White Paper

California Licensee Employee Liability

Part 4 of 9

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CALIFORNIA LICENSED SURVEYORS BEWARE

YOU MAY BE LIABLE IF YOUR EMPLOYEE OR SUBORDINATE VIOLATES A CALIFORNIA REGULATION

ALL professional license holders beware – this means doctors, lawyers, barbers, contractors, pest control licensees, SURVEYORS or any other professional required to be licensed by the State of California in order to protect the public welfare. If you hold a professional license issued by the State of California, you can have your license revoked for even one regulatory violation by one of your employees, subordinates or agents, even if you are entirely unaware of the violation and even if the employee, subordinate or agent also holds the same professional license. In making this statement, you need only look to California case law upholding this principle. It has long been recognized that statutory "public welfare" offenses do not require either guilty knowledge or intent. *Aantex Pest Control Company v. Structural Pest Control Board* (1980) 108 Cal. App. 3d 696, 702 (citing *People v. Stuart* (1956) 47 Cal. 2d 167, 172 [sale of misbranded drug]; *People v. Travers* (1975) 52 Cal. App. 3d 111, 114-116 [misbranded motor oil]); *Margarito v. State Athletic Commission* (2010) 189 Cal. App. 4th 159, 165.

In order to protect the public welfare, surveyors are required to take standardized examinations prior to obtaining their surveying license in California. This requirement ensures that the new licensee (surveyor) meets minimum qualification standards and knowledge in order to lawfully practice surveying in California. "The purpose of the licensing law is to protect the public from incompetence and dishonesty in those who provide building and construction services." *Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal. 3d 988, 995 (dealing with construction contractor licensing) (citing *Lewis & Queen v. N.M. Ball Sons* (1957) 48 Cal. 2d 141, 149-150). The licensing requirements provide minimal assurance that all persons offering such services in California have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business. *Id*. (citing *Conderback, Inc. v. Standard Oil Co.* (1966) 239 Cal. App. 2d 664, 678-679). The statutory intent of these licensing requirements is to discourage persons (who have failed to comply with the licensing law) from offering or providing their unlicensed services for pay. *Id*.

With regard to surveying, California Business & Professions Code § 8708 specifically provides:

> "In order to safeguard property and **public welfare**, no person shall practice land surveying unless appropriately licensed or specifically exempted from licensure under this chapter, and only persons licensed under this chapter shall be entitled to take and use the titles "licensed land surveyor," "professional land surveyor," or

> "land surveyor," or any combination of these words, phrases, or abbreviations thereof." [emphasis added]

Furthermore, California Business & Professions Code § 8710.1 states:

> "**Protection of the public shall be the highest priority for the Board of Professional Engineers and Land Surveyors** in exercising its licensing, regulatory, and disciplinary functions. Whenever protection of the public is inconsistent with other interests sought to be promoted, the protection of the pubic shall be paramount." [emphasis added]

Clearly, according to these statutes, the purpose of requiring surveyors to be licensed is to protect the public. As such, liability for "public welfare" statutory offenses committed by a California Licensed Surveyor do not require guilty knowledge (regarding the actions of a surveyor's employee or agent) or intent. Although there are no published cases regarding surveyors exactly on point, the following three (3) cases dealing with other professional licensees illustrate these principles.

1. ***Margarito v. State Athletic Commission*:**

In October, 2010, the case of *Margarito v. State Athletic Commission* ("*Margarito*") (October 14, 2010) 189 Cal. App. 4th 159 was decided by the California Court of Appeals. In *Margarito*, boxer Antonio Margarito's ("Margarito") California boxing license was revoked after his trainer Javier Capetillo ("Capetillo") incorrectly wrapped Margarito's hands using a hard plastic substance before the Margarito v. Mosely welterweight championship boxing contest in Los Angeles on January 24, 2009. *Id*. at 163-164. As is required by law, four (4) representatives of the California State Athletic Commission ("Commission") and Mosely's trainer witnessed Margarito's hands being wrapped by Capetillo and, after inspection, found a hardened knuckle pad in violation of California Code of Regulations, Title 4, § 323. *Id*.

