

Social Workers as Expert Witnesses: Ethical Considerations

by

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Clinical social workers provide the lion's share of mental health services to people whose challenges bring them to the attention of lawyers who practice family law. Significant numbers of clients who are immersed in proceedings related to child custody, divorce, termination of parental rights, adoption, and juvenile delinquency seek clinical social work services. Such services help people make critically important decisions (for example, petitioning for child custody, divorcing, or relinquishing parental rights) and cope with emotionally traumatic events (for example, associated with marital conflict, divorce proceedings, looming loss of child custody, prosecution).

Professionally trained social workers have been providing mental health services since the early 1900s, shortly after the profession's formal inauguration in the late nineteenth century.¹ Like clinicians in allied behavioral health professions – psychology, psychiatry, mental health counseling, marriage and family therapy – clinical social workers are trained to assess, diagnose, and ameliorate problems, disorders, and conditions that interfere with healthy functioning of people of all ages and backgrounds. They provide individual, couples, family, and group counseling in a wide variety of settings, including community mental health centers, family service agencies, psychiatric hospitals and clinics, residential treatment programs, addictions programs, and private (independent) practice.

Social work's unique perspective entails explicit, simultaneous focus on environmental and structural phenomena that often exacerbate mental health challenges faced by lawyers' clients, such as poverty, unemployment, homelessness, substandard

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¹ See WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA 250 (6th ed. 1999).

housing, environmental threats, poor health, and neighborhood violence, among others. Also, social work is the only human services profession whose national code of ethics (National Association of Social Workers) highlights the profession's particular concern for people who are oppressed and living in poverty, along with related social justice issues.

The primary mission of the social work profession is to enhance human well-being and help meet the basic human needs of all people, with particular attention to the needs and empowerment of people who are vulnerable, oppressed, and living in poverty. A historic and defining feature of social work is the profession's focus on individual well-being in a social context and the well-being of society. Fundamental to social work is attention to the environmental forces that create, contribute to, and address problems in living. . . . Social workers pursue social change, particularly with and on behalf of vulnerable and oppressed individuals and groups of people. Social workers' social change efforts are focused primarily on issues of poverty, unemployment, discrimination, and other forms of social injustice. These activities seek to promote sensitivity to and knowledge about oppression and cultural and ethnic diversity. Social workers strive to ensure access to needed information, services, and resources; equality of opportunity; and meaningful participation in decision making for all people.²

This article will address ethical issues faced by social workers who are retained as expert witnesses by family law attorneys. Part I provides a brief overview of social workers' potential expert witness roles in family law matters. Part II discusses ethical challenges social workers may face when serving as expert witnesses, especially related to informed consent, competence, misrepresentation, conflict of interest, and confidentiality. Part III explores pertinent standards of care, ethical standards, and statutes and regulations.

I. Social Workers' Role in Family Law

Family law attorneys may rely on social workers to opine about clients' mental health, ability to parent, progress in treatment or rehabilitation programs, or suitability for behavioral health treatment (for instance, as an alternative to incarceration

² National Association of Social Workers, *NASW Code of Ethics* 1, 5 <https://www.socialworkers.org/About/Ethics/Code-of-Ethics/Code-of-Ethics-English> (1996, revised 2017).

in a juvenile correctional facility). Below are several representative cases drawn from the author's expert witness consultation that illustrate the diverse matters on which attorneys consult social workers for formal clinical assessments, expert recommendations, and expert testimony:

- A clinical social worker provided counseling to a ten-year-old girl whose parents were in the midst of a child custody dispute. The child was referred for counseling because her school work had declined significantly and, according to a school counselor, the girl manifested symptoms of clinical depression. The mother sought sole custody on the grounds that the father was unable to function as an effective parent due to his longstanding addiction-related issues, including several alleged relapses. The father challenged the mother's assertions. The father's attorney retained a clinical social worker to evaluate the validity of the father's claims about his ability to parent. The social worker conducted a comprehensive clinical assessment of the father and reviewed the clinical records associated with the father's participation in counseling programs.
- The biological mother of an infant challenged the infant's adoption. The biological mother, who was seventeen at the time of the birth, claimed that she consented to the adoption under duress and was coerced by her parents and their attorney. The biological mother asserted that she is able to parent the child, then age three, competently. The attorney representing the adoptive parents retained a clinical social worker as an expert witness. The social worker specialized in adoption-related clinical cases and had published extensively on clinical issues faced by many adoptees related to emotional attachment and bonding. The attorney asked the social worker to assess the possible impact on the child if she were returned to the biological mother.
- In a juvenile court matter, a sixteen-year-old-girl was scheduled to appear in juvenile court on a wayward petition and, in addition, stolen car and robbery charges. The girl had run away from home and, with two accom-

