaliatory) behavior in the workplace (Cal. Govt. Code §12940(k)).

The Department of Fair Employment and Housing (DFEH) is the state's enforcement agency related to the obligations under the FEHA.

No Harassment, Discrimination, and Retatliation

+

Grounds for Termination are Included in Contract

16. **TERMINATION.**

a. The Team may terminate this Contract upon written notice to the Player if the Player shall:
   i. at any time, fail, refuse, or neglect to conform his personal conduct to standards of good citizenship, good moral character (defined here to mean not engaging in acts of moral turpitude, whether or not such acts would constitute a crime), and good sportsmanship, to keep himself in first class physical condition, or to obey the Team's training rules;
   ii. at any time commit a significant and inexcusable physical attack against any official or employee of the Team or the NBA (other than another player), or any person in attendance at any NBA game or event, considering the totality of the circumstances, including (but not limited to) the degree of provocation (if any) that may have led to the attack, the nature and scope of the attack, the Player's state of mind at the time of the attack, and the extent of any injury resulting from the attack;
   iii. at any time, fail, in the sole opinion of the Team's management, to exhibit sufficient skill or competitive ability to qualify to continue as a member of the Team; provided, however, (A) that if this Contract is terminated by the Team, in accordance with the provisions of this subparagraph, prior to January 10 of any Season, and the Player, at the time of such termination, is unfit to play skilled basketball as the result of an injury resulting directly from his playing for the Team, the Player shall (subject to the provisions set forth in Exhibit 3) continue to receive his full Base Compensation), less all workers' compensation benefits (which, to the extent permitted by law, and if not deducted from the Player's Compensation by the Team, the Player hereby assigns to the Team) and any insurance provided for by the Team paid or payable to the Player by reason of said injury, until such time as the Player is fit to play skilled basketball, but not beyond the Season during which such termination occurred; and provided, further, (B) that if this Contract is terminated by the Team, in accordance with the provisions of this subparagraph, during the period from the January 10 of any Season through the end of such Season, the Player shall be entitled to receive his full Base Compensation for said Season; or
   iv. at any time, fail, refuse, or neglect to render his services hereunder or in any other manner materially breach this Contract.

b. If this Contract is terminated by the Team by reason of the Player's failure to render his services hereunder due to disability caused by an injury to the Player resulting directly from his playing for the Team and rendering him unfit to play skilled basketball, and notice of such injury is given by the Player as provided herein, the Player shall (subject to the provisions set forth in Exhibit 3) be entitled to receive his full Base Compensation for the Season in which the injury was sustained, less all workers' compensation benefits (which, to the extent permitted by law, and if not deducted from the Player's Compensation by the Team, the Player hereby assigns to the Team) and any insurance provided for by the Team paid or payable to the Player by reason of said injury.

c. Notwithstanding the provisions of Paragraph 16(b) above, if this Contract is terminated by the Team prior to the first game of a Regular Season by reason of the Player's failure to render his services hereunder due to an injury or condition sustained or suffered during a preceding Season, or after such Season but prior to the Player's participation in any basketball practice or game played for the Team, payment by the Team of any Compensation earned through the date of termination under Paragraph 3(b) above, payment of the Player's board, lodging, and expense allowance during the training camp period, payment of the reasonable traveling expenses of the Player to his home city, and the expert training and coaching provided by the Team to the Player during the training season

CACI No. 2401. Breach of Employment Contract - Unspecified Term - Actual or Constructive Discharge - Essential Factual Elements

Judicial Council of California Civil Jury Instructions (2023 edition)

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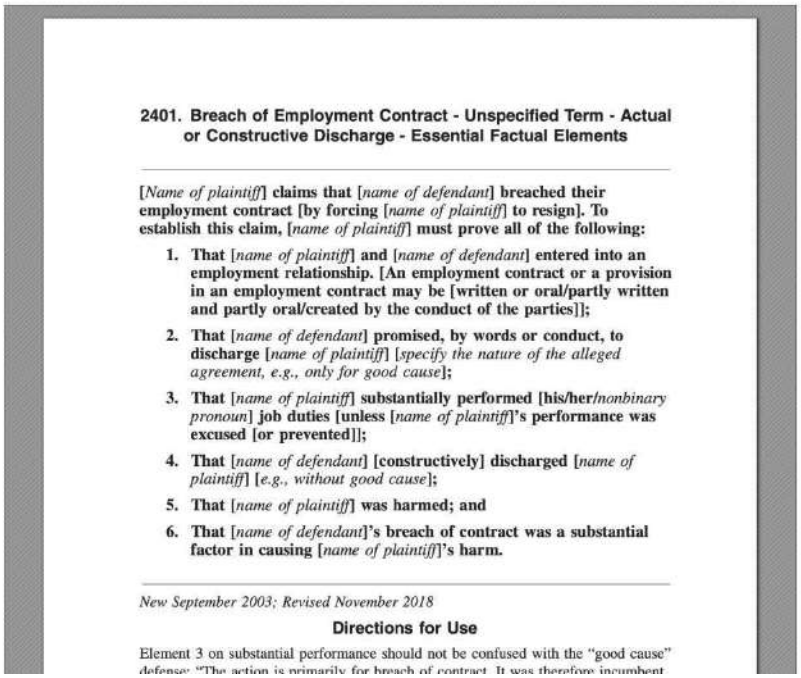


2401. Breach of Employment Contract - Unspecified Term - Actual or Constructive Discharge - Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] breached their employment contract [by forcing [*name of plaintiff*] to resign]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] and [*name of defendant*] entered into an employment relationship. [An employment contract or a provision in an employment contract may be [written or oral/partly written and partly oral/created by the conduct of the parties]];**
2. **That [*name of defendant*] promised, by words or conduct, to discharge [*name of plaintiff*] [*specify the nature of the alleged agreement, e.g., only for good cause*];**
3. **That [*name of plaintiff*] substantially performed [his/her/*nonbinary pronoun*] job duties [unless [*name of plaintiff*]'s performance was excused [or prevented]];**
4. **That [*name of defendant*] [constructively] discharged [*name of plaintiff*] [*e.g., without good cause*];**
5. **That [*name of plaintiff*] was harmed; and**
6. **That [*name of defendant*]'s breach of contract was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised November 2018

Directions for Use

Element 3 on substantial performance should not be confused with the "good cause" defense: "The action is primarily for breach of contract. It was therefore incumbent

How Do I Prove that I was Illegally Terminated as an Employee Contracted for a Period of Time?

Illegal Terminations of Independent Contractor

Independent Contractor Protections are Limited

Under California law, an independent contractor is someone who performs a specific service for a specific price. See Labor Code, § 3353. Unless your contract has a fixed term, your employer can terminate your services without notice and for any reason.

Per Cal. Code of Regs., § 11008, subd. (c)(1) Independent Contractors are not employees, since they don't work under the direct control and supervision of the employer. They therefore are not protected from workplace discrimination.

You have no legal basis for claiming wrongful termination, even when your client's behavior is discriminatory. The code only protects you from unlawful harassment under Section §12940(j)(1). However, since your work relationship is contractual, you can sue your employer for breach of contract.

How Do You Avoid Being Sued by an Employee?

Don't Have Any Employees

- Part A: I Should Have Done That... Practical Considerations
- Part B: Saying, "Your Fired" Can Get an Employer into Trouble
- Part C: Money Always Gets an Employer into Trouble
- Part D: When Safety is Not #1 Can Get an Employer into Trouble

Practical Considerations

Remember:

There are organizations that can help.

CAMFT AFFINITY PARTNER

CAMFT is pleased to offer our Members a Special Negotiated Discount* with ADP® - the leading provider of Payroll, HR and Benefits. If you have an Intern (employee) or plan to take a salary as an Officer of your Corporation, take advantage of these benefits now.

- With RUN Powered by ADP®, you can securely process your payroll via their amazing web based platform or by phone. ADP® will accurately process your payroll and accept responsibility for filing and depositing payroll taxes and respond to inquiries from the IRS and EDD(or any other State) (subject to ADP's standard terms and conditions). You and your employee(s) can enjoy the flexibility of Direct Deposit and other services
- ADP® helps Members stay in compliance with the ever changing tax laws.
- ADP® also can provide a premium payment program for workers compensation through their Pay-by-Pay® product
- SIMPLE IRA - Great Low Cost Retirement Program. Save up to $11,500.00 per year. (Sole Proprietor, LLC, Corporation)

To take advantage of this amazing offer, please contact our dedicated rep. Wendy Govenar with ADP® Directly at (818) 592-3642 or wendy.govenar@adp.com.

This program is only available to members through contacting Wendy. (Do not contact the ADP® office in your area or contact ADP® inside sales via the ADP website because you will not be eligible to participate).

*Discount applies to new clients on the Run Powered by ADP® product only.

Back to Affinity Partners

Register with EDD

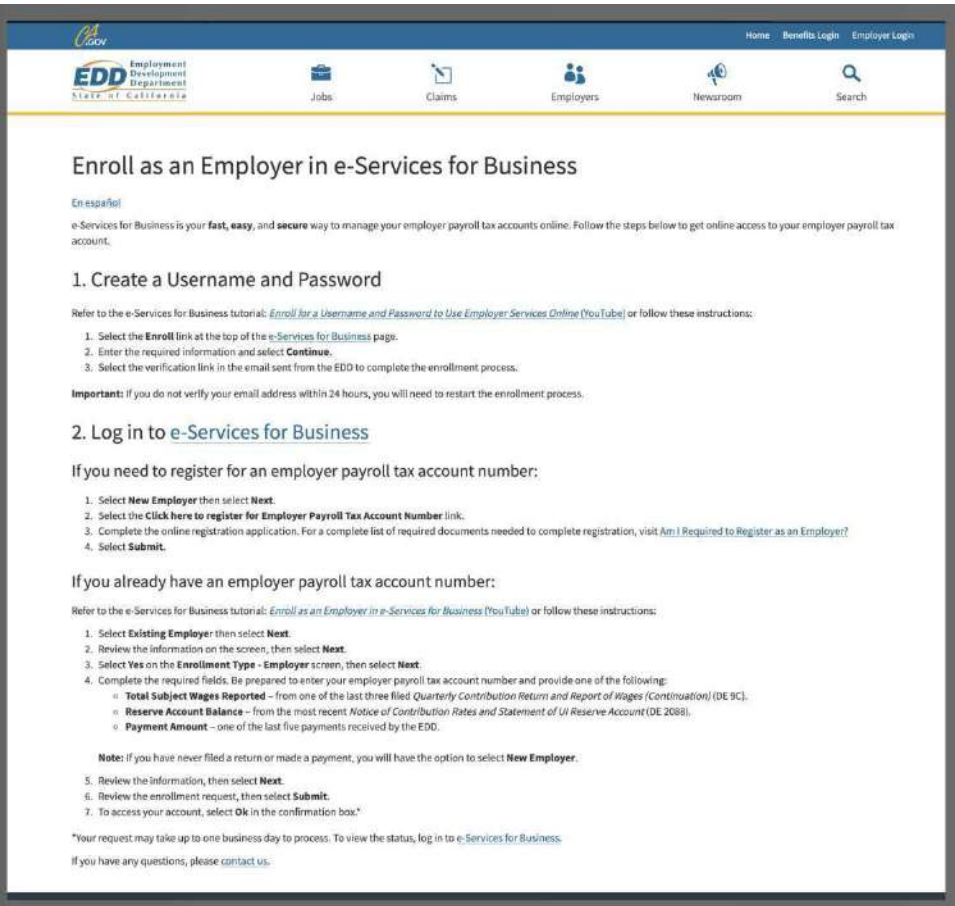
The EDD offers a wide variety of services to millions of Californians. As one of the largest state departments, the EDD:

-Administers the Unemployment Insurance and State Disability Insurance programs.

-Audits and collects payroll taxes and maintains employment records for millions of California workers.

-Connects job seekers with employers and administers federally funded workforce development programs.

-Gathers, analyzes, and publishes labor market information.



Home Benefits Login Employer Login

EDD Employment Development Department State of California

Jobs Claims Employers Newsroom Search

Enroll as an Employer in e-Services for Business

En español

e-Services for Business is your **fast, easy**, and **secure** way to manage your employer payroll tax accounts online. Follow the steps below to get online access to your employer payroll tax account.

1. Create a Username and Password

Refer to the e-Services for Business tutorial: *Enroll for a Username and Password to Use Employer Services Online* (YouTube) or follow these instructions:

1. Select the **Enroll** link at the top of the e-Services for Business page.
2. Enter the required information and select **Continue**.
3. Select the verification link in the email sent from the EDD to complete the enrollment process.

Important: If you do not verify your email address within 24 hours, you will need to restart the enrollment process.

2. Log in to e-Services for Business

If you need to register for an employer payroll tax account number:

1. Select **New Employer** then select **Next**.
2. Select the **Click here to register for Employer Payroll Tax Account Number** link.
3. Complete the online registration application. For a complete list of required documents needed to complete registration, visit Am I Required to Register as an Employer?
4. Select **Submit**.

If you already have an employer payroll tax account number:

Refer to the e-Services for Business tutorial: *Enroll as an Employer in e-Services for Business* (YouTube) or follow these instructions:

1. Select **Existing Employer** then select **Next**.
2. Review the information on the screen, then select **Next**.
3. Select **Yes** on the **Enrollment Type - Employer** screen, then select **Next**.
4. Complete the required fields. Be prepared to enter your employer payroll tax account number and provide one of the following:
   - **Total Subject Wages Reported** – from one of the last three filed *Quarterly Contribution Return and Report of Wages (Continuation)* (DE 9C).
   - **Reserve Account Balance** – from the most recent *Notice of Contribution Rates and Statement of UI Reserve Account* (DE 2088).
   - **Payment Amount** – one of the last five payments received by the EDD.

   Note: If you have never filed a return or made a payment, you will have the option to select **New Employer**.
5. Review the information, then select **Next**.
6. Review the enrollment request, then select **Submit**.
7. To access your account, select **Ok** in the confirmation box.*

*Your request may take up to one business day to process. To view the status, log in to e-Services for Business.

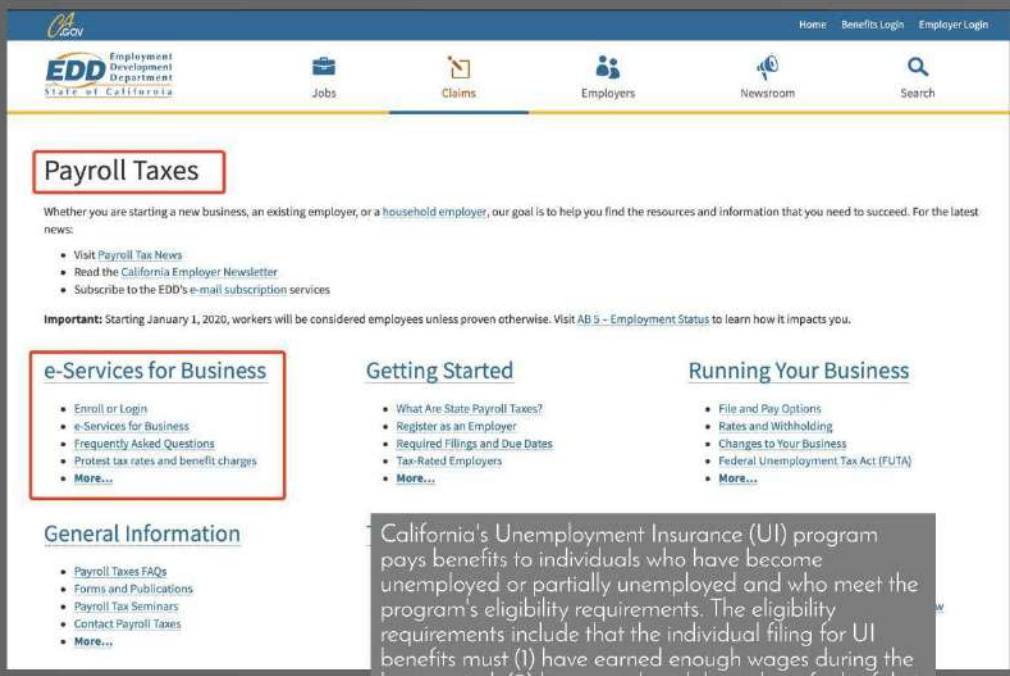
If you have any questions, please contact us.

Unemployment Insurance

The UI program was established as part of a national program administered by the U.S. Department of Labor under the Social Security Act. The UI program provides temporary payments to individuals who are unemployed through no fault of their own.

The UI program is funded through payroll taxes paid by the employer. Tax-rated employers pay a percentage on the first $7,000 in wages paid to each employee in a calendar year. The UI rate schedule and amount of taxable wages are determined annually. New employers pay 3.4 percent (.034) for a period of two to three years.

This maximum required amount is $434 per employee, per year. (The amount has been calculated at the highest UI tax rate of 6.2 percent [$7000 x .062].)



Home Benefits Login Employer Login

EDD Employment Development Department State of California

Jobs Claims Employers Newsroom Search

Payroll Taxes

Whether you are starting a new business, an existing employer, or a household employer, our goal is to help you find the resources and information that you need to succeed. For the latest news:

- Visit Payroll Tax News
- Read the California Employer Newsletter
- Subscribe to the EDD's e-mail subscription services

Important: Starting January 1, 2020, workers will be considered employees unless proven otherwise. Visit AB 5 - Employment Status to learn how it impacts you.

e-Services for Business

- Enroll or Login
- e-Services for Business
- Frequently Asked Questions
- Protest tax rates and benefit charges
- **More...**

Getting Started

- What Are State Payroll Taxes?
- Register as an Employer
- Required Filings and Due Dates
- Tax-Rated Employers
- **More...**

Running Your Business

- File and Pay Options
- Rates and Withholding
- Changes to Your Business
- Federal Unemployment Tax Act (FUTA)
- **More...**

General Information

- Payroll Taxes FAQs
- Forms and Publications
- Payroll Tax Seminars
- Contact Payroll Taxes
- **More...**

California's Unemployment Insurance (UI) program pays benefits to individuals who have become unemployed or partially unemployed and who meet the program's eligibility requirements. The eligibility requirements include that the individual filing for UI benefits must (1) have earned enough wages during the base period, (2) be unemployed through no fault of their own, (3) be physically able to work, (4) be available for work, (5) be ready and willing to accept work immediately, and (6) be actively looking for work.

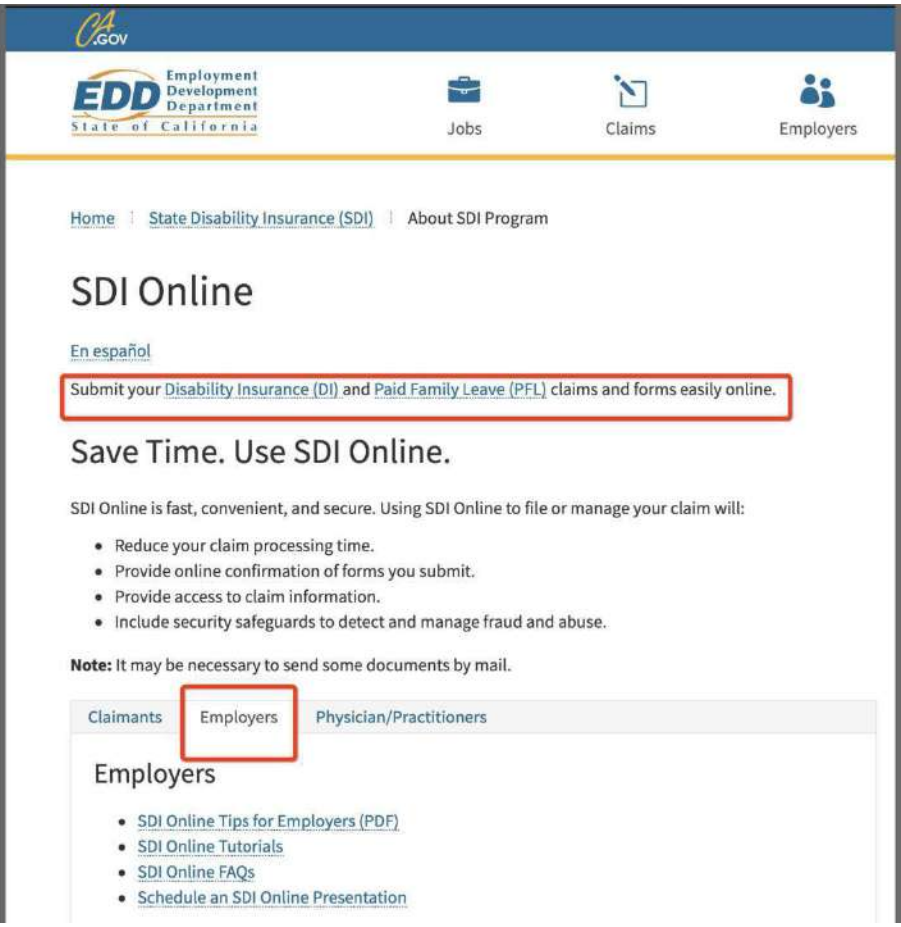
State Disability Insurance

SDI is a deduction from employees' wages. This is usually shown as "CASDI" on your paystub. This means that each time an employee gets paid, 1.2% of their wages go to the SDI program. SDI taxes are paid on income of up to $128,298 a year. The maximum to withhold for each employee is $1,539.58.

