

"SOMETIMES, It's What You DON'T SAY..."

Michael Griffin, JD, LCSW

Staff Attorney

March/April 2013

During 2012, CAMFT attorneys fielded over 24,000 requests for consultation from members, concerning a broad range of legal and ethical issues. During many of those calls, the member stated that he or she had either written a letter for a client, or, that a client had recently asked him or her to write a letter. These scenarios are so common, it would be unusual for a CAMFT attorney to go more than a few days without hearing the words, *"My client asked me to write a letter..."*

Therapists are asked to write letters for a variety of reasons, some more important than others. More often than not, *a request for a letter is really a request for the therapist to provide his or her professional opinion or recommendations regarding the client.* Because a request for a letter sounds fairly innocuous, however, compared to a request for *recommendations from a mental health professional*, the gravity of writing a letter is not always evident. In reality, the therapist's opinion, regardless of whether it is documented in a report, expressed on the witness stand, or written in a letter, can have a powerful impact on a person's life.

A therapist who fails to consider the possible consequences of writing a letter runs the risk of a malpractice lawsuit, ethics complaint, or a disciplinary action by the therapist's licensing board. Fortunately, a therapist can minimize the likelihood of encountering such events if, prior to stating his or her opinion, he or she takes the time to determine whether it is appropriate to comment on a particular topic or issue.¹ Depending on the circumstances, the therapist may decide not to comment on an issue or to offer any recommendations in a letter. Or, he or she may decide to request additional information from the client, prior to reaching a decision. Of course, the therapist would also be free to provide the requested letter, if he or she determined that it was appropriate to do so.

The Right to Say "No"

Occasionally, a therapist will remark that he or she didn't realize that it was possible to say "no" to a client's request. As a general rule, a therapist is entirely free to decline such a request. There is no legal or ethical "duty to write a letter" and a client's request, in and of itself, does not obligate a therapist to act in a particular manner.

High Risk Scenarios

One of the most challenging situations occurs when a therapist is asked to provide his or her recommendations concerning a child or adolescent client, whose parents are engaged in family court litigation.

A parent may ask the child's therapist for a letter shortly after bringing the child to therapy. In this situation, some therapists will decline the parent's request, stating that they are unfamiliar with the child and therefore unable to offer an informed opinion.

Other therapists state they do not write such letters as a matter of policy, or, they may inform the requesting parent that they do not wish to become involved in the client's legal matters. In response, the parent may "up the ante," explaining that the letter is needed for an important legal action which concerns the child, or that the therapist's help is urgently necessary in order to protect the child from a dangerous person or circumstance. In this situation, the child's parent, or the parent's attorney, may ask the therapist to write a letter "to the court," wherein the therapist would recommend some change in the minor's visitation arrangement.²

It is quite understandable that a therapist may want to provide one of the above-described letters, based upon a genuine desire to help the client, but he or she must also consider the possibility of becoming embroiled in the client's legal matters.³ The general rule is that a therapist should avoid offering his or her opinion on a legal issue, such as custodial rights or the child's visitation schedule. Although some parents may accept a therapist's refusal with little fanfare, others may continue to try and change the therapist's mind, and may ask the therapist to speak with the parent's attorney. Ultimately, some therapists eventually tire of such pressure and agree to produce the requested letter.⁴

There are therapists who do not question a parent regarding his or her request for a letter or seriously consider whether it is advisable to write such a letter. They simply produce the requested document. Generally speaking, when a therapist writes a letter on a matter that is the subject of contention in a family court matter, there is a significant risk that he or she will encounter legal and ethical problems, as evidenced in numerous complaints that are filed with licensing boards and ethics committees.

Legal and Ethical Issues

Prior to offering a professional opinion, a therapist needs to determine whether it is appropriate for him or her to express such an opinion. In making such a determination, the

therapist would be expected to consider any relevant legal and ethical standards.⁵ Generally speaking, the standards that are relevant to this area concern the following subject matter:

Scope of Competency

In order for the therapist to provide his or her professional recommendations regarding a particular topic or issue, he or she must possess a sufficient degree of education, training and experience to competently render such an opinion. Consequently, a therapist who offers his or her assessment of, or recommendations concerning, some issue, while lacking the competency to do so, may be accused of engaging in unprofessional conduct.⁶

Dual Relationships/Conflicts of Interest^{7 8 9}

A therapist is expected to avoid performing multiple roles for the same clients or treatment units, particularly when doing so is likely to impair his or her professional judgment, or where there is a potential conflict of interest. There is a potential conflict of interest, when a treating therapist provides an evaluation of his or her psychotherapy client for use in a legal proceeding.

Bias/Lack of Objectivity^{10 11}

A therapist is expected to remain impartial in a legal proceeding and to avoid compromising his or her judgment. When a therapist offers an opinion or recommendation regarding his or her psychotherapy client, for use in a legal matter, he or she may be subject to an allegation that his or her opinion was biased, because of his or her concurrent role as the person's therapist. Should the opinion concern a legal issue such as custody, an aggrieved party may decide to complain of bias, and point out that opinions regarding custody are supposed to be issued by individuals who have met specific requirements and guidelines.¹²

Disclosing the Limits of Opinions/Offering Opinions About Persons Not Evaluated¹³

It is unethical for a therapist to offer an opinion about a person that he or she has not evaluated. Furthermore, it is expected that a therapist will disclose the limits of the information upon which his or her opinion is based. Consequently, when a therapist offers an opinion which describes the alleged problems of some person whom he or she has never met, there is a significant possibility that the individual may accuse the therapist of unethical conduct.

