Playing in Their Sandbox: Professional Obligations of Mental Health Professionals in Custody Cases

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ABSTRACT. Mental health professionals (MHPs) working with court-involved families practice at the interface of psychology and law. MHPs practicing in the legal context are governed by the ethics codes and standards of their profession, but must also adjust their practices to the expectations and standards of the legal arena. The

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Journal of Child Custody, Vol. 5(3/4) 2008

doi: 10.1080/15379410802583684

judicial system, mental health, legal and interdisciplinary organizations may present different ethical standards/recommendations, leading to tension and controversy among the various professionals' obligations and concerns. In this article, the authors identify core ethical issues and concepts that underlie most professional practice standards applicable to MHPs in family law cases. Case examples are presented that demonstrate common ethical dilemmas and proactive, effective approaches to avoiding or resolving them.

KEYWORDS. Boundaries, child custody, ethics, professional relationships, professional responsibility

"I don't know the key to success, but the key to failure is trying to please everybody."

—BillCosby

Mental health professionals working with court-involved families practice at the interface of psychology and law. In addition to honoring their profession's codes of ethics, MHPs practicing in the legal context must adjust their practices to the expectations and standards of the legal arena. The judicial system, mental health, legal, and interdisciplinary organizations may present different ethical standards/recommendations, leading to tension and controversy among about the various professionals' obligations and concerns. Problem solving for these families requires creativity in our models and approaches, while keeping focus on core issues such as valid assessment, appropriate opinions/interventions, fairness and credibility in our services, and the implications of professionals' actions for children and families.

In this article, by use of a number of examples, we provide an overview of: issues that differentiate court-involved roles from daily therapeutic practice, tensions between ethical standards for legal and mental health professionals, and common ethical dilemmas encountered by mental health professionals in child custody cases. While there is no single answer for all of these situations, we offer suggestions that may assist mental health professionals to anticipate, avoid, and resolve some of these ethical dilemmas.

"I DON'T DO LEGAL CASES"

Many mental health professionals prefer to avoid any involvement with the legal system and believe they can completely sequester their clinical practices from the legal process. Nevertheless, given the frequency of divorced and separated parents raising children, many mental health professionals are likely to work with separating parents or their children at some point in their practices. Some are willing to work with divorcing families but wish to have no involvement in the legal process. Nevertheless, any case can become a court-related matter, and any treatment with a court-involved family may ultimately impact, and be impacted by, the legal process.

PLAYING IN THEIR SANDBOX

Many mental health professionals (hereafter referred to as MHPs) are, of course, choosing to assist court-involved families by serving as child custody evaluators, mediators, parent coordinators, consultants, experts, or providers of treatment to separated parents and their children. When MHPs undertake such cases, they are responsible to their own codes of ethics, specialty guidelines, and court rules applicable to the services they are providing. In a very real sense, however, they also become participants in a system that is governed by a different set of rules, with different relationships and different expectations. These may include enhanced transparency, more detailed informed consent, and limited or no confidentiality. Clients may also come to an MHP with desires and expectations derived from their experiences and agendas as litigants, rather than the self-directed motivations found in clients who enter psychotherapy voluntarily. MHPs in child custody cases are often faced with competing pressures from their own ethical codes and professional practice laws, the rules and expectations of the legal system, pressures to change professional practices to accommodate an advocacy agenda, and the emotional issues of distraught parents or troubled children.

An MHP's specific ethical/legal obligations will vary, depending on the role that s/he has assumed in the case. Some roles include considerations of confidentiality and privilege, while others are explicitly non-confidential. For purposes of this article we define "confidentiality" as information provided which cannot be shared outside a limited number of recipients.[1] We define "privilege" as a

"right or immunity attached specifically to a position or office."[2] The difference between the two is that confidentiality pertains to the communication. Privilege is based on the particular relationship between the speaker and the recipient of the communication (e.g. therapist–patient, attorney–client) to whom the law confers a particular communication right based on that relationship.

