

TESTIFYING IN DIVORCE LITIGATION: PREVENTION OF FORESEEABLE RISKS

In Colorado and across the nation, the most frequent type of board complaint involving MFT's arises from testimony in divorce and custody cases. Clients or the parents of children receiving treatment from an MFT, who are involved in bitterly contested custody battles, often consider the treating professional as an ally in the custody battle. These clients and their attorneys have unreasonable expectations concerning the role of an MFT who is providing treatment. They expect the MFT to make favorable recommendations to the court concerning parental responsibilities and parenting plans. However, that is not the proper role of a treatment professional. Such recommendations should only be made by custody evaluators, child and family investigators, G.A.L.'s or child representatives appointed by the court to conduct investigations and evaluations of parenting issues. Their recommendations can then be made to the court regarding the allocation of parental responsibilities and the implementation of parenting plans.

MFT's must comply with AAMFT Code of Ethics Principle 3.14 which states: "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" For example, if an MFT is subpoenaed to court and is then asked by a client's attorney for recommendations concerning who should have custody of the parties' children or concerning whether or not it is appropriate for a parent to have parenting time with a child, the only appropriate response should be, "I have not conducted the evaluation necessary to provide an opinion on this issue, so I cannot answer the question."

However, problems arise when clients have unreasonable expectations concerning a therapist's role, and feel betrayed when the MFT does not support the client's position in the litigation. For example, if a child's mother does not want her estranged spouse to have any contact with their children, she may be outraged if the MFT expresses an opinion that fathers should have relationships with their children, and then pull the children out of treatment with the MFT. This is an all too frequent experience for therapists nationwide who have testified in court: their clinical relationship with clients is either damaged or destroyed as a result of testimony in court in a domestic case.

How can MFT's avoid these risks? First, by not agreeing to testify in court; and secondly by disclosing to clients who are involved in custody battles at the outset of treatment that it is not the therapist's role to make recommendations to the court for purposes of domestic litigation, and that any courtroom

testimony may damage the clinical relationship. The mandatory Disclosure Statement is a vehicle whereby an appropriate disclosure can be made. In it you can disclose: "If you are involved in a divorce or custody litigation, you need to understand that my role as a therapist is not to make recommendations for the court concerning custody or parenting issues or to testify in court concerning opinions on issues involved in the litigation. By signing this disclosure statement, you agree not to call me as a witness in any such litigation. Experience has shown that testimony by therapists in domestic cases causes damage to the clinical relationship between a therapist and client. Only court-appointed experts, investigators, or evaluators can make recommendations to the court on disputed issues concerning parental responsibilities and parenting plans." Such an agreement by a client is not enforceable, in the event that the client's attorney issues a subpoena to an MFT; however, these disclosures may correct any unrealistic expectations that clients might have.

To avoid the foreseeable risks which result from testimony in domestic litigation, therefore, MFT's should not agree to testify in court and, if subpoenaed, should acknowledge their limitations as treating professionals, who have not and ethically cannot evaluate issues to be decided by the court or make recommendations concerning them. And, of course, compliance with the AAMFT Code of Ethics is the best way to prevent such risks.

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