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The Role of Aspirational Ethics and Licensing Laws in the Practice of Neurofeedback

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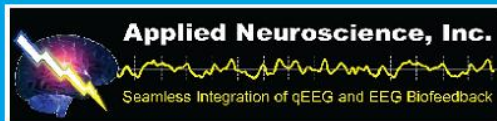
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*CURRENT CONCEPTS
IN NEUROTHERAPY*

The Role
of Aspirational Ethics and Licensing Laws
in the Practice of Neurofeedback

Sebastian “Seb” Striefel, PhD

ABSTRACT. Health Care practitioners are increasingly being held accountable for what they do and for what they fail to do. Licensing laws provide guidance for what the state expects of practitioners. It is in the best interests of all practitioners of neurofeedback services, licensed and unlicensed alike, to be aware of and adhere to both the letter and intent of these laws. Adherence has several advantages, including: it serves as an indicator that practitioners are striving for the highest level of ethical functioning by focusing in the client’s best interests, and that they are obtaining the guidance needed to meet or exceed the expected standards of care as specified in the law. In addition, awareness and adherence to licensing laws serves practitioners well if an ethical complaint or lawsuit is filed, since existing laws and other regulations are

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increasingly being used by the courts to make decisions about what is expected of practitioners.

KEYWORDS. Licensing laws, title acts, practice acts, privileged communication, dual relationships, informed consent

INTRODUCTION

Professionals are, by definition, individuals who hold themselves out to the public as having specialized skills and services to offer that are not available from the lay public. As such, professionals are held to a higher standard of care than are members of the lay public and nonprofessionals. Stromberg, Haggarty, Mishkin, Leibenluft, Rubin, McMillian and Trilling, (1998) state that a professional is expected to, “treat a patient with the degree of reasonable care and skill usually exercised by similar practitioners in good standing in their profession” (p. 436). Licensing laws and association ethical principles and standards of care, (e.g., the *Practice Guidelines and Standards of Biofeedback and Applied Psychophysiological Services*, Striefel, 1999a) provide guidance on how to be both in compliance with such regulations and also on how to exceed them.

Best Interest of Clients/Patients. Practitioners who are truly interested in doing what is in the best interest of clients strive to achieve what is known as an aspirational ethics level of functioning. Doing what is in the best interests of one’s clients means going beyond the minimal requirements of a set of ethical principles or a law. When a neurofeedback practitioner adheres to the minimal standards by attending to the “shoulds” and “should nots,” he or she is functioning at what is often called, “*mandatory ethics*” (Corey, Corey, & Callanan, 1998; Striefel, 1995). In such cases, he or she is unlikely to be faulted by an ethics committee and he or she is generally safe from legal action as well. However, the practitioner who is truly aspiring to do what is in the best interests of clients will go beyond those extra steps by reflecting on what impact their activities are having on clients. These practitioners are engaging in what is called “*aspirational ethics*,” and are striving to achieve the ideal level of service for cli-

ents. Such practitioners keep client interests as a central focus, and thus, consult with colleagues more often, seek supervision for themselves more often, engage in more continuing education activities, and strive to provide services that exceed the “*minimal standard of care.*” Aspirational ethics includes challenging one’s own thinking by asking ones self, “*Am I doing what is in the best interests of my client?*” (Corey et al. 1998; Striefel, 1995). Another aspect of aspirational functioning is knowing the content of all potentially relevant laws and adhering to them, both if required to do so, and even if not required to do so, when adherence is in the best interests of those served. Only the category of licensing laws will be discussed in this article because such laws can be most helpful to practitioners in learning to identify what the state expects from health care practitioners of different disciplines, regardless of licensing status. Discussion of other laws will follow in future articles.

