

Avoiding Malpractice: *Spotting Licensing & Employment Issues for Criminal Practitioners*



Co-Sponsored by the
CCCBA Criminal & Employment Sections

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Full-Service Labor & Employment Law Firm

We handle all matters related to labor and employment, including associated practice areas

- ✓ Employee Representation*
- ✓ Business & Union General Counsel
- ✓ Professional Licensing Defense
- ✓ Criminal Defense, Restraining Orders, Victims Rights

** Focus of this Ethics/Competence MCLE*

Webinar's Focus

1. Competence & Ethics Requirements
2. Brief Overview of Associated Practices
 - a) Professional Licensing
 - b) Employment Issues
3. Best Practices
4. Conclusion & Questions



Competence & Ethics



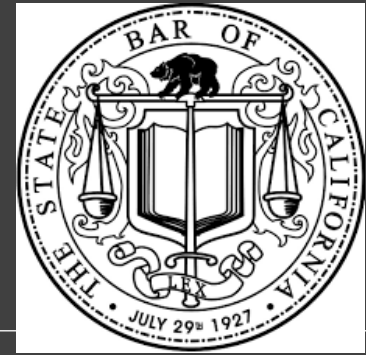
Rules of Professional Responsibility



Rule 1.1: Competence

- (a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.
- (b) For purposes of this rule, “competence” in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably* necessary for the performance of such service.
- (c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer may provide competent representation by (i) **associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes*** to be competent, (ii) acquiring sufficient learning and skill before performance is required, or (iii) **referring the matter to another lawyer whom the lawyer reasonably believes*** to be competent.
- (d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably* necessary in the circumstances.

What does this mean?



- High standard for State Bar discipline, e.g. intentional, reckless, gross negligence, repeated...
 - A single act of ordinary negligence does not suggest a lawyer is unfit to practice. (*Lewis v. State Bar* (1981) 28 Cal. 3d 683)
 - “Negligent legal representation, even amounting to legal malpractice, does not establish a [competence rule] violation. (*In Matter of Torres* (2000) 4 State Bar Court 138, 149)

Impact of IN-competence

- However, the State Bar fields a high number of complaints about attorney competence, *or IN-competence*, which can trigger an investigation
- Incompetence can also lead to:
 - ✓ termination of services
 - ✓ bad reputation in the legal community
 - ✓ loss of referrals
 - ✓ social media complaints (Facebook, LinkedIn, Yelp)



Professional Licensing



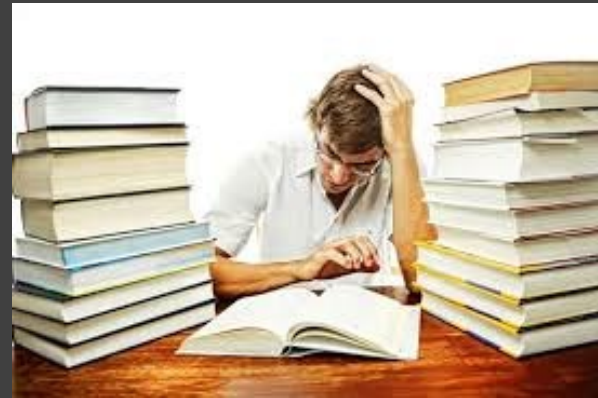
The Who: Who Is Affected?



- Who isn't?! California has over 50 regulatory agencies
- Nearly 30% of jobs require licensure
- Both State and local entities* have licensing requirements
 - ✓ Physicians
 - ✓ Nurses
 - ✓ Dentists
 - ✓ Psychiatrist
 - ✓ Counselor/Therapist
 - ✓ Social Workers
 - ✓ Real Estate Agent
 - ✓ Child Care Providers
 - ✓ Attorneys
 - ✓ Teachers & Educators
 - ✓ Respiratory Therapists
 - ✓ Accountants/CPA's
 - ✓ Chiropractor
 - ✓ Insurance Agents
 - ✓ Pharmacists
 - ✓ Physicians Assistant
 - ✓ Psych Tech
 - ✓ Veterinarian
 - ✓ Engineers
 - ✓ Contractors
 - ✓ Trades/Crafts
 - ✓and on and on...

