SCOPE OF COMPETENCE/SCOPE OF LICENSE

written by Richard Leslie | March 31, 2022

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SCOPE OF COMPETENCE/SCOPE OF LICENSE

May a licensed marriage and family therapist, psychologist, LCSW, or a licensed professional clinical counselor provide a patient or client with some kind of nonsexual massage or touch to relieve pain or discomfort? If they do, are they necessarily liable in a negligence action brought by an aggrieved patient? May a licensed professional clinical counselor diagnose and treat any mental disorder, regardless of the severity of the disorder? May a licensed marriage and family therapist or a licensed mental health counselor perform psychological testing with their clients? May licensed mental health professionals provide "life coaching" to clients? Do licensed psychologists have a broader scope of license than licensed professional clinical counselors, LCSWs or licensed marriage and family therapists? These questions all relate to the joint concepts of scope of license and scope of competence.

When discussing scope of license (sometimes referred to as scope of practice), I am referring to the statutory authority granted by the state in the licensing law for the particular profession. As was explained in a California Attorney General's opinion that I read many years ago related to licensed marriage, family, and child counselors, *in the beginning, there were physicians*. Physicians historically have had the broadest scope of license that exists – that is, they were statutorily granted the right to treat any kind of blemish, deformity, disfigurement, ailment or disorder, whether physical or mental. Thereafter, the legislature granted to other health care professions the right to practice what was previously within the exclusive province of the physician, but granted a more limited scope of license or practice to the newly regulated profession. These new licensees, whatever their particular licensure, were expected to practice within the scope of the authority granted in the licensing law.

With respect to mental health practitioners, the "turf wars" between the professions in the various states have created somewhat of a legislative and legal morass. Although the scope of license sections of the various professions vary in language, there is very little difference in some states in the actual practices between licensed clinical social workers, licensed marriage and family therapists, licensed psychologists, and licensed professional clinical counselors, despite efforts by some to assert otherwise. All of these professionals treat or provide a wide range of mental health and counseling services to adults, children, couples, families, and groups. All of these professions may be permitted to practice psychotherapy and may diagnose and treat mental disorders – and be reimbursed by federal and state programs or by private insurers for doing so. While there will be variances with this reality in some

states because of the specifics of state law, these similarities in practice are the case in many states.

While physicians have a broad scope of license, as described above, they are generally not allowed to practice outside the scope of their competence, as determined by their education, training, or experience. Thus, while physicians may be permitted by state law to perform surgery, most physicians do not perform such services because it is outside the scope of their competence. Likewise, while mental health professionals may be permitted by state law to diagnose and treat mental disorders, state law will usually attempt to restrict the scope of the services actually rendered by providing that licensees are "guilty" of unprofessional conduct for acting outside the scope of their competence – as established by one's education, training, or experience. Thus, while one may be acting within the scope of the license, they may also be acting in a manner that can result in a disciplinary action by a licensing board (e.g., for gross negligence or incompetence) or that subjects the actor to civil liability for negligence, gross negligence, or incompetence.

Suppose that during the course of therapy a licensed mental health practitioner provided some kind of physical touch or massage to relieve a patient's shoulder pain. Such acts would likely be outside the scope of the practitioner's license, and the practitioner would be subject to disciplinary action by the licensing board. The practitioner might also be subject to a criminal penalty for practicing medicine or physical therapy without a license. But, is the practitioner necessarily liable in a civil suit for monetary damages where the plaintiff alleges physical and/or emotional harm as a result of the practitioner's negligence? Arguably, there should be no liability unless the plaintiff proves that the practitioner performed the services in a negligent manner or in bad faith. There may be other theories of liability that the plaintiff can establish, but on the issue of negligence, the practitioner may prevail if it is demonstrated that he or she provided competent care or that the plaintiff did not in fact suffer injuries or harm as a result of the massage or touch. The practitioner's malpractice insurer will likely deny coverage for the claim or the lawsuit if the practitioner did not perform services that the insurer agreed to insure (e.g., was not practicing the profession covered by the policy).

The issue of psychological testing has historically been a battleground for the professions, with the psychology profession maintaining that this is their exclusive turf. In reality and in practice, that is not the case in many states. As a practical matter in some states, if a licensed mental health practitioner is competent, by reason of his or her education, training, or experience, he or she may perform psychological testing as part of the diagnosis or assessment of the patient being treated. Additionally, in some states, marriage and family therapists and other licensed professionals may lawfully perform psychological testing as a part of their role as custody evaluators, or in some other capacity and for some other purpose. Then there is the issue of the legality or appropriateness of doing psychological testing with patients who are referred to the practitioner not for treatment purposes, but for testing purposes only. State law and other legal authority may limit the right to do such psychological testing for certain professions in particular states – thus, practitioners need to first ascertain the legal/regulatory situation in their state of practice.

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CONFIDENTIALITY – COOPERATION WITH CHILD ABUSE INVESTIGATORS

While mental health practitioners must be mindful of the duty of confidentiality and must instinctively lean toward resisting (at least initially) disclosures without the patient's signed authorization, it is also useful for practitioners to know well the exceptions to confidentiality – both those that are required and those that are permissible. When some form of disclosure is mandated by law, the decision of the practitioner (assuming awareness) is relatively easy. When the disclosure is permissive, it does not necessarily follow that the practitioner should or will disclose without a written authorization. Those decisions regarding disclosure may be more difficult. A hopefully interesting example appears below.

The primary and most significant exceptions to confidentiality are found in the laws dealing with the mandates for mental health practitioners to report known or reasonable suspicion (or a similar standard) of child abuse, elder abuse, and dependent adult abuse. Connected with these duties is the issue of whether or not a practitioner, after making such a report, is required or permitted to cooperate with the investigator of the abuse, who seeks further information and perhaps appears (either announced or unannounced) at the office of the practitioner who made the report. In one state, for example, the law provides that information relevant to the incident of child abuse or neglect *may* be given to an investigator from an agency that is investigating the known or suspected case of child abuse or neglect.

What is the law in your state with respect to providing information to the investigator after you have filed the mandatory report? I have counseled psychotherapists involved with this issue for many years – and each situation is different. For example, if the therapist were treating the alleged perpetrator of physical or sexual abuse that was revealed and reported during the course of therapy, I would more often than not advise the therapist not to cooperate with the investigator. Of course, if the therapist discusses the matter with the patient and/or with the patient's attorney, the patient may want to sign an authorization allowing the therapist to communicate with the investigator. While the law in a particular state may permit communication with the investigator without the patient's written authorization, it may not mandate it. In that regard, my view has been that the reporting laws are a significant intrusion into confidentiality and privacy (although well-accepted at this time), but that there is no duty to help officials with an investigation.

If the practitioner is treating the victim of the abuse, such as a child, the practitioner may be more inclined to cooperate with the investigator. Again, even though the practitioner would be permitted to cooperate with the investigator pursuant to the applicable law, that isn't always the wisest decision. In some cases, the written authorization of both parents might be desired and easy to get, while in other cases, the written authorization of only one of the parents may be necessary. In some states, depending upon the age of the child and the circumstances involved (such as, being the victim of child abuse), only

the child’s authorization may be needed. There may be times when a practitioner may choose to provide additional information to the investigator without the patient’s authorization – but the practitioner must first be certain that state law allows this to be done.