

SPECIAL FEATURE: ASSOCIATION OF FAMILY AND CONCILIATION COURTS GUIDELINES FOR COURT-INVOLVED THERAPY

ASSOCIATION OF FAMILY AND CONCILIATION COURTS WHITE PAPER GUIDELINES FOR COURT-INVOLVED THERAPY: A BEST PRACTICE APPROACH FOR MENTAL HEALTH PROFESSIONALS

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The AFCC Task Force on Court-Involved Therapists was given the charge of defining guidelines for the professional practice of therapists working with court-involved families. A draft of the Guidelines was presented for Comments in March 2010 and all comments were submitted to the Task Force Reporter, Lyn R. Greenberg, Ph.D. on May 1, 2010.

I. INTRODUCTION

Mental health professionals may be trained to treat adults, children, couples and/or families. Many therapists have experience with divorcing families; however, providing treatment in the context of court involvement for the client presents particular complexities for the therapist and the parents or child in treatment. Navigating one's ethical and professional parameters in the unfamiliar sea of the legal system is often difficult because of the additional demands placed upon the therapist by the client, by one or both of the client's parents (in the case of a child client), by lawyers, and by the court. There has long been a need for specialized guidance for those mental health professionals providing therapy to court-involved parents or families, and for a resource for the judicial officers, attorneys and other professionals who rely on therapists' work. Until now there have been no best practices guidelines for mental health professionals treating clients who are involved in family court. The primary aim of the AFCC Guidelines for Court-Involved Therapy is to assist both those who provide mental health services and those who rely on the work of mental health professionals, when in the

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context of family court litigation. The Guidelines are also intended to assist the Courts to develop clear and effective court orders and parenting plans that may be necessary for treatment to be effective. The guidelines are intended to apply whenever court proceedings can be reasonably anticipated, as many ethical and clinical problems can be avoided through early detection and intervention.

II. BACKGROUND AND METHODOLOGY

In 2009, Dr. Robin Deutsch, then President of AFCC, appointed an interdisciplinary task force to promulgate best practice guidelines for therapists who were involved in child custody or juvenile dependency cases. Dr. Matthew Sullivan chaired the task force, Dr. Lyn Greenberg was named the reporter, and Hon. Linda Fidnick was co-chair. This task force was comprised of mental health professionals, lawyers, and judges from both the United States and Canada. In preparing to write the guidelines, members of the task force reviewed case law and statutory authority from various jurisdictions, as well as court rules, local practices, and relevant professional standards and guidelines for mental health practice.¹ Several members of the task force have published scholarly articles on this topic², and the task force members reviewed these articles as well as other relevant literature.³

Subcommittees were formed to address different subject areas, and prepare draft guidelines on those topics. All drafts were reviewed by the entire task force. Thereafter the consolidated draft guidelines were sent for comment to others outside the task force who had a particular interest or expertise in the topic of court-involved therapy. Those comments were reviewed and many were integrated into the next draft of the guidelines which was sent to the members of the task force for review. Peter Salem, Executive Director of AFCC, and his team at AFCC headquarters provided editorial assistance. A final draft was then presented to the members of the Board of Directors of AFCC for their review and approval. The Board unanimously approved the Guidelines for Court-Involved Therapy on October 28, 2010.

III. WHY GUIDELINES FOR COURT-INVOLVED THERAPISTS WERE CREATED

Certain scenarios involving mental health professionals, lawyers and judges appear repeatedly in contested child custody cases. The problems and questions raised in these scenarios pointed to the need for guidelines for both the court and the mental health profession to ensure that these issues are considered methodically, sufficiently early in the case to address potential ethical challenges and risks to the family, and that most contested issues can be resolved quickly and without escalation of costs and litigation. Here are several examples:

Scenario 1: A child's therapist is subpoenaed to testify in a contested custody case. Who determines whether the child's privileged communication with his therapist should be exposed in the courtroom? In many jurisdictions this determination is made by an independent person appointed by the court, not by either or both of the child's parents, regardless of the status of legal custody. Other jurisdictions have conflicting laws and precedents. How should the therapist address the request for testimony? What role does informed consent play?

Scenario 2: A lawyer seeks an opinion from the child's therapist about that child's diagnosis, his progress in treatment, and how he is coping psychologically with the current parenting schedule. Then the lawyer asks the therapist for his opinion on whether it is appropriate for the child's parents to share legal custody. Can, and should, the treating therapist answer this question? What are the parameters of a therapist's testimony? Who can render a psycho-legal opinion like this one? Should the therapist have been speaking to the parent's attorney at all? What are the ethical risks to the therapist, and what precautions can be taken?

Scenario 3: A client involved in a child custody case seeks therapy to assist him with stress, and to address interpersonal issues that his attorney has requested that he improve prior to a custody

evaluation. What special precautions should be taken in the informed consent process? How should the therapist deal with requests the he talk to the child custody evaluator, or that he testify on the client's behalf?

