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Swimming with Sharks: Practice, Ethics, and Risk Management for Court-Involved Therapists

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My recent experience in observing community psychologist's involvement in Family Court divorce and custody cases has raised a number of professional/risk management concerns. I will do this in two parts: 1) Psychologist's seemingly well-intentioned involvement in child custody disputes and the unwitting harm they can do to others (children and parents). 2) Risk management issues that arise in psychologist's participation in Family Court (harm they can do to themselves).

Court-Involved Therapists

Attorneys, mental health professionals, and ultimately judicial officers may need to determine: (1) whether a child's therapist has sufficient expertise regarding divorce-related issues to effectively assist the child; (2) whether the therapist has retained sufficient professional objectivity to avoid biasing treatment; and (3) the quality and credibility of the treating therapist's data, reports, and/or opinions.

Many of the assumptions which underlie traditional psychotherapy cannot be extended to treatment in a forensic case, including confidentiality and information presented to the therapist. Treatment information may not be confidential especially if reports are made to lawyers or CEs. The challenge for the forensically-informed therapist is to be aware that the information being brought into the treatment session could be intentionally or unintentionally distorted.

A child's perceptions and statements may be altered by external influences such as suggestive questioning. It is essential that the therapist critically evaluate the nature, source, and representativeness of the information being brought into the sessions.

Forensic Thinking: requires knowledge of relevant research regarding children's adjustment to divorce, domestic violence, alienation dynamics, child abuse, children's suggestibility, the impact of parental conflict on children, child development and coping skills children need to adjust successfully as they mature.

The therapist who does not engage in forensic thinking, that is, understanding the broad range of contextual possibilities concerning a child's report, increases the risk of introducing a systematic bias into the child's treatment.

Objective and balanced treatment involves two elements (1) the therapist's ability to focus on and understand the family situation in which the child lives and (2) the therapist's ability to identify, formula, and actively explore rival, different and plausible interpretations of the child's behavior, statements, problems, and needs.

If the therapist becomes overly aligned with one litigating parent and only considers that parent's viewpoint, the result is biased treatment and often an escalation of the parental conflict.

Biased therapists may escalate conflict by providing treatment information to the court at the request of one parent without obtaining a balanced understanding of both sides of an issue. This is unethical and poses a risk of license complaint or malpractice.

Offering opinions to the court based on an inadequate foundation of information, especially when the testimony crosses the line from treatment opinions into forensic judgments, is a violation of the professional standards governing most therapists.

Too often, therapists stray beyond the boundaries of their roles as treating therapists and into the arena of psycho-legal opinions and recommendations.

Two types of experts: (1) treating expert and (2) forensic expert. The forensic expert is authorized to offer opinions on psycho-legal issues such as parental capacity, or the best custody arrangement for the child. This is outside the ordinary scope of the treating therapist, who can report on the child's diagnosis, treatment plan, progress in treatment, and prognosis.

Treating therapists must understand that the information they provide to the court or a court-officer may be used in the legal proceedings and may have significant consequences.

When should a child's therapist be removed? If the child's therapist is unable to provide balanced, objective, and effective therapy, the therapist should be removed. This includes situations where the therapist has seen a child with only one parent, has served previously or concurrently as one parent's therapist, where the therapist insists on treating the child based on their personal beliefs concerning facts in the child's life, or when the therapist does not adequately recognize the boundaries of expertise between treatment and forensic roles.

The AFCC has convened a Task Force on the Role of Court-Involved Therapists to address areas of competence, critical thinking, confidentiality, psycho-legal treatment interventions, information to be provided to the Court, and collaboration with other professionals.

How Mental Health Professionals Promote Disputes

"What has received relatively little attention, however, is the role of mental health professionals in generating or entrenching disputes."

"Mental health professionals who undertake individual counseling and psychotherapy for a separating spouse are usually privy only to one view of the family problem. Moreover, they are primarily concerned about the intrapsychic adjustment or social functioning of their client, remaining somewhat ignorant of the family or couple dynamics. In support of a seemingly powerless, depressed, or abused spouse, they can encourage an uncompromising, aggressive stance that results in prolonged disputes over the post-divorce care of children. Or they can encourage avoidance and noncommunication with the ex-spouse in an effort to support their client's autonomy. They can also unwittingly endorse their client's distorted views of the divorce situation and consolidate their client's polarized negative image of the ex-spouse."