Future Applicants

- Include Current Students & Future Applicants
 - higher education & trade/vocational students
 - intent on seeking future professional licensure, e.g. law school



Researching Licensure

CA Business Portal

<https://businessportal.ca.gov/registration-permits/professional-licensure-guide/>

List of professions featured on the DCA, DIR, & other State agencies, with links to boards, bureaus, & offices that administer licenses & certifications.



Dept. of Consumer Affairs License Search

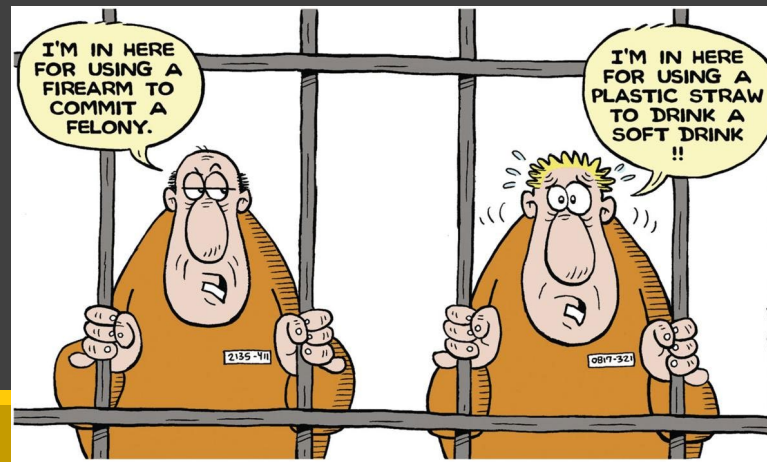
<https://search.dca.ca.gov/>

Verifies a license issued by the DCA by type. Reflect if a license is current, expired, or subject to disciplinary action. Certain professions & bureaus are excluded, including Cannabis, Contractors, Real Estate, & Education.

The image shows the 'dca SEARCH' form. It has a blue header with the 'dca SEARCH' logo. The form contains four search fields: 'FIRST NAME', 'LAST NAME', 'LICENSE NUMBER', and 'BUSINESS NAME', each with a 'Search' button. Below these is a 'BOARD OR BUREAU' dropdown menu with a list of options including 'Accountancy, Board of', 'Acupuncture Board', 'Architects Board, California', 'Automotive Repair, Bureau of', 'Barbering and Cosmetology, Board of', 'Behavioral Sciences, Board of', 'Cemetery and Funeral Bureau', and 'Chiropractic Examiners, Board of'. At the bottom is a 'LICENSE TYPE (RANK) - MAXIMUM 10 ITEMS' dropdown menu with options like 'Accountancy, Board of', 'Certified Public Accountant', 'CPA - Corporation', and 'CPA - Partnerships'.

What Criminal Acts Affect a Current License?

- Generally, conviction only & not mere arrest/detention
 - Permit significant due process guarantees
 - Judgment following a guilty or nolo plea or a finding of guilt
 - Arrests that do not result in a conviction do not trigger any agency action
 - Felonies & misdemeanors
- Exceptions to every rule so it is best to research the specific entity



What Criminal Acts Affect a Current License?

- Each agency has different rules & focus, i.e. fitness for duty
 - Accountant & financial crimes
 - Attorney & fraud
 - Medical professional & sex crimes
 - Medical professional & crimes of violence
- Imperative to consider the type crime during plea negotiations

Pursuant to [Title 16, California Code of Regulations, Section 1444](#), a conviction or act shall be considered to be substantially related to the qualifications, functions or duties of a registered nurse if to a substantial degree it evidences present or potential unfitness of a registered nurse to practice in a manner consistent with the public health, safety or welfare. Such convictions or acts shall include but not be limited to those involving the following issues:

- ◆ Assaultive or abusive conduct including, but not limited to, those violations listed in [subdivision \(d\) of Penal Code Section 11160](#).
- ◆ Failure to comply with any mandatory reporting requirements.
- ◆ Theft, dishonesty, fraud, or deceit.
- ◆ Any conviction or act subject to an order of registration pursuant to [Section 290 of the Penal Code](#).