plices, had stolen a car and robbed a convenience store clerk. The girl's attorney was prepared to argue in court that, because of her severe trauma history and psychiatric challenges, the girl should be sent to a residential treatment program rather than incarcerated. The attorney retained a clinical social worker as an expert witness. The social worker reviewed the girl's extensive mental health and psychotherapy records and planned to testify that the girl's high-risk and delinquent behaviors were a direct result of her protracted history of sexual abuse by her stepfather. The social worker prepared a detailed affidavit that included information about the abuse history and the girl's mental health diagnoses, including post-traumatic stress disorder, severe anxiety, and clinical depression.

- In a child welfare case, a three-month-old child was removed from her mother's custody by the state child welfare department. Child welfare officials had been contacted by staffers at the local hospital's emergency department after they treated the infant for severe dehydration and failure to thrive symptoms. The mother, who struggled with addiction, agreed to participate in a long-term outpatient counseling program in an effort to regain custody of her child. Nine months later, the mother's attorney retained a clinical social worker to conduct a thorough assessment of the mother, review pertinent clinical records, and offer a recommendation regarding reunification.

These case examples illustrate the diverse ways in which family law attorneys may draw on social workers' expertise. Depending on the legal matter, social workers may be in a position to provide clinical assessments of attorneys' clients, treatment recommendations that can be introduced as part of plea negotiations (in juvenile and criminal court matters), and expert witness testimony.

II. Ethical Challenges and Standards

Social workers who serve as expert witnesses in family law matters must abide by the National Association of Social Work-

ers (NASW) Code of Ethics. The current NASW code, updated in 2017, contains the most comprehensive contemporary statement of ethical standards in social work; it includes four major sections.³ The first section, “Preamble,” summarizes social work’s mission and core values. The mission statement sets forth several themes key to social work practice. These include a commitment to enhancing human well-being and helping meet the basic needs of all people; client empowerment; service to people who are vulnerable and oppressed⁴; focus on individual well-being in a social context⁵; promotion of social justice and social change⁶; and sensitivity to cultural and ethnic diversity.⁷

The second section, “Purpose of the NASW Code of Ethics,” provides an overview of the code’s main functions and a brief guide for dealing with ethical issues or dilemmas in social work practice. This section alerts social workers to the code’s various purposes, which include:

1. identifying core values on which social work’s mission is based;
2. summarizing broad ethical principles that reflect the profession’s core values and establishes a set of specific ethical standards that should be used to guide social work practice;
3. helping social workers identify relevant considerations when professional obligations conflict or ethical uncertainties arise;
4. providing ethical standards to which the general public can hold the social work profession accountable;
5. socializing practitioners new to the field to social work’s mission, values, ethical principles, and ethical standards; and

³ *See id.*

⁴ DAVID D. GIL, *CONFRONTING INJUSTICE AND OPPRESSION: CONCEPTS AND STRATEGIES FOR SOCIAL WORKERS* (1998).

⁵ BEULAH R. COMPTON & BURT GALAWAY, *SOCIAL WORK PROCESSES* (5th ed. 1994).

⁶ MICHAEL REISCH & CHARLES D. GARVIN, *SOCIAL WORK AND SOCIAL JUSTICE* (Oxford University Press, 2016).

⁷ DERALD WING SUE, MIKAL N. RASHEED, & JANICE M. RASHEED, *MULTICULTURAL SOCIAL WORK PRACTICE* (2nd ed. 2016).

6. articulating standards that the social work profession itself can use to assess whether social workers have engaged in unethical conduct.⁸

The code's third section, "Ethical Principles," presents six broad ethical principles that inform social work practice, one for each of the six core values cited in the preamble. The principles are presented at a fairly high level of abstraction to provide a conceptual base for the profession's more specific ethical standards. The code also includes a brief annotation for each of the principles.

