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Chapter 23: Extending Qualified Immunity to Marriage and Family Therapy Schools

Alexis Klein

Code Section Affected

Civil Code § 43.8 (amended).

AB 164 (Smyth); 2008 STAT. Ch. 23.

I. INTRODUCTION

Imagine a therapist, employed by a professional school, who trains individuals to counsel members of the community. This therapist and professor finds his job rewarding because he prepares others to help strengthen and repair family relationships. In addition to providing guidance in the classroom, he oversees a clinic where students and fellow colleagues offer counseling to the community. His job requires that he conduct regular evaluations of students and colleagues' clinical work and progress in the classroom. Now imagine a student or colleague brings a lawsuit for defamation in response to feedback provided as part of the mandatory evaluation process. In order to protect members of Marriage and Family Therapy Schools from this very scenario, Assembly Member Smyth introduced Chapter 23.¹

Chapter 23 protects Marriage and Family Therapy Schools by providing the schools and their members² qualified immunity in the educational and hiring process.³ Marriage and Family Therapy Schools are now among the list of protected schools under California law and are thus no longer vulnerable to civil actions regarding communications intended to aid in the hiring and evaluation process.⁴ Through their members and graduates, the schools provide mental

1. See SENATE FLOOR, COMMITTEE ANALYSIS OF AB 164, at 3 (May 15, 2008) (“[Chapter 23] provides that . . . immunities extend to any person for a communication of information in the possession of that person to any marriage and family therapy school.”).

2. Members of Marriage and Family Therapy schools include professors, board members, and students. See SENATE FLOOR, COMMITTEE ANALYSIS OF AB 164, at 3-4 (May 15, 2008) (noting that professors, supervisors, and students should be granted immunity).

3. *Id.*; see also *Hassan v. Mercy Am. River Hosp.*, 31 Cal. 4th 709, 718, 74 P.3d 726, 730 (2003) (holding section 43.8 of the California Civil Code protects entities as well as individuals).

4. CAL. CIV. CODE § 43.8 (amended by Chapter 23). The existing code section protects: [A]ny hospital, hospital medical staff, veterinary hospital staff, professional society, medical, dental, podiatric, psychology, or veterinary school, professional licensing board or division, committee or panel of a licensing board, the Senior Assistant Attorney General of the Health Quality Enforcement Section[,] . . . peer review committee, quality assurance committees[,] . . . or underwriting committee.

Id. § 43.8 (West Supp. 2008).

health care to the public; it is therefore “important . . . to obtain full and frank information about prospective students/trainees.”⁵

Indeed, members of the California Association of Marriage and Family Therapists (CAMFT) believe the legislation will “increase consumer protection by ensuring that evaluators of the students and professors” are able to provide honest feedback in the hiring and training of therapists.⁶ This will benefit the trainees and eventually those receiving counseling, namely, California families.⁷

II. BACKGROUND

Section 43.8 of the California Civil Code (section 43.8) provides qualified immunity to listed persons and entities⁸ for “communication[s] intended to aid in the evaluation of the qualifications, fitness, character, or insurability of a practitioner of the healing or veterinary arts.”⁹ Because communications are protected, section 43.8 shields those listed against defamation lawsuits.¹⁰ To understand why Marriage and Family Therapy Schools have been incorporated into this section of the Civil Code, it is helpful to explore who Marriage and Family Therapists are and the case law interpreting section 43.8.

A. *Marriage and Family Therapists (MFTs) and Schools*

MFTs are counselors trained to help people with interpersonal relationships.¹¹ The State of California licenses MFTs and statutorily prescribes the scope of their practice.¹² MFTs must complete a two-year master’s degree program¹³ and

5. Letter from Cameron Smyth, Assembly Member, Cal. State Assembly, to Arnold Schwarzenegger, Governor, Cal. State (May 29, 2008) (on file with the *McGeorge Law Review*).

6. Letter from Catherine L. Atkins, Staff Counsel, and Mary Riemersma, Executive Dir., Cal. Ass’n of Marriage and Family Therapists (CAMFT), to Dave Jones, Assembly Member, Cal. State Assembly (Dec. 26, 2007) [hereinafter CAMFT Letter] (on file with the *McGeorge Law Review*).

7. *Id.*

8. See *Hassan*, 31 Cal. 4th at 713, 74 P.3d at 727 (“We conclude that the privilege applies to *entities*, and that the privilege is qualified.” (emphasis added)).

9. CAL. CIV. CODE § 43.8 (West Supp. 2008).

10. See *Hassan*, 31 Cal. 4th at 721, 74 P.3d at 733 (“[T]he legislative record shows that, when it first enacted section 43.8, the Legislature understood that the privilege would protect medical practitioners against defamation . . .”).