What Criminal Acts Affects an Applicant?

- For Applicants, significant reform in 2018 to begin on July 1, 2020 (AB 2138)
 - 1) Denial is only for a conviction & not mere arrest/detention (B&P 7.5, 480(d))
 - 2) Denial is only for convictions within the preceding 7 years and that “substantially relate to the qualifications, functions, or duties of the biz/profession” (B&P 480(a))
 - a) except for a serious felony as defined in PC 1192.7 or PC 290(d)(2), (3), or
 - b) a felony, financial conviction “directly & adversely related to fiduciary qualifications, functions, or duties of the biz or profession” for certain professions, e.g. accountants, contractors, PI’s, real estate
 - 3) Denial cannot be based on a conviction if there is a a certificate of rehabilitation or made a showing or rehabilitation under P&B 482 (B&P 480(b))
 - 4) Denial cannot be based on dismissal or expungement (B&P 480(c))
- Boards have individual criteria for what “substantially relates” to biz (B&P 481)
- Also reforms re: requesting criminal history & appeal process for denial



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Gavin Newsom, Governor, State of California | Business, Consumer Services and Housing Agency | Department of Consumer Affairs

CRIMINAL ACTION REPORTING FORM

Pursuant to Section 802.1 of the California Business and Professions Code
(see page 2 for specific information)

REPORTING LICENTATE INFORMATION

Name:		License No.	
Address:		Phone No.	
		Date of Birth	
Defense Counsel:		Phone No.	
Address:			

INDICTMENT OR INFORMATION FILED CHARGING A FELONY

<input type="checkbox"/> Indictment	<input type="checkbox"/> Information Filed	Date of Arrest		Court Case No.	
Name/Address of Arresting Agency		Name/Address of Court			
Charges (Code/Section/Description)					

CRIMINAL CONVICTIONS

<input type="checkbox"/> MISDEMEANOR	<input type="checkbox"/> FELONY
<input type="checkbox"/> JURY VERDICT	<input type="checkbox"/> PLEA (<input type="checkbox"/> NOLO CONTENDERE/NO CONTEST; <input type="checkbox"/> GUILTY)
Name/Address of Court	Date of Conviction
	Court Case No.

