Practicing Across State Lines – An Interesting but Limited Example?

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A California statute (part of the Psychology Licensing Law) allows psychologists who are licensed at the doctoral level in another state or territory of the United States* (or a Canadian province*) to offer and provide psychological services in California for up to thirty calendar days per year. This law provides generous opportunities to the many licensed psychologists in all of the states and provinces outside of California* and provides greater choice for consumers of psychological services in California. The statute allows these licensed psychologists from the rest of the country and Canada to come to California and to consult with and treat patients (or provide other psychological services) for thirty calendar days per year. Visiting psychologists come to California for a wide variety of reasons – whether connected to academic, consultation, forensic, clinical, facility-based, or not for profit services and activities.

With the increased recognition and acceptance of psychological and mental health services being delivered via telehealth (online, or perhaps by telephone), the benefits and opportunities provided by this California statute, both to consumers and to practitioners, are seemingly magnified. Suppose an enterprising psychologist (with a doctoral degree) in another state or province* was to strategically augment his or her practice by offering and providing online psychological services to California consumers. Thirty calendar days per year seems generous enough to allow many California consumers to be served in that period of time, given the number of clients that can be "seen" in a "calendar day." Short term therapy or psycho-educational services might often be the reality, while some patients could seemingly be "seen" (treated) more long term, so long as the hours and days are thoughtfully managed. Perhaps this entrepreneurial prowess can be repeated in other states with similarly generous laws.

Physician and mental health practitioner licensing boards generally take the position (and state laws may provide) that therapy performed via telehealth takes place where the consumer (patient) resides or is located. A question that must be asked in such situations is whether the psychologist is in any way prohibited from providing services to the patient in California via telehealth. The California statute referenced above seems clear that there is, in essence, a thirty day window where services can lawfully be offered and provided in California (without a California license). The statute makes no distinction between in person or face to face treatment and treatment via telehealth. The psychologist located and licensed in the other state or province* would of course need to be aware of the laws, if any, relating to providing services via telehealth (e.g., the delivery of psychological services) in their state or province*.

Generally, licensed mental health practitioners are able to practice their craft, which is both an art and a

science, in a manner and by a means that they deem clinically appropriate – so long as there exists no prohibition in law, regulation, or a code of ethics, and provided that they comply with any applicable laws or rules governing the specific activity – in this case, services delivered via telehealth. If there was a governing telehealth law in the practitioner's state or province* , there would be a question as to whether the practitioner must comply with that law's provisions when lawfully providing services in California (based upon the patient's location), or whether the practitioner would have to comply with California's telehealth law. The answers to these questions are sometimes complex and not easily determined. For example, and of note, California's telehealth statute applies to health care providers who are licensed under Division 2 (Healing Arts) of the California Business and Professions Code.

What is the law in your state regarding licensees from other states or locations practicing in your state without a license as a clinical social worker, marriage and family therapist, professional mental health counselor, or whatever the mental health license may be? Is this California law pertaining to psychologists something that other licensed professions should be concerned about or should they be pursuing similar statutory provisions? Is there too much state regulation of online services provided by licensed mental health practitioners? Does excessive state regulation of online therapy impede patient access, stifle innovation, and limit economic opportunities for practitioners?

PRIVILEGED COMMUNICATIONS -WAIVER

"Privilege" involves the right (and perhaps the duty) to withhold testimony or records in a legal proceeding, and the privilege generally survives the death of the patient. The psychotherapist-patient privilege (which protects confidential communications and information) can be waived by the patient (generally the holder of the privilege) either expressly or through the patient's conduct. Some patients are not aware that certain of their actions may result in a waiver of the privilege, and psychotherapists (and those other named licensees covered by a testimonial privilege) know, or should know, that patients may need some education regarding the scope of the privilege, its implementation, and how it all works). The most appropriate person to provide that education is the patient's attorney. Nothing prohibits the informed therapist from providing the patient with valuable information regarding the privilege, such as how the practitioner will react and respond to being served with a subpoena for records or for testimony.

Under California law and I trust the laws of other states, no person may be held in contempt of court for failure to disclose information claimed to be privileged unless he or she has failed to comply with an order of a court that he or she disclose such information. The relevance of such a law for psychotherapists is that their initial refusal to comply with a duly issued and served subpoena for records, for example, is typically not a violation of law nor does it constitute a contempt of court. Rather, the failure (or initial hesitancy) to comply may simply be seen as an exercise of the practitioner's duty not to disclose confidential and privileged patient information. This duty to protect a patient's private and confidential information is usually satisfied by claiming or asserting that the information sought is privileged. Patients can waive the privilege, sometimes unwittingly, in a variety of ways and in a variety of circumstances – so care must be taken.

One area where care must be taken is when a couple is being treated – or perhaps a family. One member of the couple or family may waive his or her privilege, but the general rule, in essence, is that a joint holder of the privilege cannot waive the privilege for another joint holder. The primary way that the privilege is waived is by the express consent of the patient. Since the patient is the holder of the privilege, the patient can claim/assert the privilege or waive it. A guardian or conservator of the patient may be the holder of the privilege in some cases and the personal representative of the patient may be the holder of the privilege when the patient is dead.

Consent to disclosure can be manifested by any statement or other conduct by the holder of the privilege, including a failure to claim the privilege in any proceeding in which the holder has legal standing and the opportunity to claim the privilege. Another way that the patient may waive the privilege is by voluntarily disclosing a significant part of the otherwise confidential information or communications to a third party. In such a case, the information so disclosed would no longer be considered to be confidential or privileged. Of course, the person or entity seeking to introduce such information into the court proceeding would have to learn of the patient's disclosure of the information to one or more third parties. A disclosure that is itself privileged (such as a disclosure to one's lawyer or physician) is not a waiver of the privilege.

The most common waiver experienced by practitioners is where a patient has brought a lawsuit against a third party and has alleged that he or she has suffered emotional or psychological harm as a result of the defendant's negligent or otherwise wrongful conduct . Because the patient likely has a limited notion of the legal concept of privilege, it is often necessary and always wise to make sure that the patient has spoken with his or her attorney to find out whether the privilege is being waived or claimed. Generally, the therapist will follow the wishes of the patient's attorney, even if the claim of privilege is incorrectly asserted. The best way to find out the wishes of the patient's attorney is for the practitioner to communicate with the attorney directly – rather than through the patient. If there is particularly sensitive or embarrassing information in the records, it may be possible for the patient's attorney to obtain a protective order from the court in order to prevent disclosure of the particular information.

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