

Conducting Forensic Examinations on the Road: Are You Practicing Your Profession Without a License?

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Psychiatrists and other mental health professionals retained in civil or criminal litigation are frequently required to travel to a state in which they are not licensed to perform assessments and offer testimony. Adverse professional and legal consequences may await the unwary peripatetic forensic expert. Failure to address local practice requirements may result in disqualification to testify as well as civil and criminal liability, professional disciplinary action, and denial of liability insurance coverage. In this article, the authors address preventative measures to avoid charges of practicing without a license when the forensic expert crosses state lines.

Forensic psychiatry and psychology are burgeoning subspecialties. One factor driving this increasing interest in forensic practice is the recent economic upheaval in psychiatric and psychological practice. However, litigation is often alien terrain for even the most experienced psychiatrist or psychologist, who may fail to grasp the irreconcilable conflict between the therapeutic and forensic roles.¹ The psychiatrist's and psychologist's professional compass, oriented by everyday

clinical practice, may fail to provide reliable direction in the legal setting.

Apart from this important professional disorientation, there is also the potential for geographic dislocation. A psychiatrist or psychologist who is retained in civil or criminal litigation may be required to travel to another state to perform an assessment or to offer testimony where she or he is not licensed to practice. Most psychiatrists and psychologists are unaware of the adverse professional and legal consequences that may await them at the end of this road well traveled. If they fail to address local licensure requirements, they may not be permitted to testify, may incur civil and criminal liability, or may face professional disciplinary action, all of which may be reported to the

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National Practitioner Data Bank (for all health care practitioners).² They may also suffer denial of liability insurance coverage for suits brought while practicing without a license. This is not a matter to which the party who retained the expert can consent. If expert witnesses are required by statute to comply with state licensure laws, and failure to comply with these laws is a criminal offense, then the rule that a party may not give valid consent to a criminal act (e.g., one cannot consent to be murdered) precludes a party from consenting to the nonapplication of licensure laws to an expert witness.

These outcomes may strike the unwary psychiatrist or psychologist acting in a forensic rather than a therapeutic realm as unfair and draconian. Although there are scattered reports of only a small number of forensic experts having encountered out-of-state licensure challenges, the more forensic experts respond to interstate demands for their services, the more likely that these issues will arise. Thus, psychiatrists and psychologists not licensed where they perform forensic services may experience increased exposure to charges of practicing without a license.

Medical and Psychological Practice Regulations

The language used in defining the practice of medicine and psychology for the purpose of regulation varies from state to state. However, there are elements common to each state. For example, all definitions of the practice of medicine include some variation of diagnosis and treatment. The Maryland Medical Practice Act,³ typical of such acts, contains the

following definition: "'Practice medicine' means to engage, with or without compensation, in medical: (I) Diagnosis; (ii) Healing; (iii) Treatment; or (iv) Surgery." The purpose of an independent psychiatric examination is to arrive at a clinical formulation or a diagnostic conclusion. Thus, performing an independent psychiatric examination should be considered the practice of medicine, even if no doctor-patient relationship is created nor any treatment provided.

Not all acts constituting the practice of medicine by physicians not licensed in that state, however, are necessarily proscribed by state regulatory schemes. State medical licensure laws contain a number of exceptions permitting the practice of medicine without an in-state license. For example, the Maryland Medical Practice Act⁴ provides for the following relevant exceptions for out-of-state physicians who may temporarily practice medicine without a license:

(2) A physician licensed by and residing in another jurisdiction, while engaging in consultation with a physician licensed in this State;

(4) A physician who resides in and is authorized to practice medicine by any state adjoining the State and whose practice extends into this State, if: (i) The physician does not have an office or other regularly appointed place in this State to meet patients; and (ii) The same privileges are extended to licensed physicians of this State by the adjoining state.

The exception for a physician licensed in another state who consults with a physician licensed in the state is not difficult to satisfy, but it may add expense for the retaining attorney and raise undesired questions about the believability of the nonresident "consulting physician." Most

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states allow a physician who is licensed in another jurisdiction to conduct an examination under the supervision of or in consultation with a locally licensed physician. Whenever possible, the simplest solution is to have the out-of-state litigant travel to the forensic psychiatrist's office for the examination.

