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ATTORNEY GENERAL OPINION NO. 79- 247

Dr. Thomas J. FitzGerald
Secretary, Board of Examiners of Psychologists
2108 W. 7th St., Suite 400
Prairie Village, Kansas 66208

Re: State Boards, Commissions and Authorities--Board
of Examiners of Psychologists--Practice of Psychology;
Board's Powers and Duties; Ethical Conduct

Synopsis: The Certification of Psychologists Act does not
authorize persons licensed under the healing arts
act to represent themselves to be psychologists
if such persons are not certified psychologists.

The Board of Examiners of Psychologists may adopt
the American Psychological Association's code of
ethics and incorporate the same by reference in the
Board's rules and regulations. Consistent with
principles of due process, the section incorporat-
ing the code should include language advising the
reader that the referenced material is available
from the Board. Further, the incorporating section
should make reference to the effective date of the
code, and should be amended to reflect the current
effective date of the code with each future edition
or revision.

No affirmative duty is imposed by Kansas statutes or
by the Board's rules and regulations requiring agencies
providing psychological services to list the certified
psychologists affiliated with such agencies in their
telephone directory advertisements.

The relationship of client and therapist, once ini-
tiated, continues until it is ended by the consent
of the parties or revoked by the dismissal of the
therapist, or until his or her services are no longer
needed. Whether a particular client-therapist rela-
tionship has terminated depends upon the facts and
circumstances in that particular case.

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Dear Dr. FitzGerald:

The Board has requested our opinion regarding a number of questions relating to the Kansas Certification of Psychologists Act, K.S.A. 74-5301 et seq., some of which were answered in Attorney General Opinion No. 79-116, published earlier this year. We will address the remaining questions in this opinion.

First, the Board inquires as to the meaning and effect of two sections of the psychologists certification act as it pertains to persons licensed under the healing arts act (K.S.A. 65-2801 et seq.). K.S.A. 74-5302(a) defines the "practice of psychology," but also includes the following language:

"Provided, however, That in all cases involving the care of the sick and ill as defined by the laws of this state, the primary responsibility devolves upon those licensed under the Kansas healing arts act, as amended."

Additionally, K.S.A. 74-5344 provides, in pertinent part:

"Nothing contained in this act shall be construed:

. . . .

"(g) to permit persons certified as psychologists to engage in the practice of medicine as defined in the laws of this state, nor to require such certified psychologists to comply with the Kansas healing arts act as amended"

In consideration of these provisions, the Board has inquired whether persons licensed under the healing arts act may practice psychology or call themselves psychologists.

Former Attorney General Vern Miller interpreted the above-quoted proviso in K.S.A. 74-5302(a) in a letter opinion dated January 31, 1972. In answer to the Board's question whether the proviso operates to preclude the practice of psychotherapy with persons suffering from mental or emotional disturbances, the Attorney General concluded that the proviso did not have that effect. He wrote, in pertinent part:

"The practice of psychology is defined by statute, . . . as the application of established psychological principles to 'problems of behavior, adjustments, group relationships, [and] behavioral modifications' Such problems are frequently occasioned by mental or emotional disturbances. To construe the term 'sick and ill' in the above proviso as including mental and emotional disturbance would result in the shifting of primary licensing and regulatory responsibility for certified psychologists from the State Board of Examiners of Psychologists, and to strip away virtually all substance from the practice of psychology which that Board was created in 1967 to supervise and oversee

"Prior to the 1967 enactment . . . psychologists were not subject to licensing and regulation by the Board of Healing Arts, insofar as the practice of psychology itself was concerned. Nothing in the 1967 enactment indicates an intention to disturb the separation of the disciplines so far as state regulatory bodies are concerned." Opinions of the Attorney General, Vol. VII, pp. 916-17.

We affirm General Miller's conclusion. In our judgment, the above-quoted proviso and K.S.A. 74-5344(g) are intended merely to assure that the practice of the healing arts and the practice of psychology, and the regulation of each discipline, shall remain separate and distinct. Moreover, neither of the above-referenced provisions makes any suggestion that a person licensed under the healing arts act may represent himself or herself to be a psychologist. Further, K.S.A. 74-5340 very plainly states that

"it shall be unlawful, without a valid, existing certificate as a psychologist issued by the board for any person to represent himself to be a psychologist as defined in section 2 [74-5302]."

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Recall, however, our opinion earlier this year relating to the "practice of psychology" by persons without a valid certificate. We stated, in pertinent part:

"There is no provision which makes it a violation of the act for a person, not a certified psychologist, to engage in the practice of psychology where there are no representations to the public of the nature set forth in K.S.A. 74-5302(b). In fact, subsection (f) of K.S.A. 74-5344 specifically authorizes the use of psychological techniques by anyone so long as the prohibited representations are not made." Attorney General Opinion No. 79-116, p. 2. (Emphasis added.)

Thus, nothing in the Kansas Certification of Psychologists Act precludes persons licensed under the healing arts act from engaging in the practice of psychology, or using psychological techniques or tools, so long as no unlawful representations are made.

You next inquire whether the Board may adopt the American Psychological Association code of ethics and incorporate the code by reference in its rules and regulations to save the Board the time and expense of the rules and regulations amendment procedure each time the APA code is revised. K.S.A. 74-5308(a) provides, in pertinent part:

"The board is hereby authorized, empowered, and directed to administer and enforce the provisions of this act, and it is hereby granted such specific powers as are necessary for the purpose of administering and enforcing the same. In addition thereto the board shall prescribe rules and is directed to enforce such rules in the following areas: (a) The board shall adopt the code of ethics of the American psychological association."

