

LIMITATIONS ON TESTIMONY BY PSYCHOLOGISTS IN DOMESTIC ACTIONS: PRACTICAL AND ETHICAL CONSIDERATIONS

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Introduction

This article discusses the ethical limitations on testimony by psychologists, subpoenaed to testify in divorce or custody cases, according to the American Psychological Association Code (2002). In addition, practical solutions and strategies are suggested so that psychologists can provide information to clients concerning their inability under Colorado law to make recommendations to the Court about custody or parenting issues.

A Typical Scenario

Too often, parents involved in domestic litigation engage in therapist shopping. They will take their children to a therapist, establish trust and rapport with the professional, and try to appear as the model parent. Then they will make critical comments about their estranged spouse, emphasizing how uncaring or abusive that individual is. Finally, they make a plea to the therapist for assistance in court: "Will you testify for me at the final orders hearing? I need you to make a recommendation to the Judge that I should have sole custody of my children. Or the parent may request that the therapist make a recommendation that the other parent should only have supervised

parenting time. This plea is accompanied by a request from that parent=s attorney for a letter to the court by the therapist, making favorable recommendations on behalf of the client.

Such pleas by parents and requests by counsel put clinicians in an untenable position. No matter how great the therapist=s desire to be supportive, a therapist cannot go to court and assume the role of a Child-Family Investigator (CFI) or other court-appointed custody evaluator. To do so would violate a psychologist=s ethical principles and the Standards adopted by the Chief Justice of the Colorado Supreme Court for CFI investigations and evaluations. Chief Justice Directive 04-08, Standard 4, prohibits a mental health professional who has provided psychotherapy to any of the parties or children in the case from serving in the role of CFI. For a clinician providing therapy to make ultimate recommendations on issues relating to parental responsibilities would also violate C.R.S. 14-10-127(6). This Statute provides for the appointment by the court in domestic cases of licensed mental health professionals who meet the qualifications specified in this Statute, to conduct an evaluation of issues concerning the allocation of parental responsibilities. This Statute authorizes a court-appointed mental health professional to make specific recommendations to the court when the mental health professional has interviewed and assessed all parties to the dispute, assessed the quality of their relationship, or the potential for establishing a quality relationship, between the child and each of the parties, and had access to pertinent information from outside sources. Since a clinician who has provided services to a family member is prohibited from conducting an evaluation of these issues, any

recommendations by the therapist would violate the clear intent and provisions of C.R.S. 14-10-127.

The role of a therapist, who is compelled by subpoena to appear in court for a hearing on parenting issues, is therefore limited. The American Association for Marriage and Family Therapy (AAMFT) Code of Ethics Principle 3.14 provides: ^ATo avoid a conflict of interest, marriage and family therapists who treat minors or adults involved in custody or visitation actions may not also perform forensic evaluations for custody, residence, or visitation of the minor. The marriage and family therapist who treats the minor may provide the court or mental health professional performing the evaluation with information about the minor from the marriage and family therapist's perspective. While it is appropriate, then, for CFI's or other court-appointed professionals to conduct evaluations of parenting issues and to make recommendations to the court regarding them, that is their role, and not the role of a clinician who has provided treatment to a family member.

Safety Planning

What information or input is appropriate for psychologists to provide the court from their clinical perspective? The Colorado Children's Code, which mandates the reporting of suspected child abuse and neglect by all licensed and unlicensed therapists, contains statutes designed to protect children. Various provisions of the Children's Code encourage therapists to provide information to social services or law enforcement officials to promote the purposes intended by these

statutes: to keep children safe from harm. Consistent with these statutory provisions, therefore, clinicians may provide input to the court or to court-appointed professionals in domestic cases which will assist the court in implementing parenting plans designed to keep children safe. While it is the role of a CFI, GAL, or Child Representative to make recommendations to the court in the best interests of children, it would be appropriate for a psychologist to express concerns for a child's safety from a clinical perspective by suggesting to the court that a CFI may need to be appointed to investigate problems arising from a family's history of violence, abuse, drug use, etc., when a custody evaluator has not yet been appointed by the court. Since therapists reporting suspected child abuse are encouraged to provide input to child protection professionals concerning safety plans to prevent the risk of harm to children, it is reasonable for clinicians to provide the same input to the court. This has long been a generally accepted practice among mental health professionals. Certainly judges and magistrates welcome such information in order to keep children safe.

What factual information or opinions might psychologists provide to the court from their clinical perspective in a domestic case? To the extent that it may be admissible and assuming that the therapist-client privilege has been waived, psychologists may express opinions concerning their assessment of clients, their treatment plan, and clients' progress in treatment. For all the reasons discussed above, therapists may not express opinions or recommendations on ultimate issues regarding parental responsibilities. Such testimony would not only exceed the clinician's role, but would also lack the necessary foundation:

a thorough investigation and evaluation conducted by a competent court-appointed professional in compliance with the Standards set forth in CJD 04-08 and C.R.S. 14-10-127.

Practical and Ethical Considerations

As stated above, domestic attorneys on occasion make requests to psychologists for letters expressing recommendations on parenting issues, in the expectation that the clinician will advocate the client's position regarding these matters. Such requests, as well as the clients' pleas for support in court, place psychologists in conflict, torn between their loyalty to the client and their ethical duty. Harm to the therapeutic relationship inevitably results when counselors explain that they cannot go to court as an advocate for the client.

Domestic relations attorneys need to respect psychologists' boundaries and comply with the Standards established by CJD 04-08 by ensuring that they not make requests of psychologists which create ethical conflicts for them and undermine their clinical relationships. Since legal ethics require that attorneys must conform to the requirements of the law, domestic practitioners would be well advised to comply with CJD 04-08 and with C.R.S. 14-10-127 by acknowledging that clinicians cannot express opinions or recommendation regarding custodial arrangements to the court in violation of these legal provisions.

Psychologists should disclose to potential clients, as a professional relationship is being established, that if the client is involved in a divorce

or custody case, the psychologist cannot write letters to the Court or make recommendations concerning custody, parental responsibilities, or parenting time. The Client Disclosure Statement can be used to establish ground rules at the beginning of treatment, by informing a client: AIf you are involved in a divorce or a custody case, you need to understand that I cannot make recommendations to the court concerning custodial arrangements or the parenting time to be ordered by the judge. Courts can appoint custody evaluators or CFI's, who are objective and have never had a professional relationship with family members, to conduct an investigation and evaluation of custody and parenting issues, and make recommendations to assist the court in making determinations in the best interests of the children involved. Because I cannot make recommendations to the court in a case where I have provided treatment to a family member, you agree not to subpoena me to court as a witness.@ This disclosure provides clients at the outset of treatment with information concerning the ethical and legal prohibitions which prevent a clinician from expressing any opinions concerning custodial issues in order to avoid any misunderstanding or ethical dilemma from occurring later. Such a disclosure clearly identifies what a psychologist's role is and what the clinician=s role is not in family court cases, thereby complying with APA Ethical Standard 10.02.

Conclusion

The Standards established by CJD 04-08, Colorado Statutes, and ethical principles for psychologists prohibit clinicians who have treated family members from making recommendations to the court regarding

custody or parenting issues. It is the role of CFI's and other court-appointed professionals, who have conducted an appropriate investigation and evaluation, to make recommendations to the court regarding the allocation of parental responsibilities and parenting time.

Domestic relations attorneys, understanding psychologists' ethical limitations, should respect clinicians' ethical boundaries and avoid undermining their therapeutic relationships with parents, children, or families involved in domestic cases, and refrain from asking psychologists to write letters to the court with recommendations as to custody.

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