Disability Insurance (DI) provides short-term wage replacement benefits to eligible California workers. To be eligible: the employee should have a disability not related to their job.

SDI defines disability as "any mental or physical illness or injury which prevents you from performing your regular and customary work."

As an employer, you don't pay for CASDI. However, you do need to withhold and send employee contributions to the EDD.

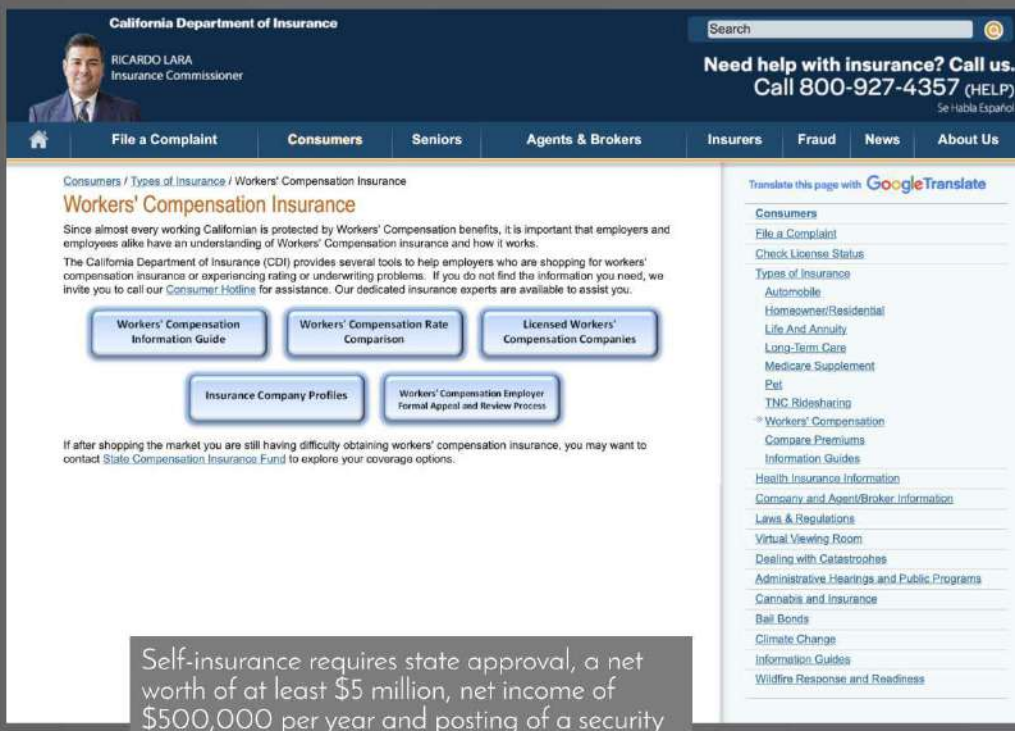


Worker's Compensation Insurance

All California employers must provide workers' compensation benefits to their employees under California Labor Code Section 3700. If a business employs one or more employees, then it must satisfy the requirement of the law.

Workers' compensation laws cover only injuries or illnesses that are related to the employee's job—or, in legalese, "arising out of employment and occurring during the course of employment" (AOE/COE).

Employers must purchase workers' compensation insurance from either a licensed insurance company or through the State Compensation Insurance Fund (State Fund). Employers may also have the option to self-insure for workers' compensation.



Self-insurance requires state approval, a net worth of at least $5 million, net income of $500,000 per year and posting of a security deposit.

Review State Specific Employment Laws

The CalSavers Retirement Savings Program was created by state law to ensure all California workers can save for retirement through automatic payroll contributions facilitated from their workplace. If the employer already has their own retirement plan they may not need to participate in the CalSavers plan.

Eligable employers with 5 or more are required to particpate immediately. Those that have 1 or more may be required to participate by December 31st, 2025.

Exceptions apply for sole proprietors where the only employee is themselves.

CalSavers Retirement Savings Program

CalSavers is a retirement savings program for private sector workers whose employers do not offer a retirement plan. This program gives employers an easy way to help their employees save for retirement, with no employer fees, no fiduciary liability, and minimal employer responsibilities.

Employers with one or more employees must participate in CalSavers if they do not already have a workplace retirement plan. The following deadlines to register are based on the size of the business.

CalSavers deadlines by business size.

Size of Business	Deadline
Over 100 employees	September 30, 2020 **(Deadline Passed)**
Over 50 employees	June 30, 2021 **(Deadline Passed)**
5 or more employees	June 30, 2022 **(Deadline Passed)**
1 or more employees	December 31, 2025

Newly mandated business with five or more employees are required to register by the end of the calendar year in which they became subject to the mandate (e.g. due to employing more than five employees or because they ceased to sponsor a retirement plan).

To register, visit CalSavers.

Senate Bill No. 1126

CHAPTER 192

An act to amend Sections 100000 and 100032 of the Government Code, relating to retirement, and making an appropriation therefor.

[Approved by Governor August 26, 2022. Filed with Secretary of State August 26, 2022.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1126, Cortese. CalSavers: retirement savings.

(1) Existing law, the CalSavers Retirement Savings Trust Act, administered by the CalSavers Retirement Savings Board, establishes the CalSavers Retirement Savings Program and the CalSavers Retirement Savings Trust. Under existing law, the trust consists of a program fund and an administrative fund with trust moneys that are continuously appropriated and administered by the CalSavers Retirement Savings Board for the purpose of promoting greater retirement savings for California private employees. Existing law requires eligible employers to offer a payroll deposit retirement savings arrangement so that eligible employees may contribute a portion of their salary or wages to a retirement savings program account in the program, as specified.

Existing law defines "eligible employer" for purposes of the act to mean a person or entity engaged in a business, industry, profession, trade, or other enterprise in the state, excluding specified federal, state, and local governmental entities, with 5 or more employees and that satisfies certain requirements to establish or participate in a payroll deposit retirement savings arrangement.

This bill would expand that definition of "eligible employer" to include a person or entity, as described above, that has at least one eligible employee and that satisfies the requirements to establish or participate in a payroll deposit retirement savings arrangement, and would additionally exclude from the definition of "eligible employer" sole proprietorships, self-employed individuals, or other business entities that do not employ any individuals other than the owners of the business. By expanding eligibilty under the act, the bill would remove a restriction limiting expenditure of funds and authorize the expenditure of continuously appropriated moneys for a new purpose, thereby making an appropriation.

What Do I Have to Pay?

You have to Pay Wages for All Labor

Per Labor Code 200:

(a) Wages are defined to include all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation. Wages can be paid based on any hourly rate, salary, commission or piece rate.

(b) "Labor" includes labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment.

Easier to Think about-- You have to Pay Employee For Every Hour Worked

Per California Code of Regulation 11040:

(K) "Hours worked" means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so. Within the health care industry, the term "hours worked" means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, as interpreted in accordance with the provisions of the Fair Labor Standards Act. [Cal. Code Regs. tit. 8 § 11040

So I have to Pay For Every Hour...

Most likely.

If the employee is hourly then absolutely.

If the employee is salary then each hour does not have to be paid specifically, because the employee has agreed to a set wage for a set number of hours (usually 40 or more).

From: https://www.worklawyers.com/exempt-employee-salary-california/

Most California employees are entitled to certain important rights. Those include:

- The right to be paid at least the minimum wage;[2]
- The right to overtime wages when they work more than eight hours in a workday, more than 40 hours in a workweek, or seven consecutive days;[3] and
- The right to meal and rest breaks when their shifts exceed a certain duration.[4]

Some employees, however, are *exempt* from some or all of these legal protections, as well as related laws.[5] In most cases, there are three simple requirements to determine whether a worker is an exempt employee under state law:

- **Minimum Salary.** The employee must be paid a salary that is at least twice California's minimum wage for full-time employment.[6]
- **White-Collar Duties.** The employee's primary duties must consist of administrative, executive, or professional tasks.[7]
- **Independent Judgment.** The employee's job duties must involve the use of discretion and independent judgment.[8]

If all three requirements are met, the employee will usually be classified as "exempt" from overtime, minimum wage, and rest break requirements (but not meal break requirements).

So I will just put everyone on Salary to Avoid All of this...

Not so fast!

This will likely cost you much more!

From: https://www.worklawyers.com/exempt-employee-salary-california/

To meet the salary test, an employee must be paid a monthly salary that is at least *twice the state minimum wage* for full-time employment.[12]

"Full-time employment," for these purposes, is defined as 40 hours per week.[13] And the phrase "monthly salary" refers to the amount of wages paid in a month, not to the frequency of payment—most employees are entitled to be paid twice a month.[14]

In 2023, employees are entitled to be paid a minimum wage of at least $15.50 per hour.[15] This means that the minimum salary for exempt employees in 2023 is **$5,373.34 per month** (or $64,480.00 annually).

These numbers are calculated by doubling the applicable minimum wage, multiplying that amount by 40 hours per week, the result of which is then multiplied by 52 weeks and divided by 12 months. This calculation gives us a monthly salary that is equal to twice the state minimum wage for full-time employment.[16]

Importantly, California's minimum wage is set to increase every year on January 1st. This means that the minimum salary for exempt employees in California will also be increasing annually.

That is not going to work for me... what about just Hourly?

Check With Local City to Verify For Additional Requirements: Wages

Federal Minimum Wage

An official website of the United States government. Here's how you know

U.S. DEPARTMENT OF LABOR

Home > Wages > Minimum Wage

Minimum Wage

More in This Section

The federal minimum wage for covered nonexempt employees is $7.25 per hour.

Many states also have minimum wage laws. In cases where an employee is subject to both the state and federal minimum wage laws, the employee is entitled to the higher of the two minimum wages.

State Minimum Wage

State of California
Department of Industrial Relations

Labor Law | Cal/OSHA - Safety & Health | Workers' Comp | Self Insurance | Apprentic

Labor Commissioner's Office | Minimum Wage

Minimum Wage

Date	Minimum Wage for Employers with 25 Employees or Less	Minimum Wage for Employers with 26 Employees or More
January 1, 2017	$10.00/hour	$10.50/hour
January 1, 2018	$10.50/hour	$11.00/hour
January 1, 2019	$11.00/hour	$12.00/hour
January 1, 2020	$12.00/hour	$13.00/hour
January 1, 2021	$13.00/hour	$14.00/hour
January 1, 2022	$14.00/hour	$15.00/hour
January 1, 2023	$15.50/hour	$15.50/hour

City Minimum Wage

The City of SAN DIEGO

53° SAN DIEGO WEATHER

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Compliance Department

Compliance Department Home | Minimum Wage | Living Wage | Equal Benefits | Prevailing Wage | Grand Jury Reports

Minimum Wage

(Updated September 29, 2022)

Effective January 1, 2023, the City's minimum wage will increase to $16.30 per hour.

Effective Date	Minimum Wage Rate
July 11, 2016	$10.50
January 1, 2017	$11.50
January 1, 2019	$12.00
January 1, 2020	$13.00
January 1, 2021	$14.00
January 1, 2022	$15.00
January 1, 2023	$16.30

*Regardless of the number of employees

What If Minimum Wage Is Still Too Much? Can I Maybe Give Them A Portion of What They Bring In?

Potentially. This would be considered a split-fee arrangement.

There has been a bit of confusion regarding if split fees are legal or not.
CAMFT's position is that they are legal.

Per Business and Professions Code 650 (b): (b) The payment or receipt of consideration for services other than the referral of patients which is based on a percentage of gross revenue or similar type of contractual arrangement shall not be unlawful if the consideration is commensurate with the value of the services furnished or with the fair rental value of any premises or equipment leased or provided by the recipient to the payer.

There are potential risks in this area so do check with your own legal counsel before engaging in split fee arrangements.

Things to Consider when Having a Split-Fee Arrangement...

Individuals still have to be paid minimum wage for each hour worked.

Example: Supervisor and Supervisee have a split fee arrangement of 50/50. Supervisee bills at a rate of $100 so they are entitled to $50.

On the surface this seems to work because it is above minimum wage, but it can be problematic.
What happens if the Supervisee takes 1 hour to write notes, 1 hour to do research on this clients unique issue, 1 hour for consultation with peers, and 1 hour for mandatory training that Supervisor requires. If you factor in the 1 hour of clinincal work this is 5 hours worth of work and they are only compensated $10 an hour or $50.

This would be below minimum wage.

Practical considerations in Split-Fee Arrangments

Here are some ideas to help in this area:

1. Timecards

2. Different rates for different services (admin rate)

3. Set limits on number of hours permitted to work on a project

4. Set expectations on how long certain tasks should take (15 minutes for notes)

5. Monitor and retain this information

What about overtime?

Unless The Employee is Exempt (Salary) then They May Qualify for Overtime Pay...

Overtime pay is 1.5 times an employee's regular rate of pay. In California, eligible employees are entitled to overtime in three scenarios.

1. An eligible employee should receive overtime pay after working 8 hours in a single day.
2. An eligible employee should receive overtime after working 40 hours at their regular rate of pay in a single week.
3. An eligible employee should receive overtime for the seventh day of work in a single workweek.

Eligible employees at times are also entitled to "double time." Double time is 2 times an employee's regular rate of pay. In California, employees are eligible for double time pay in two scenarios.

1. An eligible employee should receive double time pay after working 12 hours in a single day.
2. An eligible employee should receive double time pay after working 8 hours on the seventh day of work in a single workweek.

What Happens if Someone Gets Overtime, but I Did Not Authorize It...

As the employer, you should have been more mindful or aware of what your employees are doing.

An employer can discipline an employee if he or she violates the employer's policy of working overtime without the required authorization. However, California's wage and hour laws require that the employee be compensated for any hours he or she is "suffered or permitted to work, whether or not required to do so." California case law holds that "suffer or permit" means work the employer knew or should have known about.

Thus, an employee cannot deliberately prevent the employer from obtaining knowledge of the unauthorized overtime worked and coming back later to claim recovery but at the same time, an employer has the duty to keep accurate time records and must pay for work that the employer allows to be performed and to which the employer benefits.

If I want to Learn More on Overtime Pay...Start with Labor Code 501

510. (a) Eight hours of labor constitutes a day's work. Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee. Nothing in this section requires an employer to combine more than one rate of overtime compensation in order to calculate the amount to be paid to an employee for any hour of overtime work. The requirements of this section do not apply to the payment of overtime compensation to an employee working pursuant to any of the following:

(1) An alternative workweek schedule adopted pursuant to Section 511.

(2) An alternative workweek schedule adopted pursuant to a collective bargaining agreement pursuant to Section 514.

(3) An alternative workweek schedule to which this chapter is inapplicable pursuant to Section 554.

(b) Time spent commuting to and from the first place at which an employee's presence is required by the employer shall not be considered to be a part of a day's work, when the employee commutes in a vehicle that is owned, leased, or subsidized by the employer and is used for the purpose of ridesharing, as defined in Section 522 of the Vehicle Code.

(c) This section does not affect, change, or limit an employer's liability under the workers' compensation law.

Any other Payments I have to Make...

Split Shift Premium

In California, a split-shift occurs when a worker's schedule is broken up by an unpaid, non-working period of time in excess of sixty (60) minutes. If there is at least one (1) hour between these shifts, then the employee in question is entitled to one (1) additional hour of pay that is no less than the minimum-wage rate. Remember that the minimum wage requirement that is most generous to the employee is the one that will be applied.

Furthermore, this gap in work is not a meal or rest break and it must be to the benefit of the employer. This one (1) hour of minimum wage pay is a kind of shift pay and is formally known as a "split-shift premium". An employee who makes more than the minimum wage may also be entitled to a split-shift premium, however, the greater their pay then the lower the split-shift premium will be. In the 2012 legal case of Aleman v. Airtouch Cellular, 4th California Appellate, the California court of appeal ruled that a split-shift premium is not owed if the employee's wages are substantially higher than the minimum wage

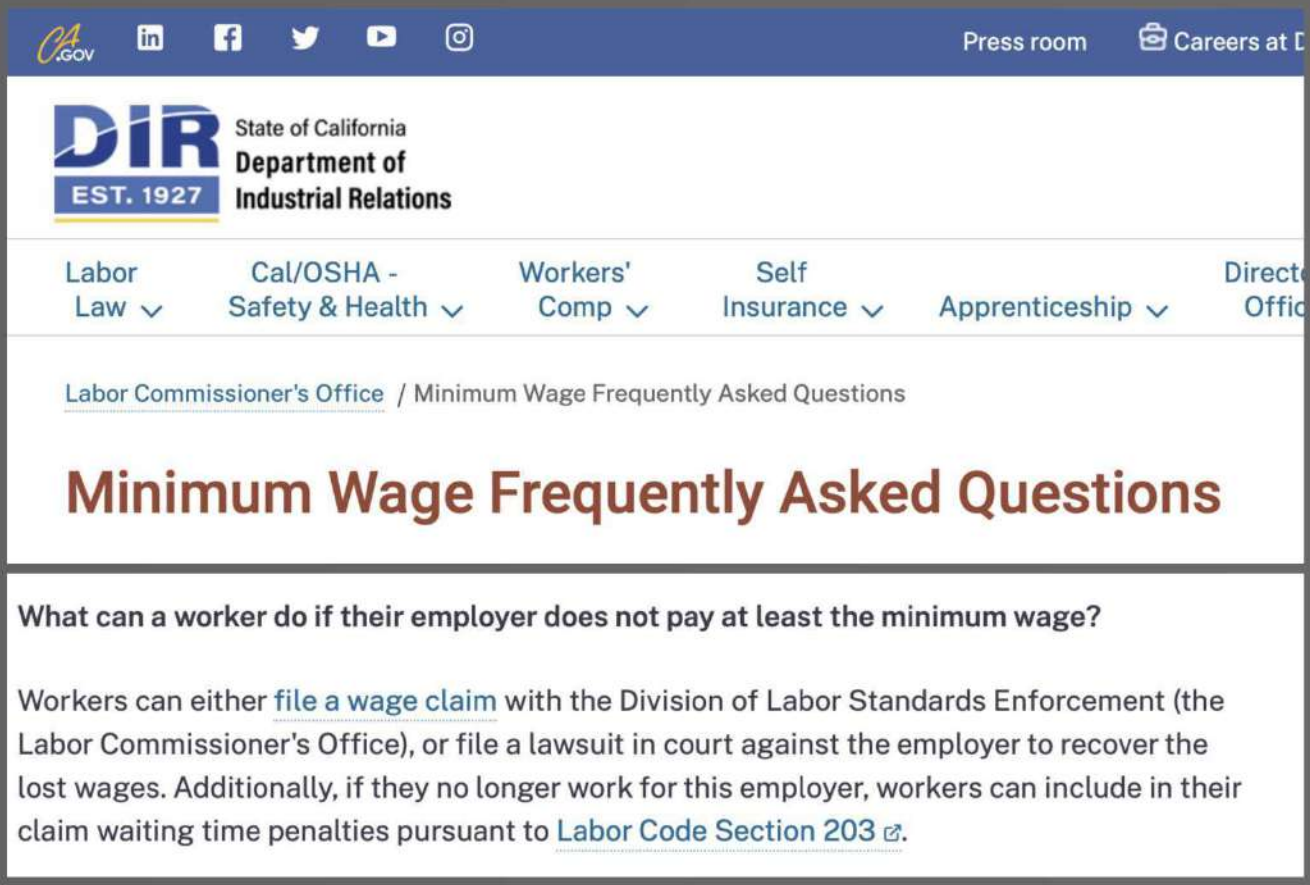
Can You Give me an Example? Sure...How About 3...

Example 1: Employee is on minimum wage. If the minimum wage is $10 and the employee works 6 hours at a split (3 hours in the morning and 3 hours in the evening) they must be paid $70. ($10 x 6 + $10 split shift premium). However, if you pay the employee above minimum wage then the employer gets credit towards the split shift premium and may not have to pay anything.

