

Navigating the Legal Framework Governing the Practice of Psychology and Grievances and Lawsuits against Psychologists in Colorado

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This article is intended to provide a general overview of the laws governing the practice of psychology and common issues in legal proceedings. This article is not, and is not intended to be a complete or comprehensive recitation of the law governing the practice of psychology in Colorado, nor is it intended to provide legal advice or guidance to any person or entity. If you have questions regarding the practice of psychology in Colorado, you are encouraged to contact an attorney and/or the Board of Psychologist Examiners.

Introduction

In general, the practice of psychology in Colorado is governed by the Colorado Mental Health Practices Act³ and the Colorado State Board of Psychologist Examiners Rules.⁴ The Colorado Mental Health Practices Act, in part, defines psychologist, the practice of psychology, creates and gives certain powers to the Board of Psychologist Examiners, and defines what is or may constitute unprofessional conduct by a psychologist. To hold a license as a psychologist in the State of Colorado, a person (1) must be at least twenty-one years of age, (2) must not be in violation of any statutes governing the practice of psychology or any rules promulgated by the Board of Psychologist Examiners, (3) must hold a doctorate degree with a major in psychology, or the equivalent to such major as determined by the Board, from an approved school, (4) must have completed at least one year of postdoctoral experience practicing psychology under supervision approved by the Board, (5) must have demonstrated professional competence by passing a single, written examination in psychology as prescribed by the Board and a written, mail-in jurisprudence examination administered by the department of regulatory agencies.⁵ No person may use the title “psychologist” or the terms “psychology” and “psychological” unless he or she possesses a valid, unsuspended, and unrevoked license as a psychologist in the State of Colorado.⁶

Practice of Psychology in Colorado

In Colorado, the definition of the practice of psychology is fairly broad and encompassing. The “practice of psychology” is defined as:

the observation, description, evaluation, interpretation, treatment, or modification of behavior, cognitions, or emotions by the application of psychological, behavioral, and physical principles, methods, or procedures, for the purpose of preventing or eliminating symptomatic, maladaptive, or undesired behavior, cognitions, or emotions and of enhancing interpersonal relationships, work and life adjustment, personal effectiveness, behavioral health, and mental health.

Psychologists use any and all psychological principles, methods, and devices to consider the full range of possible causes of patients' illnesses and select and apply the appropriate treatment methods.⁷

The practice of psychology includes any acts which might fall into the definition above, such as:

- Psychological testing and the evaluation or assessment of personal characteristics such as intelligence, personality, abilities, interests, and aptitudes;
- Neuropsychological tests, assessments, diagnoses, and treatment of neuropsychological and brain disorders;
- Psychotherapy, which may include psychoanalytic, existential, cognitive, and behavioral therapies, hypnosis, and biofeedback;
- Clinical and counseling psychology - the sciences of diagnosis and treatment of mental, neurological, psychophysiological, and emotional disorder or disability, alcoholism and substance abuse, behavioral abuse including dangerousness to self or others, and disorders of habit or conduct;
- Rehabilitation psychology - the science of psychology dealing with the psychological aspects of physical illness, accident, injury, or disability and rehabilitation therefrom;
- Health psychology - the science of psychology dealing with the role of psychological factors in health and illness;
- Forensic psychology - the science of psychology that deals with the relation and application of psychological research and knowledge to legal issues, including, but not limited to, assessments of competency in civil or criminal matters, legal questions of sanity, or civil commitment proceedings;
- Organizational psychology - the science of assessment and intervention by an employee within his or her organization or by a consultant retained by such organization;
- Community psychology - the science of psychology emphasizing prevention and early discovery of potential difficulties, rather than awaiting initiation of therapy by affected individuals or groups, and which is generally practiced outside of an office setting;
- Sports psychology - the science of psychology dealing with enhancement of athletic performance utilizing principles of psychological research, assessment, and knowledge;
- Psychoeducational evaluation, therapy, remediation, and consultation; and
- Research psychology - the application of research methodologies, statistics, and experimental design to psychological data.

Psychologists may practice in a variety of settings, including but not limited to professional corporations formed for the practice of psychology.⁸ The corporation may be organized with any other person, and any person may own shares in such corporation, so long as the practice of psychology by the professional service corporation is performed by or under the supervision of a licensed psychologist.⁹ Any psychologist who is a member of the professional service corporation remains individually responsible for his professional acts and conduct.¹⁰ There are also statutory requirements regarding the insurance policies covering professional corporations for the practice of psychology. Psychologists setting up practices or professional

corporations should consult an attorney and insurance agent regarding the requirements for insurance.