Importance of Licensing Laws. It is important to be aware of licensing laws for several reasons. First of all, it is important to be aware of the law because failure to adhere to the law can have dire consequences that range from hefty fines to imprisonment (e.g., in some states it is a felony to have sex with a patient). So practitioners need to be aware of the law to know, if and how, the law applies to them or their activities. For example, the Texas Psychologists’ Licensing Act and Rules and Regulations (Texas State Board of Examiners of Psychologists, 1999) prohibits unlicensed practitioners from using biofeedback (which includes neurofeedback) unless the practitioner is a student, intern, resident, or otherwise completing the requirements for licensing or otherwise exempt. However, the Texas law has an interesting exemption that would allow an unlicensed technician to operate biofeedback equipment as long as he or she “does not provide services that involve the use of education, training, skill or knowledge in psychology . . .” (p. 68). Does this mean that an unlicensed technician can provide neurofeedback for peak performance training? Perhaps, and perhaps not. To be clear one would seek clarification from the state attorney general’s counsel on licensing or from an attorney who specializes in licensing issues.

Purpose of Licensing Laws. There are several arguments for why licensing of health care professionals is important (Corey et al. 1998). The most commonly cited reason why professional groups seek licensing for a profession is to protect the public by setting minimal

standards of care and holding professionals accountable (Corey et al. 1998; Koocher & Keith-Spiegel, 1998). The assumption seems to be that individuals who have met the educational and other requirements for licensing (e.g., passing written and oral examinations) are more likely to be competent than those who have not met these requirements. Thus, licensing is supposed to protect the public against incompetent practitioners. The second argument supporting licensing is that it is designed to protect the public from its own ignorance about how to select an appropriate practitioner or even how to identify quality services (Corey et al. 1998). The regulations associated with licensing are designed to help the public with both of these issues. The third argument supporting licensing is that many third-party payers will only reimburse for services provided by licensed practitioners, and thus, because of insurance payments, more clients can afford services (Corey et al. 1998). It should be noted that this third-party payment for neurofeedback services is still fairly rare in some or most parts of the country. The last argument supporting licensing is that it allows a profession to define itself and what it will and will not do (Corey et al. 1998). To date, biofeedback per se has not been recognized as a profession. Perhaps it never will, because biofeedback is a treatment process and procedure that is used by members of many different professions. It does not have a broad based sequence of study leading to a college degree, as do other health care professions. In these ways it is like psychotherapy and other treatment processes and procedures commonly found within the scope of practice for many different health care professions. In addition, biofeedback has not been licensed as a profession in any state. Some practitioners are trying to get such a law passed in the State of New Jersey.

Some reasons why the neurofeedback practitioner should know the laws that pertain to his or her practice activities, include: (1) It is a way of minimizing risk by being in compliance, (2) It provides a mechanism for integrating information from the law into daily clinical practice, and (3) It helps avoid confusion in terms of what is expected (Bennett, Bryant, Vanden Bos, & Greenwood, 1990). Laws are accompanied by regulations and by a means of enforcing both the law and regulations.

Regulation of a profession through licensing has the additional component of having a licensing board, which has the authority to decide what the requirements for licensing are and whether or not an

individual meets those requirements. The board can take action against providers who deviate from the acceptable standards of care or from the licensing law or rules and regulations associated with the activities of those who are licensed and against those who are not licensed if they violate the law.

A positive relationship between licensing and competence has never been verified (Koocher & Keith-Spiegel, 1998). There is, however, some data that tend to show that licensing does not protect the public and may even have some negative consequences (Koocher & Keith-Spiegel, 1998; Danish & Smyer, 1981). In fact, critics of licensing argue that licensing does less to protect the public than it does to reduce competition (Koocher & Keith-Spiegel, 1998; Gross, 1978).

Adverse Effects. The adverse effects of licensing laws are due to a number of factors, including:

1. Most licensing boards are so overworked and under funded that they are unable to enforce the law (Koocher & Keith-Spiegel, 1998). As such, the boards tend to investigate only the most severe and publicly noticeable violations. Gross (1978) said that licensing creates an illusion of competence, restrains competition, and sets prices for services.
2. Most licenses are generic. For example, someone may be licensed as a psychologist, but his or her specialization might be clinical, counseling, or organizational psychology. The public seeking service is often confused and assumes that a person licensed as a psychologist means that they are clinical psychologists (Koocher & Keith-Spiegel, 1998).
3. Ethically, professionals are expected to restrict their areas of practice to those in which they can demonstrate competence based on education, training, and experience (AAPB, 1995; Striefel, 1995, 1999b). However, seldom is this monitored unless a complaint is filed. Striefel (1995) and Corey et al. (1998) pointed out that there is no guarantee that practitioners (licensed or unlicensed) will restrict their areas of practice to those in which they are competent or even that they will remain competent over time by appropriate continuing education, training, and supervised practice. It is critical for a practitioner to know when a client's needs are beyond his or her own level of competence and when to make a referral to another practitioner (Koocher & Keith-

Spiegel, 1998), or when to seek supervision rather than consultation (Striefel, 1999b).

