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GOVERNMENT

Texans will benefit when psychologists are pushed from their safe space

By Mary Lou Serafine, Dec. 11, 2017

The little-noticed Texas State Board of Examiners of Psychologists has had quite a year. From an abortive legislative Sunset review to a lawsuit filed against it, the agency responsible for licensing psychologists has had an unusually large dose of controversy. More might be in store.

The Sunset Commission in January put the Board on a collision course with the Texas Psychological Association. Like most professional associations, the TPA is chummy with its regulators. Professional associations — once limited to physicians and surgeons, engineers, the few "learned" professions — commonly have used their lobbying clout to induce legislators to create licensing boards with close ties to those they regulate.

A few weeks ago, the Texas board changed its rules so that psychological associates with master's degrees would no longer need to have their work with patients reviewed by licensed psychologists with doctorates. The board was responding to concerns that its previous rules would violate a Supreme Court ruling that a state agency, controlled by private parties such as an association, could be liable for violating anti-trust laws intended to promote free-market capitalism. The overwhelming majority of service providers in psychology are trained to the masters' level, including licensed professional counselors, clinical social workers, marriage and family therapists and in some states, addiction counselors.

Besides the antitrust concerns, no studies support the notion that there is an identifiable difference between what those with masters degrees and those with doctoral degrees actually do in the most common forms of therapy, except to the extent they are artificially restricted.

For example, probably the largest survey of client satisfaction and effectiveness in the field of therapy is a 1995 study carried out by the esteemed psychological scientist Martin Seligman. It collected questionnaires from over 4,000 users of psychological services. It concluded that "[w]hile all mental health professionals appeared to help their patients, psychologists, psychiatrists, and social workers did equally well..." More recent studies show the same results, though with smaller samples. Overall, the research has not shown that more training leads to better outcomes.

Setting aside concerns about federal antitrust violations, the board rightly changed its rules because Texas has its own set of strong antitrust laws — stronger

than those of many other states. The Texas Constitution's Article 1, Sec. 26 states "[p]erpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed..." In addition, the Texas Free Enterprise and Antitrust Act provides additional protection for Texas consumers.

But even before the state's rule change went into effect, the TPA had filed suit to retain its sanitized pizzo, a modern-day protection fee, for doctorate-degreed psychologists to 'supervise' the masters-degreed group. TPA's president, Dr. Carol Grothues, complained that the new rules "will create a flood of new 'psychologists'" and that insurance companies "can then reimburse at lower rates."

So please understand this clearly: Grothues is asking the courts to agree that consumers should not be allowed to pay lower prices and health care premiums — the consequences of the rule change. In my view, she was admitting that the cartel effect of agency licensure would no longer protect psychologists' hourly rate. Her lawsuit is pending.

But Texas' need for compliance with higher court decisions is not limited to the U.S. Supreme Court's decision in *North Carolina State Board of Dental Examiners v. FTC*. (In that case, the U.S. Supreme Court ruled that a state agency controlled by private parties, such as an association of dentists, could be liable for violating anti-trust laws intended to promote free-market competition.)

The Legislature passed, and Gov. Greg Abbott signed, House Bill 3808 in the regular session including a new definition for the practice of psychology. The old definition was struck down as unconstitutional in federal court last year because it broadly outlawed speech about "behavior," among other reasons. It also suspiciously exempted so many people from prosecution — nurses, attorneys, others — that the exemptions cast doubt, the court said, on the state's having any compelling interest in forbidding this unlicensed "practice." The case, which I filed, is *Serafine v. Branaman* in the 5th U.S. Circuit Court of Appeals.

As a result, Texas did not enforce the psychologists' licensing act for a year and a half. In line with the previously mentioned studies on training and outcomes, it should be noted that during this time no increase in suicide, no noticeable degeneration of Texans' mentality, and no emergency petitions clamoring for more psychological regulation by government bureaucrats has been evident.

Like the previous rule protecting doctorate-degreed psychologists, legal trouble could be on the horizon for the new definition: it is equally broad, vague and just as unconstitutional as the previous one. The list of exemptions is incomprehensible, with the only clear part being that it protects from prosecution practitioners who are not acting in a "professional relationship." Only the Texas State Board of Examiners of Psychologists will know what counts as a 'professional relationship' and they will not decide what that is until someone stands — at the board's sole discretion — before them. The new law's singular bright spot is that it narrowed the definition in one respect: "behavior" is now limited to "human behavior" — not that anyone was confused.

To demonstrate the law's absurdity, consider that if you engaged in dispensing psychological advice but acted "unprofessionally" — say, cracking jokes and missing appointments — you might potentially be protected from prosecution because you wouldn't fall within the law's definitions.

I repeatedly urged Gov. Abbott to veto the bill. He campaigned in 2014 against some state-issued occupational licenses, calling for the governor's office to work "with the Legislature to remove senseless barriers to growth, because over-regulation results in less competition, fewer choices and higher costs."

But under the bill he signed, coaches, hypnotherapists, spiritual healers, business coaches, athletes, curanderas, positive thinking coaches, internet programs, masters-degreed psychologists (who are currently prohibited unless 'supervised') and countless others will be forced to operate under the radar or to avoid many fruitful topics of psychological science out of fear of agency action.

Licensing regimes of the sort now used in Texas have but one purpose: to restrict the market for services to a smaller number of providers than there would be in a free market, thus narrowing consumer choice and raising prices.

The phenomenon of cartel-driven legislation is well known. Here is how the governor described it in a campaign policy paper a few years ago: "Indeed, 'keeping out newcomers' is a considerable benefit coveted by established market participants who often lobby for licensure of their particular field." This is the exact outcome desired by the TPA: a monopoly for their members on the free speech involved in counsel and advice.

Government control of "talking professions" — clinical social work, psychology, counseling and therapy, no matter what the name — makes no sense economically and infringes our freedom of speech. These helping professions all work in one way: through ideas, opinions and advice about the mind and life itself, transmitted through speech. That was the basis of the federal courts intent in striking Texas' previous definition of the 'practice of psychology.'

The board is on the right path in liberalizing Texans' access to psychologists, whether masters- or doctorate-degreed, without artificial price supports. The Legislature could do more by certifying psychologists instead of licensing them. Otherwise more legal challenges will arise and Texas taxpayers will suffer more financial losses.

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