



Courtroom testimony: Ethics and counseling roles

Court testimony is daunting for most counselors. In fact, many counselors will say that court appearances are among their most dreaded activities.

Despite these sentiments, counselors are often asked to provide testimony. Fortunately, there are specific ethical practices and principles that inform the process, thus providing guidance for counselors in the courtroom.

Preparation before testimony

Although most counselors find giving testimony unpleasant and unsettling, they cannot simply refuse to testify. At a recent meeting, I (Bret) was surprised to hear attorneys report that some counselors ignore subpoenas. Certainly, this is not recommended, and the action may even have legal ramifications for the counselor.

Rather than ignoring subpoenas, counselors should begin preparing for testimony immediately upon receiving a subpoena. An important initial step is for counselors to consult with their professional liability insurance carrier, especially if there are questions regarding the deposition of the requested testimony. The attorneys and insurance representatives will provide guidance and support. After this consultation, counselors may feel more confident in their preparation and actual testimony.

Counselors should keep in mind that the American Counseling Association's insurance partner, Healthcare Providers Service Organization (HPSO), provides consultation as appropriate only to those counselors it insures. If a counselor is insured by a different company, the

counselor should consult that company rather than HPSO. These consultations are part of liability policies; however, counselors may need to pay for additional legal advice.

Additionally, as part of preparation for testimony, counselors should consult with the attorney or attorneys who originated the subpoena. Family attorney Deirdre Ward said in an interview with Derek Robertson that appeared in *The Family Journal* in 2016 that attorneys frequently rely on counselors to provide information about their cases. Ward stated that she wants to consult with counselors prior to their testimony to obtain the information needed to try cases.

Of course, prior to any attorney consultation of this nature, counselors must obtain a signed release of information from their clients. Standard A.2.a. of the 2014 *ACA Code of Ethics* states that counselors should provide information about the limits of confidentiality during informed consent. Standard B.2.d. indicates that counselors seek to obtain client permission prior to the release of any court-ordered confidential information and, furthermore, limit the released information as much as possible to prevent potential harm to the client. In addition, Standard B.2.e. states that "to the extent possible," clients should be informed before confidential information is released and should be involved in the decision-making of what is to be released.

Standard A.2.a. also reminds counselors that informed consent is an ongoing process. Thus, counselors must document discussions about informed

consent throughout counseling, including any conversations related to potential court appearances.

Ethically, counselors should be familiar with their clients' records. Certainly, as counselors prepare for upcoming testimony, they must carefully examine those records. The "success" of counselors' testimony often depends on their awareness of what is in their clients' records.

Some situations allow considerable time for record review. But in other situations, cases get scheduled for hearing with little advance notice, leaving counselors with limited time to prepare for court. Given this fact, counselors should keep their records updated, thereby allowing for short notice prior to testimony. Standard A.1.b. of the 2014 *ACA Code of Ethics* explicitly states that counselors create and maintain "sufficient and timely documentation."

After carefully reviewing client records, the counselor's next task should be to focus on the primary tenets of court testimony. Namely, these tenets are that the counselor's testimony must be truthful, succinct, knowledgeable, and limited to the counselor's scope of training and practice.

When counselors maintain focus on these basic concepts, court testimony becomes less intimidating. When counselors lose focus on these tenets, however, there is the potential to create major problems for themselves and their clients. Counselors naturally rely on their verbal skills every day, so they must remind themselves that any testimony they provide should be as focused and concise as possible. If their testimony is

not focused, counselors might provide irrelevant information that is based purely on unsubstantiated supposition, thereby creating potential issues that may not be relevant to their testimony.

Fact witness vs. expert witness

To fully understand their role in the courtroom, counselors must be aware of the type of testimony they are being called to provide. Namely, they must know if they are being called as a fact witness or an expert witness. Although there are significant differences between these types of witness testimony, counselors are not typically trained to understand these roles. Therefore, they are frequently unaware of the different expectations related to being a fact witness versus being an expert witness.