The Board of Psychologist Examiners

As early as 1988, the Colorado Legislature recognized and stated that, in order to safeguard the public health, safety, and welfare, it was necessary to regulate the practice of psychology.¹¹ To forward the stated public policy, the Legislature created the Board of Psychologist Examiners.¹² The Board of Psychologist Examiners operates as part the division of registrations of the department of regulatory agencies and is made up of seven members, all of whom must be United States citizens and residents of Colorado.¹³ Three of the members of the Board must be licensed psychologists, and two of those three should be engaged in the direct practice of psychology.¹⁴ The remaining four Board members are members of the general public, one of whom may be a mental health consumer or family member of a mental health consumer.¹⁵ All Board members are appointed by the Governor, generally for a term of four years.¹⁶ No member may serve more than two full consecutive terms.¹⁷

The Board is empowered, among other things, to:

- Adopt and revise rules and regulations necessary to carry out its powers and duties;
- Adopt an examination;
- Examine for, deny, withhold, or approve the license of an applicant, and renew licenses;
- Make investigations, hold hearings, and take evidence in all matters relating to the exercise and performance of the powers and duties vested in each board or the director;
- Administer oaths, take affirmations of witnesses, and issue subpoenas to compel the attendance of witnesses and the production of all relevant papers, books, records, documentary evidence, and materials in any hearing, investigation, accusation, or other matter coming before the Director or Board;
- Aid the several district attorneys of this state in the enforcement of the Mental Health Practice Act and in the prosecution of all persons, firms, associations, or corporations charged with the violation of any of its provisions and to report to the appropriate district attorney any violation that it reasonably believes involves a criminal violation;
- Take disciplinary action; and
- Notify the public of all disciplinary actions taken against licensees, registrants, certificate holders, or unlicensed psychotherapists.¹⁸

Proceedings Before the Board

a. Grievances, the “20-Day Letter” and Initial Board Review

If an individual wishes to inquire about or file a grievance against a psychologist, such inquiries and grievances are generally required to be submitted in writing to the Board. The complainant is asked to provide as much detail as possible regarding the basis for the inquiry or grievance.¹⁹ If the allegations in an inquiry/grievance against a psychologist, if proved, would

constitute grounds for action by the Board, the Director of the Board must inform the psychologist in writing that an inquiry has been made against her/him, enclose a copy of the inquiry, indicate the provisions of the Act that may have been violated, and request the psychologist's cooperation in ascertaining the facts and circumstances that led to the inquiry.²⁰ These letters are typically referred to in the psychologist and legal communities as "20-Day Letters." If a psychologist receives such a letter, he/she is required to provide a written response within 20 days.²¹ He/she should include in the response all relevant facts and may include relevant records to support his/her position. In the event a psychologist receives a 20-Day Letter, the psychologist may want to immediately contact his/her insurance carrier and place the carrier on notice of the inquiry/grievance, and may want to request that the insurance company provide counsel to assist with responding to the 20-Day Letter. If the insurance carrier does not provide counsel or coverage for Board matters, the psychologist should consider whether, in light of the allegations and potential ramifications to his/her license, he or she should individually retain legal counsel.

After the psychologist has responded to an inquiry or grievance, or at the expiration of the response time, the Director will forward the inquiry/grievance, the response, and any other available information to the Board for its initial consideration and review.²² Inquiries, complaints, investigations, hearings, meetings and other proceedings of the Board relating to disciplinary proceedings are confidential and are not open to public inspection until the Board meets for its initial consideration.²³ The initial consideration of the inquiry/grievance and all further proceedings are generally open and the information and records related to the inquiry/grievance are available for public inspection.²⁴

b. Action Following Initial Board Review

Based upon its review of a matter, the Board may take one of several actions. The Board may determine that there are no reasonable grounds to warrant further action and "dismiss" the matter. The Board may determine that the inquiry/grievance requires notification to the licensee that there is a concern about what was done or how it was done by the licensee, and the Board may issue a confidential letter of concern. That letter may advise the licensee about what he/she should do to alleviate the Board's concern.²⁵ A confidential letter of concern is not discipline, but it will remain on file with the Board and may be used in considering the outcome of future proceedings on additional inquiries/grievances. There is no reporting of a letter of concern and the letter of concern remains private.²⁶