11. California Association of Marriage and Family Therapists, *Why Use a Marriage and Family Therapist?*, <http://www.camft.org/scriptcontent/index.cfm?displaypage=WhatIsMFT/whyUseMFT.html> (last visited Oct. 31, 2008) (on file with the *McGeorge Law Review*). MFTs also “diagnose and treat the mental disorders and emotional problems of individuals, couples, families, and groups.” *Id.*

12. See *id.* (“Marriage and family therapists are licensed by the State of California. They must undergo extensive education, training, clinical fieldwork and pass two rigorous exams to demonstrate professional competency.”). The scope of MFTs’ practice is found in the CAL. BUS. & PROF. CODE § 4980.02 (West 2003).

13. MFTs may also complete a related doctoral degree. See CAL. BUS. & PROF. CODE § 4980.40 (“[MFTs] shall possess a doctor’s or master’s degree . . .”).

3,000 hours of practical experience.¹⁴ Marriage and Family Therapy Schools provide classroom and experiential training to individuals seeking licensure as an MFT.¹⁵ Both students and professors are evaluated as part of their participation in the school, which includes feedback from those receiving therapy.¹⁶ Because students participate in experiential learning, supervisors also provide feedback on a regular basis.¹⁷

B. Qualified Immunity and Its Applicability—The Hassan Decision

Last year, the California State Legislature incorporated the California Supreme Court's 2003 decision in *Hassan v. Mercy American River Hospital*¹⁸ into section 43.8.¹⁹ Specifically, the Legislature amended the statute to clarify the interpretation of the immunity granted under section 43.8.²⁰

Dr. Hassan, a physician employee of Mercy American River Hospital (Mercy), filed suit because his personnel records were released to another medical facility.²¹ Mercy received a request for information regarding Dr. Hassan and responded by releasing documents to the potential employer, including letters concerning his residency and a summary of a phone conversation between Mercy and another former employer hospital.²² Dr. Hassan claimed that the materials were derogatory and initiated an action for libel against Mercy.²³

The California Supreme Court held that the material was privileged under section 43.8 because it was intended to aid in the evaluation of Dr. Hassan.²⁴

14. See *id.* § 4980.43(a)-(a)(3) ("Prior to applying for licensure examinations, each applicant shall complete . . . [a] minimum of 3,000 hours completed during a period of at least 104 weeks. . . . Not more than 1,700 hours of supervised experience completed subsequent to the granting of the qualifying master's or doctor's degree."); California Association of Marriage and Family Therapists, What is a Marriage and Family Therapist?, <http://www.camft.org/scriptcontent/index.cfm?displaypage=WhatIsAnMFT/WhatIsAnMFT.html> (last visited Jan. 3, 2009) (on file with the *McGeorge Law Review*) ("Requirements for licensure include a related doctoral or two-year master's degree, passage of a comprehensive written and oral examination and at least 3,000 hours of supervised experience.").

15. See CAL. BUS. & PROF. CODE § 4980.40 (prescribing the training MFTs are to receive, including "applied psychotherapeutic techniques, assessment, diagnosis, prognosis, and treatment of premarital, couple, family, and child relationships, including dysfunctions, healthy functioning, health promotion, and illness prevention").

16. See CAMFT Letter, *supra* note 6 ("This amendment is specifically aimed at MFTs in training, as well as those who teach at MFT graduate programs. . . . [C]ommunity members have a right to assurances that they can provide forthright information to the school about the professor . . .").

17. See *id.* (discussing supervisors' role in evaluations).

18. 31 Cal. 4th 709, 74 P.3d 726 (2003).

19. See CAL. CIVIL CODE § 43.8 (amended by 2007 Stat. Ch. 36) (incorporating the holding in *Hassan*, 31 Cal. 4th 709, 74 P.3d 726).

20. See *id.* ("Nothing in this section is intended in any way to affect the [*Hassan* decision], holding that subdivision (a) provides a qualified privilege.").

21. *Hassan*, 31 Cal. 4th at 714, 74 P.3d at 728.

22. *Id.*

23. *Id.*

24. *Id.* at 724, 74 P.3d at 734. The court also held that the privilege applies to both persons and entities under section 43.8. *Id.* However, this aspect of the decision was not explicitly incorporated into the statute. CAL.

More importantly, the court interpreted the statutory language to grant qualified, rather than absolute, immunity to the individuals exchanging information.²⁵ Thus, communications are only protected if the “communicator acts with a subjective purpose or goal to help or assist in the evaluation,” but not if his or her intent was malicious.²⁶ If the person seeking immunity under section 43.8 “knew the information was false or otherwise lacked a good faith intent to assist in the . . . evaluation,” he or she is not immune from liability.²⁷

III. CHAPTER 23

Chapter 23 extends qualified immunity to “any person” for “communication[s] intended to aid in the evaluation of the qualifications, fitness, character, or insurability of a practitioner” to Marriage and Family Therapy Schools.²⁸ As a result, Marriage and Family Therapy Schools now receive the same protection as other professional schools under California law.²⁹

IV. ANALYSIS

Chapter 23 protects communications with and among members of Marriage and Family Therapy Schools³⁰ regarding an employee, or potential employee, by eliminating a cause of action and monetary liability when information is exchanged without malice.³¹ Thus, a therapist in training may not bring suit against a Marriage and Family Therapy School or any individual for information exchanged³² regarding the trainee if the information was intended to aid in the evaluation or hiring process through the school.³³

CIV. CODE § 43.8(c) (West Supp. 2008).

25. *Hassan*, 31 Cal. 4th at 722-23, 74 P.3d at 734. Section 47 of the civil code grants absolute immunity to listed entities. CAL. CIV. CODE § 47 (West Supp. 2008). In *Hassan*, Mercy argued that section 43.8 provides absolute immunity to hospitals and that the courts should follow the reading of section 47. 31 Cal. 4th at 723, 74 P.3d at 734.