Many states make exception for physicians from adjoining states to practice medicine through reciprocity arrangements. However, this provision should be confirmed rather than assumed before entering an adjoining state to conduct an assessment without a license. Generally, states allow physicians from adjoining states to conduct examinations under the supervision of or in consultation with a locally licensed physician or some similar arrangement. The Maryland exception for physicians practicing in adjoining states that extend into the state where they are offered as an expert seems likely to present fewer problems in the forensic setting. These issues need to be addressed independently of the testifying issues. Physicians with multi-state practices in adjoining states are obligated to address these issues for the conduct of their non-forensic practice.

The practice of psychology, like the practice of medicine, is defined in relatively similar fashion from state to state. Typical of the definition of psychological services is the Texas statutory scheme, which includes "evaluation, prevention, and remediation of psychological, emotional, mental, interpersonal, learning, and behavioral disorders of individuals and groups."⁵ Thus, according to the commonly understood usage of this lan-

guage, evaluating the mental or emotional condition of a litigant to offer a psycho-legal opinion is the practice of psychology. Although Texas has no provision for an out-of-state-licensed psychologist to consult with a Texas-licensed psychologist, it does permit psychologists who are licensed in another state to obtain a temporary license to practice in Texas.⁶

Central to resolving the issue of out-of-state licensure is the fundamental question: do forensic activities constitute the practice of medicine or psychology? Logically, resolution of this question is fundamental to the determination of whether licensure within the particular state where the forensic functions are provided is necessary. Only if forensic activities constitute the practice of medicine or psychology is licensure a relevant issue; if licensure is not required for forensic activities, then sanctions for failing to have an in-state license oddly might befall only those who have bothered to obtain a license in their home state. Satisfying the licensure requirement of one's own state but not of another state presents lesser-order concerns than not satisfying the licensure requirements of any state. Satisfaction of that licensure requirement, only if even in one's own state, tells us that at least one agency has considered minimal requirements of education, training, and character for licensure.

If forensic activities constitute the practice of medicine or psychology, the impact of these licensing laws on expert witness qualifications is an important interrelated question. If the expert's field of expertise is subject to licensing or certification under state law, is licensing or

certification a requirement for qualification as an expert witness? There are two distinct lines of cases on the relationship between licensing laws and qualifications to offer expert testimony. One line of cases views the possession of the relevant professional license as a prerequisite to qualify as an expert witness.⁷ Under these cases the line is clear: no license, no qualification. This line of cases is consistent with the state's decision to restrict certain activities to persons who possess a license and to impose criminal penalties and injunctive relief on those who perform these activities without a license. Permitting courts to ignore these licensing schemes in qualifying experts is difficult to justify on legal or policy grounds. If brain surgery is the practice of medicine, as one might reasonably conclude, permitting a self-declared brain surgeon who is not a licensed physician to be qualified as an expert on brain surgery because the judge or jury can assess the probative value of this witness' testimony flouts the decision to restrict the practice of medicine to those who have satisfied the licensure requirements. Whereas licensure alone is not sufficient to demonstrate the requirements for an expert's competence/qualifications, the decision to require licensure for those activities is a decision that licensure is necessary for competence/qualifications. Licensure is sensibly a floor for finding an expert qualified in a field that is subject to licensure.

The other line of cases treats licensure and qualification as only loosely related. These decisions treat qualification of an expert as a question addressed to the

sound discretion of the trial judge, who may consider licensure as but one of many factors that bear on qualifications including education, skill, and experience. These cases simply relegate the absence of a license to practice in the relevant discipline to the weight rather than the admissibility of the witness' testimony.⁸ Under this line of cases, the legislative regulatory schemes for professional practice apply only when they deal directly with members of the public. Judges retain their common law authority to determine who may testify as an expert in their courts without regard to regulatory schemes that prescribe requirements for practicing these professions. To the extent that these disparate lines of cases share a common understanding of this issue, it is perhaps best expressed by the following observation of the Supreme Court of Delaware: "To the extent that licensing is necessary to qualify as an expert, the requirement extends only to the witness' ability to perform the evaluation with respect to which he or she is testifying. That is licensing is necessary to the qualification of experts only where the law requires a license to perform the evaluation that is being offered in court."⁹

