

## **Limitations On Testimony By Mental Health Clinicians In Domestic Actions: Practical And Ethical Considerations**

Two recent articles published in *The Colorado Lawyer*<sup>1</sup> discussed the Standards for Child and Family Investigators (“CFI’s”), established by the Chief Justice of the Colorado Supreme Court in Chief Justice Directive 04-08.<sup>2</sup> Attorneys who practice in the domestic relations courts need to understand the limitations imposed by the Standards on mental health professionals who have provided counseling or treatment to family members involved in a divorce or parental responsibilities action. Attorneys for family court litigants also need to know the ethical limitations imposed on therapists by their professional codes of ethics, which restrict a clinician’s ability to express opinions concerning the allocation of parental responsibilities or parenting time.<sup>3</sup> This article discusses the application of both CFI Standards and ethical codes for therapists, and the appropriate role for therapists subpoenaed to testify in family court cases.

### **The Application of CFI Standards and Ethical Codes for Therapists**

Attorneys understand the bounds of legal ethics in the representation of clients, and we adhere to basic ethical principles instinctively. Mental health professionals do the same in providing treatment to clients. Attorneys are aware of the boundaries created by a professional relationship, and avoid the most basic taboo, a conflict of interest.<sup>4</sup> For a therapist in a professional relationship<sup>5</sup> with a client, basic ethical principles prohibit a “dual relationship” or a “boundary violation”.<sup>6</sup> A prohibited dual relationship for a therapist, for example, would occur if a clinician were to provide counseling to a close friend, colleague or relative. Such relationships might impair the therapist’s professional judgment in providing treatment to a client or in adhering to legal duties, such as the reporting of suspected child abuse and neglect.<sup>7</sup> A boundary violation would occur if a therapist were to engage in an intimate relationship with a client, or to exercise “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”.<sup>8</sup> These ethical principles for therapists, therefore, prohibit a clinician who has provided counseling to a family, to a couple, to individuals, or to children from conducting an evaluation and making recommendations to a court concerning the allocation of parental responsibilities and parenting time. CJD 04-08, Standard 4 also prohibits a mental health professional who has provided “psychotherapy to any of the parties or children in the case<sup>9</sup> from serving in the role of CFI.”<sup>9</sup>

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 CFI or other court-appointed evaluator. To do so would violate the therapist’s ethical principles and the CFI Standards, referred to above. For a clinician providing therapy to make ultimate recommendations on issues relating to parental responsibilities would also violate the legal principles embodied in C.R.S. 14-10-127(6). This Section 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.”<sup>10</sup> 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: “To 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.”<sup>11</sup> 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.

What information or input is appropriate for therapists to provide the court from their clinical perspective? The Colorado Children’s Code,<sup>12</sup> which mandates the reporting of suspected child abuse and neglect by all licensed and unlicensed therapists,<sup>13</sup> 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.<sup>14</sup> 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<sup>15</sup> to make recommendations to the court in the best interests of children,<sup>16</sup> it would be appropriate for a therapist 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 no one has yet been appointed in one of these roles. 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, then 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.<sup>17</sup> Certainly judges and magistrate welcome such information in order to keep children safe.

What factual information or opinions might therapists provide to the court from their clinical perspective in a domestic case? To the extent that it may be admissible<sup>18</sup> and assuming that the therapist-client privilege has been waived, therapists 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 or by an evaluator appointed pursuant to C.R.S. 14-10-127.

### **Practical and Ethical Considerations for Attorneys**

As stated above, domestic attorneys on occasion make requests to therapists for letters expressing recommendations on parenting issues, in the expectation that the therapists will advocate the client's position regarding these matters. Such requests, as well as the clients' pleas for support in court, place therapists in conflict, torn between their loyalty to the client and their ethical duty. Harm to the therapeutic relationship inevitably results when therapists explain that they cannot go to court as an "advocate" for the client.<sup>19</sup>

Domestic relations practitioners need to respect therapists' boundaries and comply with the Standards established by CJD 04-08 by ensuring that they not make requests of therapists which create ethical conflicts for them and undermine their clinical relationships. Since legal ethics require that our conduct as attorneys must "conform to the requirements of the law",<sup>20</sup> domestic practitioners would be well advised to comply with the spirit and intent of CJD 04-08 Standard 4 and of C.R.S. 14-10-127 by

acknowledging that clinicians cannot express opinions or recommendation regarding custodial arrangements in violation of these legal provisions.

Is it practical to subpoena therapists to testify in family court matters in view of these legal and ethical limitations? Keeping in mind that a clinician who is called to provide testimony concerning treatment issues is an expert witness who must be compensated as such,<sup>21</sup> attorneys may question the cost-effectiveness of such evidence. Too often, therapists subpoenaed to testify in domestic matters complain that the attorney who issued the subpoena informed them, when advised of the clinician's fee schedule for court appearances, "Oh, you're not an expert. You're just going to be called to testify concerning your treatment." It is true that on occasion a healthcare professional may be a fact witness, called to court to provide testimony concerning a statement made by a party or regarding an eye-witness account of an incident. However, mental health professionals who testify in court regarding clinical matters which require their education, training and expertise are expert witnesses who, like attorneys, are entitled to be paid their hourly rates for the task at hand.

### **Conclusion**

The Standards established by CJD 04-08, Colorado Statutes, and ethical principles for therapists prohibit clinicians who have treated family members from making recommendations to the court regarding 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 therapists' limitations, should respect clinicians' ethical boundaries and avoid undermining their therapeutic relationships with parents, children, or families involved in domestic cases.

### **NOTES**

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1. Robert M. Smith, David Littman, and Lael Montgomery, "Child and Family Investigator Standards in Colorado -- Part 1 and Part 2," *The Colorado Lawyer*, July and August 2006.

2. Chief Justice Directive ("CJD") 04-08 became effective September 1, 2004. See Denis K. Lane, Jr., *The Legal Guide for Practicing Psychotherapy in Colorado* (Bradford Publishing 2006), which discusses compliance with CFI Standards at 205-215.

3. See, e.g., American Association for Marriage and Family Therapy ("AAMFT") Code of Ethics Principle 3.14.

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4. RPC 1.7 and 1.8.
  5. C.R.S. 12-43-201(7.5).
  6. C.R.S. 12-43-222(1)(i and j).
  7. See C.R.S. 19-3-304.
  8. C.R.S. 12-43-222(1)(j).
  9. CJD 04-08 Standard 4(b), states: “The CFI Shall Not Serve Dual Roles.”
  
  10. 10. C.R.S. 14-10-127(6)(a).
  11. See also American Psychological Association Code of Ethics Section 10.02 (2002).
  12. C.R.S. 19-1-101 *et seq.*
  13. C.R.S. 19-3-304.
  14. C.R.S. 19-3-307(1)(h).
  15. See C.R.S. 13-91-104 *et seq.*
  16. See C.R.S. 14-10-124 which defines “best interests of a child”.
  17. C.R.S. 12-43-222(1)(g).
  18. C.R.E. 702.
  19. Denis K. Lane, Jr., “Testifying in Divorce Litigation: Risks and Risk Prevention”, *Family Therapy*, Vol. 5, No. 3, pp. 43-45. (AAMFT 2006).
  20. RPC, Preamble.
  21. C.R.E. 702.