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Handy Carry Item
Agenda Item 10(c)

November 18, 2011

HAND-DELIVERED 11/18/11
Linda Kassis
Board of Psychology
2005 Evergreen Street, Suite 1400
Sacramento, CA 95815

Re: Comment Upon Proposed Modifications to Section 1397.2 of Title 16 of California Code of Regulations

Dear Ms. Kassis:

This office represents licensed professionals in disciplinary investigations and proceedings. This office also represents many licensed professionals in criminal investigations and proceedings. We are often called upon to provide advice and counsel regarding the collateral consequences of the proposed resolution of a criminal action.

The proposed modification to the text of section 1397.2 of Division 13.1 of Title 16 of the California Code of Regulations in subdivision (d)(1) provides that it is unprofessional conduct if a licensee fails to report to the Board within 30 days "...the conviction of the licensee or registrant including a verdict of guilty, or pleas of guilty or no contest, of any felony or misdemeanor."

As a practitioner advising professional licensees I find the description of a conviction contained in the proposed modification to the text of section 1397.2 to be confusing and inconsistent with other law regulating licensees and registrants before the Board of Psychology.

The proposed modification to section 1397.2 makes it an act of unprofessional conduct to fail to report a conviction, but describes a conviction in effect to include a plea of no contest to any felony or misdemeanor. This is inconsistent with other professional licensing schemes and, in particular, the statutes which regulate persons licensed by the Board. For example, Title 16, section 1381.7 requires that an applicant for renewal of a license or registration disclose a conviction of any violation of the law in this or any other state except for specified minor traffic infractions. It does not otherwise define "conviction" which is a term defined in other relevant statutes regulating those licensed or registered by the Board.

For example, Business and Professions Code section 480 subdivision (a)(1) defines a conviction to be: "...a plea or verdict of guilt or *a conviction following a plea of nolo contendere*." Chapter 6.6 of division 2 of the Business and Professions Code sets out the specific statutory provisions pertinent to psychologists. Business and Professions Code section 2963 defines a

conviction in pertinent part as: "A plea or verdict of guilt *or a conviction following a plea of nolo contendere* made to a charge which is substantially related to the qualifications, functions and duties of a psychologist or psychological assistant is deemed to be a conviction within the meaning of this article." The article referenced is Article 4, which sets out the statutes pertinent to denial, suspension and revocation of licenses and registrations before the Board.

As the term conviction is elsewhere defined within the statutes regulating the practice of psychology, it would seem that the proposed modification to section 1397.2 subdivision (d)(1) should be modified to read: "The conviction of the licensee or registrant of any felony or misdemeanor." There is no need to define a conviction within the regulation where that term of art has been defined by relevant statutes as set out above. Each of the statutes above-referenced requires that a no contest plea be followed by a conviction. The proposed modification to section 1397.2 subdivision (d)(1) is inconsistent with those statutes to the extent that it includes within a conviction a plea of no contest without specifying that it must be followed by a conviction, as is statutorily required.

If the proposed modification to the language of section 1397.2 were adopted, it would create confusion and would impermissibly conflict with controlling statutory authority.

I appreciate the opportunity to comment upon this proposed regulation.

Very truly yours,

M. BRADLEY WISHEK

MBW:sas

AVAILABILITY OF MODIFIED TEXT

NOTICE IS HEREBY GIVEN that the Board of Psychology (BOP) has proposed modification to the text of section 1380.4 of Division 13.1 of Title 16 California Code of Regulations. This regulatory proposal was the subject of a regulatory hearing on May 21, 2011. A copy of the modified text is enclosed. Any person who wishes to comment on the proposed modifications may do so by submitting written comments on or before August 18, 2011, at 5:00 p.m. to the following:

Contact Person:	Linda Kassis
Agency Name:	Board of Psychology
Address:	2005 Evergreen Street, Suite 1400 Sacramento, CA 95815
Telephone No.:	(916) 263-0712
Fax No:	(916) 263-2697
E-Mail Address:	Linda_Kassis@dca.ca.gov

DATED: August 3, 2011

Jeffrey Thomas
Assistant Executive Officer

BOARD OF PSYCHOLOGY
Proposed Language

Modified Text

Changes to the proposed language are shown by double underline for new text and double strike-through for deleted text.

1. Section 1380.4 is amended to read as follows:

§ 1380.4. Delegation of Functions.
Except for those powers reserved exclusively to the "agency itself" under the Administrative Procedure Act (section 11500 et seq. of the Government Code), the Bboard delegates and confers upon the executive officer for the Bboard, or in his or her absence, his or her designee, ~~the assistant executive officer, or in his or her absence, the chairperson president of the Bboard, or in his or her absence, the vice chairperson president of the Bboard,~~ all functions necessary to the dispatch of business of the Bboard in connection with investigative and administrative proceedings under the jurisdiction of the Bboard, including the authority to order an examination pursuant to section 820 of the Code or section 1381, or to approve a settlement agreement for the revocation, surrender, or interim suspension of a license or registration.

NOTE: Authority cited: Section 2930, Business and Professions Code. Reference: Sections 2928 and 2965, Business and Professions Code; and Sections 11415.60 and 11500, Government Code.

2. The title of Article 7 of Division 13.1 is amended to read as follows:

Article 7. ~~Restoration of Suspended or Revoked~~ Standards Related to Denial, Discipline, and Reinstatement of Licenses or Registrations

3. Section 1397.2 is added to Article 8 of Division 13.1 to read as follows:

§ 1397.2. Other Actions Constituting Unprofessional Conduct.
In addition to the conduct described in Section 2960 of the Code, "unprofessional conduct" also includes but is not limited to the following:
(a) Including or permitting to be included any of the following provisions in an agreement to settle a civil dispute arising from the licensee's or registrant's practice to which the licensee or registrant is or expects to be named as a party, whether the agreement is made before or after the filing of an action:

(1) A provision that prohibits another party to the dispute from contacting, cooperating with, or filing a complaint with the Board.
(2) A provision that requires another party to the dispute to attempt to withdraw a complaint the party has filed with the Board.
(b) Failure to provide to the Board, as directed, lawfully requested certified copies of documents within 15 days of receipt of the request or within the time specified in the request, whichever is later, unless the licensee or registrant is unable to provide the certified documents with this time period for good cause, including but not limited to, physical inability to access the records in the time allowed due to illness or travel. This subsection shall not apply to a licensee or registrant who does not have access to, and control over, medical records.
(c) Failure to cooperate and participate in any Board investigation pending against the licensee or registrant. This subsection shall not be construed to deprive a licensee or registrant of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States, or any other constitutional or statutory privilege. This subsection shall not be construed to require a licensee or registrant to cooperate with a request that would require the licensee or registrant to waive any constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the licensee's or registrant's practice. Any exercise by a licensee or registrant of any constitutional or statutory privilege shall not be used against the licensee or registrant in a regulatory or disciplinary proceeding against the licensee or registrant.
(d) Failure to report to the Board within 30 days any of the following:
(1) The bringing of an indictment or information charging a felony against the licensee or registrant.
(2) The arrest of the licensee or registrant.
(3) The conviction of the licensee or registrant, including any verdict of guilty, or pleas of guilty or no contest, of any felony or misdemeanor.
(4) Any disciplinary action taken by another licensing entity or authority of this state or of another state or an agency of the federal government or the United States military.

NOTE: Authority cited: Section 2930, Business and Professions Code. Reference: Section 2930, Business and Professions Code.