Social Workers and Confidentiality for Couples Counseling

Introduction

Clinical social workers routinely provide therapeutic services to couples and families, as well as to individuals. It is not uncommon for couples to seek counseling during periods of conflict that may eventually result in a decision to end the relationship. This Legal Issue of the Month article reviews legal issues pertaining to the confidentiality of adult clients related primarily to marital dissolution or child custody proceedings. Prior Legal Issue of the Month articles separately addressed the confidentiality rights of children and child custody evaluations. See www.socialworkers.org/ldf/legal_issue/default.asp.

Considerations When Initiating Couples Treatment

When initiating therapy with a couple, a prudent social worker should communicate clearly with both members of the couple about privacy policies. The areas to address include:

- Clarifying the purpose of the sessions and the role of the social worker as treating clinician, rather than as an expert witness for legal proceedings.
- Articulating a policy protecting both clients’ privacy regarding information shared in conjoint sessions unless both clients consent to disclosure.
- Clarifying that due to the nature of the treatment, if individual therapy is recommended, it may be necessary for the social worker to refer the client(s) to another therapist to avoid a possible conflict of interest.

Requests for Involvement in Legal Proceedings

At some point a couple that received joint treatment from a social worker may become estranged and initiate legal action to dissolve the couple’s relationship or resolve child custody matters. One member of an estranged couple may independently seek the involvement of the social worker to advocate for an advantageous position in the couple’s legal conflict. The request may be for a letter to the party’s attorney clarifying certain facts that were discussed in therapy, to attest to the client’s cooperation in attending therapy sessions, or to testify in court on related matters.

Social workers should consider several resources in order to formulate an appropriate response to such requests. These include the NASW Code of Ethics and state social worker-client confidentiality and privilege laws, as well as exceptions to privilege made by the courts in related legal proceedings.

The NASW Code of Ethics, Standard 1.06, states that social workers “should be alert to and avoid conflicts of interest that interfere with the exercise of professional discretion and impartial...
judgment.” Acting as an advocate for one member of a couple in derogation of the rights of the other member of the couple presents a clear example of a conflict of interest, given the adversarial nature of the legal system and the couple’s relationship. The Code of Ethics further provides that social workers who are asked to testify in a divorce proceeding “should clarify their role with the parties involved and take appropriate action to minimize any conflict of interest” (NASW, 1999). Additional information regarding social workers who testify regarding child custody matters is addressed in the LDF Law Note, Social Workers and the Legal Rights of Children (2007). Further information regarding conflicts of interest and treatment of multiple parties is available in Ethical Standards in Social Work by Frederic G. Reamer (2006).

Social workers who terminate treatment with one member of a couple and continue to provide services to the other should keep in mind that the duty remains to protect the interests of the former client. Generally, it is advisable for social workers who have provided couples or family therapy to decline voluntary involvement in divorce or custody proceedings. Involvement that is based on the receipt of a subpoena is addressed below.

Subpoenas for Records

A subpoena for a couple’s therapy records is generally issued by an attorney for one of the parties in a divorce or child custody matter. A key consideration for a treating social worker who receives such a request is how records were created and maintained for the couple’s therapy. Some states have laws stating that the presence of additional people in the therapy session does not invalidate the confidential nature of the communications shared during such sessions (Cabrera, 1990). If records from conjoint sessions were maintained in one file, then consent to release the joint record is needed from both members of the couple. Records of any individual sessions may be released based on consent from the individual client who was the subject of the records.

If one party to the couples counseling does not consent to the disclosure of records requested in a subpoena, the social worker may be obligated to take legal steps to review or seek to block the subpoena. This may be done by filing an objection, or a motion to quash. Relying on the attorney for either side of the marital dispute may create an appearance of bias on the part of the social worker and should be avoided (Rubin, 2000). Several NASW resources are available to social workers who have questions about subpoenas and the need to respond. See the LDF Law Note, Social Workers and Subpoenas (2005), and LDF Legal Issue of the Month, Social Workers, HIPAA and Subpoenas (NASW, 2003).