Court-involved therapists are increasingly presented with situations like these. It is difficult and often confusing, given the disparate goals and lexicon of the law, for a mental health professional to balance the needs and rights of his client with the demands of the legal system. The Guidelines are intended to help mental health professionals improve their understanding of the legal system's impact on treatment of a client, and to serve as a tool for parents, attorneys, and judges in understanding the roles and responsibilities of various mental health providers.

A. WHAT ARE THE GUIDELINES?

The Guidelines for Court-Involved Therapists are a concise reference source for any professional, legal or mental health, to consult in order to better understand those the points of intersection between law and mental health treatment in the context of custody and juvenile dependency cases. Prior to the existence of these Guidelines, mental health and legal professionals often sought guidance regarding court-connected therapy dilemmas from their own professional organizations or educational sources, which generally were not specialized or interdisciplinary in nature. Now, as a result of the work of an interdisciplinary group, the Guidelines exist as a common resource for lawyers and therapists, based on relevant research and the ethical standards of the professionals involved in these difficult cases.

The Guidelines for Court-Involved Therapists are comprised of a Definitions section, ten Guidelines, a bibliography of relevant readings, and sample forms for informed consent and court orders for treatment.

The Definitions section identifies and distinguishes among the various professional roles that may be present in a custody or child dependency court case. It also defines such terms as "confidentiality" and "privilege" and describes the different types of mental health experts.

Guideline 1, entitled "Assessing Levels of Court Involvement," provides the court-involved therapist with guidance in evaluating the nexus between therapy and the court case and highlights the need to be vigilant in evaluating the impact of that nexus on both the client and the therapist's perspectives. Special considerations regarding children are also part of this Guideline.

Guideline 2, entitled "Professional Responsibilities," aids the court-involved therapist in identifying those professional responsibilities particular to treatment with a family law case as its backdrop. Ethical issues are often magnified in court-involved cases. This guideline addresses issues including maintaining appropriate role boundaries, respecting the parties' rights and the legal process, managing relationships responsibly, professional objectivity and accountability.

Guideline 3, entitled "Competence," details topics, both clinical and legal, that are important for the court-involved therapist to understand and about which the therapist should obtain sufficient training and education to address these issues effectively in the clinical context.

Guideline 4, entitled "Multiple Relationships," cautions the court-involved therapist about the perils of engaging in multiple professional roles and in roles that could represent a conflict of interest. This Guideline provides direction for the therapist in detecting and handling these complicated situations.

Guideline 5, entitled "Fee Arrangements," details best practices in making fee arrangements with clients and their attorneys, and addressing them in therapy orders as appropriate. Particularly in high-conflict cases, payment issues can be complex and involve services beyond traditional in-session charges. This section provides guidance in anticipating and addressing these issues.

Guideline 6, entitled "Informed Consent," describes the types and levels of informed consent that should be obtained when a client is involved in litigation, if the therapy is court-ordered, if the client is a child and the parents are engaged in litigation, or if there is a risk of litigation in the case. Enhanced informed-consent procedures are often essential in these cases, for the protection of both the therapist and the family.

Guideline 7, entitled “Privacy, Confidentiality and Privilege,” addresses legal, ethical, and clinical issues that may arise when a therapist works with court-involved clients. This section addresses procedures for anticipating and preventing ethical problems, as well as guidelines for responding to subpoenas or other requests for treatment information. This Guideline addresses issues such as identifying the client and contains a special section pertaining to a child who is in treatment.

Guideline 8, entitled “Methods and Procedures,” reviews recommended steps for a court-involved therapist to take whether the therapy is court-ordered or privately sought, but court proceedings are ongoing or can be reasonably anticipated. These include procedures for ensuring that therapeutic methods are adapted to the legal context, defensible if challenged, resistant to the powerful impacts of biased or distorted information, and sensitive to the potential impact of therapeutic intervention on the outcome of the case.

Guideline 9, entitled “Documentation,” suggests methods of record keeping that will protect both the client and the therapist.

Guideline 10, entitled “Professional Communication,” aids the court-involved therapist in determining what to communicate, to whom and how. In addition, this Guideline addresses issues regarding limits of therapeutic opinion and other issues that may arise when the therapist is called to testify in a court case.

B. WHO WILL BENEFIT FROM THE GUIDELINES?

Although the Guidelines for Court-Involved Therapy were conceived as a helpful tool for mental health professionals treating a client who is involved in a family law court case, they will be helpful to anyone who is a participant in the case. All professionals, whether legal or mental health, will benefit from understanding what can and cannot be asked of the court-involved therapist, and in differentiating between appropriate and inappropriate therapeutic procedures and structure.

1. Why Are the Guidelines Beneficial for Therapists?

The Guidelines highlight the special concerns inherent to the process of therapy when a family is involved in court proceedings. Prior to the consideration or initiation of legal proceedings, parents may seek professional help with their emotional conflicts or for their child’s adjustment issues. Once legal proceedings begin, the therapist is often asked to provide input about the parenting plan, suitability as a parent, or to offer opinions on other issues that may be germane to litigation but outside of the therapist’s role and information base.