Margarito alleged that he was not aware of Capetillo's actions and argued that the Commission improperly held him strictly and vicariously liable for the rule violations that occurred. *Id*. Nevertheless, Margarito's license was revoked by the Commission pursuant to California Code of Regulations, Title 4, § 390. *Id*. at 164. The Commission concluded that the use of adulterated knuckle pads by a boxer seriously endangers the boxer's opponent, gives the boxer an unfair advantage and discredits boxing. *Id*. at 164.

The Court of Appeals subsequently concluded that the Commission's interpretation of Rules 323 and 390 (to hold the boxer strictly liable for the rule violation) was reasonable in light of the language and the purpose of the rules. *Id*. at 168. Neither rule contained qualifying language such as "knowingly" or "intentionally" and the absence of this qualifying language indicated that the Commission did not intend guilty knowledge or intent to be elements of this violation. *Id*. (citing *Kahn v. Medical Board* (1993) 12 Cal. App. 4th 1834, 1845). Courts have routinely upheld an agency's decision to sanction a licensee based on the principles of strict liability. *Id*. (citing *California Real Estate Loans, Inc. v. Wallace* (1993) 18 Cal. App. 4th 1575, 1583-1584 [broker's license revoked]).

The California Boxing Act (the "Act"), pursuant to Cal. Bus. & Prof. Code § 18600, et seq., authorizes the Commission to license professional boxers (Cal. Bus. & Prof. Code § 18642) and to revoke a license for any violation or attempted violation of the Act, any rule or regulation adopted pursuant to the Act, or for any cause for which a license may be denied (Cal. Bus. & Prof. Code § 18841). *Id*. at 166. The Act mandates that, in carrying out these statutory responsibilities, the **Commission must make protection of the public its highest priority**. *Id*. at 166. [emphasis added]. Rule 390 authorizes the Commission to revoke a boxer's license under any of three circumstances: (1) the licensee violated state law, (2) the licensee violated the rules of the Commission, or (3) the licensee conducts himself in a manner deemed to discredit boxing. *Id*. at 167. In interpreting the ruling of the Commission, the Court cited the principals that:

1. The words of the regulation should be given their ordinary and usual meaning and should be construed in context and, if the language is clear and unambiguous, there is no need for interpretation, nor is it necessary to resort to other indicia of regulatory or legislative intent; and

2. An administrative agency's interpretation of its own regulations is generally given great weight by the courts, and a reviewing court must defer to an agency's interpretation of a regulation involving its area of expertise, unless the interpretation flies in the face of the clear language and purpose of the interpretive provision. The relevant inquiry is whether the interpretation offered by the agency is reasonable in light of the language and purpose of the regulation.

Id. at 167-168.

2. *Kahn v. Medical Board*:

The *Margarito* ruling is in line with other California cases revoking licenses for the actions of employees and/or agents when the public welfare is at stake. In *Kahn v. Medical Bd.* (1993) 12 Cal. App. 4th 1834 (*"Kahn"*), the California Court of Appeals upheld a Medical Board of California's finding that Dr. Kahn ("Kahn") violated California Bus. & Prof. Code §§ 2271, 2234, 2264 and 17500 (false advertising) when he (1) held out his sister as a California licensed physician on his office signage (knowing that she was only licensed in Pakistan and not in California); and (2) employed and advertised another individual as a physician's assistant when, in fact, that individual did not hold this license.

Kahn argued that he was misled into believing that his employee was licensed as a physician's assistant, however, Kahn did not affirmatively check to see if this employee was licensed. *Id*. at 1844. The Court of Appeals held that the language of the statute clearly and unambiguously permitted disciplining Kahn (pursuant to Cal. Bus. & Prof. Code §2264) **without a showing of knowledge or intent** to employ an unlicensed person. *Id*. at 1844-1845. [emphasis added]. The Court stated "the "manifest objective" of section 2264 is "the **protection of the public** from certain forms of treatment by unlicensed, and presumably unqualified persons." *Id*. at 1844 (citing *Newhouse v. Bd. Of Osteopathic Examiners* (1958) 159 Cal. App. 2d 728, 734) [emphasis added].