Example 2: Employee is paid $11 an hour. If the minimum wage is $10 and the employee works 6 hours at a split (3 hours in the morning and 3 hours in the evening) they are paid $66 without the split shift premium. ($11 x 6 hours). The law requires that they make the equivalent of 7 hours at minimum wage. Meaning 6 hours of work and 1 hour of split shift premium. This would mean that they have to make $70. ($10 x 6 + $10 split shift premium). Since you already paid them $66 you would only be obligated to pay them an additional $4

Example 3: Employee is paid $20 an hour. If the minimum wage is $10 and the employee works 6 hours at a split (3 hours in the morning and 3 hours in the evening) they are paid $120 without the split shift premium. ($20 x 6 hours).The law requires that they make the equivalent of 7 hours at minimum wage. Meaning 6 hours of work and 1 hour of split shift premium. This would mean that they have to make $70. ($10 x 6 + $10 split shift premium). Since you already paid them $120 you would not have to pay them a split shift premium.

What Happens if I Do Not Pay at Least Minimum Wage...



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Labor Commissioner's Office / Minimum Wage Frequently Asked Questions

Minimum Wage Frequently Asked Questions

What can a worker do if their employer does not pay at least the minimum wage?

Workers can either file a wage claim with the Division of Labor Standards Enforcement (the Labor Commissioner's Office), or file a lawsuit in court against the employer to recover the lost wages. Additionally, if they no longer work for this employer, workers can include in their claim waiting time penalties pursuant to Labor Code Section 203.

I Need to Pay Them...Are there Rules for Payment?

Pay Frequency

a. Employers must designate paydays in advance.

b. Nonexempt employees must be paid all wages earned at least twice a month (i.e., semimonthly) on regular paydays designated in advance. Overtime must be paid by the following payday for the next regular payroll period following the payroll period in which the overtime wages were earned.

c. Exempt employees may be paid once a month on or before the 26th of each month in which the salary is earned, including the amount yet to be earned from the 26th through the end of the month.

Wage Deductions

An employer may make deductions from an employee's wages if required by state or federal law or court order, with the employee's written authorization or for other permissible reasons, including but not limited to child support withholding, creditor garnishments and tax levies

Final Paycheck

Tip: You should never engage in a employment relationship that you do not already have an exit strategy

Ending an Employment Relationship

Luke Martin, MBA, JD
Staff Attorney

The 19th-century American poet Henry Wadsworth Longfellow said it best: "[G]reat is the art of beginning, but greater is the art of ending." As quickly as a relationship can form, it can lost to quickly change. The employer may decide that the employee is not a good fit or is not representing the employer's interests in the way they would like. The employee may decide that they would like a new experience or that the employer's values do not align with their own. Or things may happen that neither party can control, and the employment relationship must end. This article will take a deep dive into the legal, clinical, and ethical considerations of ending an employment relationship and finding a greater way forward for all parties.

ending an employment relationship

and procedures that are intended to provide undesigned care."[3] Depending on how the employee departs, the employer may need to take a more active role to avoid potential ethical concerns related to abandoning or neglecting a client's treatment.[4] There may be greater urgency with more serious clients, while other clients may be able to wait until an opening is available.

Severing the Relationship Completely

There is never a great time for an employment relationship to end, but there may be particularly bad times. The employer and the employee must consider the mental state of the client in that moment. Severing a relationship with a client who is "in crisis" or "at risk" may not be recommended. The departing employee and the employer must use "moral clinical judgment when terminating therapeutic relationships,"[5] so the therapist could be subject to disciplinary action by the BBS for unprofessional conduct.[6] A more in-depth review of these topics can be found in "Putting Ways Anticipating and Avoiding Problems During Terminations," written by staff attorney Michael Griffis for the September/October 2017 issue of *The Therapist*.

Client File

One consideration that often is difficult when an employee leaves an organization is the client file. Depending on the employee's employment and licensure status, the client file, which should include progress notes, could be viewed as a company work product that should be returned upon separation. The organization would be considered the custodian of the record. Both the employer and employee may contract around this and may allow a licensed employee to be the custodian of the record upon mutual agreement.

It is often advantageous for the employer to remain the custodian of the record because of liability issues. Should a client allege that the departing employee committed malpractice while with the employer, the employer may be included in the lawsuit based on the legal doctrine respondeat superior, or vicarious liability.[7] An employer without a copy of the record may unintentionally have put themselves in a disadvantage in litigation.

No matter who is designated the custodian of the client's record, it needs to remain confidential throughout the transition. All personal health information must remain secure in any transfer or transmittal. This aligns with CAMFT's Code of Ethics, which states, "[An] ethical and faithful therapist stores, transfers, transmits, and/or disposes of client/patient records in ways that protect confidentiality."[8]

Conclusion

There may be signs that a departure is coming, but the actual timing is often unknowable. Since both the employee and the employer can initiate an employment separation, both sides need to be vigilant in maintaining a positive relationship. The primary objective then upon the separation must be keeping the best interests of their clients in mind.

Luke Martin, MBA, JD, is a staff attorney at CAMFT. Luke is available to answer member calls regarding legal, ethical, and licensure issues.

Endnotes

1. California Labor Code § 3600
2. California Unemployment Insurance Code § 1253
3. California Code of Ethics 4.9
4. CAMFT Code of Ethics 1.3, 1.4, and 1.7
5. CAMFT Code of Ethics 1.3
6. California Business and Professions Code § 4982
7. 16 CCR § 1820.5 (a)
8. California Labor Code 226
9. California Labor Code § 201 and § 227.3
10. California Labor Code § 202
11. Id.
12. Marmiko v. Santa Cruz (1998) 68 Cal.App.4th 487
13. The Department of Industrial Relations website at https://www.dir.ca.gov, and they can be reached by phone at 844-LABOR-DIR (844.522.6737).
14. California Business and Professions Code § 4982
15. California Civil Code § 43
16. California Civil Code § 48
17. CAMFT Code of Ethics 5.6

This article is not intended to serve as legal advice and is offered for educational purposes only. The information provided should not be used as a substitute for independent legal advice and it is not intended to address every situation that could potentially arise. Please be aware that laws, regulations and technical standards change over time. As a result, it is important to verify and update any reference or information that is provided in this article.

Article on Topic

When an Employee Quits...

STATE OF CALIFORNIA — **Gavin Newsom, Governor**
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT

FINAL PAY

Employees who are discharged must be paid all wages due at the time of termination. (Labor Code § 201) "All wages" include any earned, but unused vacation pay. (Labor Code §227.3) There is no requirement under California law that an employer pay accrued sick leave upon termination. An employer must pay a discharged employee at the place of discharge. (Labor Code § 208)

An employee who does not have a written agreement for a definite period of employment and who quits without giving prior notice, must be paid his or her wages within 72 hours. If the employee gives at least 72 hours notice of his or her intention to quit, those wages must be paid at the time of quitting. An employee who quits must be paid at the office or agency of the employer in the county where the employee worked. An employee who quits without 72 hours notice may request that his or her final wage payment be mailed to a designated address. The date of mailing will be considered the date of payment. (Labor Code § 202)

An employer who willfully fails to pay any wages due an employee who is discharged or quits within the time frames provided under Labor Code § 201 or Labor Code § 202, may be assessed continuing wages as a penalty from the date the wages were due up to a maximum of 30 days. (Labor Code § 203) The penalty is calculated by multiplying the daily wage rate of the employee by 30 days. *(Mamika v. Barca* (1998) 68 Cal.App.4th 487) Penalties under Labor Code § 203 may be avoided if the employer can show that a good-faith dispute existed concerning whether any wages were due. A "good-faith" dispute means that the employer's defense, based on law or fact, if successful, would preclude any recovery on part of the employee. (Title 8 California Code of Regulations § 13520)

Even if there is a dispute, the employer must pay, without requiring a release, whatever wages are due and not in dispute. If the employer fails to pay what is undisputed, the "good faith" defense will be defeated whatever the outcome of the disputed wages. (Labor Code § 206)

When an Employee is Terminated...

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Remember: The Final Paycheck Should Include Vacation Pay

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Labor Commissioner's Office / Vacation

Vacation

There is no legal requirement in California that an employer provide its employees with either paid or unpaid vacation time. However, if an employer does have an established policy, practice, or agreement to provide paid vacation, then certain restrictions are placed on the employer as to how it fulfills its obligation to provide vacation pay. Under California law, earned vacation time is considered wages, and vacation time is earned, or vests, as labor is performed. For example, if an employee is entitled to two weeks (10 work days) of vacation per year, after six months of work he or she will have earned five days of vacation. Vacation pay accrues (adds up) as it is earned, and cannot be forfeited, even upon termination of employment, regardless of the reason for the termination. (S*uastez v. Plastic Dress Up* (1982) 31 C3d 774) An employer can place a reasonable cap on vacation benefits that prevents an employee from earning vacation over a certain amount of hours. (*Boothby v. Atlas Mechanical* (1992) 6 Cal.App.4th 1595) And, unless otherwise stipulated by a collective bargaining agreement, upon termination of employment all earned and unused vacation must be paid to the employee at his or her final rate of pay. Labor Code Section 227.3 The California Legislature, in order to ensure that vacation plans were fairly and equitably handled, provided that the Labor Commissioner was to "apply the principles of equity and fairness" in resolving vacation claims.

Consequence of Not Paying Final Pay Properly

STATE OF CALIFORNIA — **Gavin Newsom, Governor**
DEPARTMENT OF INDUSTRIAL RELATIONS
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How Do You Avoid Being Sued by an Employee?

Don't Have Any Employees

- Part A: I Should Have Done That... Practical Considerations
- Part B: Saying, "Your Fired" Can Get an Employer into Trouble
- Part C: Money Always Gets an Employer into Trouble
- Part D: When Safety is Not #1 Can Get an Employer into Trouble

A SAFE WORKPLACE IS SOUND BUSINESS

The main goal of safety and health programs is to prevent workplace injuries, illnesses, and deaths, as well as the suffering and financial hardship these events can cause for workers, their families, and employers.

Safety and health programs help businesses:

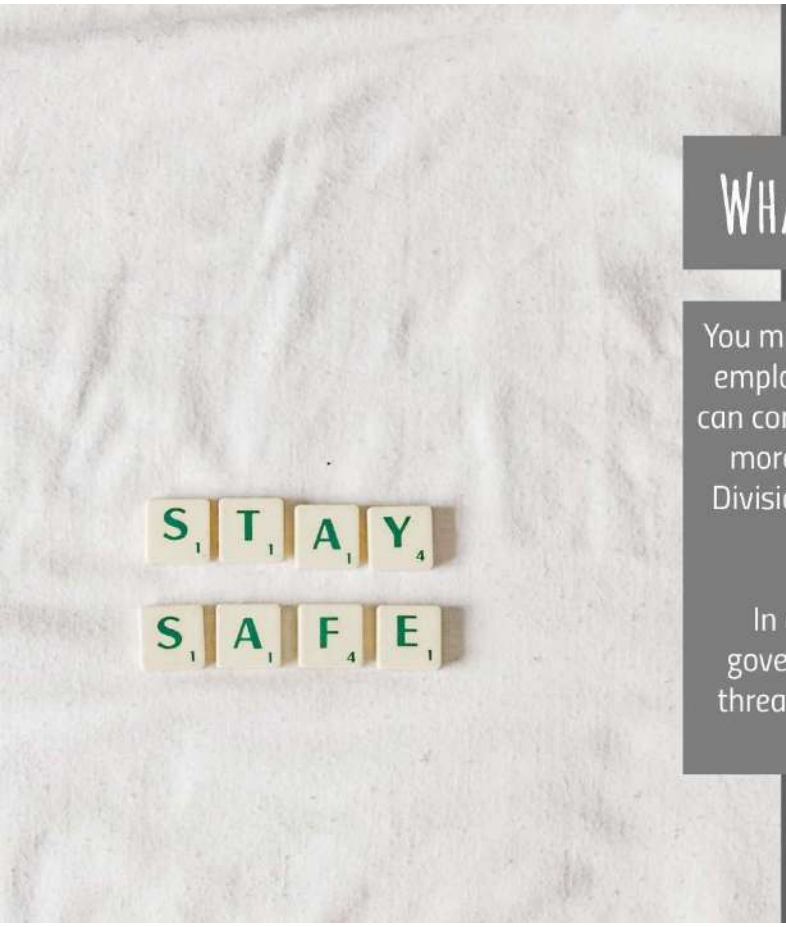
- Prevent workplace injuries and illnesses
- Improve compliance with laws and regulations
- Reduce costs, including significant reductions in workers' compensation premiums
- Engage workers
- Enhance their social responsibility goals
- Increase productivity and enhance overall business operations

How Does Workplace Safety Come Up in Theraputic Practices?

Due to the sensitive nature of their profession, therapists generally work with their patients one to one and behind closed doors. Many of these patients will be suffering from chronic or acute mental health issues, making them more likely to be unpredictable and display violent behavior. According to OSHA, healthcare workers account for nearly as many violent injuries as all other industries combined.

As an employer, you have a duty to protect your employees and clients from potential harm.

Cal/OSHA



What is my Obligation under Cal/OSHA?

You must provide a safe and healthful working environment for all employees under your direction and supervision. Employees who can concentrate on their jobs without constant fear of injury will be more productive and less inclined to complain to the California Division of Occupational Safety and Health, better known as Cal/OSHA.

In other words, as an employer, you must follow state laws governing job safety and health. Failure to do so can result in a threat to the life or health of workers, and substantial monetary penalties.

Let's Take a Step back-- What is OSHA? What is CAL/OSHA?

In 1970, the Occupational Safety and Health Act of 1970 was signed into law.

The law was created to "assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the Act; by assisting and encouraging the States in their efforts to assure safe and healthful working conditions; by providing for research, information, education, and training in the field of occupational safety and health."

Federal Law

In 1973, the California Occupational Safety and Health Act of 1973 was signed into law.

Cal/OSHA protects California workers from unsafe working conditions. As stipulated by Cal/OSHA, employers must provide their employees with a safe and healthful place of employment. This means that employees are entitled to a working area that is free from danger to safety, health, and life of the employee as permitted by the nature of employment

State Law

So Osha or Cal/Osha?

Most likely Cal/Osha.

State plans, such as Cal/OSHA, function as primary jurisdiction over all workplaces within the state, provided federal OSHA has authorized them.
Basically, CAL OSHA does everything that federal OSHA usually does under a federal plan.

However, Federal OSHA retains the rights to these responsibilities for certain workplaces within the state of California. Federal OSHA covers issues not covered by the California.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Cal/OSHA / Cal/OSHA Jurisdiction

Cal/OSHA Jurisdiction

Cal/OSHA has jurisdiction over almost every workplace in California. This means Cal/OSHA is the main government agency authorized to inspect California workplaces for occupational safety and health violations.[1]

Cal/OSHA lacks jurisdiction in only a few limited areas.[2] Some of these areas are listed below. (DISCLAIMER: This list of areas outside Cal/OSHA jurisdiction is not a definitive, exhaustive list. There are exceptions to the list and other areas not listed. If you have a question about Cal/OSHA jurisdiction, please contact the Cal/OSHA Legal Unit at 510-286-7348.)

Who is Covered by Cal/OSHA?

Most workplaces in California are covered Cal/OSHA regulation, which are equal to or more protective than federal OSHA regulations.

Almost all workers in California are protected by Cal/OSHA regulations. This includes public employees and immigrant workers who are not legally authorized to work in California. However, some workers are not covered:

- People who are self-employed.
- Family members of farm owners who work on the family farm.
- Federal employees. These workers are covered by their own agencies which have to follow federal OSHA requirements.

Cal/OSHA Requirements for Employers

Cal/OSHA is California's body that ensures that employers provide a safe environment for workers. Employers are required to:

- Provide a safe workplace free from all forms of hazards that may significantly affect the health of workers
- Provide and maintain all necessary safety equipment to reduce the likelihood of injury
- Provide thorough and adequate safety training to all their workers
- Provide employees with information on illnesses, injuries, and hazardous substances in the workplace, including exposure records and material safety data sheets
- Establish and maintain an effective injury and illness prevention program (see next slide from Cal/OSHA)
- Establish or update operating procedures
- Inspect workplaces to identify and correct hazardous and unsafe conditions in the workplace
- Use labels, posters, signs, or color codes to warn employees about potential hazards
- Post Cal/OSHA posters informing employees of their rights and responsibilities in a noticeable location within the workplace
- Maintain fire alarms and warning systems
- Provide medical examinations when required by Cal/OSHA standards
- Immediately report any serious illness, injury, or death of a worker
- Track and keep detailed reports of work-related injuries and illnesses

Requirements for an employer's injury and illness prevention program

All California employers must create and carry out an effective program to meet the requirements of Cal/OSHA's Injury and Illness Prevention Program (IIPP) regulation. The employer's IIPP must be in writing and must specify in concrete terms the employer's ongoing activities in each of the following areas:

- **Responsibility:** Name or job title of the person or persons authorized and responsible for implementing the program.
- **Compliance:** Written system for ensuring compliance with safe and healthy work practices.
- **Communication:** System for communicating in a form readily understandable by employees about safety and health matters. This can include meetings, trainings, postings, written communications, and a labor-management safety and health committee. Employers must encourage employees to report hazards without fear of reprisal. An employer using a labor-management committee to communicate health and safety matters with employees must meet certain requirements specified in the IIPP regulation.
- **Hazard Assessment:** Procedures for identifying and evaluating workplace hazards, including periodic inspections.
- **Accident or Exposure Investigation:** Procedures for investigating occupational injuries and illnesses.
- **Hazard Correction:** Methods and procedures to correct unsafe or unhealthy working conditions in a timely manner.
- **Training and Instruction:** Effective program for instructing employees on general safe work practices and hazards specific to each job assignment, in a language that the employees can understand.
- **Employee Access:** Procedures to allow employees (or their designated representative) access to the written program.
- **Recordkeeping:** Written documentation of the steps taken by the employer to establish and implement the IIPP.

The specific requirements for an IIPP are in the California Code of Regulations, title 8, **section 3203**. Or go to the home page of the **Department of Industrial Relations** (www.dir.ca.gov), link to "Laws & Regulations," link to "California Code of Regulations - Title 8," link to "Cal/ OSHA," and then search for "3203."

Use Cal/OSHA's **educational tools** to help employers create an effective IIPP. Or go to **Cal/OSHA's home page**, and under "Educational Materials," link to "Cal/OSHA Publications."

Source: https://www.dir.ca.gov/dosh/documents/health-and-safety-rights-for-workers.pdf

Why Does All of this Matter?

If The Employer doesn't provide a safe enviornment, employees don't have to work, but do have to continue to be paid

Labor Code
DIVISION 5. SAFETY IN EMPLOYMENT [6300 - 9104]
CHAPTER 1. Jurisdiction and Duties
Section 6311

Universal Citation: CA Labor Code § 6311 (through 2012 Leg Sess)

No employee shall be laid off or discharged for refusing to perform work in the performance of which this code, including Section 6400, any occupational safety or health standard or any safety order of the division or standards board will be violated, where the violation would create a real and apparent hazard to the employee or his or her fellow employees. Any employee who is laid off or discharged in violation of this section or is otherwise not paid because he or she refused to perform work in the performance of which this code, any occupational safety or health standard or any safety order of the division or standards board will be violated and where the violation would create a real and apparent hazard to the employee or his or her fellow employees shall have a right of action for wages for the time the employee is without work as a result of the layoff or discharge.

Practical Considerations for Employees with Unsafe Working Conditions

Before you refuse to perform unsafe work make sure you inform your supervisor about the unsafe condition.

Give the company a chance to correct it and hopefully they will. If the company does not correct the unsafe condition, and you decide to refuse the work, make sure that you inform your supervisor, preferably in writing or in front of others, exactly why you are refusing to do the work, and that you will return to work as soon as the condition is fixed.

Finally, you should contact Cal/OSHA to file a complaint against your employer

What are Employee Responsbilities under Cal/OSHA?

Employees have obligations under Cal/OSHA.

This includes:

- Follow all safety rules and instructions.
- Use safety equipment and protective clothing when needed.
- Look out for the health and safety of co-workers.
- Keep work areas clean and neat.
- Know what to do in an emergency.
- Report any health and safety hazards to the employer.

How Are Cal/OSHA Complaints Handled?

A complaint about a workplace hazard can be filed with Cal/OSHA by phone, fax, mail, or online.