When a complaint or investigation discloses an instance of misconduct that, in the opinion of the Board, does not warrant formal action by the Board but that should not be dismissed as being without merit, a letter of admonition may be issued.²⁷ A letter of admonition is the lowest form of discipline. A letter of admonition is a public document which must be disclosed by the psychologist on his/her insurance applications and license renewals or applications, and in credentialing matters. If a psychologist receives a letter of admonition, he/she has the right to request a formal disciplinary process and hearing through the administrative courts.²⁸ The hearing must be requested in writing within 20 days after the date of the letter of admonition.²⁹

The next level of discipline that the Board may impose is probation. If the Board places a licensee on probation, it may include any conditions for continued practice as the Board deems appropriate to assure that the licensee is physically, mentally, and otherwise qualified to practice in accordance with generally accepted professional standards of practice.³⁰ Such conditions might include: Submission by the licensee to examinations to determine the person's physical or mental condition or professional qualifications; requirements for training or education; review of practice and supervision by a practice monitor; or restrictions on practice.³¹

The Board may also suspend a psychologist's license for a period of time.³² If a license is suspended, the Board may require a probationary period and conditions upon reinstatement at the end of the suspension period.

Finally, the Board may revoke a license.³³ If the psychologist's license is revoked, the psychologist may not re-apply for licensure until 3 years after the effective date of the revocation.³⁴ Any re-application will be treated as a new application for licensure.³⁵

If the Board determines that probation, suspension, or revocation is necessary, the licensee is entitled to a hearing.³⁶ As such, the case will likely be referred to either the Office of Expedited Settlement at the Department of Regulatory Agencies or the State of Colorado Attorney General's Office for processing and handling. The Office of Expedited Settlement and the Attorney General's Office may seek to resolve the complaint through negotiations with the psychologist or the psychologist's attorney, and entry of a stipulation and final agency order. If the matter cannot be resolved through negotiations, formal charges may be filed against the psychologist with the Office of Administrative Courts.³⁷ The notice of charges must contain the legal authority and jurisdiction under which the hearing is to be held, and the matters of fact and law asserted.³⁸ As a general rule, the psychologist must file a written answer to the charges within 30 days after service of the charges.³⁹ With some technical and procedural differences, once a notice of charges is filed, the case proceeds much like civil litigation.

Trends In Civil Litigation

In our practice, the most common lawsuits we see against psychologists at this time include complaints arising out of a psychologist's report and recommendations as a Child and Family Investigator, complaints that a psychologist has breached confidentiality, and complaints of boundary violations, in addition to the more typical complaints of failure to meet general standards of care. If a psychologist receives or is served with a complaint in a civil or criminal action, the psychologist should immediately notify his/her professional liability insurance carrier and request appointment of counsel.

a. Child & Family Investigators

Psychologists are often appointed by judges to be child and family investigators ("CFI") in dissolution of marriage and custody matters.⁴⁰ The appointment must be made in writing and must set forth the specific duties of the CFI.⁴¹ Though the exact responsibilities and duties may vary from case-to-case and judge-to-judge, the psychologists are generally tasked with investigating, reporting, and making recommendations regarding custody and visitation, taking

into consideration the relevant factors for determining the best interests of the child.⁴² The child and family investigator is required to make independent and informed recommendations to the court, in the form of a written report filed with the court, unless otherwise ordered by the court.⁴³

It is imperative that any psychologist who is working as a CFI know and understand the scope of his/her appointment as a CFI and that he/she works within the guidelines of that appointment. It is not the role of a CFI to provide counseling or therapy to the children or any family members.⁴⁴ The CFI shall strive to maintain objectivity and independence and must request termination of the appointment if faced with insurmountable bias or prejudice.⁴⁵

The CFI should maintain the confidentiality of the report and disclose that report only to the court, the parties, and the parties' counsel.⁴⁶ The CFI shall, if requested, make available to counsel or a party not represented by counsel in the case, his or her file of underlying data or reports.⁴⁷ A CFI has an obligation to document and be prepared to make available all data that form the basis for his or her opinions and recommendations. This includes all underlying data in the CFI's file including the names and addresses of all persons with whom the CFI has consulted; except that, if a CFI believes that the release of any particular information or test data would endanger any person's welfare he/she should inform counsel and the court of his or her concerns and await further direction from the court before releasing the information in question.⁴⁸

