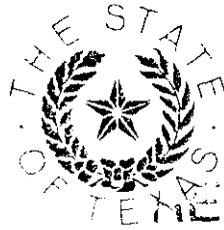


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EXAMINERS OF
PSYCHOLOGISTS

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APR 07 94

Opinion Committee

March 30, 1994

20-686

SJS

FILE # ML-23185-93
I.D.# 25698

Honorable Dan Morales
Attorney General of the State of Texas
Supreme Court Building
P. O. Box 12548
Austin, Texas 78711-2548

ATTENTION: Sarah Shirley, Opinions Committee

RE: Request for Attorney General's Opinions.

Dear Sir:

By a majority vote, the Texas State Board of Examiners of Psychologists (the Board) has asked that I make a request for Attorney General's Opinions on the following two issues:

- I. Whether a person who practices psychotherapy, hypnosis for health care purposes, hypnotherapy, or biofeedback without a license to practice psychology in Texas (an Unlicensed Practitioner) violates the Psychologists' Certification and Licensing Act (the Act).
- II. Whether the Board is authorized to take enforcement action, including injunctive relief, against an Unlicensed Practitioner.

DISCUSSION

- I. Whether a person who practices psychotherapy, hypnosis for health care purposes, hypnotherapy, or biofeedback without a license to practice psychology in Texas (an Unlicensed Practitioner) violates the Psychologists' Certification and Licensing Act (the Act).

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The Texas Legislature amended several provisions of the Act which became effective on September 1, 1993. Among these amendments were changes in section 20 ("License Required to Practice)" and section 2 ("Definitions") of the Act.

Prior to its revision in 1993, section 20 of the Act provided:

After December 31, 1970, no person shall represent himself as a psychologist or psychological associate within the meaning of this Act unless he is certified and registered under the provisions of the Act.

As amended in 1993, section 20 of the Act now provides:

A person may not engage in the practice of psychology or represent the person as a psychologist or psychological associate within the meaning of this Act unless the person is licensed or certified under this Act or is exempt from this Act. [Emphasis added]

The amendment of section 20 of the Act would appear to have expanded the Board's jurisdiction. In its prior form, section 20 prohibited persons from representing themselves as psychologists or psychological associates unless they were licensed or exempt under the Act. Thus, persons who practiced psychology without a license but did not hold themselves out to the public as being psychologists or psychological associates did not violate section 20's prohibition. In its current form, however, section 20 would appear to change this. Now, persons who do not hold themselves out to the public as being psychologists or psychological associates would nevertheless appear to violate section 20 if they engage in the practice of psychology without a license.

Turning to the issue of what constitutes engaging in the "practice of psychology", the 1993 amendments of section 2 of the Act are relevant. Added to the definitions set forth in section 2 was the following sentence in subsection 2(c): "The practice of psychology includes the use of ... psychotherapy, hypnosis for health care purposes, hypnotherapy, and biofeedback" [Emphasis added]. Thus, a reading of section 20 and subsection 2(c) together indicates that the Board's licensing and certification jurisdiction would appear to have been expanded to include the Unlicensed Practitioners as a specifically enumerated class.

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Does the Act provide a general exemption for Unlicensed Practitioners from the Act's licensing and certification requirements? It would appear that no such exemption exists. Section 22 ("Exemptions") might exempt particular Unlicensed Practitioners, however, who are:

1. employed by a governmental agency [subsection 22(a)(1)];
2. employed by a public school district [subsection 22(a)(2)];
3. employed by certain institutions of higher education [subsection 22(a)(3)];
4. pursuing certain courses of study under supervision [subsection 22(b)];
5. licensed in certain professions [subsection 22(c)];
6. acting as a member of the clergy [subsection 22(d)]; or
7. employed by or working on behalf of charitable nonprofit organizations [subsection 22(e)].

None of these specific exemptions, however, would appear to exclude the Unlicensed Practitioners as a class from the Board's apparent expanded jurisdiction over them under the amended provisions of section 20 and subsection 2(c) of the Act.