A "formal" complaint is one where the employee or employee representative gives Cal/OSHA his/her name. If the person gives a name, Cal/OSHA is required to keep it confidential.

If a worker wants to remain anonymous and does not give a name, the complaint is considered a "non-formal" complaint. Complaints from the public, including former employees of a company, are also considered non-formal.

Each complaint is classified by the Cal/OSHA Enforcement district office to determine what inspection priority the complaint should be given. Complaints about an "imminent" hazard that puts a worker in immediate danger of being killed or seriously injured are given immediate priority for investigation. Work-related deaths are also investigated immediately. Cal/OSHA gives non-formal complaints lower priority.

Source: https://www.dir.ca.gov/chswc/woshtep/iipp/materials/SB_Factsheet_F_BasicsOSHA.pdf

How Are Cal/OSHA Standards Enforced?

Cal/OSHA enforces job safety and health standards by conducting inspections and, in some cases, issuing citations and fines. Cal/OSHA inspects workplaces when it receives a report of a death or serious injury, or when there is a complaint by an employee or employee representative.

Cal/OSHA may also inspect workplaces that are on its list of "high hazard" industries. In this case, Cal/OSHA randomly selects a workplace for inspection. Cal/OSHA may also inspect an employer because it has been identified as having a higher injury rate than other employers in its industry.

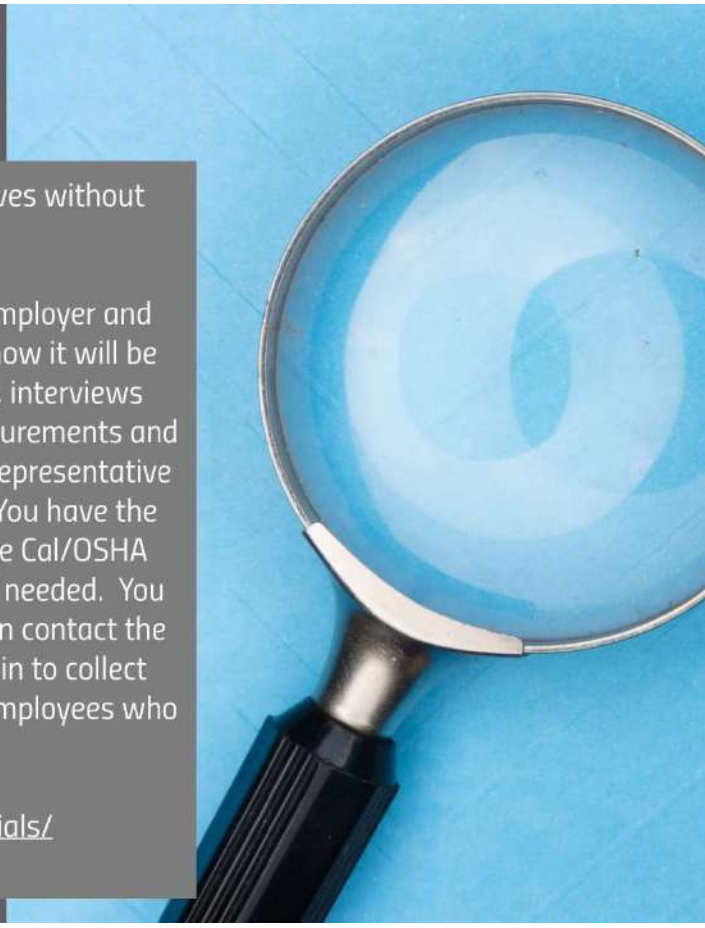
Source: https://www.dir.ca.gov/chswc/woshtep/iipp/materials/SB_Factsheet_F_BasicsOSHA.pdf

What does an inspection Look Like?

When Cal/OSHA conducts an on-site inspection, the inspector arrives without advance notice.

Upon arrival, the inspector holds an opening conference with the employer and union (if there is one) to explain the purpose of the inspection and how it will be conducted. The inspector walks around the site, observes hazards, interviews employees and supervisors, reviews written records, and takes measurements and photographs as necessary. A representative of the employer and a representative authorized by the employees may walk around with the inspector. You have the right to be interviewed in private without the employer present. The Cal/OSHA inspector will make every effort to arrange for interpreter services if needed. You may ask the inspector to give you his or her business card so you can contact the inspector away from your job. The inspector may visit the site again to collect further information, especially if the inspector needs to speak with employees who were not available during the first visit.

Source: https://www.dir.ca.gov/chswc/woshtep/iipp/materials/SB_Factsheet_F_BasicsOSHA.pdf



What Happens Aftern an inspection?

Information that Cal/OSHA collects during the inspection may show that the employer violated health and safety requirements. If this happens, one or more citations will be issued to your employer. Cal/OSHA issues citations to employers only, not to employees. If you gave your contact information when you filed the complaint, Cal/OSHA will send you a letter describing the results of the inspection.

Your employer must "abate," or correct, the violations by a specified deadline. You may participate in any appeal filed by the employer by filing a motion to be added as a party in the appeal process. In any case where Cal/OSHA issues citations, the employer must post in the workplace a copy of the citations, a description of how the hazards have been corrected, and a copy of any appeal that is filed. You may also call Cal/OSHA to request a copy of the results of the inspection, including any citations.

Source: https://www.dir.ca.gov/chswc/woshtep/iipp/materials/SB_Factsheet_F_BasicsOSHA.pdf

How Much?

Penalty amounts depend in part on the classification of the violation as regulatory, general, serious, repeat, or willful; and whether the employer failed to abate a previous violation involving the same hazardous condition. Base penalty amounts, penalty adjustment factors, and minimum and maximum penalty amounts are set forth in California Code of Regulations, title 8, section 336 (www.dir.ca.gov/title8/336.html). These usually start at $500.00 and can go up to $15,000 per violation.

In addition, a willful violation that causes death or permanent impairment of the body of any employee can result, upon conviction, in a fine of up to $250,000 or imprisonment up to three years, or both, and if the employer is a corporation or limited liability company, the fine may be up to $1.5 million.

Source: https://www.dir.ca.gov/chswc/woshtep/iipp/materials/SB_Factsheet_F_BasicsOSHA.pdf

This is ~~Terrifying~~ Interesting Information, but how does this relate to an Employee suing me?

Whistleblower Protections

While there are multiple state and federal laws protecting the rights of whistleblowers, there's a section of California Labor Code that is designed to specifically protect those who report safety and health violations in the workplace. This law also protects individuals who point out safety violations to the California Division of Occupational Safety and Health. A whistleblower is an individual who provides information to a person of authority, a law enforcement agency, or a government agency regarding hazardous or unsafe working environments.

Source: https://www.dir.ca.gov/chswc/woshtep/iipp/materials/SB_Factsheet_F_BasicsOSHA.pdf

Labor Code
DIVISION 5. SAFETY IN EMPLOYMENT [6300 - 9104]
CHAPTER 1. Jurisdiction and Duties
Section 6310

Universal Citation: CA Labor Code § 6310 (through 2012 Leg Sess)

(a) No person shall discharge or in any manner discriminate against any employee because the employee has done any of the following:

(1) Made any oral or written complaint to the division, other governmental agencies having statutory responsibility for or assisting the division with reference to employee safety or health, his or her employer, or his or her representative.

(2) Instituted or caused to be instituted any proceeding under or relating to his or her rights or has testified or is about to testify in the proceeding or because of the exercise by the employee on behalf of himself, herself, or others of any rights afforded him or her.

(3) Participated in an occupational health and safety committee established pursuant to Section 6401.7.

4605. Whistleblower Protection—Health or Safety Complaint—Essential Factual Elements (Lab. Code, § 6310)

[*Name of plaintiff*] **claims that** [*name of defendant*] **[discharged/**[*other adverse employment action*]**] [him/her/***nonbinary pronoun*] **in retaliation for [his/her/***nonbinary pronoun*] [*specify, e.g., complaint to the Division of Occupational Safety and Health regarding unsafe working conditions*]**. In order to establish this claim,** [*name of plaintiff*] **must prove all of the following:**

1. **That** [*name of plaintiff*] **was an employee of** [*name of defendant*]**;**
2. **[That** [*name of plaintiff*]**, on [his/her/***nonbinary pronoun*] **own behalf or on behalf of others,** [*select one or more of the following options:*]

   [made [an oral/a written] complaint to [*specify to whom complaint was directed, e.g., the Division of Occupational Safety and Health*] **regarding [unsafe/unhealthy] working conditions;]**

   [*or*]

   [[initiated a proceeding/caused a proceeding to be initiated] relating to [his/her/*nonbinary pronoun* **[or] another person's] rights to workplace health or safety;]**

   [*or*]

   [[testified/was about to testify] in a proceeding related to [his/her/*nonbinary pronoun* **[or] another person's] rights to workplace health or safety;]**

   [*or*]

   [exercised [his/her/*nonbinary pronoun* **[or] another person's] rights to workplace health or safety;]**

   [*or*]

   [participated in a workplace health and safety committee;]

   [*or*]

   [reported a work-related fatality, injury, or illness;]

   [*or*]

   [requested access to occupational injury or illness reports and records;]

   [*or*]

   [exercised [*specify other right(s) protected by the federal*

Occupational Safety and Health Act]**;]**

3. **That** [*name of defendant*] **[discharged/**[*other adverse employment action*]**] [***name of plaintiff*]**;**
4. **That** [*name of plaintiff*]**'s** [*specify*] **was a substantial motivating reason for** [*name of defendant*]**'s decision to [discharge/**[*other adverse employment action*]**]** [*name of plaintiff*]**;**
5. **That** [*name of plaintiff*] **was harmed; and**
6. **That** [*name of defendant*]**'s conduct was a substantial factor in causing** [*name of plaintiff*]**'s harm.**

New December 2015; Revised December 2016, May 2018

Directions for Use

Use this instruction for a whistleblower claim under Labor Code section 6310 for employer retaliation for an employee's, or an employee's family member's, complaint or other protected activity about health or safety conditions. Select the appropriate statutorily protected activity in element 2 and summarize it in the introductory paragraph. (See Lab. Code, § 6310(a), (c).)

With regard to the first option in element 2, the complaint must have been made to (1) the Division of Occupational Safety and Health, (2) to another governmental agencies having statutory responsibility for or assisting the division with reference to employee safety or health, (3) to the employer, or (4) to the employee's representative. (Lab. Code, § 6310(a)(1).)

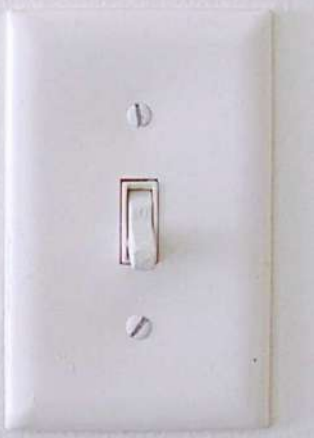
The statute requires that the employee's complaint be "bona fide." (See Lab. Code, § 6310(b).) There appears to be a split of authority as to whether "bona fide" means that there must be an actual health or safety violation or only that the employee have a good-faith belief that there are violations. (See *Touchstone Television Productions v. Superior Court* (2012) 208 Cal.App.4th 676, 682, fn. 5 [145 Cal.Rptr.3d 766].) The instruction should be modified if the court decides to instruct one way or the other on the meaning of "bona fide."

Note that element 4 uses the term "substantial motivating reason" to express both intent and causation between the employee's protected conduct and the defendant's adverse action. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, "*Substantial Motivating Reason" Explained.*) Whether the FEHA standard applies under Labor Code section 6310 has not been addressed by the courts. There is authority for a "but for" causation standard instead of "substantial motivating reason." (See *Touchstone Television Productions, supra*, 208 Cal.App.4th at pp. 681–682.)

EXAMPLE

Here's an example of an OSHA retaliation case:

Ron works for a small therapy company in Palm Springs. Last week when Ron entered his office, the light switch was hot. This week, when Ron attempted to turn on the light switch, he smelled smoke. He reported the issue to his supervisor. Ron is concerned that the condition at the therapy office poses an imminent danger to himself and the clients. Ron's manager instructs the workers not to expose the situation at the therapy office as they figure out a solution. Ron tells his supervisor that he is planning to complain to Cal/OSHA. He proceeds with filing a complaint but shortly after, he receives a notice that there will be job cuts and his position is being eliminated. As it turns out, Ron was the only person whose position was eliminated and he believed that he was just experiencing retaliation for reporting the therapy's unsafe operating practices.



When an employee is injured on the job:

Workers Compensation

Any Good News? This presentation is a bit bleak....

YES! Here it is.

California's workers' compensation laws generally provide that workers' compensation is the exclusive remedy against an employer for an employee's injury or death that arises during the course and scope of employment.

Labor Code section 3600 provides all of the essential conditions that must exist for the exclusive remedy rule to apply.

The Evolution of Workers Compensation

The concept that workers should be protected from and compensated for injury or illness occurring in the workplace came about with the rise of the trade union movement at the beginning of the 20th century. Workers' compensation insurance is a direct result of public awareness and outrage at the poor and often dangerous working conditions people were forced to labor under in order to make a living, and the financially devastating effects of worker injury or illness on the worker and the worker's dependents.

Workers' compensation insurance is the oldest social insurance program in the United States; in fact, it is older than both social security and unemployment compensation.

California adopted workers' compensation laws in the 1910's along with most other states. Workers' compensation is based on a no-fault system, which means that an injured employee does not need to prove that the injury or illness was someone else's fault in order to receive workers' compensation benefits for an on-the-job injury or illness.

Source: https://www.insurance.ca.gov/01-consumers/105-type/95-guides/09-comm/WorkersCompensation.cfm

What Benefits Are Available in a Workers' Compensation Policy?

Depending on the circumstances of the injury or illness, injured workers are entitled to specific benefits as structured by workers' compensation insurance. There are five basic types of workers' compensation benefits that include medical care, temporary disability benefits, permanent disability benefits, supplemental job displacement benefits, and death benefits. Injured workers may be entitled to one or more of these benefits

Source: https://www.insurance.ca.gov/01-consumers/105-type/95-guides/09-comm/WorkersCompensation.cfm

How Is Coverage Structured in a Workers' Compensation Policy?

Workers' compensation coverage is offered under Part One of a workers' compensation insurance policy. In Part One, the insurance company agrees to promptly pay all benefits and compensation due to an injured worker. These payments are imposed on the employer by workers' compensation law or laws of the state or states listed on the Declarations page of the policy. Workers' compensation insurance is considered the exclusive remedy for injured employees.

Source: https://www.insurance.ca.gov/01-consumers/105-type/95-guides/09-comm/WorkersCompensation.cfm

How Is Coverage Structured in a Workers' Compensation Policy Continued?

What this means is that an employer assumes absolute liability for all work-related injuries, and workers' compensation benefits are the sole remedy for injured workers against their employers. Generally, an injured employee covered under workers' compensation laws cannot sue his/her employer for damages in civil court.

Despite the fact that workers' compensation is considered to be the exclusive remedy for employees with work-related disabilities, employers' liability insurance can provide important coverage in addition to workers' compensation insurance. Employers' liability insurance is offered under Part Two of a workers' compensation and employers' liability insurance policy. Employers' liability Part Two protects the employer against instances in which an employee's injury or disease is not subject to the workers' compensation laws. Employers may contact a licensed commercial broker-agent to discuss employers' liability coverage as a part of the workers' compensation policy.

Source: https://www.insurance.ca.gov/01-consumers/105-type/95-guides/09-comm/WorkersCompensation.cfm

Who Is Required to Purchase Workers Compensation Insurance?

You!

All California employers must provide workers' compensation benefits to their employees under California Labor Code Section 3700. If a business employs one or more employees, it must satisfy the requirement of the law.

Source: https://www.insurance.ca.gov/01-consumers/105-type/95-guides/09-comm/WorkersCompensation.cfm

What About Sole Proprietor?

Sometimes a business owner (sole-proprietor) may desire to purchase workers' compensation insurance to cover himself/herself only. The inclusion of a sole-proprietor must be clearly stated in the workers' compensation policy or must be added as a coverage endorsement to the policy. Since workers' compensation insurance is a type of liability insurance where the employer assumes complete liability for all work-related injuries, a workers' compensation policy for a sole-proprietor may not be the best choice.
Purchasing health, life, and/or disability income insurance can be viable alternatives to workers' compensation for a sole-proprietor. Contact a licensed commercial broker-agent or a casualty broker-agent for further information and consultation.

Source: https://www.insurance.ca.gov/01-consumers/105-type/95-guides/09-comm/WorkersCompensation.cfm

Where Does One Get this Worker's Compensation Injurance?

Employers must purchase workers' compensation insurance from either a licensed insurance company or through the State Compensation Insurance Fund (State Fund). Employers may also have the option to self-insure for workers' compensation. A commercial broker-agent can assist a business with purchasing workers' compensation insurance from a licensed insurance company and can provide information regarding State Fund and self-insurance. Also, information regarding insurance companies that are licensed to sell workers' compensation insurance and an online rate comparison of the top 50 workers' compensation insurers can be accessed on the California Department of Insurance (CDI) website at www.insurance.ca.gov.

Source: https://www.insurance.ca.gov/01-consumers/105-type/95-guides/09-comm/WorkersCompensation.cfm

What Happens If an Employer Fails to Purchase Workers' Compensation Insurance?

Employers that fail to purchase workers' compensation insurance are in violation of the California Labor Code. The Division of Labor Standards Enforcement (DLSE) has the authority to issue a stop order against any employer that is discovered to be unlawfully uninsured for workers' compensation. A stop order closes down business operations until workers' compensation insurance is secured. Besides issuing a stop order, the DLSE can assess fines based on whether an employer has been discovered to be unlawfully uninsured through normal investigation or through the filing of an injured workers' claim with the Uninsured Employers Benefit Trust Fund.

Source: https://www.insurance.ca.gov/01-consumers/105-type/95-guides/09-comm/WorkersCompensation.cfm

What Happens If an Employer Fails to Purchase Workers' Compensation Insurance Continued?

Failing to have worker's' compensation coverage is a criminal offense. Section 3700.5 of the California Labor Code makes it a misdemeanor punishable by either imprisonment in the county jail for up to one year, a fine of up to double the amount of workers' compensation premium that would have been necessary to secure coverage during the illegally uninsured period (in an amount not less than $10,000), or both. Additionally, the state issues penalties of up to $100,000 against illegally uninsured employers. If an employee gets hurt or sick because of work and the employer is not insured, the employer is responsible for paying all bills related to the injury or illness. Employers may want to contact the Information and Assistance officer at their local DWC office for further information. Workers' compensation benefits are the exclusive remedy for injuries suffered on the job only when the employer is properly insured.

Source: https://www.insurance.ca.gov/01-consumers/105-type/95-guides/09-comm/WorkersCompensation.cfm

So my business stops... I could go to jail...anything else...

What Happens If an Employer Fails to Purchase Workers' Compensation Insurance Continued?

And you lose the one place where you cannot be sued!

If an employer is illegally uninsured and an employee gets sick or hurt because of work, the employee can file a civil action against the employer in addition to filing a workers' compensation claim

Source: https://www.insurance.ca.gov/01-consumers/105-type/95-guides/09-comm/WorkersCompensation.cfm

Exceptions to the Exclusive Remedy

An employee injured during the course and scope of employment may bring a civil claim against his or her employer who had failed to secure workers' compensation coverage as of the time of the injury. (Lab. Code, § 3706.)

Flight Between Employees

An employer is not vicariously liable for any injury or death caused by a physical assault by one of its employees against another employee. (Lab. Code, § 3601) However, an employee may bring a civil suit against his or her employer where the employer has acted affirmatively by either willfully assaulting the employee or ratifying the assault of the employee by a co-employee. (Lab. Code, § 3602, subd. (b)(1).)

How Do You Avoid Being Sued by an Employee?

Don't Have Any Employees

- Part A: I Should Have Done That... Practical Considerations
- Part B: Saying, "Your Fired" Can Get an Employer into Trouble
- Part C: Money Always Gets an Employer into Trouble
- Part D: When Safety is Not #1 Can Get an Employer into Trouble

How to Avoid Being SUED!

Staying Out Of Legal Trouble with Clients, Employees, and 3rd Party Organizations

Presented by Luke Matthew Martin, MBA, JD
CAMFT Staff Attorney

- Disclaimer Presenter Agenda
- Part 1: Avoid being sued by a client
- Part 2: Avoid being sued by an Employee
- Part 3: Avoid being sued by a 3rd Party Organization

3rd Party Suing You

You Should Know...