The code's final section, "Ethical Standards," includes specific ethical standards to guide social workers' conduct and provide a basis for adjudication of ethics complaints filed against NASW members. The standards fall into six categories concerning social workers' ethical responsibilities to clients, to colleagues, in practice settings, as professionals, to the profession, and to society at large. The introduction to this section of the code states explicitly that some standards are enforceable guidelines for professional conduct and some are standards to which social workers should aspire. Examples of enforceable standards include those pertaining to disclosure of confidential information without client consent, consent to treatment, conflicts of interest, sexual contact with clients, sexual harassment, termination of services, and documentation. Licensing boards and the NASW ethics committee often cite specific standards in the NASW Code of Ethics when adjudicating formal complaints filed against social workers. Many state licensing statutes and regulations cite the NASW Code of Ethics. In contrast, aspirational standards in the code concern such matters as engaging in research, interdisciplinary collaboration, promoting social justice, cultural awareness, and providing pro bono assistance during public emergencies. These standards exhort social workers to embrace specific ideals that are not enforceable.

In general, the code's standards concern three kinds of issues,⁹ all of which are relevant to social workers' role as expert

⁸ National Association of Social Workers, *supra* note 2, at 2.

⁹ FREDERIC G. REAMER, *RISK MANAGEMENT IN SOCIAL WORK: PREVENTING PROFESSIONAL MALPRACTICE, LIABILITY, AND DISCIPLINARY ACTION* 7-30 (2015).

witnesses. The first includes what can be described as mistakes social workers might make that have ethical implications. Examples include leaving confidential material forwarded by the client's attorney displayed on one's unsupervised computer screen in a way that it can be read by unauthorized individuals, or forgetting to include important details in a client's release of information document. The second category includes issues associated with difficult ethical decisions or dilemmas—for example, whether to disclose confidential information obtained during a consultation, without client consent, to child welfare officials when social workers suspect that the client has abused or neglected a child. The final category includes issues pertaining to social worker misconduct, such as misrepresentation of one's credentials during expert witness testimony.

Several sections of NASW Code of Ethics standards are particularly relevant when social workers serve as expert witnesses in family law matters.

A. Informed Consent

Social workers who serve as expert witnesses must ensure that attorneys' clients fully understand their role (i.e., the difference between an expert witness and clinical role) and, in particular, that clients' consent meets prevailing standards in the social work profession concerning clients' right to comprehensive information regarding the consent, capacity to consent, right to consent without coercion, and right to refuse or withdraw consent.

Social work education typically includes overviews of the concept of informed consent as it pertains to professional practice. According to the NASW Code of Ethics

Social workers should provide services to clients only in the context of a professional relationship based, when appropriate, on valid informed consent. Social workers should use clear and understandable language to inform clients of the purpose of the services, risks related to the services, limits to services because of the requirements of a third-party payer, relevant costs, reasonable alternatives, clients' right to refuse or withdraw consent, and the time frame covered by the consent. Social workers should provide clients with an opportunity to ask questions.¹⁰

¹⁰ National Association of Social Workers, *supra* note 2, at standard 1.03[a].

Social workers have always recognized the importance of informed consent, whether it pertains to the release of information or provision of services.¹¹ The NASW Code of Ethics standard concerning informed consent reflects what professionals have learned over the years about the nature of the consent process, particularly in light of various important court decisions involving parties who questioned the validity of consent obtained by professionals.

The first major legal ruling in the United States on informed consent is found in the 1914 landmark decision of *Schloendorff v. Society of New York Hospital*,¹² in which New York Supreme Court Justice Benjamin Cardozo set forth his opinion concerning an individual's right to self-determination. Another important decision was handed down in the 1957 case of *Salgo v. Leland Stanford Jr. University Board of Trustees*,¹³ in which the term *informed consent* was formally introduced. The plaintiff in this case, who became paraplegic following a diagnostic procedure for a circulatory problem, claimed that his physician did not properly disclose ahead of time pertinent information concerning risks associated with the procedure.

Although the concept of informed consent has its origins in medicine and health care, over the years it has been applied legislatively, judicially, and administratively to a wide range of other client groups, such as people with mental illness or disability, children, senior citizens, people with physical disabilities, prisoners, hospital patients, and research participants.¹⁴ States and local jurisdictions have different interpretations of informed consent standards, but there is considerable agreement about a number of key elements, and these are reflected in code standard 1.03(a):

- Coercion and undue influence must not have played a role in the client's decision.