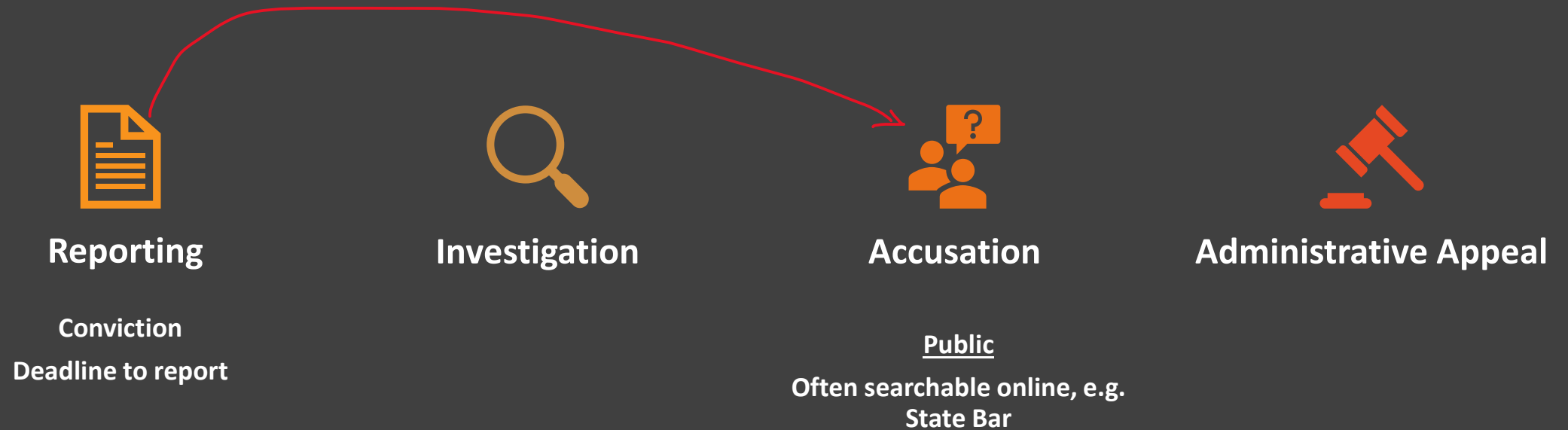
Reporting Requirement

- Required to report all convictions
 - misdemeanor or felony
 - applies to current licensee & applicants

Applicants should be aware that the Board receives information regarding actions that have been dismissed or expunged, and the application forms advise applicants to disclose all prior convictions including those that have been dismissed or expunged. **If in doubt as to whether a conviction should be disclosed, it is best to disclose the conviction on the application.** Please be aware, the Board will be notified of all future criminal actions through subsequent reports from the DOJ and/or the

- Each agency has its own regulations
- Often, a short reporting deadline, i.e. 30 days from conviction
- Important to draft a thoughtful report with rehabilitative or mitigating information***

How it Works: Process & Procedure



How to Avoid Discipline: Early Mitigation

- Early mitigation helps during an investigation, negotiation, and administrative appeal ... and, staying employed

DUTY STATEMENT		SHADED AREA TO REFLECT RECLASS POSITION NUMBER ONLY	
		RPA	EFFECTIVE DATE:
CDCR INSTITUTION OR DEPARTMENT California Correctional Health Care Services	POSITION NUMBER (Agency – Unit – Class – Serial)		
UNIT NAME AND CITY LOCATED Nursing Services	CLAS Sup		
PROPOSED INCUMBENT (if known)	CHIEF		

LICENSURE REQUIREMENT

Active California Registered Nursing License in good standing.

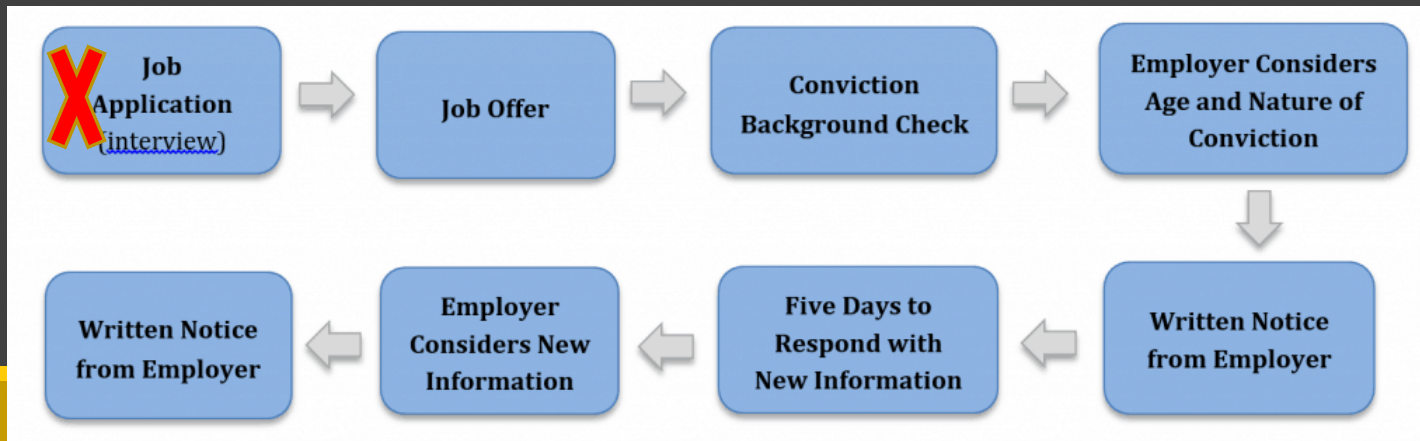
- Advise clients to participate in early mitigation to demonstrate evidence of rehabilitative measures
 - Rehab/AA
 - Anger management
 - Additional training or classes