The Actions in Your Personal Life Impact Your Professional Life

Claims from 3rd Party Organizations Such as BBS and OCR Can Arise from Actions Outside of the Practice

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

PEOPLE vs. Defendant

COURT CASE NUMBER

PLEA OF GUILTY/NO CONTEST - MISDEMEANOR

DA OR CA CASE NUMBER

INSTRUCTIONS: Fill out this form if you wish to plead guilty or no contest to the charges against you. Initial each applicable item only if you understand it. If you have any questions about your case, the possible sentence, or the information on this form, ask your attorney or the judge.

I, the defendant in the above-entitled case, personally and/or by my attorney, declare as follows:

1. Of those charges now filed against me in this case, I plead

GUILTY/NO CONTEST

to the following offenses and admit the enhancements, allegations, and prior convictions as follows:

COUNT	CHARGE	ENHANCEMENT/ALLEGATION

PRIORS: (LIST ALLEGATION SECTION, CONVICTION DATE, CASE NUMBER AND CHARGE)

2. I have not been induced to enter the above plea by any promise or representation of any kind, except: (State any agreement with the prosecutor.)

3. I am entering a plea freely and voluntarily, without threat or fear to me or anyone closely related to me.

4. I understand that a plea of No Contest is the same as a plea of Guilty for all purposes.

5. I am sober and my judgment is not impaired. I have not consumed any drug, alcohol or narcotic within the past 24 hours.

RIGHT TO AN ATTORNEY

6. I understand that I have the Constitutional right to be represented by an attorney at all stages of the proceedings including sentencing. I can hire my own attorney or the court will appoint an attorney for me if I cannot afford one. I understand the dangers and disadvantages of representing myself and that it is usually unwise to represent myself.

6a. I understand that I have the right to be present in court to enter my plea and for sentencing. I expressly authorize my attorney to enter this plea on my behalf, in my absence. I expressly authorize my attorney to appear for me at sentencing.

6b. I give up the right to an attorney and wish to represent myself.

CONSTITUTIONAL RIGHTS

I understand that as to all charges, allegations and prior convictions filed against me I also have the following constitutional rights, which I now give up to enter my plea of guilty/no contest:

7. I have the right to a **speedy and public trial by jury**. **I now give up this right.**

PLEA OF GUILTY/NO CONTEST – MISDEMEANOR

Criminal Convictions

Display All

About

- **Consumer Protection Mandate**
- **Applicant Reporting Requirement**
- **Licensee/Registrant Reporting Requirement**
  - All licensees and registrants are required by law, to report all misdemeanor and felony convictions to the within 30 days of the conviction
  - Failure to report a conviction may result in the issuance of a citation or disciplinary action taken against their license or registration
- **Applicant Conviction Review**

The evaluation of the applicant's criminal history is part of the application process. The Board evaluates each application with a prior conviction history on a case-by-case basis to determine the applicant's ability to practice with safety to the public. Included in the Board's evaluation are:

- The nature and severity of the offense
- Additional subsequent acts
- Recency of crime
- Compliance with sanctions
- Evidence of rehabilitation (criteria outlined by California Code of Regulations, Title 16, §1813)

Most People Think This Is Double Jeopardy....

Double Jeopardy

Trailer

ARDY

Double Jeopardy

Defined in Movie

Every Lawyer After Watching Movie

What is Double Jeopardy...Really?

State of California

PENAL CODE

Section 687

687. No person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted.

(Enacted 1872.)

The term "double jeopardy" has two essential components. The first is that it only applies when someone has already been "prosecuted" for a crime. In other words, it is not enough that you have been charged with a crime.

You must have already gone through some portion of the criminal justice process, including a trial. Once you have been acquitted or convicted of a crime, you may not be prosecuted for that same crime again.

The second part of the double jeopardy principle only applies to the "same offense."

In other words, if you are prosecuted and acquitted of one crime, you may still be charged with a different crime—even if it is related to the first crime. For example, if you are acquitted of first-degree murder, you may still be prosecuted for second-degree murder, capital murder, voluntary manslaughter, involuntary manslaughter, etc.

We Come Back To...

The Actions in Your Personal Life Impact Your Professional Life

- Part 1: Bad Behavior Gets You Into Trouble
- Part 2: Lying Gets You Into Trouble
- Part 3: Not Taking Care Of Self Gets You Into Trouble

ARTICLE 2. DENIAL, SUSPENSION, AND REVOCATION

§ 4982. UNPROFESSIONAL CONDUCT

The board may deny a license or registration or may suspend or revoke the license or registration of a licensee or registrant if the licensee or registrant has been guilty of unprofessional conduct. Unprofessional conduct includes, but is not limited to, the following:

§ 4982. UNPROFESSIONAL CONDUCT

The board may deny a license or registration or may suspend or revoke the license or registration of a licensee or registrant if the licensee or registrant has been guilty of unprofessional conduct. Unprofessional conduct includes, but is not limited to, the following:

(a) The conviction of a crime substantially related to the qualifications, functions, or duties of a licensee or registrant under this chapter. The record of conviction shall be conclusive evidence only of the fact that the conviction occurred. The board may inquire into the circumstances surrounding the commission of the crime in order to fix the degree of discipline or to determine if the conviction is substantially related to the qualifications, functions, or duties of a licensee or registrant under this chapter. A conviction has the same meaning as defined in Section 7.5. The board may order any license or registration suspended or revoked, or may decline to issue a license or registration when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or, when an order granting probation is made suspending the imposition of sentence. All actions pursuant to this subdivision shall be taken pursuant to Division 1.5 (commencing with Section 475).

(b) Securing a license or registration by fraud, deceit, or misrepresentation on any application for licensure or registration submitted to the board, whether engaged in by an applicant for a license or registration, or by a licensee in support of any application for licensure or registration.

(c) Administering to themself any controlled substance or using of any of the dangerous drugs specified in Section 4022, or of any alcoholic beverage to the extent, or in a manner, as to be dangerous or injurious to the person applying for a registration or license or holding a registration or license under this chapter, or to any other person, or to the public, or, to the extent that the use impairs the ability of the person applying for or holding a registration or license to conduct with safety to the public the practice authorized by the registration or license. The board shall deny an application for a registration or license or revoke the license or registration of any person, other than one who is licensed as a physician and surgeon, who uses or offers to use drugs in the course of performing marriage and family therapy services.

(d) Gross negligence or incompetence in the performance of marriage and family therapy.

(e) Violating, attempting to violate, or conspiring to violate any of the provisions of this chapter or any regulation adopted by the board.

(f) Misrepresentation as to the type or status of a license or registration held by the licensee or registrant or otherwise misrepresenting or permitting misrepresentation of the licensee's or registrant's education, professional qualifications, or professional affiliations to any person or entity.

(g) Impersonation of another by any licensee, registrant, or applicant for a license or registration, or, in the case of a licensee or registrant, allowing any other person to use the licensee's or registrant's license or registration.

(h) Aiding or abetting, or employing, directly or indirectly, any unlicensed or unregistered person to engage in conduct for which a license or registration is required under this chapter.

(i) Intentionally or recklessly causing physical or emotional harm to any client.

(j) The commission of any dishonest, corrupt, or fraudulent act substantially related to the qualifications, functions, or duties of a licensee or registrant.

(k) Engaging in sexual relations with a client, or a former client within two years following termination of therapy, soliciting sexual relations with a client, or committing an act of sexual abuse, or sexual misconduct with a client, or committing an act punishable as a sexually related crime, if that act or solicitation is substantially related to the qualifications, functions, or duties of a marriage and family therapist.

(l) Performing, or holding oneself out as being able to perform, or offering to perform, or permitting any trainee, registered associate, or applicant for licensure under supervision to perform, any professional services beyond the scope of the license authorized by this chapter.

(m) Failure to maintain confidentiality, except as otherwise required or permitted by law, of all information that has been received from a client in confidence during the course of treatment and all information about the client that is obtained from tests or other means.

(n) Prior to the commencement of treatment, failing to disclose to the client or prospective client the fee to be charged for the professional services, or the basis upon which that fee will be computed.

(o) Paying, accepting, or soliciting any consideration, compensation, or remuneration, whether monetary or otherwise, for the referral of professional clients. All consideration, compensation, or remuneration shall be in relation to professional counseling services actually provided by the licensee. This subdivision does not prevent collaboration among two or more licensees in a case or cases. However, a fee shall not be charged for that collaboration, except when disclosure of the fee has been made in compliance with subdivision (n).

(p) Advertising in a manner that is false, fraudulent, misleading, or deceptive, as defined in Section 651.

(q) Reproduction or description in public, or in any publication subject to general public distribution, of 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 the test or device.

(r) Any conduct in the supervision of any registered associate, trainee, or applicant for licensure by any licensee that violates this chapter or any rules or regulations adopted by the board.

(s) Performing or holding oneself out as being able to perform mental health services beyond the scope of one's competence, as established by one's education, training, or experience. This subdivision shall not be construed to expand the scope of the license authorized by this chapter.

(t) Permitting a trainee, registered associate, or applicant for licensure under one's supervision or control to perform, or permitting the trainee, registered associate, or applicant for licensure to hold themself out as competent to perform, mental health services beyond the trainee's, registered associate's, or applicant for licensure's level of education, training, or experience.

(u) The violation of any statute or regulation governing the gaining and supervision of experience required by this chapter.

(v) Failure to keep records consistent with sound clinical judgment, the standards of the profession, and the nature of the services being rendered.

(w) Failure to comply with the child abuse reporting requirements of Section 11166 of the Penal Code.

(x) Failure to comply with the elder and dependent adult abuse reporting requirements of Section 15630 of the Welfare and Institutions Code.

(y) Willful violation of Chapter 1 (commencing with Section 123100) of Part 1 of Division 106 of the Health and Safety Code.

(z) Failure to comply with Section 2290.5.

(aa) (1) Engaging in an act described in Section 261, 286, 287, or 289 of, or former Section 288a of, the Penal Code with a minor or an act described in Section 288 or 288.5 of the Penal Code regardless of whether the act occurred prior to or after the time the registration or license was issued by the board. An act described in this subdivision occurring prior to the effective date of this subdivision shall constitute unprofessional conduct and shall subject the licensee to refusal, suspension, or revocation of a license under this section.

(2) The Legislature hereby finds and declares that protection of the public, and in particular minors, from sexual misconduct by a licensee is a compelling governmental interest, and that the ability to suspend or revoke a license for sexual conduct with a minor occurring prior to the effective date of this section is equally important to protecting the public as is the ability to refuse a license for sexual conduct with a minor occurring prior to the effective date of this section.

(ab) Engaging in any conduct that subverts or attempts to subvert any licensing examination or the administration of an examination as described in Section 123.

BBS
Board of Behavioral Sciences

Criminal Convictions

Display All

About

Consumer Protection Mandate

- The Board is responsible for ensuring that consumers receive mental health services from safe practitioners

Applicant Reporting Requirement

- Criminal Conviction FAQ – AB2138 – Updated 12/17/2020

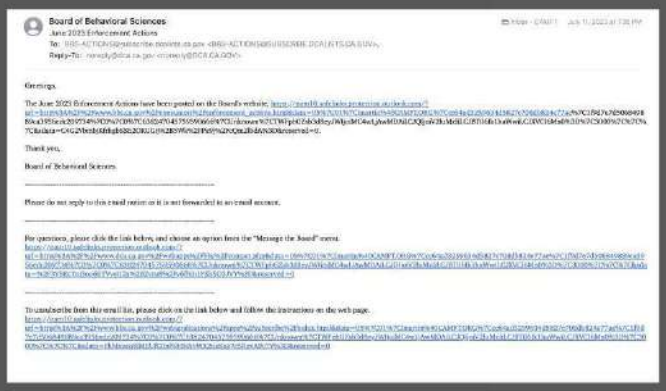
Licensee/Registrant Reporting Requirement

- All licensees and registrants are required by law, to report all misdemeanor and felony convictions to the within 30 days of the conviction
- Failure to report a conviction may result in the issuance of a citation or disciplinary action taken against their license or registration

Applicant Conviction Review

The evaluation of the applicant's criminal history is part of the application process. The Board evaluates each application with a prior conviction history on a case-by-case basis to determine the applicant's ability to practice with safety to the public. Included in the Board's evaluation are:

- The nature and severity of the offense
- Additional subsequent acts
- Recency of crime
- Compliance with sanctions
- Evidence of rehabilitation (criteria outlined by California Code of Regulations, Title 16, §1813)



Board of Behavioral Sciences
June 2023 Enforcement Actions

Greetings,

The June 2023 Enforcement Actions have been posted on the Board's website:

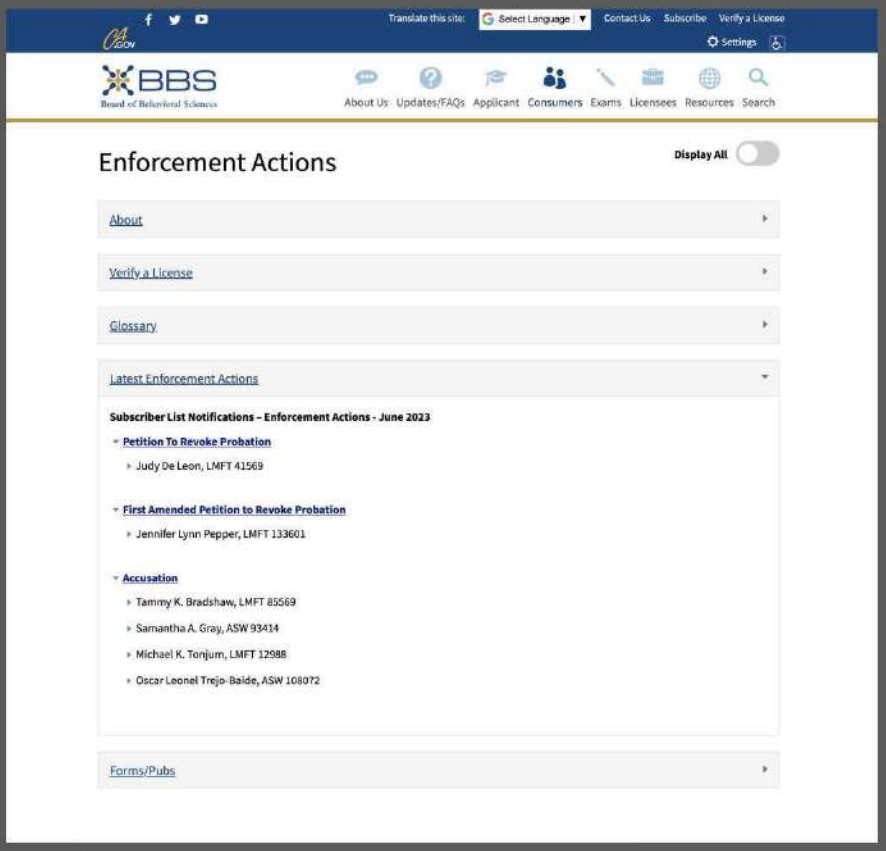
Thank you,

Board of Behavioral Sciences

Please do not reply to this email notice as it is not forwarded to an e-mail account.

For questions, please click the link below, and choose an option from the "Message the Board" menu.

To unsubscribe from this email list, please click on the link below and follow the instructions on the web page.



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BBS Board of Behavioral Sciences

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Enforcement Actions

Display All

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- Glossary
- Latest Enforcement Actions

Subscriber List Notifications – Enforcement Actions - June 2023

Petition To Revoke Probation

- Judy De Leon, LMFT 41569

First Amended Petition to Revoke Probation

- Jennifer Lynn Pepper, LMFT 133601

Accusation

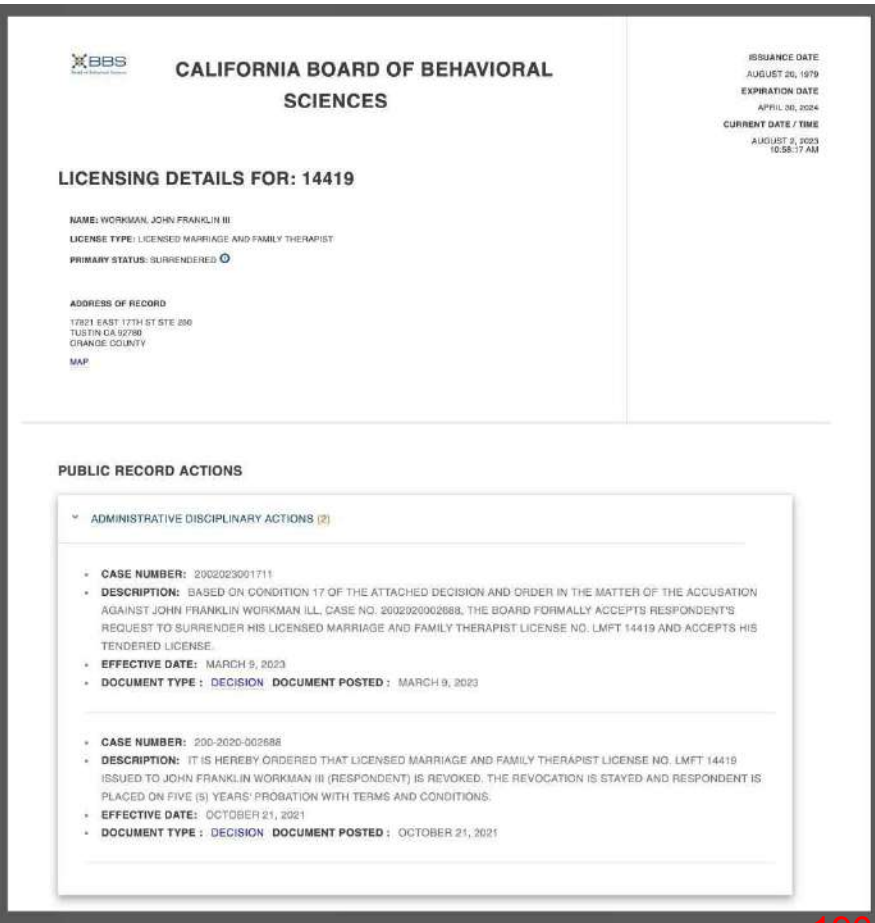
- Tammy K. Bradshaw, LMFT 85569
- Samantha A. Gray, ASW 93414
- Michael K. Tonjum, LMFT 12988
- Oscar Leonel Trejo-Balde, ASW 108072

- Forms/Pubs

dca

1 RESULTS

WORKMAN, JOHN FRANKLIN III
LICENSE NUMBER: 14419 LICENSE TYPE: LICENSED MARRIAGE AND FAMILY THERAPIST
LICENSE STATUS: SURRENDERED EXPIRATION DATE: APRIL 30, 2024
SECONDARY STATUS: N/A
CITY: TUSTIN STATE: CALIFORNIA COUNTY: ORANGE ZIP: 92780



BBS

CALIFORNIA BOARD OF BEHAVIORAL SCIENCES

ISSUANCE DATE
AUGUST 20, 1979
EXPIRATION DATE
APRIL 30, 2024
CURRENT DATE / TIME
AUGUST 2, 2023
10:58:17 AM

LICENSING DETAILS FOR: 14419

NAME: WORKMAN, JOHN FRANKLIN III
LICENSE TYPE: LICENSED MARRIAGE AND FAMILY THERAPIST
PRIMARY STATUS: SURRENDERED

ADDRESS OF RECORD
17821 EAST 17TH ST STE 299
TUSTIN CA 92780
ORANGE COUNTY
MAP

PUBLIC RECORD ACTIONS

ADMINISTRATIVE DISCIPLINARY ACTIONS (2)

- **CASE NUMBER:** 2002023001711
- **DESCRIPTION:** BASED ON CONDITION 17 OF THE ATTACHED DECISION AND ORDER IN THE MATTER OF THE ACCUSATION AGAINST JOHN FRANKLIN WORKMAN III, CASE NO. 2002020002688, THE BOARD FORMALLY ACCEPTS RESPONDENT'S REQUEST TO SURRENDER HIS LICENSED MARRIAGE AND FAMILY THERAPIST LICENSE NO. LMFT 14419 AND ACCEPTS HIS TENDERED LICENSE.
- **EFFECTIVE DATE:** MARCH 9, 2023
- **DOCUMENT TYPE :** DECISION **DOCUMENT POSTED :** MARCH 9, 2023

- **CASE NUMBER:** 200-2020-002688
- **DESCRIPTION:** IT IS HEREBY ORDERED THAT LICENSED MARRIAGE AND FAMILY THERAPIST LICENSE NO. LMFT 14419 ISSUED TO JOHN FRANKLIN WORKMAN III (RESPONDENT) IS REVOKED. THE REVOCATION IS STAYED AND RESPONDENT IS PLACED ON FIVE (5) YEARS' PROBATION WITH TERMS AND CONDITIONS.
- **EFFECTIVE DATE:** OCTOBER 21, 2021
- **DOCUMENT TYPE :** DECISION **DOCUMENT POSTED :** OCTOBER 21, 2021

XAVIER BECERRA
Attorney General of California
GREGORY J. SALUTE
Supervising Deputy Attorney General
RITA M. LANE
Deputy Attorney General
State Bar No. 171352
600 West Broadway, Suite 1800
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 738-9421
Facsimile: (619) 645-2061
Attorneys for Complainant

BEFORE THE
BOARD OF BEHAVIORAL SCIENCES
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	Case No. 200-2020-002688
JOHN FRANKLIN WORKMAN III **17821 East 17th Street, Suite 250** **Tustin, CA 92780** **Licensed Marriage and Family Therapist** **License No. LMFT 14419** Respondent.	**ACCUSATION**

PARTIES

1. Steve Sodergren (Complainant) brings this Accusation solely in his official capacity as the Interim Executive Officer of the Board of Behavioral Sciences (Board), Department of Consumer Affairs.