Formal standards or guidelines have been developed for child custody evaluators, mediators and parent coordinators (American Psychological Association, 2002; Martindale et al., 2007) while best practices for consultants, experts, and therapists are the subjects of active discussion in the professional literature (Greenberg & Gould, 2001; Greenberg, Gould, Gould-Saltman, & Stahl, 2003; Greenberg, Martindale, Gould, & Gould-Saltman, 2004; Knapp, Gottlieb, Berman, & Handelsman, 2007; Shuman & Greenberg, 2003).

Several professional organizations also have standards or guidelines in development and there are ongoing professional controversies about the appropriate scope, tone, implications and use of such documents (Gould-Saltman, Connell, Ver Steech, & Martindale, 2006; Martindale, 2008). It is beyond the scope of this article to engage these controversies; however, it is worth noting that most of the relevant mental health standards and professional literature include common elements and core ethical constructs relevant to most mental health practices in the legal system. These include: (1) knowledge of confidentiality and privilege issues and the limits thereof; (2) establishing competence in the relevant practice area; (3) increased accountability, including transparency in non-confidential roles; (4) enhanced informed consent procedures; (5) appreciating the impact of the legal context, including critical evaluation of information; (6) appropriate application of relevant research; (7) defining and maintaining role boundaries; and (8) maintaining appropriate limits in reports and testimony. Detailed discussion of these issues can be found in a number of publications including Greenberg et al. (2004). While specific elements among professional standards may vary, most of the relevant literature promotes these general values as likely to produce the best outcomes for children, and the system, by requiring that psychologists adhere to the data and practice appropriately for the relevant legal system. As other authors (Knapp et al., 2007) have noted, MHPs can avoid many ethical dilemmas by focusing on these essential issues, anticipating ethical problems and adopting a methodical approach to ethical practice and decision-making.

Attorneys and mental health professionals are governed by a different set of legal and ethical obligations. While many attorneys attempt to promote settlement and resolution of family problems, an attorney's core obligation is to present and advocate the position of the client they represent. Generally, an attorney's obligation is to highlight the information that supports his/her client's case, and to oppose or minimize the information that will weaken that parent's position. (The obligations of children's attorneys may differ, and may include representation of the child's best interests.) The concept is that presentation of adversarial positions in the venue of a court will allow the arguments to be tested and the best outcome to prevail, but the process toward that end can be foreign to an MHP whose obligation is to present all sides of the data.[3]

Family law judicial officers are under extraordinary stress in most jurisdictions, with escalating caseloads, diminishing resources, and escalating complexity of high conflict cases (Nordwind, 2000). They approach family law issues from a wide variety of perspectives, personal and legal experiences. They may be generally aware of the harmful effects of prolonged parental conflict on children, but rely on mental health experts to acquaint them with specific psychological issues, the boundaries of mental health expertise, and appropriate interventions for high conflict families (Elrod, 2001, 2002). They also see many families who lack the resources for the specialized services often needed by these families. These pressures can create tensions between an MHP's ethical requirements and a variety of pragmatic considerations in a given legal matter. For example, an MHP in a child custody proceeding may face pressures to expand his or her role, either in terms of expressing opinions that cannot be supported or filling additional roles on the case, as described in the examples below. Such pressures may emerge via flattering appeals to the MHP's extensive knowledge of a child and the family, the benefits of speedier resolution, the family's limited resources, and/or the willingness of all involved to waive any potential claims of conflicts of interest due to the MHP assuming multiple roles.

The case examples discussed below provide a small sample of some of the ethical issues and dilemmas that MHPs may face in the family court system. After presenting each one, we identify core issues that MHPs could consider, and propose processes that the MHP may employ in an effort to anticipate, prevent, and resolve them.

The "Evaluator to Mediator" Dilemma

Dr. Betwixt completed a complex and contentious Child Custody Evaluation (CCE). Despite good relations in the past, all the adults were now extremely hostile and entrenched in their positions. The dispute surrounded Mother's request for increased parenting time and the removal of supervised visitation. The Father strongly contended that granting Mother's petition was dangerous based on her previous, and well documented, behavior. The evaluator found that, since the filing of the current law suit, Mother was doing better than Father or others realized and recommended a phased-in plan for increased access and eventual removal of supervision over an extended period of time.