¹¹ SELF-DETERMINATION IN SOCIAL WORK (F. E. McDermott, ed. 1975).

¹² 211 N.Y. 125 (1914).

¹³ 317 P.2d 170 (Cal. Ct. App. 1957).

¹⁴ TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS (7th ed., 2012).

- Clients must be mentally capable of providing consent and able to understand the language and terms used during the consent process.
- Clients must consent to specific procedures or actions, not to broadly worded or blanket consent forms.
- The forms of consent must be valid.
- Clients must have the right to refuse or withdraw consent.
- Clients' decisions must be based on adequate information: details of the nature and purpose of a service or disclosure of information; advantages and disadvantages of an intervention; substantial or probable risks to clients, if any; potential effects on clients' families, jobs, social activities, and other important aspects of their lives; and alternatives to the proposed disclosure. All this information must be presented to clients in understandable language and in a manner that encourages them to ask questions. Social workers should be especially sensitive to clients' cultural and ethnic differences related to the meaning of such concepts as "self-determination" and "consent."¹⁵

B. Competence

Social workers should agree to serve as expert witnesses only when they have the expertise requested by the attorneys who seek to retain them. The NASW Code of Ethics states, "Social workers should provide services and represent themselves as competent only within the boundaries of their education, training, license, certification, consultation received, supervised experience, or other relevant professional experience."¹⁶ Thus, a social worker who does not have specialized expertise and train-

¹⁵ JESSICA W. BERG, PAUL S. APPELBAUM, CHARLES W. LIDZ & LISA S. PARKER, *INFORMED CONSENT: LEGAL THEORY AND CLINICAL PRACTICE* (2d ed., 2001); DONALD T. DICKSON, *LAW IN THE HEALTH AND HUMAN SERVICES: A GUIDE FOR SOCIAL WORKERS, PSYCHOLOGISTS, PSYCHIATRISTS, AND RELATED PROFESSIONALS* (1995); FAY A. ROZOVSKY, *CONSENT TO TREATMENT: A PRACTICAL GUIDE* (Wolters Kluwer, 5th ed., 2015).

¹⁶ National Association of Social Workers, *supra* note 2, at standard 1.04[a].

ing related to childhood trauma, mental illness, or addiction, for example, should not agree to serve as an expert witness with regard to these phenomena. Indeed, the NASW code obligates social workers to make referrals to colleagues when “other professionals’ specialized knowledge or expertise is needed to serve clients fully.”¹⁷

C. *Misrepresentation*

Similarly, social workers have a duty to avoid misrepresenting their expertise and credentials when attorneys explore the possibility that they will serve as an expert witness. Social workers must be forthright in their claims about their areas of competence and expertise. The NASW Code of Ethics is clear:

Social workers should ensure that their representations to clients, agencies, and the public of professional qualifications, credentials, education, competence, affiliations, services provided, or results to be achieved are accurate. Social workers should claim only those relevant professional credentials they actually possess and take steps to correct any inaccuracies or misrepresentations of their credentials by others.¹⁸

D. *Conflicts of Interest*

Social workers who are contacted by attorneys as potential expert witnesses must ensure that there is no actual or potential conflict of interest. In particular, social workers should ensure that their current or prior relationships with relevant parties would not compromise their integrity or ability to provide independent, objective opinions (for example, due to friendships or romantic involvement with relevant parties). According to the NASW Code of Ethics,

Social workers should be alert to and avoid conflicts of interest that interfere with the exercise of professional discretion and impartial judgment. Social workers should inform clients when a real or potential conflict of interest arises and take reasonable steps to resolve the issue in a manner that makes the clients’ interests primary and protects clients’ interests to the greatest extent possible. In some cases, protecting clients’ interests may require termination of the professional relationship with proper referral of the client.¹⁹

¹⁷ *Id.* at standard 1.16[a].

¹⁸ *Id.* at standard 4.06[c].

¹⁹ *Id.* at standard 1.06[a].

Social workers receive extensive education about the concepts of conflicts of interest, professional boundaries, and dual relationships. Conflicts of interest occur when a social worker's services to or relationship with a client are compromised, or might be compromised, because of decisions or actions in relation to another client, a colleague, himself or herself, or some other third party.²⁰ Conflicts of interest may be actual or potential (when conflicting interests may develop but do not yet exist).

