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Psychologists Involvement in Family Law Proceedings

Christopher J. Zopatti, JD

Family law remains a very contentious area of law, generating strong emotions from those who engage in the legal process to resolve their domestic disputes. The strong emotions generated by litigants can trap naïve and unwary therapists who provide services to patients involved in family law proceedings. The following is a list of affirmations all psychologists should consider when dealing with patients who are about to, or are involved in family law litigation.

Affirmation No. 1: "If I do not want to be deposed or testify in court I will not accept clients who are contemplating divorce, in the divorce process or have child custody issues."

We often hear clients state "I don't like lawyers. I don't want to testify. I just want to help people. Make this subpoena go away." Unfortunately, unless a statute provides otherwise, no person has a privilege to refuse to be a witness or refuse to produce any writing. (California Evid. Code § 911.) If you fit into this category of the practitioner who doesn't like to testify, be cautious about working with clients who are involved in child customdy matters.

Affirmation No. 2: "I will include a provision in my fee agreement to compensate me for preparation, travel and attendance at any deposition or court proceeding."

When you receive a subpoena for deposition or trial testimony, more often than not it will be at the last minute and specify a date and time that is inconvenient to you and your patients. If you ask, most attorneys will make an attempt to accommodate you by moving the deposition to a location convenient to you, even your office. Most attorneys will also try to accommodate your schedule when calling you to testify at trial, although their ability to do so is dependent on the judge. A minority of attorneys, especially in family law, will not provide any accommodations. They will require you travel to the court, spend the day, and then tell you to go home because the matter settled or was continued. They will not pay you for preparation time, travel time or the time you spend in court.

Another common question we receive from psychologists who become involved in family law proceeding is that they want to be paid for their time. California Government Code § 68092.5 provides "a treating . . . health care practitioner **who is to be asked to express an opinion during the action or proceeding**, . . . shall [be] pa[id] the reasonable and customary hourly or daily fee **for the actual time consumed in the examination** of that witness by any party attending the action or proceeding. (Emphasis added.) Note that this section does not provide payment for travel and waiting.

Psychologists should note that Government Code § 68092.5, subd. (e) also provides that "[a]n express contract entered into between a person and the party requesting or requiring the person to testify, relating to compensation, shall be enforceable and shall prevail over the provisions of this section."

Consistent with APA Ethical Standard 6.04 at the beginning

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of therapy, as part of your fee disclosure and informed consent, you can include a provision that states that if you are called as a witness in any legal matter you will charge your hourly rate for preparation time, travel time and time testifying. With such an agreement, you can collect directly from the client no matter who subpoenas you to testify at deposition or trial.

Affirmation No. 3: "I will never write letters or sign declarations that will be presented to attorneys or judges regarding clients who are involved in family law or child custody matters."

Two standards from the APA Ethical Principles and Code of Conduct would apply: sections 1.01 and 9.01 a and b.

The duty of a lawyer both to his client and to the legal system is to represent his client zealously within the bounds of the law. (*People v. McKenzie* (1983) 34 California 3d 616, 631.) Attorneys and litigants involved in family law litigation have misused and misrepresented statements made to them by therapists when it is advantageous to them winning the case. Even an innocuous request from a client requesting a letter that 'simply' states an observation such as "Mother is a loving and caring parent" can be misconstrued by the court. Leave custody recommendations to court-appointed, qualified and certified custody evaluators. Keep in mind that attorneys only care about winning the case for their client. If a psychologist's license comes under scrutiny by the Board of Psychology, or a therapist's reputation is ruined, they don't care as long as they win the case for their client.

Some therapists naively believe that a judge "doesn't know what the issues are" or "should know what harm the other side is causing." As a result "corrective" letters are written either directly to the judge, or at the request of their patient, given to their attorney. Family law judges are keenly aware of the legal issues in divorce cases. Legal resolution does not necessarily coincide with what may be best therapeutically for the client and family. Know that it is unethical to provide unsolicited opinions, without proper foundation, to any legal proceeding. Also know that judges do not read mail from third parties as this is an *ex parte* contact. Judges never accept *ex parte* communications from anyone unless appropriate notice procedures are followed. If you do mail a letter to the court, know that the letter will never be read by the judge. It will be sent by the clerk to the attorneys. Any party offended by the communication will send it to the Board of Psychology.

Affirmation No. 4: "I will not opine about custody unless I have been appointed by the court as a child custody evaluator."

Many silver tongued family law lawyers will try to cut corners and get the naïve practitioner to provide an opinion regarding child custody. Never provide an opinion regarding child custody in a deposition or in court unless you have the necessary education, qualifications and experience and performed an evaluation meeting the requirements of Family Code § 3111 and California Rules of Court, Rules 5.220 et seq.

Affirmation No. 5: "I will not provide records and testimony to anyone unless I have a release from the patient(s) or an order of the court."

Family court is very contentious. Emotions are very high. Attorneys are very aggressive. Just because you receive a subpoena does not automatically require you to produce records and testify. Make sure that the patient you are treating consents to release the records and allow you to testify. Many times they will not. If the child(ren)'s records are requested, make sure you know (in writing) who has legal custody and who can release the records. If you have concerns about releasing the child's records, consult an attorney. Know that in some cases parents are not concerned about the child's best interests, but rather, want to do what will emotionally injure the other parent. If you are treating a child and one of the parents subpoena's the records, make sure both parents consent if there is joint legal custody.

Affirmation No. 6: "I will consult."

In any activity involving a legal proceeding, consult an attorney. There is no valid reason why you should not. You will be surprised how professional lawyers and litigants can become once you have someone in your corner, zealously representing your interests. ■

None of the above concerns should discourage psychologists from working with these clients. However, psychologists should be prepared, but not discouraged, if some of these issues do occur.

Handy Hints...

To make your license renewal easier

1. Clip out this article and the following Ethics Corner – and put them in a folder to create instant documentation of your ongoing training is professional psychology ethics and law.
2. Annually, go to the BOP's website – under the Laws and Regulations tab – and print out the Recent Legislation section; add that to the same folder.
3. Subscribe to the CE Bank service – then you can relax when the Board sends you a CE audit notice. Just call us.