4. Licensing often pits one profession against another, as they compete for clients, turf, and income (Corey et al. 1998). Such competition is a waste of resources that might better be spent in serving clients.

Positive Aspects of Licensing. In spite of the potential shortcomings of licensing, there are also some positive aspects to licensing. First, if a licensing board is functioning correctly (adequately staffed and funded), the public will be well served because their primary focus will be on protecting the public from incompetent and unethical practitioners (Koocher & Keith-Spiegel, 1998), licensed and unlicensed alike. Second, licensing means that a discipline/profession has received recognition from the state (Koocher & Keith-Spiegel, 1998), which is indicative that the profession is a part of mainstream health care, which over time, tends to increase the rate of third-party reimbursement for services. Third, licensing does assure that practitioners have had one or more years of supervised practice to enhance their competence, usually after having received a masters or doctoral degree in a relevant discipline with an organized program of study (Corey et al. 1998). Supervised practice increases the likelihood that a practitioner will have achieved some level of competence to provide service, e.g., supervision in providing neurofeedback services (Lubar, 1995; Striefel, 1999b). In addition, licensed individuals must usually pass a written and oral examination. Passing such examinations means mastering at least some knowledge and information, which is another indicator of competence.

Licensing Laws. There are generally two types of licensing laws. The first type is called a Professional Title Act. It restricts the use of a specific title to those from a specific discipline who are licensed by the state to use that title. Such laws may exempt some individuals, e.g., professionals working for state agencies such as universities or state institutions. With a Title Act others can engage in all of the same activities as the person who is licensed, as long as they do not call themselves by that title or lead the public to believe that they are licensed in that discipline. For example, a Professional Counselor Title Act would mean only a person who is licensed by the state as a professional counselor or exempted by the law, can call him or her self

a professional counselor. Others, including those who use an unprotected title, such as psychotherapist, can do everything that a professional counselor does as long as they do not call themselves a professional counselor.

The second type of licensing law is called a Professional Practice Act and it restricts both the use of a specific title (e.g., professional counselor) and the activities defined as part of the practice for that discipline. For example, the Utah Psychologist's Licensing Act (National Assessment Institute, 1993, p. 632) defines the practice of psychology as:

“Practice of psychology” means the observation, description, evaluation, interpretation, and modification of human behavior by the application of established psychological principles, methods, and procedures for the purpose of preventing or eliminating symptomatic or maladaptive behavior. The practice of psychology includes, but is not limited to, psychological testing and the evaluation or assessment of personal characteristics such as intelligence, personality, abilities, interests, aptitudes, and neuropsychological functioning; counseling, marital counseling and therapy, psychoanalysis, psychotherapy, hypnosis, biofeedback, and behavior analysis and therapy; diagnosis and treatment of mental and emotional disorder or disability, alcoholism and substance abuse disorder or habit or conduct, as well as psychological aspects of physical illness, accident, injury, or disability; and psychoeducation evaluation, therapy, remediation, and consultation. Psychological services may be rendered to individuals, couples, families, groups, and the public.

Furthermore, the law specifies that it is unlawful to, “. . . hold oneself out to be a psychologist by any title or by any description using the word “Psychology,” “Psychologist,” or “psychological” or to offer to render psychological services unless licensed under this chapter or exempted under this section” (National Assessment Institute, 1993, p. 634). Violating this law is at minimum a class A misdemeanor, which can result in a jail term of up to one year.