Boundary issues occur when social workers face possible conflicts of interest in the form of what have become known as dual or multiple relationships. Dual or multiple relationships occur when professionals engage with clients or colleagues in more than one relationship, whether social, sexual, religious, or business.²¹ According to Jill Kagle and Pam Giebelhausen,

a professional enters into a dual relationship whenever he or she assumes a second role with a client, becoming social worker and friend, employer, teacher, business associate, family member, or sex partner. A practitioner can engage in a dual relationship whether the second relationship begins before, during, or after the social worker relationship.²²

In some instances, social workers' conflicts of interest are obvious, for example, when a lawyer approaches a social worker about serving as an expert witness and the social worker once dated the lawyer's client. In other instances, however, the conflict may be less clear. For example, social workers who are approached by an attorney about possibly serving as an expert witness might have had some limited social contact with the attorney's client because they live in the same suburban community and their children were once playmates. In such circumstances, social workers should be certain to disclose to the attorney the nature of any existing or prior relationships with the attorney's client to assess whether a true conflict of interest exists.

²⁰ FREDERIC G. REAMER, *BOUNDARY ISSUES AND DUAL RELATIONSHIPS IN THE HUMAN SERVICES* (2012); ANDREA SALTZMAN, DAVID M. FURMAN, & KATHLEEN OHMAN, *LAW IN SOCIAL WORK PRACTICE* (3d ed., 2016); LYN K. SLATER & KARA R. FINCK, *SOCIAL WORK PRACTICE AND THE LAW* (2012).

²¹ Frederic G. Reamer, *Boundary Issues in Social Work: Managing Dual Relationships*, 48 *SOC. WORK* 121 (2003).

²² Jill D. Kagle & Pam N. Giebelhausen, *Dual Relationships and Professional Boundaries*, 39 *SOC. WORK* 213 (1994).

Also, social workers must avoid serving simultaneously as an expert witness and as a client's clinician. Doing so could compromise social workers' ability to serve as zealous advocates for their clients and could jeopardize the social worker-client relationship. As Gordon notes with regard to clinicians' dual roles in forensic mental health matters,

When an individual clinician assumes both a treatment and a forensic role in the context of a single case, however, that clinician forms a dual relationship with the patient—a practice that creates a conflict of interest and violates professional ethical guidelines. The court, the parties, and the patient are all affected by this conflict and the biased testimony that may result from dual relationships. When providing forensic testimony, the mental health professional's primary duty is to the court, not to the patient, and she has an obligation to give objective and truthful testimony. But this testimony can result in the patient's detention or punishment, a legal outcome that implicates the mental health professional's corresponding obligation to "do no harm" to the patient. Moreover, the conflict of interest created by a dual relationship can affect the objectivity and reliability of forensic testimony.²³

E. *Privacy, Confidentiality, and Privileged Communication*

Ordinarily, social workers are well schooled on the concepts of privacy, confidentiality, and privileged communications. They should fully understand their obligation to protect the confidentiality of their communications with clients and their review of confidential records. This is consistent with relevant laws (pertinent federal and state statutes and regulations) and ethical standards. The NASW Code states, "Social workers may disclose confidential information when appropriate with valid consent from a client or a person legally authorized to consent on behalf of a client."²⁴

That said, on relatively rare occasions social workers may find that their ethical duties conflict with their duties arising out of their relationships with attorneys who retain them as experts. For example, in one case a social worker serving as an expert witness interviewed an attorney's client in the context of a child

²³ Sara Gordon, *Crossing the Line: Daubert, Dual Roles, and the Admissibility of Forensic Mental Health Testimony* 37 *CARDOZO L. REV.* 1345 (2016).