The Board has received several public comments from Unlicensed Practitioners, individually and collectively, who strongly oppose the proposition that the amended Act grants the Board jurisdiction over the licensing, certification, and regulation of them. These comments have taken the form of appearances at an open meeting of the Board, telephone calls to the staff of the Board, visits to the staff of the Board, and letters to the Board. Attached to this request is a copy of one letter received by the staff of the Board from an organization which represents many hypnotherapists. It is provided for your reference and consideration as an example of the comments we have received from hypnotherapists.

Additionally, Senator Carl Parker has expressed views concerning this issue which are reflected in the copies of two letters attached to this request. Our staff has verified that these letters were sent by Senator Parker, although we never received the originals of them. We submit Senator Parker's comments to you for your consideration in rendering the opinion we request.

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To date, the Board has not established an administrative construction of this issue. Its new General Counsel has advised that Unlicensed Practitioners appear to be subject to the Board's jurisdiction by reason of the 1993 amendments to the Act discussed above, and has further advised that Unlicensed Practitioners, as a class, probably are not generally exempt from the Act's licensing and certification requirements. General Counsel's advice, however, has not yet been adopted, either formally or informally, by the Board as its position on this issue.

The Board would note that it has not considered hypnotherapists to be psychologists at any point in the past. While some psychologists use psychotherapy, hypnosis, hypnotherapy, and biofeedback as techniques in their practices, it has not been the case that Unlicensed Practitioners have been treated as psychologists by the Board or by the psychology profession generally.

The Board is very concerned about this issue. It has never exercised jurisdiction over Unlicensed Practitioners in the past and questions its authority to do so now. Further, Unlicensed Practitioners have never been regulated by a Texas state agency in the past. The Unlicensed Practitioners question the necessity of obtaining licenses to practice psychology when they do not wish to practice psychology as they understand it, but only wish to practice psychotherapy, hypnosis for health care purposes, hypnotherapy, or biofeedback. The educational, experience, examination, and fee requirements to obtaining a license or certification to practice psychology under the Act and the rules of the Board are substantial. Accordingly, the Board requests an Attorney General's Opinion on whether Unlicensed Practitioners are in violation of the Act.

II. Whether the Board is authorized to take enforcement action, including injunctive relief, against an Unlicensed Practitioner.

Should the Attorney General's Opinion on the first issue presented be in the affirmative, the Board hereby requests an Attorney General's Opinion on whether the Board has clear legal authority to proceed with enforcement actions against Unlicensed Practitioners who are not currently licensed or certified under the provisions of the Act and the rules of the Board. Again, it should be emphasized that the practices of psychotherapy, hypnosis for health care purposes, hypnotherapy, and biofeedback have not been regulated in the past by the Board or by any other Texas state agency.

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Consequently, the Board is wary of taking what might be perceived as precipitous and drastic enforcement actions against Unlicensed Practitioners who are not licensed or certified as psychologists or psychological associates. The Board's enforcement actions might include, but would not be limited to, seeking restraining orders and injunctions (see, e.g., section 24 of the Act) to prohibit the further practices of Unlicensed Practitioners who are not licensed or certified under the provisions of the Act and the rules of the Board.

Finally, I have enclosed a copy of the Act and the rules of the Board to you for the Attorney General's consideration of the two issues presented. Please do not hesitate to call me if the Board or its staff may be of assistance to you in rendering the opinions requested above. Thank you for your attention to these matters.

Respectfully submitted,

Rebecca E Forkner

Rebecca E. Forkner
Executive Director/Investigation,
Compliance & Enforcement
Division Manager

REF:ja

Enclosures

cc: Michael D. Chisum, General Counsel of the Board ✓
Roberta L. Nutt, Ph.D., Chair and Board Member
Kenneth Kopel, Ph.D., Vice-Chair and Board Member
Susan S. Askanase, B.S., Board Member
Ron Brandon, M.S., Board Member
Lorraine E. Breckenridge, Ph.D., Board Member
Lawrence S. Schoenfeld, Ph.D., Board Member
John M. Sell, Ph.D., Board Member
Emily G. Sutter, Ph.D., Board Member
Senator Carl Parker
Gerald Schoonover
Richard Taylor