2. On or about August 20, 1979, the Board issued Licensed Marriage and Family Therapist License Number LMFT 14419 to John Franklin Workman III (Respondent). The Licensed Marriage and Family Therapist License was in full force and effect at all times relevant to the charges brought herein and will expire on April 30, 2022, unless renewed.

///

COST RECOVERY

12. Section 125.3 of the Code provides, in pertinent part, that the Board may request the administrative law judge to direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case, with failure of the licentiate to comply subjecting the license to not being renewed or reinstated. If a case settles, recovery of investigation and enforcement costs may be included in a stipulated settlement.

FIRST CAUSE FOR DISCIPLINE

(Criminal Conviction on January 3, 2020)

13. Respondent has subjected his Licensed Marriage and Family Therapist License to disciplinary action under Code sections 490 and 4982, subdivision (a), and California Code of Regulations, title 16, section 1812, for conviction of a substantially related crime, in that on or about July 17, 2017, Respondent entered a guilty plea in *USA v. Workman, United States District Court, Southern District of California Court, Case No. 3:17-cr-01844-CAB*, and was convicted of one count of Title 18, U.S. Code, section 371-conspiracy to commit health care fraud, honest services, mail fraud, and violated the travel act, a felony. On January 3, 2020, Respondent was sentenced and placed on supervised release for three years, ordered to 240 days of home detention, to pay a $100 assessment fee, and a criminal forfeiture in the amount of $534,436.90.

14. The circumstances that led to the conviction are that between 2005 through 2015, Respondent conspired with others in a scheme to defraud and deprive patients of intangible rights to honest services from physicians. Two of Respondent's co-conspirators owned a company that provided mobile shockwave[1] therapy to patients at their doctors' offices. Numerous deceptive tactics were employed by Respondent and his co-conspirators to make payments, which were exclusively for patient referrals, appear legitimate. Respondent worked as a marketer for various physicians, doctors, chiropractors and medical clinics in southern California, and facilitated kickback payments to the doctors from various providers. The kickback payments covered such services as shockwave therapy and other medical services that were billed and paid through workers' compensation insurance and private insurance. The conspirators through bribes and kickbacks caused over $16.9 million in claims to be submitted for shockwave treatments. Respondent made kickback agreements that consisted of Respondent splitting the proceeds that resulted from the doctors referring patients to his co-conspirators' company for shockwave treatments, with the shockwave company billing the insurance companies, collecting fees, and then providing the proceeds to Respondent to split accordingly. Respondent obtained $534,436.90 from his part in the scheme.

15. On March 30, 2018, when Respondent completed his online renewal application with the Board, he answered "No" to the question "Since your last renewal, have you had any license disciplined by a governmental agency or other disciplinary body; or, have you been convicted of any crime in any state…?"

16. On April 3, 2020, Respondent notified the Board in his license renewal application that he had been convicted of a crime in that he answered "Yes" to the question "Since your last renewal, have you had any license disciplined by a governmental agency or other disciplinary body; or, have you been convicted of any crime in any state…?"

SECOND CAUSE FOR DISCIPLINE

(Unprofessional Conduct - Failure to Report Conviction
To the Board Within 30 Days of Occurrence)

17. Respondent has subjected his Licensed Marriage and Family Therapist License to disciplinary action for unprofessional conduct under Code sections 4982, subdivision (e) in conjunction with California Code of Regulations, title 16, section 1845, subdivision (g)(1), in that he failed to report to the Board within 30 days, his July 17, 2017 criminal conviction, and his January 3, 2020 criminal sentencing. Respondent did not notify the Board of his conviction until after he completed his license renewal application on April 3, 2020. The facts and circumstances are set forth in paragraphs 13 through 16, above, and incorporated herein by reference.

///

///

[1] Shockwave therapy is described as being a non-invasive therapy that uses low-energy sound waves to initiate tissue repair of musculoskeletal conditions.

What Do You Think Should Have Happened in This Situation?

Here is What Happened in This Situation...

XAVIER BECERRA
Attorney General of California
GREGORY J. SALUTE
Supervising Deputy Attorney General
RITA M. LANE
Deputy Attorney General
State Bar No. 171352
600 West Broadway, Suite 1800
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 738-9421
Facsimile: (619) 645-2061
Attorneys for Complainant

BEFORE THE
BOARD OF BEHAVIORAL SCIENCES
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	Case No. 200-2020-002688
JOHN FRANKLIN WORKMAN III **17821 East 17th Street, Suite 250** **Tustin, CA 92780** **Licensed Marriage and Family Therapist** **License No. LMFT 14419** Respondent.	**STIPULATED SETTLEMENT AND DISCIPLINARY ORDER**

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-entitled proceedings that the following matters are true:

PARTIES

1. Steve Sodergren (Complainant) is the Executive Officer of the Board of Behavioral Sciences (Board). He brought this action solely in his official capacity and is represented in this matter by Xavier Becerra, Attorney General of the State of California, by Rita M. Lane, Deputy Attorney General.

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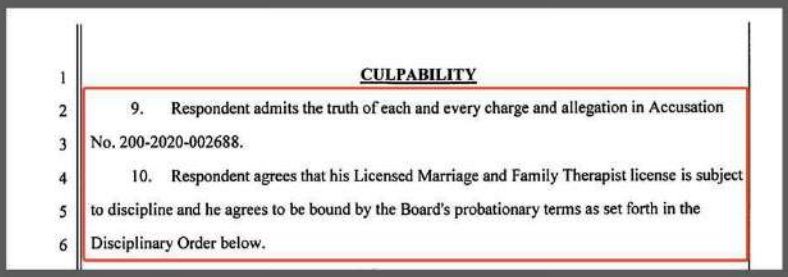
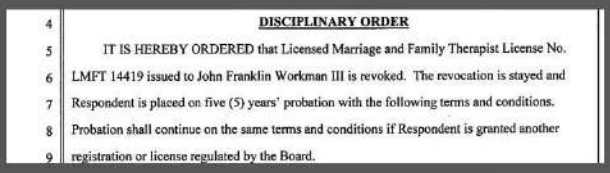
STIPULATED SETTLEMENT (200-2020-002688)



CULPABILITY

9. Respondent admits the truth of each and every charge and allegation in Accusation No. 200-2020-002688.

10. Respondent agrees that his Licensed Marriage and Family Therapist license is subject to discipline and he agrees to be bound by the Board's probationary terms as set forth in the Disciplinary Order below.

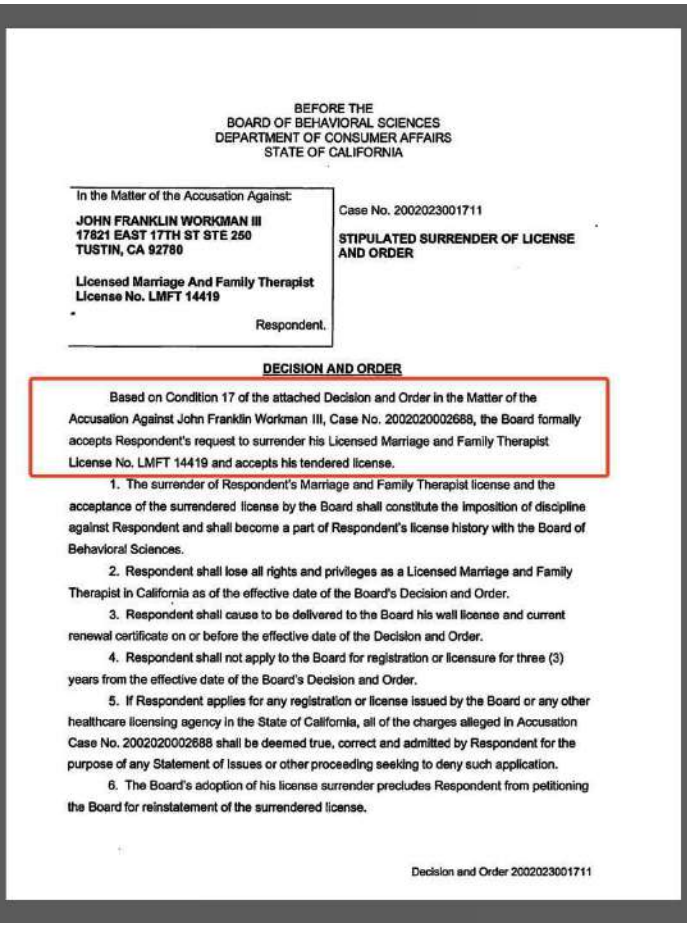


DISCIPLINARY ORDER

IT IS HEREBY ORDERED that Licensed Marriage and Family Therapist License No. LMFT 14419 issued to John Franklin Workman III is revoked. The revocation is stayed and Respondent is placed on five (5) years' probation with the following terms and conditions. Probation shall continue on the same terms and conditions if Respondent is granted another registration or license regulated by the Board.

1. Psychological / Psychiatric Evaluation
2. Psychotherapy
3. Supervised Practice
4. Take and pass California Law & Ethics Exam
5. Law and Ethics Coursework
6. Obey all laws / Fingerprinting
7. File Quarterly Reports
8. Comply with Probation Program
9. Interview with the Board
10. Failure to Practice Notification
11. Change of Place of Employment or Place of Residence
12. Supervision of Unlicensed Persons
13. Notification to Clients
14. Notification to Employers
15. Violation of Probation Terms
16. Maintain Valid License to Continue
17. License Surrender
18. Not Allowed to be Instructor for CEs
19. Notification to Referral Service of Decision
20. Reimbursement of Probation Program and Cost Recovery

The End Result...



BEFORE THE
BOARD OF BEHAVIORAL SCIENCES
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

JOHN FRANKLIN WORKMAN III
17821 EAST 17TH ST STE 250
TUSTIN, CA 92780

Licensed Marriage And Family Therapist
License No. LMFT 14419

Respondent.

Case No. 2002023001711

STIPULATED SURRENDER OF LICENSE AND ORDER

DECISION AND ORDER

Based on Condition 17 of the attached Decision and Order in the Matter of the Accusation Against John Franklin Workman III, Case No. 2002020002688, the Board formally accepts Respondent's request to surrender his Licensed Marriage and Family Therapist License No. LMFT 14419 and accepts his tendered license.

1. The surrender of Respondent's Marriage and Family Therapist license and the acceptance of the surrendered license by the Board shall constitute the imposition of discipline against Respondent and shall become a part of Respondent's license history with the Board of Behavioral Sciences.

2. Respondent shall lose all rights and privileges as a Licensed Marriage and Family Therapist in California as of the effective date of the Board's Decision and Order.

3. Respondent shall cause to be delivered to the Board his wall license and current renewal certificate on or before the effective date of the Decision and Order.

4. Respondent shall not apply to the Board for registration or licensure for three (3) years from the effective date of the Board's Decision and Order.

5. If Respondent applies for any registration or license issued by the Board or any other healthcare licensing agency in the State of California, all of the charges alleged in Accusation Case No. 2002020002688 shall be deemed true, correct and admitted by Respondent for the purpose of any Statement of Issues or other proceeding seeking to deny such application.

6. The Board's adoption of his license surrender precludes Respondent from petitioning the Board for reinstatement of the surrendered license.

Decision and Order 2002023001711

Most Common Bad Behavior: DUI

DUI

PROBATION

FIRST CAUSE FOR DISCIPLINE

(June 17, 2021 Criminal Conviction - DUI on January 27, 2020)

11. Respondent is subject to disciplinary action under Code sections 490 and 4992.3(a), in conjunction with California Code of Regulations, title 16, section 1812(a), in that Respondent was convicted of a crime substantially related to the qualifications, functions, or duties of a licensee. On or about June 17, 2021, in a criminal proceeding entitled *The People of the State of California vs. Ira Arthell Neighbors*, in Superior Court of California, County of San Bernardino, Case No. MSB20010874, Respondent was convicted of violating Vehicle Code section 23152(b) (driving under the influence of alcohol/0.08% or more), a misdemeanor. Respondent was sentenced to serve 10 days in jail, placed on probation for three years with terms and conditions, ordered to complete an alcohol education program, and pay fines and fees.

12. The circumstances surrounding the conviction are that on or about January 27, 2020, a San Bernardino Police Department officer was dispatched to a traffic collision involving Respondent. Respondent struck a parked vehicle causing minor damage and drove away from the scene. Respondent then collided with another vehicle at a stop light. Upon speaking to Respondent, the officer noticed a strong odor of an alcoholic beverage coming from his person, bloodshot watery eyes, slurred speech, and lethargic. Respondent submitted a blood sample that revealed a blood alcohol concentration of 0.17% and cannabinoids.

8. Respondent has not used is LCSW license since 1994 but had kept it current.

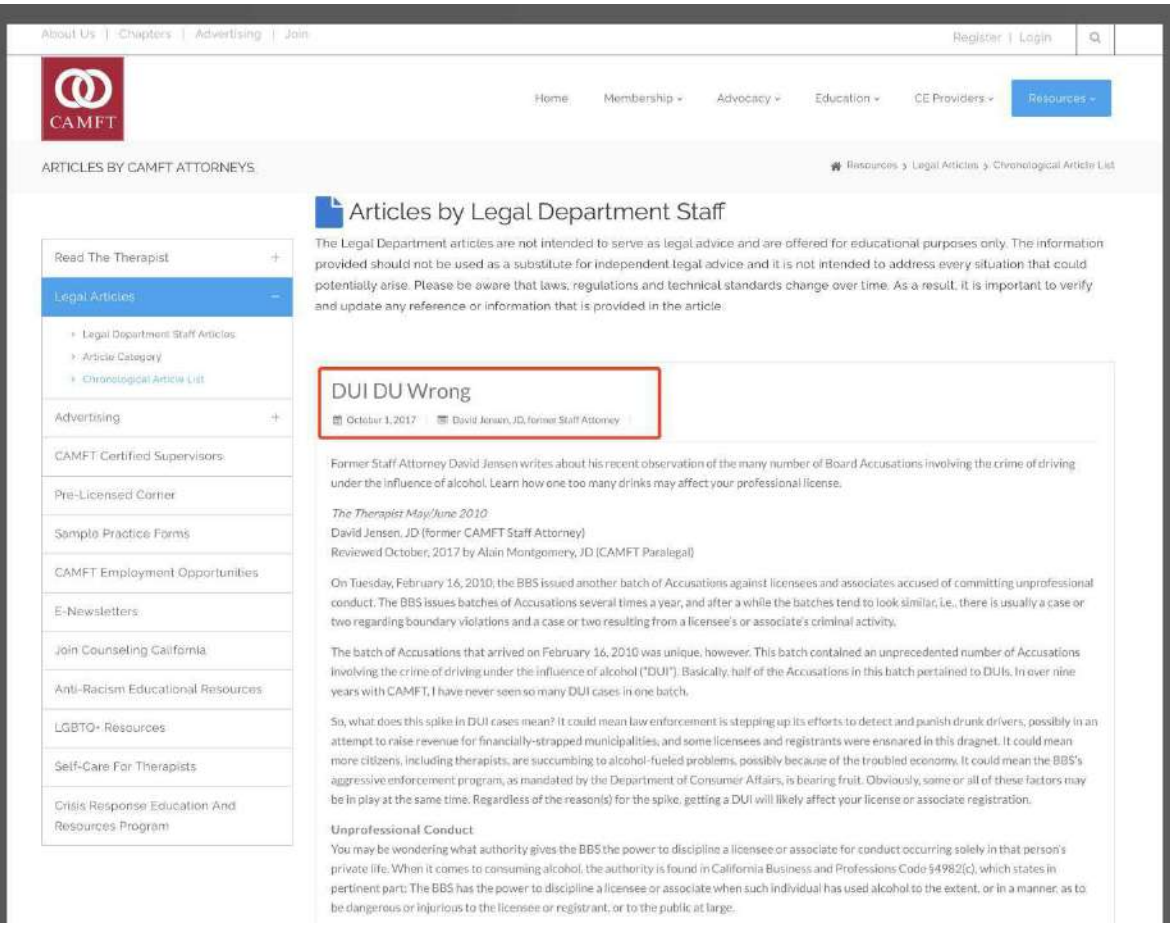
9. Respondent admitted to driving under the influence of alcohol on January 27, 2020. He asserted that his best friend passed away just prior to that date, and he consumed alcohol at home to cope with being asked to give the eulogy at the funeral service. Respondent testified that he "had no business driving" and expressed regret for doing so. He contends that he learned his lesson and has not driven while under the influence of alcohol since that date.

10. Respondent stated he learned a lot from the driving under the influence class in terms of what not to do and the fact that he could have killed himself and others. He also described the consequences of his conduct in terms of spending time in jail and the pain he caused his family. Respondent testified that his driver's license was suspended following his conviction but has been reinstated. He also testified that he completed the driving under the influence (DUI) training and has not missed a payment to the court. The record is unclear as to any balance remaining on the court-ordered fines and fees.

11. Respondent stated that he does not have the means to pay the Board's costs of investigation and enforcement. He explained that he is facing foreclosure, he receives $12,00 per year from social security and a small pension and has difficulty buying food.

12. Delma Lee, Respondent's niece, testified on Respondent's behalf. She asserted that Respondent has granted her power of attorney to make decisions for him in the event he becomes incapacitated. Ms. Lee described Respondent as being a good social worker and she has attended awards ceremonies where Respondent was

5



Other Bad Behavior: Second Degree Murder

Applicant Social Worker Initially Denied Registration Due to 2nd Degree Murder Conviction

Current, Probation

REGULATORY PROVISIONS

6. California Code of Regulations, title 16, section 1812(a) states:

For purposes of denial, suspension, or revocation of a license pursuant to Section 141, Division 1.5 (commencing with Section 475), or Section 4982, Section 4989.54, Section 4992.3, or Section 4999.90 of the Code, a crime, professional misconduct, or act shall be considered to be substantially related to the qualifications, functions or duties of a person holding a license under Chapters 13, 13.5, 14, and 16 of Division 2 of the Code if to a substantial degree it evidences present or potential unfitness of a person holding a license to perform the functions authorized by the license in a manner consistent with the public health, safety or welfare. For purposes of this section, "license" shall mean license or registration.

CAUSE FOR DENIAL OF APPLICATION

(February 26, 1988 Criminal Conviction - Second Degree Murder on September 12, 1986)

7. Respondent's application is subject to denial under Code sections 480(a)(1)(A) and 4992.3(a), in conjunction with California Code of Regulations, title 16, section 1812(a), in that on or about February 26, 1988, in a criminal proceeding entitled *The People of the State of California v. Shawn Christopher Boykin*, in Superior Court of California, County of Los Angeles, Case Number A792791, Respondent was convicted of violating Penal Code section 187(a) (second degree murder), a serious felony. Respondent also admitted as true, a special allegation for violating Penal Code section 12022(a) (armed with a firearm). Respondent was sentenced to serve 16 years to life in state prison and ordered to pay a restitution fine of $10,000 to the victim's family.

The circumstances surrounding the conviction are that on or about September 12, 1986, a Los Angeles Police Department officer responded to a murder at Fairfax High School in Los Angeles, CA. Respondent and a co-defendant A.W. were gang members who got into an argument over the use of a pay telephone with A.T., an 18-year old victim. The victim was not a gang member and had overcome dyslexia and was college-bound. He was visiting the high school campus to get college advice from a former high school teacher who had helped him with his learning disorder. Respondent and his co-defendant chased down the victim and began fighting. The Respondent was carrying a chrome semi-automatic handgun which he provided to the co-defendant. The Respondent yelled, "Gat him, cuz" and then the co-defendant fired three shots at the victim. One bullet entered the victim's back and pierced his heart.