²⁴ National Association of Social Workers, *supra* note 2, at standard 1.07[b].

custody dispute and learned from the client that he had abused his child. Under mandatory reporting statutes in every state, the social worker would be obligated to contact child welfare officials to report that suspected child abuse. Further, according to the NASW Code of Ethics, "Social workers should protect the confidentiality of all information obtained in the course of professional service, *except for compelling professional reasons.*"²⁵ However, such disclosure clearly could be used against the attorney's client. A social worker who serves as an expert witness in such a case would be caught between her duty to disclose and prohibitions against disclosure imposed by attorney-client privilege. As Paula Galowitz notes:

Confidentiality is a core value for both professions. Because legal and mental health professions have different standards for privilege and confidentiality, however, potential conflicts can arise when determining the range and degree of confidentiality owed to the client. For lawyers, confidentiality derives from the common law attorney-client privilege, which protects confidential communications, including advice, opinions, and information transmitted, developed, or gathered in furtherance of the attorney-client relationship. Confidentiality requires that lawyers not knowingly reveal their clients' confidences or secrets to anyone outside of the relationship. Confidentiality covers not only the lawyer who was told the information by the client but also others working in the law office, as well as all employees and associates of the lawyer, including law students, support staff, and other nonlawyers working on the case.²⁶

Many legal services and clinical programs take the position that social workers who participate in the program's legal representation of clients are functioning as law office personnel and therefore are bound by attorney-client rules of confidentiality. However, other programs take the position that social workers are mandated reporters even when working with an attorney on a civil matter; clients are informed of this when the client begins working with the social worker and is required to sign a confidentiality contract that explains the circumstances under which confidential information must be reported.

²⁵ *Id.* at standard 1.07[c] (emphasis added).

²⁶ Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Re-examining the Nature and Potential of the Relationship*, 67 *FORDHAM L. REV.* 2123, 2135-36 (1999).

III. Practicing Ethically and Preventing Risk: Essential Knowledge

It behooves both attorneys and social workers to be aware of risk management issues that social workers may face when they serve as expert witnesses. Very few social workers have legal training and may be unfamiliar with the rules that govern conflicts of interest and disclosure of confidential information during discovery and trial. For example, some social workers do not fully understand their duties and options when attorneys subpoena them by issuing a subpoena duces tecum or subpoena testificandum. On occasion, social workers disclose confidential information in response to subpoenas without authorization.²⁷ They may assume that the standard subpoena instruction “You are hereby commanded to appear in person . . .” is unequivocal and that any resistance on their part exposes them to serious penalties. Social workers may not understand that subpoenaed parties have a right to challenge the subpoena in the form of a motion to quash or a motion for a protective order when they do not have proper consent or a court order compelling disclosure. Indeed, the NASW Code of Ethics provides clear advice that social workers should know about and heed:

Social workers should protect the confidentiality of clients during legal proceedings to the extent permitted by law. When a court of law or other legally authorized body orders social workers to disclose confidential or privileged information without a client’s consent and such disclosure could cause harm to the client, social workers should request that the court withdraw the order or limit the order as narrowly as possible or maintain the records under seal, unavailable for public inspection.²⁸

Social workers who serve as experts must be aware of potential malpractice and disciplinary risks. They must ensure that their service as expert witnesses is not negligent (in that they breach their duty in a way that directly causes harm) and does not violate standards set forth in regulations that govern their professional license. Specifically, social workers must not misrepresent their credentials and areas of expertise. For example, a

²⁷ Frederic G. Reamer, *Malpractice and Liability Claims Against Social Workers: First Facts*, 40 *SOC. WORK* 595 (1995).

²⁸ National Association of Social Workers, *supra* note 2, at standard 1.07[j].

social worker who does not have substantive expertise related to eating disorders or drug addiction should not offer her or his expert services on these matters; rather, a social worker who is approached by an attorney for assistance might offer to locate a colleague who is qualified to provide such expert consultation and opinion. Also, social workers should not embellish their resume or claim educational, certification, or licensing credentials they do not possess. Breach of their duty as expert witnesses can expose social workers to liability. Violations of state licensure regulations can expose expert witnesses to sanctions including license revocation, suspension, reprimand, and various forms of corrective action (such as mandatory ethics education or consultation).²⁹

To adhere to ethical standards, social workers who serve as expert witnesses should be knowledgeable about pertinent (1) standards of care, (2) ethical standards, and (3) statutes and regulations. As attorneys know, standards of care include what reasonably competent and prudent practitioners would have done in the same or similar circumstances. To adhere to standards of care, social work expert witnesses must be sure to comply with widely accepted protocols related to informed consent, competence, misrepresentation, conflict of interest, and confidentiality.