Social Worker – Client Privilege

Courts will evaluate the social worker–client privilege laws (or psychotherapist–patient privilege) in the state to determine whether an exception applies to the divorce or custody proceedings in order to rule on the motion to quash a subpoena. As part of this process, a judge may review the record “in camera,” that is, privately, to determine whether the client file in its entirety, or any portion, is relevant to the matters at issue. Finally, a request to keep the records “under seal” and unavailable to the public should accompany any release of records required for court proceedings (NASW, 1999, Standard 1.07 (j)).
A Maryland case, *Laznovsky v. Laznovsky*, clarified that under the law of that state, a parent does not automatically relinquish the psychiatrist-patient privilege by the act of seeking sole custody of children. The Maryland court analyzed the legislative history of the privilege statutes for various mental health disciplines, including social work, and highlighted the fact that the legislature had expressly eliminated an exception to privilege for custody proceedings.

In *Kinsella v. Kinsella*, 150 N.J. 276 (1997), the Supreme Court of New Jersey determined that the communications made by one spouse in joint therapy sessions were protected from disclosure in a divorce action by the marriage and family therapist privilege. However, in child custody determinations the court’s need for information may be more compelling. The court directed that the “first source of information about the parents’ mental health should be the independent experts appointed by the courts or hired by the parties for the purpose of litigation, rather than the professionals who have established relationships with the parties.” (*Kinsella*, *328*). A court order to disclose treatment records must be based on “independent evidence of potential for harm to the child” before psychologist-patient privilege will be pierced.

A key understanding for social workers involved in divorce and custody matters is that the court should be given the opportunity to interpret and apply the law and consider the importance of client–therapist confidentiality in the context of competing interests relating to requests for the disclosure of confidential treatment information. This can occur if the social worker, through legal counsel, asserts the client’s right to privilege by filing an objection or a motion to quash. It is not necessary for a social worker to second guess what the court’s decision will be prior to asserting social worker–client privilege. The outcome of a motion to quash will usually determine the required course of action for the social worker. Providing confidential information under court order to do so is a defense to an ethics complaint recognized under the *Code of Ethics* and also may be a basis for defending against a lawsuit alleging a breach of the client’s privacy.

**Legal Assistance for Social Workers**

As divorce and custody cases can become acrimonious it is often beneficial to have the assistance of legal counsel in responding to a subpoena for client documents. As mentioned above, it is not advisable for a social worker who has treated a couple to rely on the advice of an attorney who represents either member of the couple in contested legal proceedings. Thus, it may be necessary for the social worker to obtain independent legal counsel.

The costs of a lawyer may be covered by the social worker’s professional liability insurer, such as that offered to NASW members through the NASW Assurance Services, Inc. (formerly the NASW Insurance Trust). NASW members should contact NASW Assurance Services to confirm whether their coverage includes the costs for an attorney to assist in preparing a response to the subpoena (1-866-591-8267). In other instances, referral to legal counsel may be sought from a state or county bar association. The NASW Legal Defense Fund may also be an appropriate source of financial assistance for legal costs in defending against a subpoena. More information about the resources available from the Legal Defense Fund is available online at [www.socialworkers.org/ldf](http://www.socialworkers.org/ldf).
Conclusions

Social workers providing clinical services to couples must keep in mind that both members of the couple possess the right to confidentiality and privilege. Social workers should avoid aligning with one member of the couple and avoid even the appearance of doing so when requested for assistance by an individual member of a former couple involved in legal proceedings. Clients who require a social work evaluation for court purposes may retain the services of a social worker independent from the couples’ therapy. Social workers who receive a subpoena for a client’s record from couples therapy must act to protect the interests of each of the members of the former couple and may need to retain independent legal counsel in order to do so effectively. Acting diligently to protect the privacy of couples and families is not only prudent and ethical practice, it may avoid legal action on the part of one or more of the individuals involved in couples or family therapy.

References