Sometimes the court, attorneys or litigants make requests of therapists such as to write an affidavit, to offer an opinion, or to make decisions about issues such as the pace of reunification. The Guidelines remind the therapist of how to evaluate these requests in the context of his/her own expertise and particular role with a family, as well as in consideration of the impact of these requests on the therapeutic process. This also serves as a caution to legal professionals to utilize the expertise of mental health professionals appropriately and within the court rules governing expert testimony. In addition, the guidelines provide support to therapists who require appropriate procedures or decline to violate the boundaries of their roles. The current climate of declining resources and economic stress may lead to pressures on mental health professionals to expand their roles in ways that can eventually land the therapist in ethical or legal trouble. The Guidelines may provide support to therapists in resisting these pressures.

In court-ordered therapy, a therapist may be ordered to provide information to a number of people, including a child custody evaluator, attorneys, a guardian *ad litem*, or a child protective services agency. Confidentiality may be limited in these cases, or the parents may come under pressure to waive applicable privileges to allow information to be shared with one of these professionals. Depending on the law of a specific jurisdiction, confidentiality even with respect to privately engaged therapy may be limited by law, or by situational pressures such as those outlined above. Clients are

often surprised by this, and need to be fully informed of their rights and the possibility that circumstances could arise that will lead to requests for treatment information. The Guidelines will help therapists with providing adequate informed consent, for these and other issues that may arise in court-related cases.

Because of the high stakes in any child custody or dependency proceedings, the Guidelines remind professionals to be especially alert to the distorting potential of bias and alignment. Specific practices are suggested for maintaining professional objectivity and defensible procedures.

2. Why Are the Guidelines Beneficial for Attorneys and the Court?

Attorneys may be unaware of the limitations on a treating therapist's ability to participate in litigation, of the particular requirements that must be met before a child's therapist discloses information or professional opinions, or of the appropriate and ethically required limits on professional opinions by therapists. An attorney may ask a therapist to write an affidavit or to opine on a psycho-legal issue such as legal and physical custody. The Guidelines will help counsel understand the limitations so that the therapist can be as effective as possible in the proceedings without compromising the therapist's professional responsibilities.

Forensic experts are retained by the parties or appointed by the court to provide expert testimony and/or apply psychological methods to answer a legal question. When the forensic expert has completed an evaluation of the child and parents, he/she may be asked or permitted to provide opinions on psycho-legal issues such as parental competence or the best parenting plan for a child. While either a treating expert or a forensic expert will have knowledge beyond that of the lay person, the treating expert may only offer opinion evidence within the boundaries of the therapist's role. The ability to distinguish between these roles is critical in effective legal representation.

It is not uncommon for a therapist who is serving in a neutral, child focused role to eventually say or do something that displeases one of the parents; in fact, it may be critical to effective therapy that the therapist confront or redirect unhealthy behavior. On the other hand, there are cases in which therapists become inappropriately aligned or biased, or engage in procedures that cause serious problems. The Guidelines may be of assistance to counsel and the court in differentiating between the invalid complaints of disgruntled litigants and serious reasons to be concerned about a course of treatment.

3. Why Are the Guidelines Beneficial for Children?

The Guidelines stress the importance of the unique issues regarding securing informed consent for treatment of a child, providing appropriate information to children, determining who holds a child's privilege, the complexities of confidentiality and obtaining balanced and accurate information in the context of a custody case, and appropriate steps for determining treatment procedures. When a therapist is able to provide unbiased treatment to a child and properly evaluate the child's responses to family conflict, teach coping strategies, and help a child navigate through family crisis, the child's best interests are served.

C. BEST PRACTICES

The Guidelines are conceived and written as an aid to "best practices" for court-involved therapists and other professionals involved in child dependency and family court litigation, and are neither intended, nor written, to create a standard of care. The Guidelines may be used, in combination with the ethical standards of the involved professions, to guide assessments of the conduct of therapy in a particular case, and to educate the Court as to the appropriateness, risks, or benefits of ongoing treatment. By their very nature, the Guidelines do not purport to regulate any particular profession, but instead provide interdisciplinary guidance in the best practices for mental health and legal professional participants in a custody case.

The Task Force's highest aspiration for the Guidelines is as an educational tool for mental health professionals to understand and respect the various considerations inherent to the court process and for legal professionals to understand and respect the various considerations inherent to the professional standards of court involved mental health professionals.

IV. CONCLUSION

The AFCC Task Force on Court Involved Therapy created the Guidelines with the intention of providing a tool that would be useful to all mental health and legal professionals directly or indirectly involved in child custody litigation. Treatment of adults, children and families who are engaged in a family law case raises complicated considerations that are unique to these situations. The Guidelines are offered as advice to those involved, with the understanding that an interdisciplinary approach is needed to address the intersection of the two professions uniquely linked in family law and juvenile dependency cases.

NOTES

1. Ethical standards reviewed included the American Psychological Association Ethical Code and the ethical standards promulgated by the National Association of Social Workers and the American Association of Family Therapists, and (insert reference to the LPC's code).
2. Friedlander, S. & Walters, M. G. (2010).
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3. Various members of the task force also included a range of developmental literature and other literature relevant to court-related treatment. A list of recommended readings is included as an appendix to the guidelines and can be accessed from the AFCC web site.

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