This case was heard in an overcrowded court system, where long waits for hearings in the hallway are common; waiting sometimes fosters an atmosphere for settlement. Dr. Betwixt was present at the courthouse waiting to testify when negotiations ensued between the lawyers, one of whom would occasionally ask Dr. Betwixt a factual question.

Then Dr. Betwixt was asked to meet jointly with the lawyers, without the parties present. She agreed, and a variety of matters were discussed regarding her intent in crafting her recommendations, and whether one scheme or another would fall within her recommendations.

The lawyers then spoke with their respective clients.

Suddenly, Father's lawyer asked Dr. Betwixt to meet with Mother and her lawyer to see if she could assist Mother's lawyer in persuading his client that a deal he had worked out with Father's lawyer should be accepted. Although the proposed agreement was not Dr. Betwixt's preference, it was generally consistent with her recommendations, and Dr. Betwixt agreed to meet with Mother and her lawyer. During the meeting, Dr. Betwixt tried to persuade Mother that the proposed agreement was in Mother's interest and the interest of the children. This explanation was met with outrage from Mother who accused her of bias and keeping her from her children. Negotiations broke down, and the case was eventually litigated.

Analysis

In this case, the blurring of Dr. Betwixt's role was seductive and subtle. Initially, she was simply asked to clarify factual matters for counsel. In some jurisdictions, any separate communication between Dr. Betwixt and one of the attorneys would be a violation of law or

court rule,[4] which would mean that she was already putting herself at risk when she engaged in separate (*ex parte*) communications with counsel. Had the attorneys' negotiations broken down at that point at that point, this could have led to allegations that she was favoring one side, thereby undermining the perception of her neutrality. Later substantive negotiations did occur in an evenhanded process, with the attorneys now jointly consulting Dr. Betwixt about their various options for settlement. Counsel's questions were largely factual, but they also solicited Dr. Betwixt's opinion, as they asked Dr. Betwixt whether various schemes would fall within the ambit of her recommendations.

By this point, Dr. Betwixt had become actively engaged in the settlement process, and may well have become invested in seeing a successful settlement herself. It is likely that she was also being exposed to additional data about each parent's attitude toward her report, her recommendations, and the prospect of settlement. To the degree that settlement discussions are privileged in her jurisdiction, Dr. Betwixt might be prohibited from discussing the content of the discussions she had witnessed, but she could not rule out the possibility that her perception of either parent might have changed based on her observation of them during the negotiations.

As the person who had written the original recommendations, Dr. Betwixt was vulnerable to confirmatory bias (Martindale, 2005), or a tendency to respond more favorably to settlement proposals that were consistent with her recommendations. This increased the risk that she would respond more favorably to the parent who accepted her recommendations. This is a risk that Dr. Betwixt should have identified, and that should have been explained to the parties, before Dr. Betwixt participated in any negotiations. Ultimately, this process escalated to the point that Dr. Betwixt was asked to become involved in persuading the mother to accept a settlement proposal that the attorneys had negotiated. Agreeing to do so changed Dr. Betwixt's role from that of a neutral to one of an advocate, now actively attempting to persuade the mother to accept the proposed settlement. This was a fundamental change from the neutral role that she had occupied at the beginning of the case, which makes it unsurprising that the parent who did not wish to accept the settlement began to see Dr. Betwixt as aligning with other professionals against the mother.

Finally, when negotiations broke down, Dr. Betwixt had to resume her role as the neutral evaluator and testifying expert. Even if the initial evaluation were done perfectly, her subsequent conduct, and exposure to post-evaluation information, could leave Dr. Betwixt vulnerable to

accusations of bias and even an ethics or licensing board complaint. At a minimum, Dr. Betwixt's conduct could undermine the effectiveness of any testimony she later provided.

Evaluators in busy jurisdictions will find this a familiar dilemma, especially since it seems so practical and obvious to attorneys and judges that evaluators participate in settlement discussions. It might have been better had Dr. Betwixt avoided all contact with the attorneys until she testified, but evaluators may face appeals to become involved as mediators well before trial, "to see if we can settle this case." These appeals often demand rapid decisions by mental health professionals, in an atmosphere that may impede informed consent and a careful consideration of the alternatives.