The CFI should not participate in any non-disclosed conversations with one party or one party's counsel. In addition, the CFI should not have any contact with the judge regarding the case unless counsel for the parties and/or the parties are present. Absent a court determination that the need for the information requested outweighs the need for privacy, the CFI's report or underlying investigation materials shall not be disclosed in any proceeding other than the proceeding before the appointing court.⁴⁹

Not surprisingly, one or more parties involved with the dissolution of marriage and custody matters may be displeased with the report and recommendations of the CFI and/or will be unhappy that he/she has to pay the fees of the CFI. Such displeasure sometimes results in lawsuits being filed against CFIs. The unhappy party may complain that the CFI did not consider all of the information presented, was improperly influenced by the other party, took action outside of or exceeded the authority of the appointment of the Court, or charged excessive fees, or displeased with the fees.

So long as the CFI is acting within the scope of the appointment, taking into consideration the relevant factors for determining the best interests of the child, and making independent and informed recommendations to the Court, the CFI should be immune from liability for his/her evaluation, the report resulting from the evaluation, and the recommendations he/she submitted to the Court.⁵⁰ If, however, the CFI provides counseling or takes other actions outside the scope of the appointment, or improperly discloses information regarding the evaluation or report, he/she may be subject to liability.

b. Confidentiality

As a general rule, a psychologist shall not disclose, without the consent of the client, any confidential communications made by the client, or advice given thereon, in the course of the professional relationship.⁵¹ Similarly, the employees or associates of psychologists are not permitted to disclose any knowledge of confidential communications.⁵² This duty of confidentiality survives the death of the patient. As a general rule, before disclosing any records, communications, or advice, a psychologist must have a signed written authorization from the client, or a signed Order from a court of competent jurisdiction. A subpoena duces tecum by an attorney is not generally sufficient to allow release of records or require testimony by a psychologist regarding confidential communications or advice given to the client based on the client's communications.

There are some specific exceptions to the general rule of confidentiality. For example, a psychologist may disclose confidential communications and advice as necessary to defend against a suit or a complaint filed by the client or the heirs, executors, or administrators of a client on any cause of action arising out of or connected with the care or treatment of such client.⁵³ In addition, a psychologist who has reasonable cause to know or suspect that a child has been subjected to abuse or neglect or who has observed the child being subjected to circumstances or conditions which would reasonably result in abuse or neglect is required to immediately report such fact to the county department or local law enforcement agency.⁵⁴ A psychologist also has a duty to make reasonable efforts to warn and protect the person or persons where the patient has communicated a serious threat of imminent physical violence against a specific person or persons.⁵⁵ In such circumstances the psychologist must also notify an appropriate law enforcement agency or take other appropriate action including, but not limited to, hospitalizing the patient.⁵⁶ Finally, if a minor who is fifteen years or older is consenting to his or her own mental health treatment, the psychologist may, with or without the consent of the minor, advise the parent or legal guardian of the minor of the services given or needed.⁵⁷

Confidentiality of treatment notes and summaries is a very complex area. Understanding confidentiality is critical to a psychologist's practice, but is outside the scope of this article. Specific questions about confidentiality of client information, record keeping, or how to respond to a subpoena for records or to appear should be directed to legal counsel.

c. Boundary Violations

It is important for psychologists to maintain a professional relationship with their clients. Most dual relationships with clients are not strictly prohibited, but they do create certain risks for the practitioner, and cases involving allegations of dual relationships are often difficult to defend. Colorado statutes prohibit relationships with clients that are likely to impair the psychologist's professional judgment or increase the risk of client exploitation.⁵⁸ Such relationships might include treating employees, supervisees, close colleagues, or relatives.⁵⁹ Colorado also prohibits psychologists from exercising undue influence on the client, including the promotion of the sale of services, goods, property, or drugs in such a manner as to exploit the client for the financial gain of the practitioner or a third party.⁶⁰

If a psychologist enters into a business venture, employs, develops a friendship with, or attends social interactions, weddings, graduations, or funerals with a client, a dual relationship is created. It is the responsibility of the psychologist to assess transference issues and the effect the

dual relationship may have on the ability of the psychologist to provide reasonable and appropriate mental health care to the client. If, at any time, the psychologist makes an assessment that the dual relationship may be prohibited or may interfere with the mental health of the client, the psychologist must terminate therapy.⁶¹

It is always improper for a psychologist to engage in sexual contact, sexual intrusion, or sexual penetration with a client during the period of time in which a therapeutic relationship exists or for up to two years after the therapeutic relationship is ended.⁶² The fact that the sexual contact, sexual intrusion, or sexual penetration may have been or was consensual is not a defense.