The Board has no specific statutory authority for adoption and incorporation of the code of ethics by reference, but we are aware of no provision in the certification act or in the statutes establishing the administrative rulemaking procedure, K.S.A. 77-415 et seq., prohibiting such incorporation by reference.

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Thus, it is our opinion that the Board may adopt the American Psychological Association's code of ethics and incorporate the same by reference in the Board's rules and regulations. However, consistent with principles of due process, the Board should include language in the section incorporating the code to advise the reader that the referenced material is available from the Board, thus foreclosing any constitutional objections for lack of notice of rules governing the professional conduct of certificants. Further, for the same reason, the incorporating section should make reference to the effective date of the code. The section should be amended to reflect the current effective date of the code with each future edition or revision.

The Board next inquires whether an agency providing psychological services may be listed in a "yellow pages" telephone directory under the heading designated for psychologists without listing the psychologists attached to that agency. You advise that, from time to time, persons who are not certified psychologists will place advertisements in the directory under the "Psychologists" heading by listing only the agency name, e.g., Universal Counseling Center.

As the Board is well aware, any person lacking a valid certificate who represents himself or herself to be a psychologist, i.e., holding himself or herself out to the public by "any title or description of services incorporating the word 'psychologic,' 'psychological,' 'psychologist,' or 'psychology,' and under such title or description offers to render or renders services to individuals, corporations, or the public for a fee, monetary or otherwise" is violating the law. K.S.A. 74-5340 and 74-5302(b). In our judgment, the situation you describe (persons who are not certified psychologists advertising under the "yellow pages" listing for psychologists) would constitute such a violation of Kansas law in that the directory listing "Psychologists" is a "title or description of services" by which the unlawful representation is made.

However, we find no affirmative duty imposed by Kansas statutes or by the Board's rules and regulations requiring such an agency to list the certified psychologists affiliated with the agency in its advertisements. K.A.R. 72-12-10 refers to individual and agency listings in telephone directories. Subsection (b) of that section provides, in relevant part:

"Individual listings in telephone directories are limited to name, highest relevant degree, certification status, address and telephone number. They may also include identification in a few words of the psychologist's major areas of practice; for example, child therapy, personnel selection, industrial psychology. Agency listings are equally modest."

Although the regulation requires agency listings to be as modest as individual listings, as set forth above, it imposes no specific requirement that the names of certified psychologists attached to the agency be listed in the advertisement.

Lastly, you inquire concerning the client-therapist relationship. You advise that the current APA code of ethics states that "[s]exual intimacies with clients are unethical." You further advise that the Board has had a number of inquiries whether it is unethical for a therapist to have sexual relationships with former clients. You have asked for our opinion as to what constitutes a client-therapist relationship, and when does the relationship terminate.

After exhaustive research of these questions, we have found no ready and precise answers. Frankly, a statement of the law on this question without application of the rules to a specific factual situation has little meaning. With that caveat, a statement of some general principles may provide guidance for case-by-case determinations. In answer to the question as to what constitutes a client-therapist relationship, we think the definition of a physician-patient relationship is sufficiently analogous. In 61 Am.Jur.2d Physicians, Surgeons and Other Healers, §96, the creation and nature of the relationship is defined as follows:

"A physician is under no obligation to engage in practice or to accept professional employment, but when the professional services of a physician are accepted by another person for the purposes of medical or surgical treatment, the relation of physician and patient is created. The relation is a consensual one wherein the patient knowingly seeks the assistance of a physician and the physician knowingly accepts him as a patient."

On the question of termination of the relationship, the above-referenced encyclopedic statement continues, in a subsequent section:

"It is the settled rule that one who engages a physician to treat his case impliedly engages him to attend throughout that illness, or until his services are dispensed with. In other words, the relation of physician and patient, once initiated, continues until it is ended by the consent of the parties or revoked by the dismissal of the physician, or until his services are no longer needed." 61 Am.Jur.2d Physicians, Surgeons, and Other Healers, §97. (Emphasis added.)

Accord, Collins v. Meeker, 198 Kan. 390, 402 (1967); Capps v. Valk, 189 Kan. 287, 290 (1962).

In our view, however, the APA code of ethics itself may help to provide a better answer to the questions you have raised in the context of sexual relationships between therapists and persons for whom they have rendered professional services. The legal definition of the relationship does not resolve this sensitive issue. We note, for example, in Principle 1(e) of the code, the following statement:

"As practitioners, psychologists know that they bear a heavy social responsibility because their recommendations and professional actions may alter the lives of others. They are alert to personal, social, organizational, financial, or political situations or pressures that might lead to misuse of their influence."

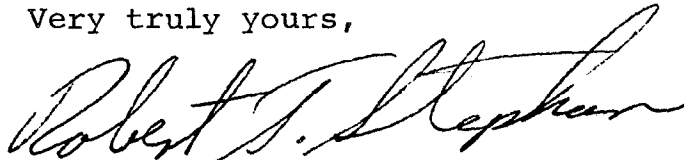
Perhaps most significant in this regard is the code principle to which we have earlier referred, Principle 6(a):

"Psychologists are continually cognizant of their own needs and of their inherently powerful position vis a vis clients, in order to avoid exploiting their trust and dependency. Psychologists make every effort to avoid dual relationships with clients and/or relationships which might impair their professional judgment or increase the risk of client exploitation." (Emphasis added.)

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Whether a particular client-therapist relationship has terminated will, in any event, and must necessarily depend upon the facts and circumstances in that particular case. Whether a psychologist may engage in an intimate personal relationship with a former client outside of the professional relationship must necessarily be a question to be answered by the psychologist, guided by his or her own conscience and by the application of ethical standards which govern his or her professional conduct.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Steven Carr
Assistant Attorney General

RTS:WRA:SC:gk