Relevant ethical standards (American Psychological Association, 2002; Martindale et al., 2007) do not prohibit MHPs from assuming multiple roles, but it is generally unwise to do so.[5] Multiple roles are particularly hazardous in litigious situations, where parties are likely to be particularly alert to indices of bias and betrayal. They may not remember statements made, particularly in the "heat of the moment," to waive potential conflicts of interest. In this respect, all of the relevant professional standards (American Psychological Association, 2002; Knapp & VandeCreek, 2006; Martindale et al., 2007) offer a common and potentially protective element to both MHPs and litigants, by requiring that the mental health professional carefully consider the implications of role diffusion, and inform consumers of these implications before agreeing to undertake an additional role. This often requires that the MHP resist demands for a rapid decision and deliberately slow the process down, so that he or she can consider the implications of the attorneys' request, get consultation if necessary, carefully explain those implications to consumers, and *document* that these procedures have been followed. If Dr. Betwixt had taken these steps, she might have realized how her conduct could appear to the court if negotiations broke down, declined the proposed expansion of her role, or stopped the process before it became destructive. Careful adherence to these requirements, and a methodical decision-making process may aid MHPs in avoiding the slippery slope of blurred roles.

Treatment of the Court-Involved Child: Dr. Well-Intentioned

Tiffany, age four, was the subject of an intense custody dispute. Following a contested custody hearing, the court ordered that the parents share legal custody; Tiffany was to spend every other weekend and a

weekday overnight with her father. Following the third overnight visit, Mother noticed Tiffany touching herself. When she asked Tiffany about it, Tiffany allegedly responded, "Daddy said I could." Mother took Tiffany to see a therapist, without informing Father. The therapist interviewed Mother and then interviewed Tiffany. Although Tiffany did not make any statement alleging abuse, and the therapist had not contacted father, the therapist was sufficiently concerned to file a report with Child Protective Services. Tiffany did not allege abuse to the CPS worker, who found the case "unsubstantiated" and closed the investigation, but made a vague, unofficial recommendation that Tiffany receive "play therapy."

The court appointed a new therapist, Dr. Well-Intentioned, to treat Tiffany, specifying that Tiffany should receive "play therapy." Since Mother had Tiffany most of the time, she transported Tiffany to all appointments. She asked Dr. Well-Intentioned to refrain from contacting Tiffany's father, so that Tiffany would feel "safe" in therapy. Since the Mother had apparent legal authority to consent to Tiffany's treatment, Dr. Well-Intentioned did not contact Father. Later, Father placed a call to Dr. Well-Intentioned, but the therapist did not return his call, believing that she needed a release from Mother to talk to Father.

Four months later, Mother asked Dr. Well-Intentioned to provide a letter outlining Tiffany's statements in therapy and Tiffany's anxiety about seeing Father. Dr. Well-Intentioned wrote the letter. Unbeknownst to Dr. Well-Intentioned, Mother attached it to her pleadings with a demand that Tiffany's visits with Father be suspended. Father responded that Dr. Well-intentioned had never spoken with him, and that any statements made by Tiffany were the result of the mother's influence and the therapist's leading questioning. He demanded Tiffany's therapy records. Dr. Well-Intentioned was appalled that Father wanted to invade Tiffany's therapy in this way, and considered it consistent with the abusive behavior that he was alleged to have committed. In the belief that tendering the records would harm Tiffany, she asserted her client's privilege. The court suspended treatment with Dr. Well-Intentioned and appointed minor's counsel to investigate the competing claims regarding Tiffany's therapy. The court also restricted Father's parenting time, pending the outcome of minor's counsel's investigation. Tiffany's mother asserted that, as the primary custodial parent, she held the privilege and refused to allow Dr. Well-Intentioned to communicate with minor's counsel or release

Tiffany's records. Father subsequently regained his parenting time with Tiffany and filed a successful licensing Board complaint against Dr. Well-Intentioned for making statements to the court that she could not substantiate.