Employment Matters



Do I Have to Tell a Potential Employer?

- In Jan. 1, 2018, CA enacted “Ban the Box” legislation
- Employers with 5+ employees generally cannot inquire into an applicant’s criminal history before making a “conditional” job offer
- A “conditional offer” can be contingent on a background check later
- There is an “appeal” process of sorts if denied a job



Do I Have to Inform My Current Employer?

- Unlike licensing, your client may have to report a Conviction and Arrest
- Each employer is different as to reporting
 - Some are any police contact, e.g. cops, some are convictions only, and some are silent
 - Review the CBA/MOU or Handbook/internal rules



Reporting Criminal Acts: Current Employee

- Think about how, when, & what to report
 - a meeting or in writing
 - how detailed should the report be
 - should your client have a representative
 - how quickly to report
- Be mindful of self-incrimination & how the information may be used in the future

The image shows a screenshot of a web-based incident report form for Deluca Financial. The form is titled "DELUCA FINANCIAL Incident Report" and is divided into several sections. The "EMPLOYEE DETAILS" section includes fields for NAME, DEPARTMENT, and PHONE NUMBER. The "DESCRIPTION OF INCIDENT" section includes a "Location:" field, a "Date:" field, a "Time:" field, and a "Police Notified:" section with "Yes" and "No" radio buttons. There is a large text area for "Incident Details" with a note: "(How the incident happened, factors leading to the event, and what took place. Be as specific as possible.)". Below this, there are two columns: "Incident Causes:" and "Follow Up Recommendations:". At the bottom, there is a "REPORTED BY:" section with fields for Name, Position, and Department. A small disclaimer at the bottom left states: "Incident reports are necessary for documenting details of the occurrence while they are most present in the minds of the witnesses and incident reporter. The information that is included in the report can be useful for decision-making on future incidents, identify behavioral patterns and identifying larger issues. To maintain a safe and healthy work environment, a thorough investigation should be undertaken following an incident in order to initiate corrective actions."

DELUCA FINANCIAL Incident Report			
EMPLOYEE DETAILS			
NAME			
DEPARTMENT			
PHONE NUMBER			
DESCRIPTION OF INCIDENT			
Location:			
Date:	Incident Details (How the incident happened, factors leading to the event, and what took place. Be as specific as possible.)		
Time:			
Police Notified: <input type="checkbox"/> Yes <input type="checkbox"/> No			
Incident Causes:		Follow Up Recommendations:	
REPORTED BY:		Name:	
		Position:	
		Department:	



Can I Get in Trouble or Fired?

Conviction ... YES!

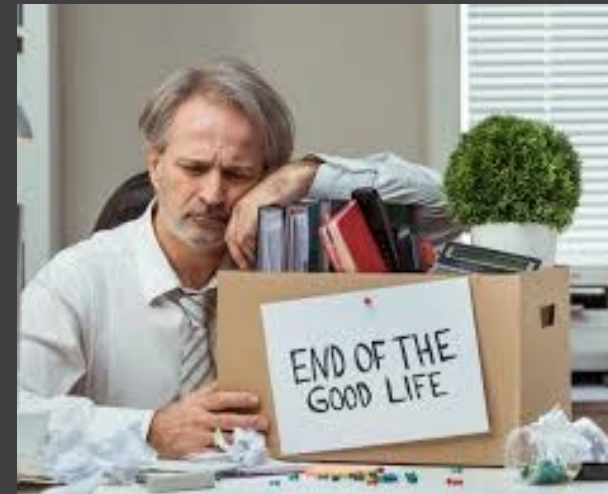
Arrest only ... it depends!