In some states, at least for psychologists, the relationship between licensing laws and qualifications for forensic practice is directly addressed by statute. In Maryland, for example, only a psychologist "licensed under the 'Maryland Psychologists Act' and qualified as an expert witness may testify on ultimate issues, including insanity, competency to stand trial, and matters within a psychologist's special knowledge, in any case in any

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court.”¹⁰ A psychologist who does not possess the qualifications described in the licensing act is not qualified as an expert on a defendant’s lack of criminal responsibility.¹¹ Similarly, Illinois has a statutory requirement that makes registration as a clinical psychologist a qualification for a psychologist to testify as an expert.¹² Thus, these statutes leave little doubt that in these states psychologists offering testimony must be licensed or face disqualification and criminal prosecution.

Consultations, Record Reviews, Depositions, and Trials

Jury consultation involves neither diagnosis and treatment nor the evaluation, prevention, or remediation of a disorder; thus, it should not be considered the practice of medicine or psychology. Moreover, courts are not asked to rule on the qualifications of nontestifying jury consultants, and thus the issue of out-of-state-licensed psychiatrists and psychologists engaging in forensic practice is unlikely to arise in that setting. Similarly, acting solely as a consultant to an attorney on strategic decisions or witness preparation should not be considered the practice of medicine or psychology, as it entails neither treatment or diagnosis nor the evaluation, prevention, or remediation of a disorder. The review of medical, psychological, and other health care records to arrive at psychiatric or psychological conclusions, including diagnoses, for out-of-state depositions or trials by a psychiatrist or psychologist licensed only in another jurisdiction is less clear. Deposition or trial testimony itself is unlikely

to be considered medical or psychological practice in most states.

The real issue is the activity(s) that gave rise to that testimony. If the activity that gave rise to that testimony entails diagnosis or treatment, it should constitute the practice of medicine, and if the activity entails evaluation, prevention, or remediation of a disorder, it should constitute the practice of psychology. Thus, for example, a psychologist not licensed to practice in Texas, who is retained by the state to assess a sex offender’s potential to benefit from a treatment program, is engaged in the evaluation, prevention, or remediation of a disorder. These acts constitute the practice of psychology for which a Texas license is required. Alternatively, if these activities are performed in another state in which the psychologist is licensed and the psychologist simply presents by deposition or live testimony the results of that out-of-state practice, local licensing requirements are unlikely to preclude the admission of such testimony.¹³

These distinctions are not always applied as one might expect, however. In Virginia, for example, the “practice of clinical psychology” is statutorily defined to include “rendering expert psychological or clinical psychological opinion.”¹⁴ The definition of medical practice for physicians in Virginia does not contain any equivalent reference to forensic practice.¹⁵ Curiously, in *Fowler v. City of Manassas Department of Social Services*,¹⁶ a decision that did not make reference to the definition of the practice of psychology as including rendering expert

opinions, the Virginia Court of Appeals rejected the appellant's contention that the trial court erred by allowing into evidence the testimony of the psychologist who had conducted an evaluation without a license to practice in Virginia. The psychologist evaluated two children in a termination of parental rights suit. The appellate court stated: "We find neither authority nor need for an additional requirement that an otherwise qualified professional called as an expert witness must be licensed to practice in Virginia."¹⁷

The psychiatrist or psychologist licensed in another jurisdiction who examines a litigant without prior appropriate arrangements may not encounter difficulties at deposition. At the time of trial, however, the psychiatrist or psychologist may be challenged for violating the state's medical or psychological practice laws. In other instances, opposing counsel will challenge the unlicensed out-of-state expert through a pretrial motion.

Consequences

In one unreported case, the prosecution accused a forensic clinical social worker, offered by the defense in the sentencing phase of a capital murder case, of committing a misdemeanor by examining the defendant and collateral witnesses without an in-state clinical social work license.¹⁸ The judge "resolved" the issue by ordering the witness to evaluate the defendant and his family members. However, the order raises an interesting question whether the judge's order was valid in light of the state's licensing requirements.