Analysis

The dilemmas presented in this case seem all too common, and they were complicated even before Dr. Well-Intentioned entered the case. A therapist had already interviewed Tiffany. This therapist had not previously contacted Tiffany's father and she had called Child Protective Services, even though her interview of Tiffany was based solely on Mother's report and Tiffany made no disclosure of abuse. Although the results of the CPS interview were "unsubstantiated," the CPS worker made a vague recommendation for play therapy, which the court adopted by sending an equally vague order for Dr. Well-Intentioned to treat Tiffany.

We do not know what Mother told Dr. Well-Intentioned, but it is fair to assume that she disclosed her suspicion of sexual abuse, reported Tiffany's distress, and suggested that therapy was ordered by the court and was due to the CPS referral. Dr. Well-Intentioned, like most MHPs, wanted to protect and help a child, but she neglected to follow a number of fundamental procedures that might have precluded her being sanctioned and avoided disrupting the therapy relationship with a very young child.

Clarifying the Order, Setting the Stage for Balanced Treatment

Dr. Well-intentioned could have avoided considerable difficulty by asking for a clarification of the court's order. A conference call or letter to the court and counsel could have started this process, giving Dr. Well-Intentioned the opportunity to establish appropriate professional boundaries and educate the court regarding what she could and could not do. If appropriate, she might have recommended a diagnostic evaluation before proceeding to treatment, or clarified what issues could be addressed through treatment and what would require a forensic evaluation.

Many MHPs may be reluctant to take this additional step since it involves a delay in services that might alleviate a child's distress. This is an understandable concern, but as this case demonstrates, children

are also placed at risk when critical issues are not clarified before treatment begins.

Had she contacted the court and the attorneys, Dr. Well-Intentioned could have gained vital information that could have helped her structure Tiffany's treatment. For example, she might have learned that the parents had joint decision-making authority and that Father's perception of Tiffany's difficulties was quite different from Mother's. Having learned this, she might have been able to: (1) obtain more balanced information; (2) observe Tiffany's interaction with both parents; (3) engage both parents in the treatment process; and (4) establish a treatment plan that focused on reasonable goals and use effective techniques to help Tiffany and her parents improve. Dr. Well-Intentioned could also have used this opportunity to explain the importance of the parents being involved in Tiffany's therapy, discuss how she would update them on Tiffany's progress, and clarify the limits of confidentiality/privilege so that Tiffany would have some measure of privacy.

Defining the Role of "Play" in Therapy

It was critical that Dr. Well-Intentioned clarify the meaning of "play therapy" as contemplated in the order, and that she educate the court and counsel as to the appropriate and inappropriate uses of play in therapy. While all child therapists employ play as a means of engaging children, this use of play is quite different from therapy based on interpretation of a child's play. In the latter approach, MHPs develop opinions and/or conclusions about the meaning of a child's play in the context of whatever problems a child may be having.

Some MHPs consider interpretive play therapy to be useful in clinical situations, but Dr. Well-Intentioned should have explained that such techniques may present serious challenges to a child's ability to express perceptions and memories accurately. This is a particular risk when a child has already been exposed to parental conflict, suggestive interviews and/or other events that might have influenced the memory and/or the content of her play (Pezdek & Roe, 1997). Additionally, it would be critical for Dr. Well-Intentioned to explain that there are no reliable data that differentiate the play of abused children from the play of non-abused children (Kuehnle, 2003; Kuehnle & Kirkpatrick, 2005).

Critical Evaluation of Information

MHPs in traditional clinical practice are accustomed to uncritically accepting information from presenting parents/clients, whom they may reasonably assume are being honest in order to gain assistance. Obtaining historical information is a fundamental element of any initial interview, which the MHP may use to focus on certain statements and/or behaviors of the child. Unfortunately, such a stance can create serious problems when children are presented for treatment within the context of a legal dispute. In such a case, there will likely be at least two competing theories as to the reasons for a child's problems, as well as any independent hypotheses that the therapist may develop. Balanced assessment and appropriate treatment require that the therapist critically evaluate incoming information, and consider a variety of hypotheses as to the meaning of the incoming information and the child's needs. Failure to do so creates biased treatment and biased interpretations of the child's behavior. In this case, it may have also directly led to Dr. Well-Intentioned being sanctioned.