Can I Get in Trouble or Fired?

- Under Labor Code 432.7, an employer cannot use to determine any “condition of employment”
 - 1) any record of an arrest or detention that did not result in a conviction
 - 2) any record for referral or participation in diversion
 - 3) any conviction dismissed or ordered sealed
 - 4) any juvenile conviction
- A “condition of employment” includes hiring, promotion, termination, apprenticeship program, or other training program
- Significant liability for a violation, including a misdo

Can I Get in Trouble or Fired?

- Exceptions to the rule
 - an employer can inquire about an arrest while out on bail or OR'd pending trial (432.7(a)(1))
 - a peace officers are exempt (432.7(b))
 - investigations into the underlying conduct can occur
- Practical considerations for Arrests only
 - get an NCF from the DA to ensure employer cannot discipline & compliant with 432.7
 - inform the client that an investigation into the conduct might happen





Workplace Investigations

- the conviction and/or underlying actions
- not a requirement before discipline/termination
- often a difference between public & private employers
- there is **NO RIGHT TO REMAIN SILENT!**
- But, you can have a representative!



Appeal Process or Settlement

- Private Employees
 - Generally At-Will & no right to appeal
 - Review Handbook or internal rules & regulations
- Public Employees
 - Guaranteed Due Process rights
 - Skelly Hearing or pre-disciplinary response
 - Some type of administrative appeal is generally required
- Negotiation a lesser discipline or separation agreement

How to Avoid Discipline: Early Mitigation

- Like criminal cases & licensure matters, mitigation and early rehabilitative steps are important
 - Rehab/AA
 - Anger management
 - Additional training or classes
 - Apology letters



Victims & Witnesses of Crime

- Under Labor Code 230 & 230.1*, an employer cannot discharge, discriminate or retaliate against an employee:
 - who is a victim of crime & for taking time to appear in court
 - who is victim of domestic violence, sexual assault, or stalking for taking time off from work to obtain or attempt to obtain a TRO/RO or other injunctive relief to help ensure the health, safety, or welfare of the victim or their child
 - who is victim of domestic violence, sexual assault, or stalking for taking time off to seek medical attention; to obtain services from a DV shelter , program, or rape crisis center; to obtain psychological counseling related to an experience of domestic violence, sexual assault, or stalking; or to participate in safety planning and take other actions to increase safety from future domestic violence, sexual assault, or stalking, including temporary or permanent relocation.*
- Significant liability for a violation, including a misdemeanor

COVID-19 Employment Issues

- Families First Coronavirus Response Act
- Health & Safety Concerns
- Termination & Separation Agreements
- Discrimination, e.g. Age
- Remote Work Issues



Best Practices



We find the defendant innocent, Your Honor, but his lawyer guilty.

Should You Care?



- 1) Vast number of clients impacted
- 2) Different crimes affect different types of licensure & employment conditions
- 3) Reporting requirements to licensing agencies & employer
- 4) Investigations can be public & can result in loss of licensure, loss of job, loss of profession, & loss of money
- 5) Early mitigation is highly advantageous for both licensing & employment issues
- 6) Oh yeah, you want to be **COMPETENT!**

Best Practice

- ✓ Add professional licensure to intake process for current licensees & applicants
- ✓ Know the types of crimes that impact licensure for pleas
- ✓ Discuss job duties & requirements with clients for pleas
- ✓ Advise clients there is often duty to report to licensing agency and employer, especially after a conviction
- ✓ Will there be an internal investigation? Does the client need representation?
- ✓ Will early mitigation can assist across the board
- ✓ Seek professional guidance or refer the matter to an experienced attorney

Questions & Thank You!



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