If the psychiatrist or psychologist is found to have violated the licensure laws of the state where he or she is performing forensic services, civil penalties may be imposed or criminal charges filed. Penalties imposed for licensure violations are reported to the National Practitioner Data Bank. Disciplinary actions may be brought against the psychiatrist or psychologist in the state where he or she is licensed to practice.

The psychiatrist or psychologist who performs forensic services in a state in which he or she is not licensed risks suit for negligence or fraud. Although this outcome may seem far-fetched, the incidence of malpractice claims against experts is increasing.¹⁹ The risks associated with these claims are exacerbated when forensic services are performed in a state where the expert is not licensed. Professional liability insurance policies may not provide coverage for malpractice claims against psychiatrists or psychologists who are found to be practicing without a license. The Professional Liability Insurance Policy²⁰ sponsored by the American Psychiatric Association excludes "[a]ny claim arising out of a Medical Incident which took place or is alleged to have taken place while the Insured's license or certification to practice or dispense controlled substances was suspended, revoked, terminated or surrendered or from acts committed in violation of a license or permit restriction." This language appears to be fairly standard in professional liability insurance policies, excluding coverage for claims made while practicing without a license.

Risk Management

It is a relatively simple matter to avoid the anguish and turmoil of summary dismissal from a case or the professional and legal consequences of unwittingly practicing without an in-state license. Obviously, the first step is to recognize that performing an unlicensed, out-of-state psychiatric or psychological examination can have adverse professional and legal consequences. The forensic psychiatrist or psychologist should openly discuss the problem of licensure with the out of state attorney at the time of retention. The attorney, who may be unaware that potential licensure problems exist, should investigate the legal issues surrounding an unlicensed, out-of-state examination. Often a local physician or psychologist has been retained by the attorney. Although contrived, the local physician can legitimately request a consultation from the out-of-state psychiatrist, just as the local psychologist can request a consultation for the out-of-state psychologist. Some supervisory arrangements can be problematic; for example, a general physician does not have the training to supervise a psychiatrist, and a supervisory relationship arranged with a local psychiatrist could be exploited by opposing counsel as a sham transaction. Retention and consultation with an attorney alone will not be likely to meet a state's licensure exemption clause for a physician licensed in another state to practice medicine in that state.

The forensic psychiatrist or psychologist should request a copy of the relevant state practice code to study the definition

of medical or psychological practice and the relevant exceptions for out of state practitioners. Expansive definitions may include various aspects of forensic practice, thus requiring the practitioner to obtain a license or an exemption for services other than an examination. Adherence to the state's practice code will preempt the charges and complications of practicing without a license. However, merely obtaining the litigant's consent to an examination that also contains a statement that no doctor-patient relationship is being created will not immunize the psychiatrist from licensure civil and criminal penalties, as these requirements are not contractually based but stem from the state's police power to protect its citizenry from incompetent or unqualified practitioners.

If the court requests the out-of-state psychiatrist or psychologist to conduct an examination, the expert should disclose his or her licensure status and seek a ruling on the applicability of state licensing laws to the provision of the expert testimony. Similar precautions apply for psychiatric or psychological examinations conducted in out-of-state jails and prisons. Clarification of licensure issues should be sought from the corrections authorities through the licensing agency or the state's attorney general.

Conclusions

The fast-growing subspecialties of forensic psychiatry and psychology are stimulating and challenging. However, they are also full of pitfalls for the unwary. Conducting out-of-state examinations or even providing testimony without possessing a license to practice in that

state means risking adverse professional and legal consequences. The awareness that licensure problems may exist and that there are appropriate ways to conduct out-of-state examinations without incurring legal violations provides a ready tool for limiting the forensic psychiatrist and psychologist's risk exposure.

Perhaps the more perplexing questions relate to the position that courts, legislatures, and regulatory agencies should take on these issues. If satisfying these state licensing requirements is at best a revenue measure or an attempt to limit out-of-state competition while not addressing the quality of the resultant testimony, we should not ultimately expect courts to regard this issue seriously. Alternatively, if the legislature and regulatory agencies take seriously the policing of mental health professionals' forensic as well as therapeutic activities, there is reason to expect more than a *pro forma* response from the courts.

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