So the Utah Psychologist's Licensing Act has many implications for those who provide biofeedback services, as do the licensing acts for other professions in Utah and in every other state. To understand the implications of licensing laws, the Psychology Licensing Acts of Utah

and Texas will be used because they have many similarities and many differences. The Utah definition of the practice of psychology given before has many implications. First, is that it defines biofeedback, which includes neurofeedback or EEG biofeedback as the practice of psychology, but in other areas of the law it makes clear that psychological assistants, students and others can provide biofeedback services, as long as they are supervised by a licensed psychologist or otherwise exempted by the law (e.g., licensed practitioners of other disciplines whose own licensing law allows them to provide neurofeedback services).

The Texas psychology licensing law also generally restricts the use of biofeedback to licensed practitioners, with a couple of notable exceptions. First, it does not allow psychologists to supervise unlicensed practitioners (what is known as “extending the practice of psychology”), other than for the exceptions in the law for students, interns, residents and others engaged in the activities needed to meet the requirements for becoming licensed. So generally, in Utah a psychologist can supervise unlicensed, non-students engaged in the practice of psychology and in Texas he or she cannot do so. The second exception concerning the use of biofeedback in Texas has to do with technicians being allowed to do biofeedback as long as the services they provide do not fall within the scope of practice for psychology as defined by the law. The Texas definition of the practice of psychology also includes, “. . . the psychological disorders that accompany medical problems, organizational structures, stress, and health” (Texas State Board of Examiners of Psychologists, 1999, p. 2). Utah law is not specific in terms of whether it applies to the psychological aspects of medical problems, but common use in Utah would indicate that it does. If there are questions about the meaning of the law one can go to the licensing board, attorney general’s office, or an attorney familiar with licensing issues. State Professional Associations can usually provide the names of competent attorneys they have used concerning licensing issues.

Other sections of the Utah and Texas Laws specify exactly whom the laws exempt. Both laws include certain other licensed professionals whose own licensing act defines biofeedback as part of the practice of that discipline and they also exempt students and/or other staff being supervised by a licensed psychologist with the differences previously discussed.

Other Important Components of the Licensing Acts: Privileged Communication. Most health care professional licensing acts also include a provision, which specifies that certain communications between a licensed practitioner and a client/patient be considered to be privileged communication. Privileged communication is established in a legal statute. When it exists, it means that information revealed by a client in confidence to a covered licensed practitioner cannot be revealed in any civil or legal proceeding without the client's permission (usually in written form) unless required to do so by some other component of a law (Corey et al. 1998; Koocher & Keith-Spiegel, 1998; Striefel, 1995). In Utah's Psychology Licensing Act the privilege is extended to include matriculated graduate students, post-doctoral trainees, and psychological assistants supervised by a psychologist. It appears that in Texas the privilege applies only to licensed professionals.

Privileged communication is not absolute. The exceptions specified in the Utah Psychologist's Licensing Law include:

- when there is suspected abuse or neglect of children, the elderly, the disabled or an incompetent individual;
- when the validity of the will of a deceased client is contested;
- when the information is necessary for a psychologist to defend him or herself against a malpractice suit initiated by the client;
- when there is an immediate threat of physical violence against an identifiable victim or the client;
- when the client is involved in a civil commitment proceeding;
- when the client alleges mental or emotional damage in litigation;
- when a client is court ordered for an examination or treatment;
- when a client files a complaint against a psychologist with the licensing board; and
- when the client signs a release of information form.

The Texas Psychologist's Licensing Law has similar exceptions. It also includes: judicial proceedings initiated to collect on claims for services rendered by the psychologist to the patient, any judicial or administrative proceeding affecting the parent-child relationship, any criminal proceeding as specified in applicable law, and proceedings where the court or an appropriate state agency has issued an order or subpoena. It is important for all neurofeedback practitioners to know if

communications between them and the clients they serve are protected by a privileged communication statute and what the exceptions are.

Licensing laws may also specify other situations in which confidentiality must be violated, which at least initially, do not involve a court proceeding. Some of these provisions from either the Utah and/or the Texas Psychologist's Licensing Laws, include the reporting of communicable diseases; abuse, neglect, or exploitation of disabled adults; abuse and neglect of children and the elderly; school related substance abuse; suspected danger to self or identifiable others; initiation of involuntary commitment; disclosure for audits of management or financial records, program evaluation or research (within clearly specified rules); fee collections; in official legislative inquiries; and when needed by others involved in the client's treatment when involuntarily hospitalized, placed in a penal institution, or supervised by the psychologist. Each state has its own provisions concerning confidentiality and privileged communication and such laws increasingly specify that clients/patients must be informed as to the limits of confidentiality early in the professional-client relationship. Most ethics codes also specify that clients be informed about the limits of confidentiality early in the treatment process (AAPB, 1995; Striefel, 1989, 1995).

