



The pitfalls of serving as both treating counselor and expert witness

Question: I am a licensed professional counselor in private practice and have been counseling a woman for several years. The client is going through a bitter divorce and custody battle and has asked me to be an expert witness for her in this matter. From what she has told me over several years, her spouse has no interest in either her or their children and is doing everything he can to prevent her from getting financial support. I think my client would be very disappointed if I decline her request. She thinks my testimony would hold great weight with the court, but I am trying to figure out whether there may be complications if I accept this role.

Answer: You are wise to evaluate the consequences of accepting the role of an expert witness in this situation. There are numerous pitfalls that could lead to an ethics complaint, licensure board investigation or legal action. Perhaps the main problem is that this new role could lead to a conflict of interest.

Expert forensic (i.e., court-related) evaluations and testimony serve a need for the court to obtain information based on science or practice standards of certain health care professionals. If one agrees to be an expert witness, there is an inherent obligation to act as a neutral, unbiased person who bases her or his opinions on data-backed evidence, education, training and experience. A mental health expert may also be asked hypothetical questions about certain diagnoses and their impact on clients.

However, if you are already acting as a treating counselor, your client may view you as an advocate. From what you have said, it appears that your client truly does view you in this light. You are expected to act in your client's best interests and, to the extent possible, preserve the client's privacy and honor your duty of confidentiality. It may be difficult, if not impossible, for you to say you are an unbiased expert while also fully supporting your client. After spending years working with and listening to your

client, there is a danger of bias, whether intentional or unintentional.

If you were to accept the role of expert witness, you would have a duty to answer all questions honestly. What if your client experienced some lapses of judgment in the past and you were questioned about those lapses in court? What if you had to make a child abuse report in the past related to your client's actions but she thinks you wouldn't possibly bring that up in court or at a deposition? Your honest answers could compromise the therapeutic relationship.

Standard E.13.c. of the 2014 *ACA Code of Ethics* prohibits counselors from evaluating current or former clients for forensic purposes and, conversely, prohibits counselors from counseling individuals whom they are evaluating. You may not have viewed this potential new role as involving evaluation. Yet, if you do not also engage in interviewing your client's spouse, and potentially the children or others relevant to the custody decision, how can you truly be an expert witness in a custody case? If you do engage in such activities, you risk ruining the therapeutic relationship.

How can you appropriately respond to your client? You could have a thorough discussion with your client about the potential problems related to serving as her expert witness. You might suggest that the parties obtain the services of an independent mental health professional who can act as an expert witness. An independent expert should be free of the biases that you cannot eradicate.

You might also explain how the *ACA Code of Ethics* must guide your actions. In addition, you could offer, with your client's authorization, to speak with her attorney about why you are not the right person for the role of expert witness. Sometimes, attorneys and judges do not fully understand ethics in the mental health realm. Also, clients' attorneys are sometimes motivated to have the treating counselor testify because they believe it will save money.

In some circumstances, you may be subpoenaed to appear as a *witness of fact*

for your client. For example, your client's attorney may want you to testify regarding a session in which the client relayed that her spouse had abused the children. This testimony would be based on the facts as relayed to you. With appropriate authorization from your client or a court order, or under certain state laws, you may have to testify. However, you would not be expected to be a neutral expert and should not be forced to give opinions based on hypothetical questions. One drawback of acting as a witness of fact is that, often, the fees are severely constrained by law and local court rules. However, some states do allow fact witnesses to be paid at the mental health professional's ordinary hourly rate.

Looking prospectively, you may want to include in your informed consent document information about when you can and cannot act as a witness in court. You may wish to have a local health care attorney review your informed consent document to ensure that it meets with the reality of state laws and local practice on witness appearances and fees. Because informed consent involves a *process*, not just a static document, you should discuss these issues with your clients at the outset of treatment and on a periodic basis thereafter.

The question addressed in this column was developed from a de-identified composite of calls made to the Risk Management Helpline sponsored by the American Counseling Association. This information is presented solely for educational purposes. For specific legal advice, please consult your own local attorney. ♦

Anne Marie “Nancy” Wheeler, an attorney licensed in Maryland and Washington, D.C., is the risk management consultant for the American Counseling Association's Ethics Department.

Letters to the editor:
ct@counseling.org