On Appeal-- Court Ordered BBS to issue Registration for ASW

ORDER

IT IS HEREBY ORDERED THAT respondent Shawn Christopher Boykin be issued a registration as an associate clinical social worker. Said registration shall be revoked. The revocation will be stayed and respondent placed on five years' probation with the following terms and conditions. Probation shall continue on the same terms and conditions if respondent is granted a subsequent registration, becomes licensed, or is granted another registration or license regulated by the Board during the probationary period.

Other Bad Behavior: There is More...A lot...

Unlawful Entry into a Dwelling

Probation

FACTUAL SUMMARY

8. On or about January 21, 2020, in Marin Superior Court case number CR208711A, Respondent was convicted of having violated California Penal Code section 602.5(a) (unlawful entry into a dwelling). The conviction was based on an incident which occurred on or about April 24, 2019, in which Respondent went, uninvited, to the residence of her child's father and assaulted him verbally and physically. The Court placed Respondent on supervised probation, ordered her to complete a batterer's program, and ordered her not to engage in any "further acts" of violence, threats, stalking, sexual abuse or harassment of the victim.

- Vandalism
- Driving Under the Influence of a Drug
- Battery on School Official

Probation

FIRST CAUSE FOR DENIAL OF APPLICATION

(Substantially-Related Conviction(s))

8. Respondent's application is subject to denial under Code sections 480, subdivision (a)(1), and 4992.3, subdivision (a), in that he was convicted of a crime substantially related to the qualifications, functions, or duties of a registrant.

9. On or about March 13, 2020, in the Superior Court of California for the County of Alameda, in the case titled *People of the State of California v. Gary Lavon Callahan-Smith*, Case No. 19-CR-014626, Respondent pled no contest to and was convicted of violating Penal Code section 594(a) (vandalism with over $400 damage), a misdemeanor; Vehicle Code section 23152(f) (driving under the influence of a drug), a misdemeanor; and Penal Code section 243.6 (battery on school official), a misdemeanor. The circumstances underlying the convictions were that on or about September 13, 2019, while under the influence of methamphetamine, Respondent drove his vehicle. Respondent then parked and exited his vehicle and jumped on another vehicle's roof repeatedly, causing significant damage. Respondent thereafter attempted to fight another individual, after which Respondent drove to his child's elementary school and punched a school official.

- Burglary
- Exhibiting Firearm in attempt to resist arrest
- Threat to commit a Crime Resulting in Death

License Revoked

FACTUAL BACKGROUND

9. On May 30, 2019, at about 12:20 a.m., the Humboldt County Sheriff's Department received a 911 call from a fourteen year-old girl who reported a home invasion and assault. The girl stated that Respondent, her mother's ex-partner, broke into the residence and was physically attacking her mother. The girl also reported that her 9 year-old sister was present in the home. Respondent made specific threats to kill the mother and girls. He fled the home shortly before law enforcement arrived.

10. The mother reported that Respondent struck her 6 or 7 times with a small baseball bat. Respondent later told law enforcement that he brought the bat to the victims' home because it was "the perfect size to beat [the mother] with." During the attack, Respondent grabbed the mother by the hair and slammed her head toward the headboard of a bed several times. The reporting deputy noted bleeding and swelling on the mother's forearm, redness and swelling on her right knee, outer right calf, and right ankle. The mother also reported pain to the back of her head, and that she believed her right wrist was sprained or broken. Neither of the girls was physically injured.

11. A short time later, Respondent's vehicle was identified by a sheriff's deputy who attempted to stop it by using lights and siren. Respondent refused to yield, and accelerated his vehicle to approximately 95 miles per hour, weaving over two traffic lanes. Law enforcement pursued Respondent for over 20 miles.

12. Deputies eventually effectuated a stop on Respondent's vehicle. Respondent exited his vehicle brandishing a knife, and making threats against the responding deputies. Respondent was red in the face, slurring his words, and had an unsteady gait. Respondent eventually dropped the knife, but then turned back toward his vehicle. A K9 Officer was dispatched to stop Respondent from re-entering his vehicle. Respondent was arrested and taken to a hospital for treatment of a dog bite and possible overdose. When deputies performed a search of Respondent's vehicle, they found an empty bottle of Jose Cuervo on the right front floorboard, and an empty bottle of Alprazolam on the driver's seat. Empty bottles of Seroquel and Ativan were also found on Respondent's person.

13. On or about August 10, 2020, in *People v. Edward Pena, Jr.*, Humboldt County Superior Court, Case No. CR 1902442, Respondent was convicted of burglary (Pen. Code, § 459), exhibiting firearm/deadly weapon in attempt to resist arrest (Pen. Code, § 417.8), two counts of threatening to commit a crime resulting in death (Pen. Code, §422), and evading a peace officer (Veh. Code, § 2800.2, subd. (a)). The court sentenced Respondent to serve 7 years and 8 months in state prison.

FIRST CAUSE FOR DISCIPLINE
(Conviction of Substantially Related Crime)
(Bus. & Prof. Code 4982, subd. (a))

14. Respondent has subjected his Licensed Marriage and Family Therapist License No. LMFT 47450 to discipline on the grounds of unprofessional conduct in that, on or about August 10, 2020, he was convicted of crimes substantially related to the qualifications, functions, and duties of a licensed marriage and family therapist (Bus. & Prof. Code § 4982, subd. (a)). Specifically, Respondent was convicted of burglary (Pen. Code, § 459), exhibiting firearm/deadly weapon in attempt to resist arrest (Pen. Code, § 417.8), two counts of threatening to commit crime resulting in death (Pen. Code, §422), and evading a peace officer (Veh. Code, § 2800.2,

Child Pornography

License Revoked

FIRST CAUSE FOR DISCIPLINE

(Conviction of a Substantially Related Crime)

12. Respondent is subject to disciplinary action under sections 490 and 4992.3, subdivision (a), in conjunction with California Code of Regulations, title 16, section 1812, subdivision (a), in that Respondent committed a substantially related crime, as follows:

a. On or about May 5, 2021, Respondent was convicted of one felony count of violating Penal Code section 311.11(c)(1) [possession of over 600 images of child or youth pornography] in the criminal proceeding entitled *The People of the State of California v. Auriel Quiambao Camacho* (Super. Ct. L.A. County, 2021, No. BA485260). The Court sentenced Respondent to three days in jail, placed him on two years of formal probation, and ordered him to: complete a 52-Week Sexual Offender program, register as a convicted sex offender carrying proof of registration at all times, submit to a DNA test, have his electronic devices subject to search and seizure, and be prohibited from having any firearms.

b. The circumstances that led to the arrest resulting in the conviction are that Los Angeles Sheriff's Department, Special Victims Bureau received a mandated reporting internet cybertip, initiated on or about July 30, 2019, of on-line child sexual exploitation by Respondent. On or about December 18, 2019, officers executed a search warrant of Respondent's various computer electronic devices, which held over 1,200 images and videos of child pornography and anime.

Sexual Assault

License Surrendered

FIRST CAUSE FOR DISCIPLINE

(Conviction of a Substantially Related Crime)

12. Respondent is subject to disciplinary action under sections 4982, subdivision (a), 490, and 493, in conjunction with California Code of Regulations, title 16, section 1812, in that Respondent was convicted of a crime substantially related to the qualifications, functions, and duties of an associate marriage and family therapist. Specifically, on or about September 23, 2020, Respondent was convicted of seven felony counts of Penal Code section 243.4, subdivision (c), [sexual battery by fraud] in the criminal proceeding entitled *The People of the State of California v. Edgar Gustavo Villamarin* (Super. Ct. L.A. County, No. GA104966). Respondent was sentenced to four (4) years in prison and to register as a sex offender. The circumstances underlying the conviction are as follows:

a. On or about August of 2014, A.G. went to Respondent's office for therapy. During the therapy session, Respondent cupped A.G.'s breasts. Then Respondent pulled down A.G.'s pants and underwear before inserting two fingers from his right hand into A.G.'s vagina.

b. On or about December 29, 2015, L.G. visited Respondent's office for a therapy appointment. When L.G. described feeling stress and back pain, Respondent began massaging her back several minutes over her shirt. Respondent then instructed L.G. to lay face down on the floor on a blanket. Respondent began massaging L.G.'s back, sides, legs, and then touched her vagina over her clothes.

Conviction In Another State

License Surrendered

CAUSE FOR DISCIPLINE

(Unprofessional Conduct - Disciplinary Action Against Respondent's Arizona Licensed Associate Counselor License)

8. Respondent has subjected her registration to disciplinary action under section 4999.91, subdivision (a), for unprofessional conduct in that disciplinary action was imposed by the Arizona Board of Behavioral Health Examiners (Arizona Board) against her Arizona licensed associate counselor license number LAC-18040. The circumstances are as follows:

9. On February 14, 2022, in a disciplinary proceeding titled *In the Matter of April I. Franklin, LAC-18040, Licensed Associate Counselor, In the State of Arizona,* in Case No. 2022-0083, the Arizona Board accepted and approved a Consent Agreement for Voluntary Surrender (Agreement), wherein Respondent was ordered to surrender her licensed associate counselor license. Under the terms of the Agreement, such surrender is to be considered a revocation of Respondent's license. The Arizona Board issued the following Findings of Fact and Conclusions of Law:

b. Respondent contacted M. D. via Respondent's personal cell phone, forwarded internal Facility emails to M.D. with notes to "Read and Delete" the emails, which included a client's name and confidential information, and sent M. D. two videos of Facility clients. Respondent shared with M.D. information about her personal life, and texted "Love you" and emailed "I miss you!". Respondent also texted M.D. a picture of Respondent with a Facility client, C. F., that said: "current resident that I am in Love with" and identified the resident's name in the text. Respondent also emailed C.F. pictures of several Facility clients. Respondent acknowledged that she had a platonic friendship with C. F. Respondent's phone records showed over 70 phone calls from September 22, 2021 through December 2, 2021 between Respondent and C. F. indicating their contact continued after Respondent was notified of the Board complaint and C. F.'s discharge from the Facility. In addition, an anonymous Facility client reported to the Board that Respondent was their family therapist, and that Respondent remained in contact, and engaged in a friendship, after they were discharged from the Facility.

c. The Arizona Board concluded that Respondent's conduct constitutes violation of Arizona Revised Statute section 32-3251, subdivisions (16)(l) (engaging in conduct, practice or condition that impairs the ability of the licensee to safely and competently practice the licensee's profession), (16)(k) (engaging in conduct or practice that is contrary to recognized standards of ethics in the behavioral health profession or that constitute a danger to the health, welfare or safety of a client), and (16)(t) (disclosing a professional confidence or privileged communication except as may otherwise be required by law or permitted by a legally valid written release).

So Am I Only In Trouble with the BBS if I get Convicted?

No

There are Plenty of Non-Criminal Behavior That Will Get You Into Trouble...

Sexual Relationship with Client

Revoked, due to Default

FACTUAL ALLEGATIONS

10. In May 2015, KS began therapy with Respondent. KS continued to pay Respondent for therapy sessions up to November 2017. However, beginning in August 2017, the relationship between Respondent and KS changed and became what KS described as a "romantic relationship." In an August 18, 2017, text message sent to KS, Respondent asserted:

> "Yes I am attracted to you in every way. I keep a tight control over my lust for obvious reasons. But I let my love for you run free because I can only express it as your therapist."

11. Throughout August 2017, Respondent and KS repeatedly corresponded expressing their sexual desires and love for one another. In September 2017, KS purchased a ring for Respondent and they began to call each other "wife" in written communications. Thereafter, KS and Respondent engaged in an exhaustive dialog of expressing their love for one another,

including explicit sexual messages that continued at least up to September 2018.

12. In June 2019, Respondent moved into KS's home. She moved out of KS's home on July 4, 2020.

13. On August 4, 2020, the Board received a complaint from KS regarding the inappropriate relationship with Respondent. On March 10, 2022, the Board sent a letter to Respondent at her address of record seeking a response to the allegations contained in KS's complaint. On April 19, 2022, this letter was returned by the US Postal Service with notification that the letter was "Not deliverable as addressed. Unable to forward."

14. On April 13, 2022, the Board sent a second letter to Respondent at her address of record with the Board, requesting a response to KS's allegations. The Board also sent the letter to the e-mail address that Respondent had on record with the Board. Respondent did not respond to the Board.

FIRST CAUSE FOR DISCIPLINE

(Unprofessional Conduct - Sexual Relations/Misconduct with Client)

15. Respondent is subject to discipline for unprofessional conduct pursuant to Code section 4982, subdivision (k), in that she engaged in a sexual relationship and/or sexual misconduct with a client during therapy and within two years of the termination of the therapeutic relationship. The facts in support of this cause for discipline are set forth above in paragraphs 10 through 12.

Giving Drugs to a Client

Revoked, due to Default

10. On or about October 15, 2020, Respondent invited Client 1 to Respondent's home where Client 1 made a virtual court appearance. Following the court appearance, Respondent offered Client 1 marijuana, which Client 1 then smoked. Respondent additionally offered Client 1 whippets[2]. Later that same night, Respondent and Client 1 went to a drug dealer's home where Respondent purchased cocaine, and Respondent and Client 1 "did a bump" of the cocaine at the drug dealer's home. Client 1 had attempted to decline Respondent's offer of drugs numerous times, but Respondent assured her that it would be therapeutic if Client 1 tried it. Respondent and Client 1 thereafter attended a party in Oakland whereat both Respondent and Client 1 consumed cocaine and drank alcohol. Client 1 went back to Respondent's home after the party.

11. On or about the morning of October 16, 2020, Client 1 awoke in Respondent's bed with Respondent next to her. Client 1 began to get up but Respondent encouraged her to remain in bed with Respondent.

12. On or about October 19, 2020, Respondent was terminated from employment with BACS after Respondent contacted Client 1 during BACS's active investigation of Respondent regarding her conduct on October 15-16, 2020 with Client 1.

13. Respondent thereafter sent approximately 50 messages to Client 1, blaming Client 1 for the Board's investigation and Respondent's termination from employment, blaming Client 1 for Respondent's stressors related to the Board's investigation and Respondent's termination, demanding Client 1 to stop disclosing information, and admitting to professional wrongdoing.

14. The Board, in its investigation into the complaint, sought a response from Respondent as to the claims. On or about November 1, 2021, Respondent wrote a letter to the Board discrediting the validity of Client 1's complaints by framing them as symptoms of Client 1's unmanaged mental health rather than Respondent's misconduct. On or about March 10, 2022, the Board sent Respondent a letter asking for an explanation of photographic evidence provided by Client 1. Respondent did not reply. On or about April 14, 2022, the Board sent a second letter as a follow-up to Respondent. Again, Respondent did not reply and has not provided any further response or information to the Board.

[2] Nitrous oxide used as a recreational inhalant.

Forgetting to Report Child Abuse

Probation

FACTUAL ALLEGATIONS

10. On March 3, 2019, the Board received an anonymous complaint with a copy of an article from the Los Angeles Times published the same day. The article described the 2013 death of eight-year-old G.F. as "a notorious failure of Los Angeles County's safety net to protect abused and neglected children." The article also reported the death of a second boy, A.A., from "alleged abuse." Similarly, on March 18, 2019, the Board received a second complaint.

FIRST CAUSE FOR DISCIPLINE

(Failure to Report Suspected Child Abuse)

21. Respondent is subject to disciplinary action under Code section 4982, subdivision (w), as a mandated reporter with reasonable suspicion, in that Respondent failed to comply with the child abuse reporting requirements after she became aware of allegations of sexual abuse and physical abuse of Client G.F. in 2013 and Client A.A. in 2015, respectively. Complainant refers to, and by this reference incorporates, the allegation set forth above in paragraphs 10 through 20, inclusive, as though set forth fully herein.

SECOND CAUSE FOR DISCIPLINE

(Intentionally or Recklessly Causing Harm to Client)

22. Respondent is subject to disciplinary action under Code section 4982, subdivision (i), in that Respondent intentionally or recklessly caused physical or emotional harm to Client G.F. in 2013 and Client A.A. in 2015, respectively, by failing to assess abuse suffered by the clients. Complainant refers to, and by this reference incorporates, the allegation set forth above in paragraphs 10 through 20, inclusive, as though set forth fully herein.

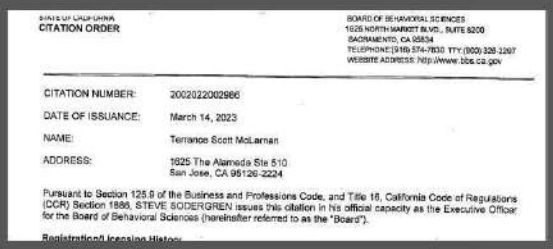
THIRD CAUSE FOR DISCIPLINE

(Gross Negligence or Incompetence)

23. Respondent is subject to disciplinary action under Code section 4982, subdivision (d), in that Respondent committed acts of gross negligence or incompetence as to Client G.F. in 2013 and Client A.A. in 2015, respectively, which placed their welfare in jeopardy. Complainant refers to, and by this reference incorporates, the allegation set forth above in paragraphs 10 through 20, inclusive, as though set forth fully herein.

Performing Services Out of State

Citation



STATE OF CALIFORNIA
CITATION ORDER

BOARD OF BEHAVIORAL SCIENCES
1625 NORTH MARKET BLVD., SUITE S200
SACRAMENTO, CA 95834
TELEPHONE (916) 574-7830 TTY (800) 326-2297
WEBSITE ADDRESS: http://www.bbs.ca.gov

CITATION NUMBER: 20202022002986

DATE OF ISSUANCE: March 14, 2023

NAME: Terrance Scott McLarnan

ADDRESS: 1625 The Alameda Ste 510
San Jose, CA 95126-2224

Pursuant to Section 125.9 of the Business and Professions Code, and Title 16, California Code of Regulations (CCR) Section 1886, STEVE SODERGREN issues this citation in his official capacity as the Executive Officer for the Board of Behavioral Sciences (hereinafter referred to as the "Board").

Registration/Licensing History

Cause for Citation

Findings from the investigation found you provided therapy services for two minor children while they resided in California and Oregon. Per your statement to the Board, you provided services to the children from October 2018 to January 2022. The therapy services were initiated by the children's father following a high-conflict divorce from the children's biological mother. In June 2021 the court granted the father's request to move the children to the state of Oregon. The father moved the children to Oregon within 72 hours of the court's decision.

In your statement to the Board, you do not hold qualifications allowing you to provide services in Oregon. Per your statement, you found it "clinically appropriate" to continue treatment with the minor children remotely to help with their transition to a new home out of state. The remote sessions were conducted weekly with each child "in a step-down mode toward termination". Per your admission to the Board, you did not contact the licensing board in the state of Oregon for their approval when you continued treatment with the minors after their move to the state.

In addition, you also provided the Board the Stipulated Order from the Oregon Board of Licensed Professional Counselors and Therapists, which found you practiced professional counseling or family therapy without being a licensee of the board from June 2021 to January 2022. You were ordered to pay a civil penalty to the Oregon Board and pay the costs associated with the disciplinary process.

Based on the facts stated above, it is the Board's finding that you violated section 1815.5(e) of the California Code of Regulations. Accordingly, a citation containing an Order of Abatement and a fine has been ordered for the aforementioned violation(s) of the California Code of Regulations.

The Actions in Your Personal Life Impact Your Professional Life

BBS

Board of Behavioral Sciences

- Part 1: Bad Behavior Gets You Into Trouble
- Part 2: Lying Gets You Into Trouble
- Part 3: Not Taking Care Of Self Gets You Into Trouble

ARTICLE 2. DENIAL, SUSPENSION, AND REVOCATION

§ 4982. UNPROFESSIONAL CONDUCT

The board may deny a license or registration or may suspend or revoke the license or registration of a licensee or registrant if the licensee or registrant has been guilty of unprofessional conduct. Unprofessional conduct includes, but is not limited to, the following:

Lying Can Get You Into Trouble...

ARTICLE 2. DENIAL, SUSPENSION, AND REVOCATION

§ 4982. UNPROFESSIONAL CONDUCT

The board may deny a license or registration or may suspend or revoke the license or registration of a licensee or registrant if the licensee or registrant has been guilty of unprofessional conduct. Unprofessional conduct includes, but is not limited to, the following:

(j) The commission of any dishonest, corrupt, or fraudulent act substantially related to the qualifications, functions, or duties of a licensee or registrant.

