

# Scope Of Competence / Scope Of License

written by Richard Leslie | May 24, 2016

## **Avoiding Liability Bulletin - October 2011**

... May a licensed marriage and family therapist or a licensed professional clinical counselor provide a patient or client with some kind of massage or touch to relieve pain? 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 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 a client? May licensed mental health professionals provide "life coaching" to clients? Do licensed psychologists have a broader scope of license than licensed professional clinical counselors or licensed marriage and family therapists? These questions all relate to the joint concepts of scope of license/scope of competence.

When one discusses scope of license (sometimes referred to as scope of practice), he or she is necessarily 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 licensed profession. These new licensees, whatever their particular licensure, were expected to practice strictly 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 will 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 may be 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 brain 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 the licensee is “guilty” of unprofessional conduct for acting outside the scope of his or her competence – as established by his or her education, training, or experience. Thus, while one may be acting within the scope of his or her license, he or she may be acting in a manner that can result in a disciplinary proceeding by the 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 a licensed mental health practitioner provided, during the course of therapy, some kind of physical touch or massage to relieve a patient’s 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. 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 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 psychologists 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 perform psychological testing as a part of their role as custody evaluators, or in some other capacity and for some other purpose. This raises 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 a particular state – and practitioners need to ascertain the legal/regulatory situation in their state of practice.