Social workers who serve as expert witnesses are expected to adhere to prominent practice standards in the profession. According to attorney and social worker Dana Prescott, who discussed practice standards related to social-workers-as-expert-witnesses at a conference sponsored by the National Organization of Forensic Social Work,

- Expert opinions should be data based, including thorough consideration given to all sources of information.

²⁹ See, e.g., MD. CODE ANN. §§ 19-101 – 19-501 (2017) (Maryland Department of Health, Board of Social Work Examiners, Regulations Governing Licensure), <https://health.maryland.gov/bswe/Documents/Regs/10.42.01GoverningLicensure.pdf>; Louisiana State Board of Social Work Examiners, *Rules, Standards, and Procedures*, <https://www.labswe.org/page/rules-standards-and-procedures> (last visited Jan. 11, 2018); Rhode Island Department of Health, *Rules and Regulations for Licensing Clinical Social Workers and Independent Clinical Social Workers* (Sept. 2012), <http://sos.ri.gov/documents/archives/regdocs/released/pdf/DOH/7005.pdf>.

- Relevant and generalizable research studies should be considered and explained within the report.
- Findings should be examined for consistency within and between data sources.
- When possible, opinion should incorporate sources with established reliability and validity consistent with the evaluation, investigation, or recommendations.
- Alternative opinions conflicting with the opinions reached should be considered and rejected when they are less consistent with all the information available to the expert.³⁰

Adhering to NASW Code of Ethics guidelines increases the likelihood that social workers will comply with prevailing standards of care. In addition, social workers who serve as expert witnesses should be familiar with relevant federal and state laws, especially those related to management of confidential and privileged information. At the federal level, the most relevant laws are HIPAA (Health Insurance Portability and Accountability Act)³¹ and 42 CFR Part 2 (Confidentiality of Substance Use Disorder Patient Records).³² The Privacy Rule, as well as all the Administrative Simplification rules, apply to health plans, health care clearinghouses, and to any health care provider who transmits health information in electronic form in connection with transactions for which the Secretary of HHS has adopted standards under HIPAA (“covered entities”). Many social workers who serve as expert witnesses fall under HIPAA standards and have access to protected health information as defined by HIPAA.

Also, some social workers who function as expert witnesses, and documents reviewed by these social workers, fall under 42

³⁰ Dana E. Prescott, *Forensic Social Workers as Expert Witnesses: Do the Courts as a Host Environment Warp Social Work Values and Ethics*, National Organization of Forensic Social Work (July 26, 2014), <http://nofsw.org/wp-content/uploads/2014/07/C3A.pdf>

³¹ The Health Insurance Portability and Accountability Act of 1996 (HIPAA), P.L. No. 104-191, 110 Stat. 1938 (1996) (codified as amended at 42 U.S.C. § 1320).

³² Confidentiality of Substance Use Disorder Patient Records, 42 U.S.C. 290dd-2 (2017).

C.F.R. Part 2. This prominent and strict federal regulation applies to any individual or entity that is federally assisted and holds itself out as providing, and provides, substance use disorder diagnosis, treatment, or referral for treatment. Social workers who serve as expert witnesses may be asked to review confidential documents pertaining to clients' substance use disorders and would need to comply with so-called redisclosure restrictions. Section 2.32 ("Notice to Accompany Disclosure") states:

Each disclosure made with the patient's written consent must be accompanied by the following written statement: This information has been disclosed to you from records protected by federal confidentiality rules (42 CFR part 2). The federal rules prohibit you from making any further disclosure of information in this record that identifies a patient as having or having had a substance use disorder either directly, by reference to publicly available information, or through verification of such identification by another person unless further disclosure is expressly permitted by the written consent of the individual whose information is being disclosed or as otherwise permitted by 42 CFR part 2. A general authorization for the release of medical or other information is *NOT* sufficient for this purpose (see § 2.31).³³

Lawyers who practice family law often have good reasons to retain social workers as expert witnesses. Skilled and knowledgeable social workers can provide valuable assistance in a wide variety of family law matters, especially related to child custody, divorce, termination of parental rights, adoption, and juvenile delinquency. Social workers who serve as expert witnesses must comply with widely accepted ethical standards and practice standards, and relevant laws, particularly related to informed consent, competence, misrepresentation, conflict of interest, and confidentiality. It is useful for lawyers who retain social workers as expert witnesses to fully understand social workers' ethical duties and obligations.

³³ 42 U.S.C. 2.32 (2017).