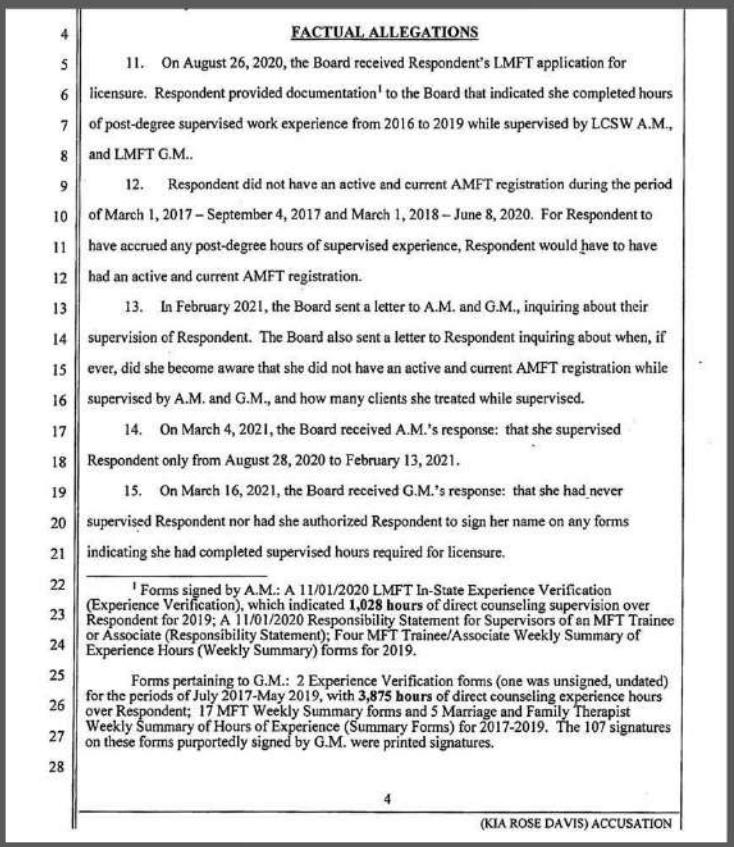
The Board Must Investigate...

GOVERNMENT CODE

11503. (a) A hearing to determine whether a right, authority, license, or privilege should be revoked, suspended, limited, or conditioned shall be initiated by filing an accusation or District Statement of Reduction in Force. The accusation or District Statement of Reduction in Force shall be a written statement of charges that shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare their defense. It shall specify the statutes and rules that the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of those statutes and rules. The accusation or District Statement of Reduction in Force shall be verified unless made by a public officer acting in their official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief.

Submitting Supervision Paperwork Not Signed By Supervisor, but Claiming It Was

SURRENDERED



FACTUAL ALLEGATIONS

11. On August 26, 2020, the Board received Respondent's LMFT application for licensure. Respondent provided documentation[1] to the Board that indicated she completed hours of post-degree supervised work experience from 2016 to 2019 while supervised by LCSW A.M., and LMFT G.M..

12. Respondent did not have an active and current AMFT registration during the period of March 1, 2017 – September 4, 2017 and March 1, 2018 – June 8, 2020. For Respondent to have accrued any post-degree hours of supervised experience, Respondent would have to have had an active and current AMFT registration.

13. In February 2021, the Board sent a letter to A.M. and G.M., inquiring about their supervision of Respondent. The Board also sent a letter to Respondent inquiring about when, if ever, did she become aware that she did not have an active and current AMFT registration while supervised by A.M. and G.M., and how many clients she treated while supervised.

14. On March 4, 2021, the Board received A.M.'s response: that she supervised Respondent only from August 28, 2020 to February 13, 2021.

15. On March 16, 2021, the Board received G.M.'s response: that she had never supervised Respondent nor had she authorized Respondent to sign her name on any forms indicating she had completed supervised hours required for licensure.

[1] Forms signed by A.M.: A 11/01/2020 LMFT In-State Experience Verification (Experience Verification), which indicated **1,028 hours** of direct counseling supervision over Respondent for 2019; A 11/01/2020 Responsibility Statement for Supervisors of an MFT Trainee or Associate (Responsibility Statement); Four MFT Trainee/Associate Weekly Summary of Experience Hours (Weekly Summary) forms for 2019.

Forms pertaining to G.M.: 2 Experience Verification forms (one was unsigned, undated) for the periods of July 2017-May 2019, with **3,875 hours** of direct counseling experience hours over Respondent; 17 MFT Weekly Summary forms and 5 Marriage and Family Therapist Weekly Summary of Hours of Experience (Summary Forms) for 2017-2019. The 107 signatures on these forms purportedly signed by G.M. were printed signatures.

4

(KIA ROSE DAVIS) ACCUSATION

On that same day, the Board received a letter from Respondent, dated February 23, 2021, stating that she submitted forms containing her hours of supervised experience while she was under a lot of stress, and that her client caseload varied while supervised by A.M. and G.M..

16. On March 18, 2021, the Board sent a second letter to A.M. with copies of the forms[2] containing A.M.'s name and/or signature that Respondent submitted to the Board in support of her application for licensure. The Board inquired about the nature of her relationship with Respondent prior to supervising Respondent, and asked her to provide a statement if she signed any of the attached forms. The Board requested that A.M. provide copies of paperwork A.M. completed regarding her supervision of Respondent from August 28, 2020 to February 13, 2021.

On that same day, the Board sent a letter to Respondent and attached copies of the forms she submitted to the Board in support of her application, inquiring about who signed the forms, her periods of supervision by A.M. and G.M., the nature of her relationship with A.M., and requested a summary of her discussion with G.M. on February 12, 2021.

17. On April 7, 2021, the Board received Respondent's response: that she was supervised by A.M. from August 28, 2020, to February 13, 2021, and not during the period of January 3, 2019 to August 16, 2019; confirmed the validity of A.M.'s signature on the forms; that she had no relationship with A.M. prior to the start of supervision; and that both Respondent and A.M. worked for Sacramento City College. Respondent stated she was not being mindful that her AMFT registration was delinquent while supervised by G.M. from October 3, 2016, to April 2, 2018, and July 10, 2017, to May 31, 2019; that Respondent signed the forms where G.M.'s name appeared; and that on February 12, 2021, she called G.M. and informed her that she wrote G.M.'s name on the forms instead of obtaining G.M.'s actual signature, due to Respondent's fear of leaving her residence during the pandemic.

18. On April 21, 2021, A.M. responded through her attorney by email to the Board that she had no relationship with Respondent prior to the start of supervision, that both she and Respondent worked for Sacramento City College and exchanged a handful of communications through the 2019-2020 school year which included information from Respondent that she had

[2] Responsibility Statement, Verification Form, and Summary Forms.

already had all of the necessary clinical hours. A.M. admitted she intentionally signed the forms Respondent submitted to the Board, which were blank at the time, understanding their agreement to be that Respondent was to provide her with copies of the paperwork once Respondent got clarification from the Board regarding the possibility of using clinical hours from both A.M. and Sacramento City College. A.M. stated that Respondent never provided her with a copy of the final paperwork.

FIRST CAUSE FOR DISCIPLINE

(Attempt to Obtain License by Fraud, Deceit, or Misrepresentation on Application for License)

19. Respondent is subject to disciplinary action under Code section 4982, subdivision (b), and section 4982, subdivision (e), in that she attempted to obtain a license by fraud, deceit or misrepresentation on her application for licensure when she misrepresented that she was supervised by LCSW A.M. and LMFT G.M. for the periods she listed in the documents she submitted to the Board in support of her application for a license, as set forth more fully in paragraphs 11-18 above.

SECOND CAUSE FOR DISCIPLINE

(Commission of Dishonest, Corrupt, or Fraudulent Acts)

20. Respondent is subject to disciplinary action under Code section 4982, subdivision (j), in that Respondent committed dishonest, corrupt, or fraudulent acts when she submitted paperwork as having been signed by A.M. and G.M. when it had not, as set forth more fully in paragraphs 11-18 above.

THIRD CAUSE FOR DISCIPLINE

(Violation of Any Statute or Regulation Governing the Gaining and Supervision of Experience)

21. Respondent is subject to disciplinary action under Code section 4982, subdivision (u), in conjunction with California Code of Regulations, title 16, section 1833, subdivision (e), for unprofessional conduct in that Respondent violated the statutes and regulations governing the gaining and supervision of experience, when she misrepresented the number of hours of supervised work experience she had completed, as set forth more fully in paragraphs 11-18 above.

You Can Have Your License Taken Away If Deception is Found

Revoked

FACTUAL ALLEGATIONS

9. On November 6, 2020, Respondent emailed the Board's Enforcement Unit email account and stated the following:

> I am in a 12 step program for freedom and treatment from food addiction. It's important that I clean up my past mistakes and wrong doings. I wanted to acknowledge my dishonest behavior and admit that I forged 2 signatures on my LMFT application for licenseure. While I did complete a lot more than 3,000 hours prior to my licensing exam, I was also not 100% accurate in the specificity of my hours. I did not get the signatures from my supervisors during my traineeship at the time I worked with them, and did not reach out to them once I was done with my hours to have them sign all the forms. I acted out of selfishness and sincerely regret this behavior. I assume full responsibility for making this decision and commit to never repeating this behavior again.

As a result of the complaint, the Board conducted an investigation into Respondent's allegations which revealed the following:

FIRST CAUSE FOR DISCIPLINE

(Securing License by Fraud, Deceit, or Misrepresentation)

14. Respondent is subject to disciplinary action under Code section 4982, subdivision (b), in that Respondent secured her LMFT License by fraud, deceit, or misrepresentation on her Application when she forged signatures of supervisors L. C., D. H., C. W. and S. D. on four In-State Experience Verification forms she submitted with the Application. Complainant refers to, and by this reference incorporates, the allegations set forth above in paragraphs 9 through 13, as though set forth fully herein.

SECOND CAUSE FOR DISCIPLINE

(Commission of Dishonest, Corrupt, or Fraudulent Acts)

15. Respondent is subject to disciplinary action under Code section 4982, subdivision (j), in that Respondent forged signatures of supervisors L. C., D. H., C. W. and S. D. on four In-State Experience Verification forms she submitted with her Application. Complainant refers to, and by this reference incorporates, the allegations set forth above in paragraphs 9 through 13, as though set forth fully herein.

THIRD CAUSE FOR DISCIPLINE

(Violation of Statute or Regulation Governing Experience Requirement)

16. Respondent is subject to disciplinary action under Code section 4982, subdivision (u), in that Respondent violated California Code of Regulations, title 16, section 1833, when she forged signatures of supervisors L. C., D. H., C. W. and S. D. on four In-State Experience Verification forms she submitted with her Application. Complainant refers to, and by this

DETERMINATION OF ISSUES

1. Based on the foregoing findings of fact, Respondent Yevgeniya Libman has subjected her Licensed Marriage and Family Therapist License No. LMFT 119940 to discipline.

2. The agency has jurisdiction to adjudicate this case by default.

3. The Board of Behavioral Sciences is authorized to revoke Respondent's Licensed Marriage and Family Therapist License based upon the following violations alleged in the Accusation which are supported by the evidence contained in the Default Decision Investigatory Evidence Packet in this case:

a. Business and Professions Code section 4982, subdivision (b): Respondent secured her LMFT License by fraud, deceit, or misrepresentation on her Application when she forged signatures of supervisors L. C., D. H., C. W. and S. D. on four In-State Experience Verification forms she submitted with the Application.

b. Business and Professions Code section 4982, subdivision (j): Respondent forged signatures of supervisors L. C., D. H., C. W. and S. D. on four In-State Experience Verification forms she submitted with her Application.

c. Business and Professions Code section 4982, subdivision (u): Respondent violated California Code of Regulations, title 16, section 1833, when she forged signatures of supervisors L. C., D. H., C. W. and S. D. on four In-State Experience Verification forms she submitted with her Application.

d. Business and Professions Code section 4982, subdivision (e): Respondent violated provisions of the Licensed Marriage and Family Therapist Act or regulations adopted by the Board.

SAYING YOU ARE SOMETHING YOU ARE NOT

SURRENDERED

FACTUAL ALLEGATIONS

7. Client J.C. saw Respondent, a licensed marriage and family therapist, for psychotherapy and a mental health assessment. Respondent agreed to evaluate Client J.C. to provide a report in support of Client J.C.'s husband, F.S.'s waiver application to the United States Bureau of Immigration and Citizen Services (USICS).

8. Client J.C. had two sessions with Respondent. Respondent told Client J.C. that Respondent was a psychologist and in one of her reports, she used the title, "Psychological Evaluation."

9. Client J.C. saw Respondent on January 6, 2020, for a therapy session and had a second session with Respondent on March 15, 2020. However, in her reports, Respondent wrote that she had sessions with Client J.C. and his spouse, F.S, on January 2, 6, 13, 20, and 27, 2018; as well as on March 2, 9, and 17, 2019. Yet in Respondent's notes, she indicates Client J.C. only came in-person for one session on January 2, 2018.

10. Respondent did not provide the Board with any billing records or progress notes to confirm the sessions she had with Client J.C. and/or his spouse, F.S. Further, Respondent did not provide the Board with intake documents, treatment plans, a signed consent for treatment or a HIPPA rights signature page from Client J.C.

11. Finally, Respondent's reports to USICS lacked important testing details to support her conclusions, used the wrong name for a diagnosis, used outdated codes in her report, and assigned a diagnosis to Client J.C. based on a potential future event of F.S. being deported.

FIRST CAUSE FOR DISCIPLINE

(Gross Negligence and/or Incompetence)

11. Respondent is subject to disciplinary action under section 4982 for unprofessional conduct on the grounds that she violated section 4982 subdivision (d) in that Respondent was grossly negligent and/or incompetent as follows:

a. Respondent told Client J.C. that she was a psychologist and used the misleading title, "Psychological Evaluation" in one of her reports.

b. Respondent falsified the number of therapy sessions she had with Client J.C. and his spouse, F.S.

c. Respondent's reports to USICS were poorly written, lacked important testing details to support her conclusions, used the wrong name for a diagnosis, used outdated codes in her report, and assigned a diagnosis to Client J.C. based on a potential future event of F.S. being deported.

12. The facts in support of this cause for discipline are set forth above in paragraphs 7 through 9, and paragraph 11, which are incorporated here by this reference, as though set forth fully.

SECOND CAUSE FOR DISCIPLINE

(Unprofessional Conduct - Misrepresenting License)

13. Respondent is subject to disciplinary action under section 4982 for unprofessional conduct on the grounds that she violated section 4982 subdivision (f) in that she told Client J.C. that she was a psychologist and used the misleading title, "Psychological Evaluation" in one of her reports.

14. The facts in support of this cause for discipline are set forth above in paragraphs 7 through 8, which are incorporated here by this reference, as though set forth fully.

THIRD CAUSE FOR DISCIPLINE

(Unprofessional Conduct – Dishonesty)

15. Respondent is subject to disciplinary action under section 4982 for unprofessional conduct on the grounds that she violated section 4982 subdivision (f) in that Respondent falsified information regarding the number of sessions she had with Client J.C. and his husband, F.S.

BBS

Board of Behavioral Sciences

- Part 1: Bad Behavior Gets You Into Trouble
- Part 2: Lying Gets You Into Trouble
- Part 3: Not Taking Care Of Self Gets You Into Trouble

ARTICLE 2. DENIAL, SUSPENSION, AND REVOCATION

§ 4982. UNPROFESSIONAL CONDUCT

The board may deny a license or registration or may suspend or revoke the license or registration of a licensee or registrant if the licensee or registrant has been guilty of unprofessional conduct. Unprofessional conduct includes, but is not limited to, the following:

Not Putting Self-First

Surrendered

FACTUAL ALLEGATIONS

8. In or about December 2020, Respondent sent three strange emails to the Board's Consumer Complaint website, raising concern about Respondent's mental health.

9. On July 1, 2021, the Board issued a Petition and Order Compelling Mental and/or Physical Examination which required Respondent to submit to a psychological examination to determine if Respondent was mentally ill or physically impaired to the extent that her condition would affect her ability to safely practice as a Licensed Marriage and Family Therapist. The psychological evaluation was conducted by a Licensed Psychologist who administered assessment tests to Respondent on July 19, 2021.

10. On November 26, 2021, the Board received Respondent's psychological evaluation. The evaluator found Respondent's ability to practice her profession safely is impaired because of a mental or physical impairment affecting competency.

CAUSE FOR DISCIPLINE

(Unsafe to Practice)

11. Respondent is subject to disciplinary action under Code section 822 in that the Board has determined that Respondent's ability to practice her profession safely is impaired because of a mental or physical impairment affecting competency. Complainant hereby incorporates paragraphs 9 through 11, above, as though set forth fully herein.

Cal. Bus. & Prof. Code § 820

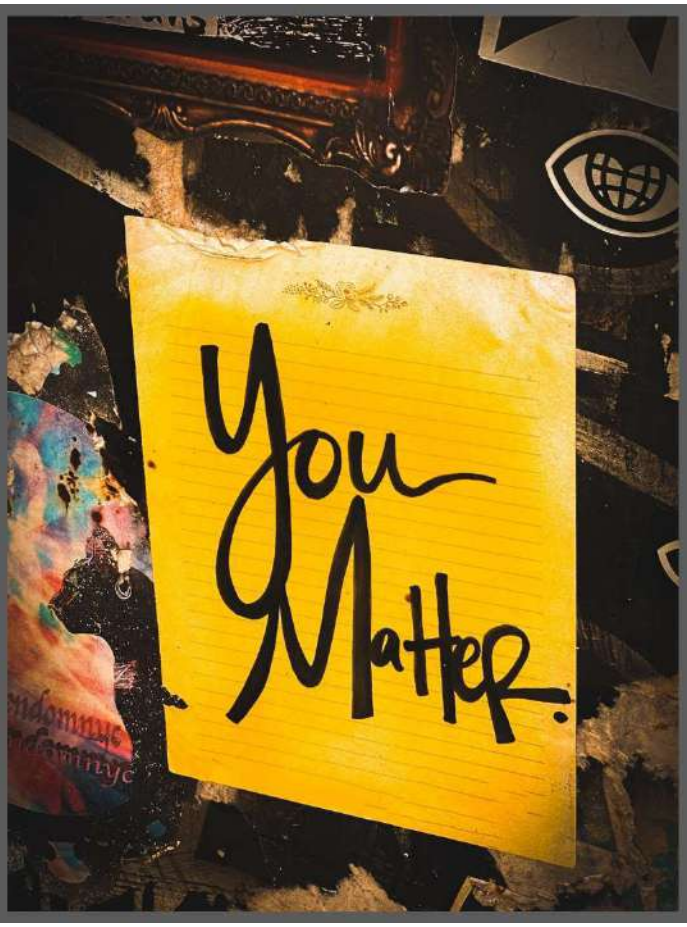
Whenever it appears that any person holding a license, certificate or permit under this division or under any initiative act referred to in this division may be unable to practice his or her profession safely because the licentiate's ability to practice is impaired due to mental illness, or physical illness affecting competency, the licensing agency may order the licentiate to be examined by one or more physicians and surgeons or psychologists designated by the agency. The report of the examiners shall be made available to the licentiate and may be received as direct evidence in proceedings conducted pursuant to Section 822.

Cal. Bus. & Prof. Code § 822

If a licensing agency determines that its licentiate's ability to practice his or her profession safely is impaired because the licentiate is mentally ill, or physically ill affecting competency, the licensing agency may take action by any one of the following methods:

(a) Revoking the licentiate's certificate or license.
(b) Suspending the licentiate's right to practice.
(c) Placing the licentiate on probation.
(d) Taking such other action in relation to the licentiate as the licensing agency in its discretion deems proper.

The licensing agency shall not reinstate a revoked or suspended certificate or license until it has received competent evidence of the absence or control of the condition which caused its action and until it is satisfied that with due regard for the public health and safety the person's right to practice his or her profession may be safely reinstated.



BBS

Board of Behavioral Sciences

- Part 1: Bad Behavior Gets You Into Trouble
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- Part 3: Not Taking Care Of Self Gets You Into Trouble

ARTICLE 2. DENIAL, SUSPENSION, AND REVOCATION

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How to avoid being SUED!

Staying Out Of Legal Trouble with Clients, Employees, and 3rd Party organizations

Presented by Luke Matthew Martin, MBA, JD
CAMFT Staff Attorney

- Disclaimer
- Presenter
- Agenda

- Part 1: Avoid being sued by a client
- Part 2: Avoid being sued by an Employee
- Part 3: Avoid being sued by a 3rd Party Organization