

POLICY NUMBER 7: SUMMARY OF CASE LAW FOR PURPOSE OF CLARIFYING GROUNDS FOR RPF/CERTIFIED SPECIALIST DISCIPLINARY ACTION UNDER RESOURCES CODE, SECTION 778(b)

The failures of responsibility which subject a RPF or Certified Specialist (CRM) to “Disciplinary Action” (Pursuant to PRC, 778) are summarized as below, to provide general reference and guidance only. CURRENT APPLICABLE CODES AND CASE LAW TAKE PRECEDENCE.

1. Deceit is either:

- (a) The suggestion, as a fact, of that which is not true, by one who does not believe it be true; or,
- (b) The assertion, as a fact, of that which is not true, by one who has no reasonable grounds for believing it to be true; or,
- (c) The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or,
- (d) A promise, made without any intention of performing it. Civil Code, Section 1710.

Fraudulent Deceit: “One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damages which he thereby suffers.” Civil Code, Section 1709.

Deceit Upon the Public: “One who practices a deceit with intent to defraud the public, or a particular class of persons, is deemed to have intended to defraud every individual in that class, who is actually misled by the deceit.” Civil Code, Section 1711.

2. Fraud is a bad faith, dishonest or overreaching act done with intent to deprive another of his right, or in some manner to do a person an injury. It includes all surprise, trick, cunning, dissembling and unfair ways by which another is cheated. As distinguished from gross negligence, it is always intentional.

Actual Fraud. See Deceit above with addition of:

(e) Any other act fitted to deceive.
Civil code, Section 1572.

3. Incompetence is a demonstrated lack of ability, skill, or knowledge to perform professional functions. Such lack may be demonstrated by a single and specific incident or by a series of lesser failures in performance. This is not to say that a single honest failing in performing his/her duties constitutes incompetence in a RPF or Certified Specialist’s (CRM) practice. Because of the difficulty in defining incompetence, performance standards are established by expert witnesses and relate to specific instances, time and place.

4. Material Misstatement of Fact is a misstatement that would be likely to affect the decision of the administrative agency or reasonable person in the transaction in question. In contracts, material facts are those which constitute substantially the consideration of the contract, or without which it would not have been made. For purposes of the Forest Practice Act and Code Section 4583.5 in particular, a material misstatement in a Timber Harvesting Plan or a report submitted to the Department would thus include any misstatements which would be likely to affect the Department's decision with respect to the Timber Harvesting Plan or report.

"A 'misrepresentation' is 'material' if it would be likely to affect the conduct of a reasonable man with reference to the transaction in question." Costello v. Roer (1946) 77 Cal.App.2d 174, 175 Pp.2d 65.

5. Misrepresentation is a conduct or a representation contrary to fact made by a RPF or Certified Specialist (CRM), under circumstances in which a reasonable RPF or Certified Specialist (CRM) would not have made the representation. There need not be actual or constructive intent to deceive. Misrepresentation can occur when a RPF or Certified Specialist (CRM) holds himself/herself out to be specially qualified, when in fact the RPF/Certified Specialist (CRM) is not; it may also occur when a RPF or Certified Specialist (CRM) knowingly acts on an insufficient basis of readily available information commonly accepted by a reasonable and prudent by the RPF/Certified Specialist (CRM) community in making a representation.

Negligent Misrepresentation:

- (a) The respondent must have made a representation as to a past existing material fact;
- (b) The representation must have been untrue;
- (c) Regardless of respondent's actual belief, the representation must have been made without any reasonable ground for believing it to be true;
- (d) The representation must have been with the intent to induce plaintiff to rely upon it;
- (e) The plaintiff must have been unaware of the falsity of the representation; he must have acted in reliance upon the truth of the representation and he must have been justified in relying upon the representation.
- (f) And, finally as a result of his reliance upon the truth of the representation, the plaintiff must have sustained damage. Book of Approved Jury Instructions (BAJI), 12.45.

6. Gross Negligence is an extreme departure from the prudent standards of conduct or performance, which may be established by expert witnesses. It is the exercise of so little care that it justifies the belief that the person was indifferent to the interests and welfare of other people or natural resources. Gross negligence does not require actual or constructive intent.

“The intentional, conscious failure to do a thing that is incumbent upon one to do, or the doing of a thing intentionally that one ought not to do.” Pilot Industries v. Southern Bell Tel. & Tel. Co., D.C.S.C., F.Supp. 356, 362.

“The exercise of so slight a degree of care as to raise a presumption of conscious indifference to the consequences. A finding a gross negligence is made by applying an objective test: If a reasonable person in the defendant’s position would have been aware of the risk involved, then the defendant is presumed to have had such an awareness.” People v. Soledad (1987, 5th Dist) 190 Cal.App.3d 74, 235. Cal.Rptr. 208.

Gross – great; absolute; exists in its own right, and not as an appendage of another thing of all measure; beyond allowance; not to be excused; flagrant; gross carelessness.

Negligence – “Negligence is the doing of something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent wpuld do, under circumstances similar to those shown by the evidence. It is the failure to use ordinary or reasonable care. Ordinary or reasonable care is that care which persons of ordinary prudence would use in order to avoid injury to themselves or others under circumstances similar to those shown by the evidence. [You will note that the person whose conduct we set up as a standard is not the extraordinary cautious individual, not the exceptional skillful one, but a person of reasonable and ordinary prudence.]” BAJI 3.10.

Actionable Negligence: “[A] legal duty to use due care, breach of that duty, and a proximate or legal casual connection between the breach and plaintiff’s injuries.” E.F. Hutton & Co. v. City National Bank (1983, 2nd Dist) 149 Cal. App. 3d 60, 196 Cal. Rptr. 614).

7. CODE SECTIONS NOTED IN FELONY CRITERIA, 14 CCR §1613 that may be substantially related to the duties of a RPF or Certified Specialist (CRM):

(a) Public Contract
Code

Section 10422 Corrupt performance of official act. "Any officer or employee of the department who corruptly performs any official act under this chapter to the injury of the state..."

Section 10423 Corruptly permitting violation of contract; felony. "Any person contracting with the state by contract who corruptly permits the violation of any contract made under this chapter..."

(b) Business and Professions
Code

Division 7 – Part 2 – Preservation and Regulation of
Competition

(c) Health and Safety Code

Division IX, Part I,
Explosives

8. Failure of Fiduciary Responsibility may be tied to Grounds for Disciplinary Action.

Fiduciary Responsibility – A relation subsisting two persons in regard to a business, contract, or piece of property, or in regard to the general business or estate of one of them, of such a character that each must repose trust and confidence. It may involve an agreement where a person delivers a thing to another on the condition he will restore it to him. Violation of fiduciary responsibility may arise from recklessness (inadequate records, etc.). It differs from fraud which is willful.

(Fiduciary Responsibility –
Duty)

"In performing professional services for a client, a [forester/certified specialist] has the duty to have that degree of learning and skill ordinarily possessed by reputable [foresters/certified specialists], practicing in the same or a similar locality and under similar circumstances." It is the [forester's/certified specialist's] "duty to use the care and skill ordinarily used in like cases by reputable members if his or her profession practicing in the same or a similar locality under similar circumstances, and to use reasonable diligence and his or her best judgment in application of his or her learning, in a effort to

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accomplish the purpose for which he or she was employed. A failure to fulfill such duty is negligence: BAJI 6.37.

Note: A felony conviction could occur when a contractor received payment and does not pay for materials or labor rendered – the word “fraudulent” is not mentioned in this statute. Federal or out-of-state codes may also not refer to fraud in some situations.