Involvement with the legal system isn’t always convenient or pleasant. It can represent an intrusion into treatment and a potential derailment for treatment goals. Traditional models of psychotherapy strive to protect treatment from extraneous distractions in order to maximize the interpretive value of the interactive process. But no matter the theoretical approach, most psychologists are likely to want to avoid involvement with the legal system. Within this context, Benjamin and Tien’s article in the May/June 2010 issue of the California Psychologist was eagerly received.

In their article “Use a Stipulation: How to Avoid Being Accused of Involvement in a Multiple Relationship,” Benjamin and Tien describe the possibility of a treating psychologist offering forensic opinions in legal proceedings about their own patients and others. They point out that the disclosure of records and testimony of the treating psychologist may lead to a rupture in the psychotherapy. The authors also state that “Engaging in treatment, then later engaging in any part of a legal proceeding can be construed as a multiple relationship (p.27).” To prevent such a possibility, the authors suggest the use of a stipulation agreeing that no information ever disclosed in psychotherapy would be requested for any purpose outside of the psychotherapy. Benjamin (an attorney and a psychologist) and Tien, both of whom are from Washington State, have a wealth of experience and success using stipulations to protect psychotherapy records from disclosure.

Since Benjamin and Tien’s article was published, we have received questions about whether the use of such a stipulation in California is permissible. The answer to whether they are permissible is, of course: “it depends.” As a general matter, the use of agreements such as the one offered by Benjamin and Tier are permissible, depending on the nature of the case and the patient. The purpose of this article is to provide more context on the use of these agreements and to provide an additional perspective on the ethical problems these stipulations are designed to remedy. Our goal is to emphasize that psychologists have an abundance of flexibility in these situations.

Part of the rationale behind the use of stipulations is to avoid involvement in the legal-system. Benjamin and Tien suggest that involvement on the part of the treating psychologist in the legal system can be construed as a multiple relationship. However, principle 3.05 of the Ethics Code (APA, 2002) points out that a multiple relationship occurs “when a psychologist is in a professional role with a person and (1) at the same time is in another role with the same person (p.6).” We believe that a treating psychologist testifying about the nature of the psychotherapy might not be engaged in another role, because the testimony could be part of the original professional relationship.

We do, however, agree that offering expert testimony about legal matters may be outside of the scope of the psychotherapy relationship. Offering opinions about persons not evaluated or opinions about who is at fault in a marriage, who should have custody or guardianship of children or whether an employer is responsible for work related disability might be outside of the scope of the treating psychologist. Not only could these activities constitute a multiple relationship where the treating psychologist becomes a forensic expert about legal matters and persons outside of the scope of therapy, but could also violate Ethics Code standard 9.01, (Bases for Assessment), which requires psychologists to “base the opinions contained in their recommendations, reports, and diagnostic or evaluative statements, including forensic testimony, on information and techniques sufficient to substantiate their findings,” as well as 9.01(b), which requires “psychologists [to] provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements or conclusions (p.13).”

We wholeheartedly support the authors’ concerns that intrusions into psychotherapy are problematic and disruptive to the treatment process, the sense of safety and security of the client and treating psychologist necessary for good clinical work. As one of the authors (Donner and Fridhandler, 2005) previously wrote, “(F)or some time now, we have observed the Scylla and Charybdis of erosion of confidentiality and increased fears of liability… Many psychologists are now more concerned with being sued than they are about privacy for their patients or the protection of the public (p.20).” It is understandable that many psychologists would be interested in having patients sign stipulations as a condition of treatment.

In the eyes of the law, the basis of the psychotherapist-patient relationship is a contractual one. Psychotherapists agree to provide a service to patients in exchange for the payment of a fee. This is much like many other business relationships. Contractual relationships often contain agreements restricting the rights of the parties. Kaiser patients, for example, sign agreements prior to joining Kaiser

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where they agree to give up their right to sue Kaiser in court, and instead agree to submit claims to binding arbitration. This is just one example of how healthcare patients can (and do) agree to forego some of their legal rights in exchange for treatment. The law assumes that the free market ultimately restricts parties from demanding unreasonable contractual provisions; if enough parties refuse to contract because of unreasonable demands, the demanding party will be forced to adjust those demands.

Some psychologists, however, may have mixed feelings about requiring their patients to sign stipulations where their rights are waved. As a matter of principle, some psychologists would rather refrain from asking parties entering into psychotherapy to sign such a stipulation. They may base their preference on principle E of the Ethics Code (Respect for People’s Rights and Dignity), which asks psychologists to respect “the rights of individuals to privacy, confidentiality, and self-determination (p.4).” Respecting the autonomy and self-determination of clients is important, just like privacy and confidentiality. In addition, while an external demand for records may cause a rupture in the treatment, so too might a therapist’s refusal to provide records to a client in order to avoid any involvement with the legal system. Recall that the Ethics Code (6.01 Documentation of Professional and Scientific Work and Maintenance of Records) also obligates psychologists to maintain records in order to “facilitate provision of services later by them or by other professionals (p.9).”

We can imagine many scenarios in which a patient may require access to their records. Child custody evaluations, personal injury and wrongful death suits may arise in the life of many patients. The use of a stipulation could, under some circumstances, transfer discretion for disclosures to the treating psychologist rather than utilizing the treatment relationship to help clients understand the implications of any request for their records. A stipulation could, in some circumstances, represent a shift away from acknowledging our clients’ right to choose how they wish their treatment information to be used. Such an approach isn’t wrong, but it does represent a change in perspective.

In addition, because a stipulation often requires all parties sign and consult with counsel, in many cases such an approach might prove to be impractical. Psychologists who wish to use stipulations to avoid involvement in the legal system should also be aware that stipulations may not accomplish this goal: stipulations can significantly facilitate the quashing or withdrawal of a subpoena, but are less likely to prevent the issuing or receipt of a subpoena.

Psychologists are expected to take reasonable steps to avoid harm (3.04). But while intrusions from third parties are certainly a risk to the treatment, not all will destroy the treatment. Treating psychologists may be able to use the psychotherapy itself to deal with the consequences of an intrusion from the legal system. The ethical principle of Beneficence and Non-maleficence (do good and do no harm) suggests that treating psychologists also consider the potential harm to the patient where the psychologist chooses to withhold records.

At the same time, treating psychologists must understand the crucial distinction between a forensic evaluation and clinical work. Treating psychologists should be wary of the prospect of offering opinions about persons not evaluated and cannot be forced to provide an expert opinion about a legal matter, and should not offer to do so. A treating psychologist who adheres to these standards faces little risk of engaging in an unethical multiple relationship.

An ethical approach to clinical practice should encompass consideration of a wide variety of factors, but should ultimately rise above concerns about violating rules and the (understandable) anxiety that the treating psychologist will be dragged into the legal system. Treating psychologists should be prepared to offer a vigorous defense against outside intrusions into the treatment but should do so in collaboration with the client. Therapy takes place within the real world, and sometimes the real world requires involvement in the legal system. This does not mean the end of therapy. Dealing with intrusions to the best of one’s ability (while seeking consultation) is an equally viable option that can also serve to maintain and possibly even strengthen the therapeutic relationship.

CPA members encountering a demand for records and or testimony may call the CPA Central Office (916-286-7979) for free consultation with the Director of Professional Affairs and the Ethics Committee to receive assistance in navigating the nuances of these complex situations.

References