The Benefit of Consultation

It is advisable for a therapist to seek consultation from a colleague or other reliable source at the time the request is made. While it is appropriate to seek consultation about a matter at *any* time, consultation is likely to be more effective when it is sought prior to offering the requested letter, rather than afterwards.

Questions to Consider

Before responding to a request for a letter, a therapist may find it helpful to consider the following questions:

1. What is the specific nature of the request?
2. What does the requesting person want from you?
3. Are you reluctant to respond to the request? Why?
4. What does the request have to do with your role as a therapist?
5. Are there any reasons that you should not honor the particular request?
6. Do you feel pressured or compelled to honor the request? If so, why?
7. Is it appropriate to provide the information that is being requested?
8. Are you qualified to address the particular issue?

Anticipating Problems

It is often possible for a therapist to anticipate that he or she may be asked to interject his or her opinion on a legal matter. The common example is when a therapist is asked to provide treatment to a child whose parents are in the midst of a divorce. Or, a therapist may discover that one of his or her existing child clients has become the subject of litigation. In either scenario, it is fairly inevitable that one or both of the child's parents will ask the therapist to provide information about the child's treatment, and, or, to express an opinion regarding the child's relationship to his or her parents. The therapist may even be asked to comment on issues such as custody or visitation.

In these instances, it is important for the therapist to learn what the child's parent(s) expect of him or her, and, it is also necessary for the therapist to clarify the nature and limits of his or her role as the child's therapist. When only one of the parents initiated contact with the therapist, prior to beginning therapy with the minor, the therapist must ensure that he or she has obtained the appropriate consent to provide services. It is advisable for the therapist to carefully assess all of the facts and circumstances, and to be cautious about engaging in treatment of the minor without the involvement of both parents.¹⁴ The parent who initiated treatment often assumes that the therapist will be willing to advocate for him or her regarding visitation or custody issues. In such instances, it's also likely that, at some point, the therapist will be asked to write a letter. Considering

the prevalence of such requests, especially in cases where there is family court involvement, the question isn't whether the therapist will receive a request for a letter. It's really a matter of when.

Michael Griffin, JD, LCSW, is a Staff Attorney at CAMFT. Michael is available to answer member calls regarding legal, ethical, and licensure issues.

References

1. The amount of time spent in such deliberation depends on the nature of the request and the particular facts and circumstances.
2. These circumstances have the potential to lead an unwary therapist into trouble and it is strongly recommended that a therapist seek appropriate consultation when needed.
3. There are exceptions to almost any rule. The discussion concerns many or most circumstances. In select circumstances, subject to direction of the court, it may be possible for a therapist to provide information related to visitation, or other issues.
4. If the therapist declines to write a letter, it is generally advisable for him or her to document his or her decision in the record, including any reason(s) that may be applicable.
5. The legal and ethical standards that are discussed in this article are not intended to be an exhaustive list of every legal or ethical standard that is relevant to the subject matter. The ethical standards that are cited are located in Part I of the *CAMFT Code of Ethics*, which is available at: www.camft.org. The legal and ethical standards that may apply to a given situation will vary, depending on the specific facts and circumstances. Professionals who are members of professional associations other than CAMFT should also consult the ethical standards that are provided by their respective organization.
6. §4982(s), Business & Professions Code, Performing or holding oneself out as being able to perform professional services beyond the scope of one's competence, as established by one's education, training or experience is unprofessional conduct.
7. §1.2 *CAMFT Code of Ethics*: Marriage and family therapists are aware of their influential position with respect to patients, and they avoid exploiting the trust and dependency of such persons. Marriage and family therapists therefore avoid dual relationships with patients that are reasonably likely to impair professional judgment or lead to exploitation. A dual relationship occurs when a therapist and his/her patient engage in a separate and distinct relationship either simultaneously with the therapeutic relationship, or during a reasonable period of time following the

termination of the therapeutic relationship. Not all dual relationships are unethical, and some dual relationships cannot be avoided. When a concurrent or subsequent dual relationship occurs, marriage and family therapists take appropriate professional precautions to ensure that judgment is not impaired and that no exploitation occurs.

8. §8.4 *CAMFT Code of Ethics*: Marriage and family therapists avoid providing both treatment and evaluations for the same clients or treatment units in legal proceedings such as child custody, visitation, dependency, or guardianship proceedings, unless otherwise required by law or initially appointed pursuant to court order.
9. §8.3 *CAMFT Code of Ethics*: Whenever possible, marriage and family therapists avoid performing conflicting roles in legal proceedings and disclose any potential conflicts. At the outset of the service to be provided and as changes occur, marriage and family therapists clarify role expectations and the extent of confidentiality to prospective clients, to the courts, or to others as appropriate.
10. §8.5 *CAMFT Code of Ethics*: Marriage and family therapists, regardless of their role in a legal proceeding, remain impartial and do not compromise their professional judgment or integrity.
11. §8.8 *CAMFT Code of Ethics*: Marriage and family therapists who are custody evaluators (private or court-based) or special masters provide such services only if they meet the requirements established by pertinent laws, regulations, and rules of court.
12. See, Kashing, Sara, JD, "Private Child Custody Evaluator Requirements," *The Therapist*, Nov./Dec., 2012
13. §8.7 *CAMFT Code of Ethics*: Marriage and family therapists shall only express professional opinions about clients they have treated or examined. Marriage and family therapists, when expressing professional opinions, specify the limits of the information upon which their professional opinions are based. Such professional opinions include, but are not limited to, mental or emotional conditions or parenting abilities.
14. The recommendation for caution by the therapist are generally given and should not be interpreted to mean that a therapist is automatically precluded from providing treatment to a minor unless both parents are involved. No two situations are identical. The treatment plan that is appropriate in a given circumstance depends on all of the relevant facts and circumstances.