26. *Hassan*, 31 Cal. 4th at 718, 720, 74 P.3d at 731-33 (“In the context of communication privileges, malice has been described as ‘a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy, or injure another person.’” (quoting *Agarwal v. Johnson*, 25 Cal. 3d 932, 944, 603 P.2d 58, 66 (1979))).

27. *Id.* at 724, 74 P.3d at 734.

28. CAL. CIV. CODE § 43.8 (amended by Chapter 23).

29. See *supra* note 4 and accompanying text.

30. Based on case law interpreting the statute as applied to other persons and entities, the communications protected are those among members of Marriage and Family Therapy Schools, and with previous employers of applicants, and the applicants themselves. See *supra* Part II.

31. See CAL. CIV. CODE § 43.8 (amended by Chapter 23) (including Marriage and Family Therapy schools among those receiving qualified immunity in certain circumstances); *Hassan*, 31 Cal. 4th at 718, 720, 724, 74 P.3d at 731-32, 734 (holding qualified immunity protection requires the absence of actual malice under section 43.8).

32. Information may be exchanged verbally or in writing. See *Hassan*, 31 Cal. 4th at 714, 74, P.3d at 728 (involving a law suit for libel); *Ellenberger v. Espinosa*, 30 Cal. App. 4th 943, 947, 36 Cal. Rptr. 2d 360, 361 (4th Dist. 1994) (involving a law suit for slander).

33. See CAL. CIV. CODE § 43.8 (amended by Chapter 23) (“[T]here shall be no monetary liability . . . and no cause of action for damages . . . against[] *any person* on account of the communication of information . . .”

CAMFT alerted the California Legislature of the need for statutory protection.³⁴ Chapter 23 is intended to protect consumers of mental health care³⁵ by preempting litigation involving Marriage and Family Therapy Schools.³⁶ According to CAMFT, Chapter 23 will allow “evaluators of mental health professionals to be honest and candid in their assessments and appraisals” of other professionals because it eliminates the fear of civil action regarding the information exchanged.³⁷ Because information will be exchanged freely and openly, CAMFT believes that schools will be able to better discern which individuals are truly qualified and suitable MFTs.³⁸ By “removing unethical, ineffective, or inferior mental health professionals,” the consumer will benefit by receiving therapy from a qualified professional.³⁹

V. CONCLUSION

Because Chapter 23 grants qualified immunity, only time, and further interpretation of section 43.8 by the courts, will illustrate whether the new law actually protects Marriage and Family Therapy Schools.⁴⁰ To the extent Chapter 23 allows a free flow of information during the hiring and training process of MFTs, it has likely accomplished its goal of protecting those who must evaluate up-and-coming medical professionals.⁴¹ Such protection will lead to more effective counseling for all Californians.⁴²

(emphasis added)). In *Ellenberger v. Espinosa*, a dentist filed suit against former patients and the state for, *inter alia*, slander. 30 Cal. App. 4th at 947, 36 Cal. Rptr. 2d at 361. The court of appeals found that the patients’ statements to the Dental Board regarding the dentist’s fitness for continued licensure were protected, and “[t]o find otherwise would deter patients from expressing legitimate complaints regarding doctor’s services for fear that the doctors would initiate defamation actions against them.” *Id.* at 952, 36 Cal. Rptr. at 365.

34. See generally CAMFT letter, *supra* note 6 (“On behalf of the 30,000 members of the California Association of Marriage and Family Therapists, we urge you to support AB 164.”).

35. *Id.*

36. See generally, *e.g.*, SENATE FLOOR, COMMITTEE ANALYSIS OF AB 164 (May 15, 2008) (lacking discussion of litigation involving Marriage and Family Therapy Schools).

37. *Id.*

38. See *id.* (“[Chapter 23 will help] aid[] in the evaluation of the qualifications, fitness, character, [and] insurability of students who are training to become mental health practitioners, or professor working within the graduate schools.”).

39. *Id.*

40. See generally *Hassan v. Mercy Am. River Hosp.*, 31 Cal. 4th 709, 74 P.3d 726 (2003) (holding that communications made by a hospital to another facility regarding a potential employee are privileged).

41. See CAMFT Letter, *supra* note 6 (“There is a need for consumer protection by allowing the evaluators of mental health professionals to be honest and candid in their assessments and appraisals of those professionals without fear of legal action and/or other retaliatory measures.”).

42. See *id.* (“[Chapter 23] will increase consumer protection by ensuring that the evaluators of the MFT students and professors [can] speak freely without the fear of reprisal.”).