MHPs are trained to consider alternative hypothesis, but in clinical situations this process is generally employed to rule in/out various diagnostic considerations. This process is quite different from the one employed in forensic contexts where a parent's report and motives must be questioned. Court-involved therapists also need to be aware of the impact of exposure to parental conflict on children; they may see startling differences depending on the circumstances in which a child is brought to a therapy session.

Presented with a parent's compelling story and superficially consistent child behavior, an MHP may find him/herself swayed and thus not consider alternative explanations. But if the MHP fails to actively seek information from both parents and independent sources, s/he will be unable to consider alternative hypotheses. Furthermore, the failure to do so can lead to the therapist missing and/or misinterpreting the child's behavior, and this can directly contribute to inaccurate conclusions.

In this regard, MHPs should be alert any time a parent wishes to exclude the other parent from involvement in the treatment process. Such behavior sends powerful messages. First, it may tell the child that the MHP is aligned with the presenting parent, inadvertently drawing the child into the parental conflict and colluding with the presenting parent. An attempt to exclude the other parent should be a warning

to the MHP that there may be more to the child's difficulties, and to the legal situation, than the MHP is being told. Finally, Dr. Well-Intentioned may have unintentionally escalated the parental conflict by refusing to communicate with Father; implicitly criticizing the Father—daughter relationship in the letter she provided; and aligning with Mother to refuse Father's request for her records, rather than requesting that a neutral professional such as minor's counsel assume privilege and determine what should happen to the records.

Clinical Humility and Accountability

Dr. Well-Intentioned may have sincerely believed that she was serving a higher purpose by protecting a child from an abusive parent. If so, excluding Father from Tiffany's treatment might have *seemed* justified. Allegations of child sexual abuse produce powerful reactions in most professionals, and it is understandable that Dr. Well-Intentioned would want to protect Tiffany.

Unfortunately, there is a wealth of data suggesting that a biased treatment process can seriously contaminate a child's perceptions, recollections, and statements, making it all but impossible for an objective investigator to subsequently obtain valid information from Tiffany. Dr. Well-Intentioned obtained treatment background information only from Mother, and then interpreted Tiffany's behavior in accordance with that preconception. Being limited in this way, she may have unwittingly focused her therapy sessions on Mother's concerns, thereby reinforcing those issues for Tiffany. This created a circular, deleterious, and self-fulfilling process that led to her opinions about Father and likely failed to assist Tiffany with her realistic concerns.

Once an attorney was appointed for Tiffany, Dr. Well-Intentioned should have contacted him/her and asked who held Tiffany's privilege and what her obligations were within the legal context. For example, Mother's assertion of the privilege might require that Dr. Well-Intentioned ask the child's attorney to provide a court order so that she could release the records. If she felt that the records should be protected, she would have been well advised to seek advice from her own attorney, as well as working cooperatively with minor's counsel.

It should be noted that, in the vignette described above, no conclusion is expressed regarding whether Tiffany was actually a victim of child abuse. Unfortunately, even if Mother's report was accurate, Dr. Well-Intentioned's behavior may have made it more difficult, if

not impossible, to accurately assess the situation and protect Tiffany from further abuse.

In conclusion, if Dr. Well-Intentioned were armed with more balanced information, she might have: (1) developed different hypotheses about Tiffany's behavior; (2) intervened more appropriately with each household; (3) assisted Tiffany in expressing her concerns; and (4) provided parenting education to help Tiffany adjust. Had she done so, and then been asked to prepare a letter for the court, its content would have been far more evenhanded, and not risked betraying either parent, or harming Tiffany. By focusing primarily on Mother's allegations and considering information only from that source, Dr. Well-Intentioned risked biasing the treatment and may have missed a valuable opportunity to assist her client.