"What is most disturbing are the number of instances in which a mental health professional is willing to offer an opinion or even testify in court as to the disposition of issues under dispute (such as custody or visitation) without having seen the other spouse or sometimes even the child. Or a therapist attempts to see the whole family but only after extensive individual counseling with one member, making his or her neutrality questionable. Furthermore, the court in some cases is willing to give credence to such testimony. Other counselors continue to see one party after the family counseling breaks down and participate in the polarization of positions and the escalation of the dispute."

"In conclusion, there is a need to educate the legal and mental health community as to the role of professionals in maintaining the disputes of high-conflict divorcing families. More explicit guidelines are required for ethical conduct in

case management with these families.

“Some therapists, who saw only one of the parents, encouraged uncompromising stands, reified distorted views of the other parent, and wrote recommendations and even testified on behalf of their client with little or no understanding of the child’s needs, the other parent’s position, or the couple and family dynamics.”

Practice Pointers

Doing good while avoiding risk: Although Family Court work can be tempting for a variety of reasons, and the court and lawyers seem highly willing to attract new providers, I have seen a number of situations where psychologists exposed themselves to potentially license damaging risk. The examples I provide below are from real life instances. Some of these cases were brought to me as an expert consultant.

1. Do not accept any case from the court where you are expected to provide information that could potentially be used by one parent against another, for example, a court appointment to determine a child's readiness for visitation, whether a child has been abused, or where a child should live, especially if you are using medical insurance. If a parent does not agree with you or if there is an adverse effect, they can file a complaint with the third party payor for violation of your insurance contract. Using health insurance in a contested legal matter where the covered parties are in conflict is extremely risky.
2. If you accept an evaluation case, do not do so without appointment to the court as an Evaluator or GAL, because otherwise you do not have quasi-judicial immunity (immunity from law suit). In any case, you are not protected from license complaints. Make sure that you have a licensing board complaints rider on your malpractice insurance.
3. If you accept a treatment case under court order, for example of a child, do not do so unless there is an intermediary between you and the court. Be very careful to separate the treatment and evaluator roles. Sometimes the court dumps a case on a provider to clean up a mess outside of court. Insist there be a court officer to serve as intermediary to the Court.
4. Do not accept any appointments where the order says that you have the final say, for example, in whether a child should visit.
5. You should be aware that making decisions that adversely affects a party's interests in a legal matter without actually seeing them is extremely risky, unless

you are covered, for example, by a mandated reporting statute. I continue to see reports regularly where a therapist seeing a child makes a report about visitation that crosses the line, expressing opinions about a parent based on the child's report, without having done a proper evaluation, or seen the other parent.

6. In a contested divorce case, always check to determine if there are orders for concerning sole or joint legal custody.

7. Be extremely wary in situations where you are asked to see a child without notification of the other parent, including situations where there is joint legal custody, or if the other parent's health insurance is being used. In general seeing children in individual therapy in contested divorce case, without access to both parents, is potentially harmful.

8. Be fully aware of the newly revised APA Guidelines for Psychologists in Custody Proceedings. If you are interested in deeper involvement consult the Specialty Guidelines for Forensic Psychologists.

9. If the work you are doing can conceivably be foreseen as "forensic," it is forensic-- be aware newly revised of the Specialty Guidelines for Forensic Psychologists. They provide guidelines for practice that will keep you out of trouble.

10. Be aware that any involvement in a Family Court case may ultimately expose you to subpoena for records and appearance (cross examination). A recent Intermediate Court of Appeals opinion (Doe vs. Doe) states clearly that any information a Custody Evaluator or GAL uses from a therapist is discoverable (that is, not confidential). The implications for this finding in relation to confidentiality issues needs to be debated in the HPA community. Make sure that your records will pass the scrutiny of an adversarial attorney or expert.

11. Be aware that to practice ethically you have to practice competently; therefore make sure that your practice is based on documented education, training, and supervision.

The court and attorneys do not care much about whether you know what you are doing. It is your responsibility to protect yourself.

References

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