Roles for the Therapist in Divorce and Custody Proceedings and Important Legal Considerations

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In order to best serve the needs of the client, and to protect his or her interests, it is essential for the mental health provider to understand the context in which conflict is being addressed. This article will describe divorce mediation, collaboration, negotiation and litigation processes and provide examples of how adversarial negotiations may be either cooperative or aggressive, and how the therapist's involvement in the litigation arena may take different forms.

When the therapist's client is involved in mediation or collaboration, the client and his or her attorney will typically be genuinely motivated to help the family. The parties will share common goals, and will be seeking traditional services at the direction of their attorneys, such as individual or family therapy, help with couples communication, co-parenting assistance or therapy for their children.

Licensed mental health practitioners may obtain training in the collaborative divorce process, and may actually participate in that process. That participation may entail acting as a "neutral mental health professional" to help facilitate the negotiations, may entail functioning as a "coach" to offer insight and encouragement to one or both parties in helping to evaluate options and needs, or may entail acting as a voice for the parties' child or children.

Clients unable to mediate or collaborate may become involved in either cooperative adversarial negotiation, or aggressive adversarial negotiation. Cooperative adversarial negotiation may proceed in much the same manner as proceedings involving mediation and collaboration, and again the attorneys may encourage the parties to seek the same mental health services as in non-adversarial cases.

The therapist should be aware that his or her testimony, just as the testimony of any party, is subject to impeachment. If testimony is "impeached," that means the testimony is shown to not be trustworthy, and therefore should not be given much weight by the judge.

However, if the adversarial negotiation is aggressive, the therapist may find that he or she is being sought after to act as a "hired gun" to advance an individual party's agenda. The client's attorney may be looking to involve the mental health professional to develop and strengthen evidence for posturing in the negotiations, or to groom the therapist for court testimony. The therapist will be called upon to willingly cooperate with the client's attorney, and may be subjected to pressure to tell the other party's attorney, or a judge, what the client's attorney wants the therapist to say.

Clients unable to mediate, collaborate, or negotiate either cooperatively or aggressively, may become involved in divorce litigation. The mental health professional may be drawn into that arena either by the client, or by the client's soon-to-be-ex-spouse, or "X2B."

The client may wish to involve the therapist in the court proceedings because the therapist may be able to render an "opinion" if "qualified" by the client's attorney (verb—not adjective) as an "expert." Judges often give greater weight to the testimony of experts, which may then result in each party hiring his or her own expert so the experts may duel it out in court. An expert, unlike a nonexpert "lay" witness, is entitled to render an opinion in the matter for which he or she has been qualified. The sought-after opinion may relate to whom should have custody of a child, and whether court-ordered visitation terms should perhaps limit contact or set conditions as a prerequisite.

Significantly, the opinion can be based upon hearsay. Hearsay is a statement by someone not present in court, which statement is offered for its truth, such as the statement of a child who is too young to testify in court. For example, a mother may wish to call the child's therapist to testify that the child told the therapist that during visitation dad yells, drinks, swears, watches pornography, has his paramour over past the child's bedtime, and that therefore it is in the child's best interests that mom's request for supervised visitation, or request for terms of visitation (such as attendance at AA, no cohabitation, or no inappropriate computer viewing) be granted.

A client may also wish to have his or her therapist give lay (nonexpert) testimony as to facts (not opinion), such as the therapist's observation that after the client learned of his or her X2B's adultery and betrayal, the client is in therapy, is on medication, gained or lost weight, and is deeply upset. These facts may support a claim that the client's X2B's behavior has had a negative impact on the client's well-being, and that therefore, the attorney will argue, the client should get a greater share of the marital assets.

The therapist should be aware that his or her testimony, just as the testimony of any party, is subject to impeachment. If testimony is "impeached," that means the testimony is shown to not be trustworthy, and therefore should not be given much weight by the judge. A showing of bias is one way in which attorneys will try to impeach testimony. Bias can be shown by having the professional disclose how much he or she is being paid to testify in court, or to render professional services, in an effort to show that the professional has a financial stake in saying what the client wants him or her to say.

The therapist may also find him or herself involuntarily involved in litigation proceedings by his or her client's X2B. The attorney for the client's X2B may telephone the therapist in an effort to influence or "enlighten" the therapist as to the client's bad behavior, in the possibly misguided belief that the therapist will somehow get his or her client to see the light, to admit to wrongdoing, and to address the perceived problem. The attorney may think the therapist is unaware his or her client has a sexual addiction, has undiagnosed bipolar disorder, has borderline personality disorder, or is narcissistic.

If the attorney for the client's X2B is unable to co-opt the therapist to his or her cause, such as perhaps being unable to get the therapist to pressure the client to agree to supervised visitation, the attorney may feel compelled to take action to get the therapist to "cooperate" or to "see the truth." The attorney may then serve the therapist with a subpoena.

The attorney may serve the therapist with a subpoena compelling the therapist merely to produce documents. Or the attorney may subpoena the therapist to be deposed in the lawyer's office. This proceeding is called a "discovery" deposition, at which deposition the attorney will attempt to "discover" information to use at trial.

If the therapist is subpoenaed to appear for a discovery deposition, the attorney may be looking for evidence of a psychological disorder, evidence of a sexual disorder, or evidence that as a mandated reporter the therapist reported physical or sexual abuse by his or her client to the appropriate authorities.

The therapist may "move" to "quash" or eliminate the subpoena if the therapist fears the therapeutic relationship would be compromised by disclosure of information, or if it is not clear who will be paying the therapist for his or her time.

The professional will have to appear to be deposed, unless he or she files a motion with the court to quash the subpoena, and the motion is heard by a judge and granted. Otherwise, the professional risks being held in contempt of a subpoena. At the deposition in the lawyer's office, the therapist will have to answer questions under oath. The subpoena to attend the deposition may include a mandate that the therapist bring his or her records regarding the client.

If the therapist would not be available to testify on the date of trial, an attorney may serve a subpoena upon the mental health professional to attend what is called a de bene esse deposition, which is a deposition for the purpose of preparing and using a transcript of the deposition in court as testimony. At the de bene esse deposition, the professional will be placed under oath, will be questioned, and the testimony will be transcribed. That transcript will be read by the judge at the hearing, and will be considered in the same manner as live court testimony.

The therapist may be subpoenaed by the client's X2B to testify at trial. The therapist will have to answer the questions propounded by his client's spouse's attorney, unless the client's attorney objects to a question and the judge sustains that objection. The therapist will then be cross-examined by his or her client's attorney.

Although called to testify by the client's X2B, the client or the client's attorney may help the therapist with the logistics of testifying—when, where, navigating courthouse security, what to wear, and how to answer questions. That attorney may even help the therapist "prepare" his or her testimony. The client's attorney does not represent the therapist, however, and is under no duty to protect the therapist's interests.

Keeping in mind these differing roles and responsibilities in the legal process can help avoid any unfortunate missteps and can prepare the therapist to reach the best results for families. ■

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