Child custody cases represent one of the fastest growing sources of ethical complaints, many of them filed against well-meaning therapists such as Dr. Well-Intentioned. As this case illustrates, clinical practitioners who enter the forensic arena need to understand that there are numerous and fundamental differences between clinical and forensic cases including: (1) more permeable patient privilege; (2) a higher degree of accountability; (3) a more thorough and detailed informed consent process with the parents and the child; and (4) the need to critically evaluate client information; and to modify one's practice and therapy techniques to the legal context. Finally, therapists for highest-conflict families need to be familiar with both the legal process and relevant research on children's adjustment to divorce, child abuse, etc. Specialized treatment models have been advanced by a few authors, some requiring detailed court orders that address the most common ethical risks and require accountability from all parties (Greenberg, Gould, Schnider, Gould-Saltman, & Martindale, 2003). Community therapists need to assess their own skills in relation to the services needed by a family and the legal context of the case, and determine if referral to a forensic-level specialist is necessary.

Attorney-MHP Boundaries

Nancy Naif, PhD. was trained as a child clinical psychologist. After appropriate training, she began performing custody evaluations. Being a social person, Naif found marketing her new practice niche enjoyable. She met a number of family lawyers but especially enjoyed the company of Harriet Hapless, JD, who was the same age. They enjoyed similar

activities and soon began socializing. During these activities, conversations became more personal, and Dr. Naif began to learn that Hapless was recently divorced and experiencing a variety of emotional and financial difficulties. As the relationship continued, Hapless disclosed even more personal information regarding the abusive nature of her previous marriage as well as that of her mother when she was a child.

During this time, Naif received a court order to perform a child custody evaluation from a judge in whose court she had not previously worked. One of the parties was a client of Hapless. A preevaluation telephone conference call was arranged so that Naif could learn about the case from the lawyers and explain her procedures to them. During the conference, Hapless's opposing counsel, Sally Serpente did not inquire regarding Naif's relationship with Hapless, and Naif did not volunteer the information.

The case turned out to be contentious and well publicized. At the time of trial, Hapless called Naif to testify on behalf of her client. Serpente moved to disqualify Naif for bias based on her relationship with Hapless. The motion was sustained.

Analysis

Dr. Naif may have conducted an excellent child custody evaluation, but that information never reached the court because of the appearance of bias.

MHPs involved in child custody cases often engage professionally with attorneys and judicial officers, both for marketing their practices and via engagement in interdisciplinary activities and organizations. In smaller communities, attorneys and MHPs may interact on in any number of contexts. Issues regarding the MHP's relationships, and the potential impact of an existing relationship on the MHP's objectivity, periodically arise in these settings.

Dr. Naif may honestly have believed that she would not be biased in favor of Hapless's client, but she may not have been in the best position to make this decision. Before taking the case, it would have been wise for her to consult a trusted colleague to ensure that she was adequately considering her own potential bias. Would she continue to socialize with Hapless during the evaluation? Could her perception of Hapless's client be influenced by her knowledge of Hapless? Could her knowledge of Hapless's own difficulties influence either her objectivity, her perceptions of the litigants, or her interaction with the attorneys?

If she were satisfied that she could complete the assignment objectively, Dr. Naif had an obligation to disclose her relationship with Hapless, and her potential conflict of interest, at the outset of the evaluation. Experienced forensic practitioners know that even the appearance of bias can seriously erode the work of the custody evaluator and defeat the purpose of a neutral and objective evaluation. Both litigants, and both counsel, had the right to be aware of Dr. Naif's relationship with Ms. Hapless before accepting Dr. Naif as a neutral evaluator. Appropriate disclosure and transparency are essential aspects of forensic evaluation, as they promote the trust necessary for judicial officers to rely on our work.

When MHPs are confronted with this type of dilemma, it is useful for them to consider how each option they are contemplating might appear to the parties, their attorneys and the court, if the evaluator's work is later challenged. If Ms. Serpente and her client had known of the relationship between Dr. Naif and attorney Hapless, would they have consented to using Dr. Naif as the neutral evaluator? Had Dr. Naif disclosed the relationship, she might have been successful in reassuring Ms. Serpente that the relationship would have no effect upon her judgment. On the other hand, Ms. Serpente and her client might, out of an abundance of caution, have chosen someone else to do the work. In either case, it was Dr. Naif's obligation to consider whether either side would have reasonable cause to allege bias, and consistent with the requirements of informed consent, provide this information so that the attorneys and their clients could make an informed decision.