The Court also held that there was sufficient evidence that Kahn violated Cal. Bus. & Prof. Code § 17500 when he falsely advertised the employ of a female physician when she was not employed or licensed. *Id*. at 1846. The Court stated that, even though section 17500 is a criminal statute, it falls within the category of offenses known as public welfare offenses that do not require criminal intent. *Id*. Sections 17500 and 2271 can be violated through negligence under the standard of "which is known, or which by the exercise of reasonable care, should have been known . . . " *Id*.

3. ***Aantex Pest Control Company v. Structural Pest Control Board*:**

Again, the case of *Aantex Pest Control Company v. Structural Pest Control Board* (1980) 108 Cal. App. 3d 696 ("*Aantex*") supports the *Margarito* decision. In *Aantex*, plaintiff Aantex Pest Control's exterminator's license was revoked (pursuant to California Bus. & Prof. Code § 8647) following an administrative hearing where Aantex Pest Control was found to have violated the Economic Poisons Act and also negligently used a poisonous exterminating agent. *Id*.

Aantex Pest Control's managing partner argued that it did not know about his employees' possession and use of a banned extermination chemical. *Id*. at 700-701. Nevertheless, the Court of Appeals held that there was no requirement that the culpable conduct was willful in order to invoke the statutory sanction and that the evidence supported a finding of negligence against Aantex Pest Control. *Id*. at 703-704. The Court held:

> "It has been long recognized that **statutory "public welfare" offenses require neither guilty knowledge nor intent**. Thus although ordinarily an innocent employer cannot be held liable for the misconduct of an employee, such an employer will nonetheless be held accountable whenever the offense involved consists of a general public welfare regulation."

Id. at 702-703. [emphasis added]

These three (3) cases exemplify the principle that knowledge and/or intent are not required to hold an individual (licensed and charged with protecting the public welfare) liable for work related statutory violations by the licensee's employees or agents. For example:

- As a licensed surveyor, you will be liable (disciplinary action and possible civil liability) if your licensed employee or licensed subordinate fails to properly file a record of survey when required pursuant to Cal. Bus. & Prof. Code § 8762, et seq.;

- You will be liable if your licensed employee or licensed subordinate fails to properly label and sign, stamp, seal or approve a map, plat, report, description or other document pursuant to Cal. Bus. & Prof. Code § 8761;

- You will be liable if you fail to verify the credentials of an employee or subordinate claiming to hold a professional license pursuant to Cal. Bus. & Prof. Code § 8708;

- You will also be liable for false advertising, pursuant to Cal. Bus. & Prof. Code § 17500, if you hold an employee or subordinate out as a licensed surveyor when they are not actually licensed. This false advertising can include signage, employee directories, employee business cards, letterhead, etc.

These are just a few examples of when a professional land surveyor may be liable for the statutory violations by his/her employees or agents. There are an infinite number of examples possible, however, the point is that liability extends even if the licensed surveyor lacked intent or knowledge of the actions of the employee or subordinate. While depriving a professional of his livelihood because of a single unauthorized act of misconduct by a sophisticated employee (who may also be licensed) may seem harsh, there is a clear and valid public policy reason for this rule. Protecting the public is paramount and California cases uphold license revocation where "public welfare" is at stake.

Special thanks to attorney Michael Partos of the law firm Cozen O'Conner for allowing the author to use his article "A Lesson Learned In The Boxing Ring: If Your Employee Violates State Regulations, You May Be The One Fighting To Keep Your Professional License" published in the Orange County Business Journal on November 22, 2010 as the basis for this article.

END.

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