Conclusion

To prevent lawsuits and Board actions, it is important that psychologists understand not only mental health issues, but the legal framework under which they are working. Psychologists should carefully evaluate clients and be selective about client and case selection. Psychologists should always understand their professional limitations and should make appropriate referrals or consultations where appropriate. Psychologists should also know and follow association rules and the APA Code of Ethics, the Rules and regulations of the Board, and Colorado Statutes. Finally, psychologists should always maintain professional competence through continuing education and subscribing to appropriate journals, and should maintain a professional decorum with their patients.

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³ COLO.REV.STAT., §§ 12-43-101, *et seq.*

⁴ 3 CCR 721-1

⁵ COLO.REV.STAT., § 12-43-304(1).

⁶ *Id.*, § 12-43-305(1).

⁷ *Id.*, § 12-43-303(1).

⁸ *Id.*, § 12-43-211(1).

⁹ *Id.*, § 12-43-211(1)(b).

¹⁰ *Id.*

¹¹ *See id.*, § 12-43-101.

¹² *Id.*

¹³ *Id.*, §§ 12-43-210, 12-43-302(2).

¹⁴ *Id.*, § 12-43-302(2)(a).

¹⁵ *Id.*, § 12-43-302(2)(b).

¹⁶ *Id.*, § 12-43-302(4), (6).

¹⁷ *Id.*, § 12-43-302(4).

¹⁸ *Id.*, §§ 12-43-203, 12-43-221.

¹⁹ 3 CCR 721-1, Rule 5(a).

²⁰ *Id.*, Rule 5(d)(1).

²¹ *Id.*, Rule 5(d)(2).

²² *Id.*, Rule 5(f).

²³ *Id.*, Rule 4(a).

²⁴ *Id.*

²⁵ COLO.REV.STAT., §12-43-224(3)(e).

²⁶ *Id.*

²⁷ *Id.*, § 12-43-224(3)(d)(I).

²⁸ *Id.*, § 12-43-224(3)(d)(II).

²⁹ *Id.*

³⁰ *Id.*, § 12-43-224(3)(c).

³¹ *Id.*

³² *Id.*, § 12-43-224(3)(b).

³³ *Id.*, § 12-43-224(3)(a)(I).

³⁴ *Id.*, § 12-43-224(3)(a)(II).

³⁵ *Id.*

³⁶ *See id.*, § 24-4-105.

³⁷ *Id.*, § 24-4-105(2)(a)

³⁸ *Id.*

³⁹ *Id.*, § 24-4-105(2)(b).

⁴⁰ *See generally id.*, § 14-10-116.5 (concerning court appointment of child and family investigators).

⁴¹ *Id.*, § 14-10-116.5(1).

⁴² *Id.*, § 14-10-116.5(2).

⁴³ *Id.*

⁴⁴ Supreme Court of Colorado, Chief Justice Directive 04-08, Standard 4.

⁴⁵ *Id.*, Standard 2.

⁴⁶ *Id.*, Standard 13.

⁴⁷ *Id.*, Standard 12.

⁴⁸ *Id.*, Standard 12, Comment.

⁴⁹ *Id.*, Standard 13, Comment.

⁵⁰ *Lawai v. Kotin*, 872 P.2d 1332, 1336 (Colo. App. 1993).

⁵¹ COLO.REV.STAT. § 12-43-218(1). *See id.*, § 13-90-107(g) (a licensed psychologist shall not be examined without the consent of the client as to any communication made by the client to the psychologist or the psychologist's advice given thereon in the course of professional employment).

⁵² *Id.*, § 12-43-218(1).

⁵³ *Id.*, § 12-43-218(2)(a).

⁵⁴ *Id.*, § 19-3-304(1)-(2).

⁵⁵ *Id.*, § 13-21-117.

⁵⁶ *Id.*

⁵⁷ *Id.*, § 27-10-103(2).

⁵⁸ *Id.*, § 12-43-222(i).

⁵⁹ *Id.*

⁶⁰ *Id.*, § 12-43-222(j).

⁶¹ *See id.*, § 12-43-222(k)-(l) (it may be unprofessional conduct to fail to terminate a relationship with a client when it was reasonably clear that the client was not benefiting from the relationship and is not likely to gain such benefit in the future or to fail to refer a client to an appropriate practitioner when the problem of the client is beyond such person's training, experience, or competence).

⁶² *Id.*, § 12-43-222(r).