Continuing Education. Most licensing laws have continuing education requirements that are specified in an effort to assure that practitioners make some effort to remain competent. These requirements usually include a specification of how many clock hours of training must be obtained each year, what kind of training will count to meet the requirement, and what kind of documentation must be maintained on the training received. Failure to obtain the appropriate continuing education is grounds for losing one's license to practice. The Texas law even includes a provision whereby the licensing board can require a practitioner to submit to a physical examination by a physician or a mental examination by a physician or psychologist if the board has reason to believe that the psychologist is not physically or mentally competent to provide psychological services (Texas State Board of Examiners of Psychologists, 1999). Obtaining continuing education hours does not assure practitioner competence if the material is not mastered or if the area of training does not apply to a practitioner's scope of practice.

Informed Consent. The Texas Psychologists Licensing Law also has specific requirements concerning informed consent. Texas law re-

quires licensees to obtain informed consent concerning all services that they intend to provide to clients before they initiate the services, using a level of language understandable by the client. Clients must be kept informed on an ongoing basis as issues arise, treatment changes, etc. Informed consent must be obtained on the purpose of treatment; setting treatment goals; selecting treatment procedures and alternative treatments available (including possible side effects); possible duration of treatment; limits of confidentiality; all relevant information about costs and methods of collection; the right of the client to access their treatment file; the relationship with each party involved in treatment, including potential conflicting roles (e.g., each partner in couples counseling or custody evaluations); and consent must be obtained from legal guardians for children and others not competent to give consent on their own.

Dual Relationships. Texas also defines what kinds of dual relationships are allowed between psychologists and patients/clients, students, supervisees, research participants, colleagues, and others with whom they have a professional relationship. The law specifies that they avoid relationships that will impair their objectivity, exploit others, or that might otherwise interfere with their ability to effectively or competently provide psychological services. Sexual relationships with clients or anyone else over whom they have an evaluative, supervisory or authoritative role, including students, trainees, and supervisees are prohibited. In addition, Texas psychologists are prohibited from treating anyone with whom they have had a sexual relationship. Most, if not all licensing laws prohibit sexual relationships with clients/patients, and often with former clients and patients. Increasingly sexual relationships with students, trainees, and supervisees are also being prohibited by licensing laws because of the power differential and high probability of exploitation and harm. Most ethical codes (e.g., AAPB, 1995; APA, 1995) also prohibit sexual relationships with clients, students, trainees, and supervisees. Several states have provisions in their law that makes it a felony to have sexual relationships with clients or former clients, e.g., Minnesota and Wisconsin (Corey et al. 1998).

Other. Licensing laws have a wide variety of other provisions, including variables such as supervision requirements (e.g., number of hours of face-to face supervision per week, registration with the state on who is being supervised, what supervisees are allowed to do, etc.);

record-keeping requirements (e.g., whether or not clients can access their records, how long records must be maintained); statutes of limitations for actions against providers; requirements for forensic, educational or research services; requirements for termination of services (e.g., how to avoid abandoning a client); and of course, specifying the penalties that can be imposed if the law is violated.

Professional Responsibility. All neurofeedback practitioners need to be aware of the provisions of licensing laws related to their professional activities regardless of whether or not they are licensed or unlicensed or allowed to provide services independently or only under supervision. When a practitioner gets into difficulty with a client or other person to whom he or she has an obligation and it results in a complaint to an ethics committee or licensing board, or the filing of a malpractice lawsuit, the regulating groups often look to existing laws, rules and regulations, ethical codes and standards of practice that apply to others providing similar services (Corey et al. 1998; Striefel, 1995). As such, all practitioners of neurofeedback services should aspire to the highest level of aspirational ethical functioning, which includes being aware of, and adhering to, the components of licensing laws.

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