Fact witnesses report, under oath, their knowledge of events that are pertinent to a case. In other words, as described by the Psychological Center for Expert Evaluations, fact witnesses testify to case-relevant events that they have observed personally. Thus, fact witness testimony is limited to factual knowledge that is reported without any further opinion or speculation. For example, when serving as fact witnesses, counselors may report facts related to diagnostic information, session frequency, client punctuality, client payments, and specific observable events that they have witnessed.

Expert witnesses, on the other hand, provide specialized information that the court would not know on its own. Accordingly, the first step to being designated as an expert witness is for the court to agree that the counselor is indeed an “expert” prior to testimony. Although this agreement can be reached in several ways, the most common procedures are outlined in the Federal Rules of Evidence (*rulesofevidence.org*). These rules affirm that to be deemed an expert witness, a person must have knowledge, skills, education, experience or training in a specialized field. Qualification as an expert witness usually occurs after court officials have examined a counselor’s vita containing information about the person’s degrees, certifications, licensure, training and publications.

Once approved by the court, the role of the expert witness is to help those in the courtroom understand the information

being presented that requires the specialized knowledge of an expert witness. Consequently, counselors who serve as expert witnesses explain their conclusions based on their training, clinical observations, and knowledge of counseling theory, diagnostics and research.

Additionally, counselors serving as expert witnesses may be asked to explain their rationale for the use of particular assessment instruments and the relevance of assessment results. Furthermore, counselors must be able to explain the reliability, validity and other psychometric properties of the instruments they describe. Counselors should also explain the cultural contexts of client assessment. As stated in Standard C.6.b. of the *ACA Code of Ethics*, “Counselors are accurate, honest and objective in reporting their professional activities and judgments to appropriate third parties, including courts ...”

Standard E.9.a. says that counselors consider clients’ cultural backgrounds and indicate any reservations the counselor has about the validity or reliability of assessment results based on the norms of the person tested. Standard E.9.c. states that counselors must accurately describe the purpose, norms, validity, reliability and applications of the procedures while maintaining their ethical responsibility to those whom they have assessed. Finally, counselors should consider the ethical guidance in Standard E.13.d. and avoid trying to serve as both a fact witness and an expert witness in the same case.

Counselor ethics and boundaries

Throughout court testimony, counselors must maintain their ethical responsibilities, regardless of whether they are serving as fact witnesses or expert witnesses. Correspondingly, it is vital for counselors to understand that many attorneys and judges have only superficial knowledge of counselors and counseling. With this in mind, counselors should not take for granted that attorneys and judges are aware of the counseling boundaries and other ethics to which counselors must adhere.

Given that attorneys and judges may not understand counseling ethics, counselors might be asked to testify about matters that are outside their scope of

practice or training or that do not align with the *ACA Code of Ethics*. If such a request occurs, counselors should decline to provide this testimony, stating their professional ethics as the reason for their refusal. It is affirmed in Standard E.2.a. of the *ACA Code of Ethics* that counselors must provide only that testimony for which they are qualified through training. It is advisable for counselors to take copies of their ethics codes and state counseling regulations with them to court in case they need to justify their refusal to provide testimony that could be unethical.

Conclusion

Counselors must be aware of their ethical obligations pertaining to providing court testimony. They must also understand their role in the courtroom (serving as a fact witness versus serving as an expert witness) and should provide truthful and concise testimony based on the facts and their own training and expertise. ❖

Bret Hendricks is a professor and the coordinator of the counselor education program at Texas Tech University. He is a past president of the International Association of Marriage and Family Counselors and the Texas Counseling Association and a current member of the American Counseling Association Ethics Committee. Contact him at bret.hendricks@ttu.edu.

Joy Natwick is an ethics specialist for the American Counseling Association. Contact her at ethics@counseling.org.

Letters to the editor:
ct@counseling.org