Conflicts Between Legal and Ethical Obligations–Dynamic Duo Mediation Team

Frank and Fran Forlorn separated three months ago and are attempting to mediate a parenting plan regarding their twin seven-year-olds, Frank, Jr. and Freddy. They retained the services of the mediation team of Judy Justice, attorney, and Frances Feel-Good, MHP, to assist them. In their jurisdiction, mediation is confidential. MHPs are mandated to report suspected child abuse in this jurisdiction, but attorneys are not. Dr. Feel-Good asked the parties to sign a standard mental health consent form. Ms. Justice obtained a formal mediation agreement authorizing the services of both professionals.

During a co-facilitated session, Fran asked Frank to take a parenting class to help him learn to cope more effectively with the children's misbehavior. She reminded him of a time when Frank Jr. broke his prized golf paperweight, and Frank spanked him so hard that he left bruises. Frank acknowledged the incident but stated that Fran had over-reacted, and that in any event, he had never lost his temper with the boys again. Neither parent reported the incident to anyone at the time.

Dr. Feel-Good believed that this disclosure triggered her obligation to file a child abuse report. Ms. Justice asserted that the mediation was confidential, and the incident could not be reported. Both professionals have contacted their malpractice carriers. Dr. Feel-Good was advised to report what she had learned; Ms. Justice received the opposite advice.

Analysis

Lawyer-MHP teams can be extraordinarily effective in helping parents reach settlements in support of their children, and such interdisciplinary teams are increasingly common in child custody practice (Portnoy, 2006). In this situation, Dr. Feel-Good was providing collaborative services with someone who has different professional obligations than she does. She believed that the parents' statements triggered an obligation to file a report. As Knapp et al. (2007) note, MHPs often face difficult choices when faced with a statement suggesting a past incident of child abuse, when they are concerned that the act of reporting may itself cause harm. But in this case, the situation is even more complicated because Dr. Feel-Good is serving as a mediator within a legally privileged process.

Jurisdictions may differ in their standards or requirements for reporting child abuse. It was Dr. Feel-Good's obligation to become aware of the standards applicable to her state and the role she was undertaking, and to address any conflicts with Ms. Justice's obligations before undertaking the mediation process.

Advance consideration of these issues would also have allowed the mediation team to offer meaningful informed consent to the parents. A standard mental health consent form usually includes a reference to child abuse reporting requirements, but in this case the parents were presented with two consent forms (one from each professional) which likely contained inconsistent information regarding this issue. Since MHPs are governed by different rules than attorneys, they must

inform potential clients of those differences and the potential implications of these issues for the clients. Even in jurisdictions where attorneys are not mandated reporters, they may be discretionary reporters. If it is an attorney's policy to make such reports, this must also be disclosed.

AVOIDING LANDMINES IN THE SAND BOX

In the case examples above, we have illustrated some common ethical dilemmas and the events that preceded them. Many ethical problems can be prevented when MHPs establish competence in family forensic work, become familiar with the relevant research, consult with trusted colleagues, work to anticipate ethical issues, and provide thorough informed consent to consumers. As we described, however, many ethical conundrums develop gradually and without our awareness, ensnaring well-meaning MHPs in dilemmas that seem to appear suddenly and without warning. Below we list some core issues, risk factors and warning signs that may alert MHPs to potential ethical problems early enough to successfully avoid or resolve them.

Flattery, Boundaries and Objectivity

Each of our examples involved some issue related to professional boundaries, and the threats to objectivity that can result when they are not maintained. Dr. Betwixt found herself playing the additional role of mediator quite suddenly, and she did not take time to think about the implications of doing so before being swept up by the circumstances. Dr. Well-Intentioned became caught up in a compelling story of alleged child abuse, and did not consider her obligation to engage both parents, use balanced procedures in treating a child, and limit her opinions as appropriate to her role and information base. Dr. Feel-Good joined a mediation partnership without considering that her ethical obligations and those of Ms. Justice might conflict, and Dr. Naif found herself in a conflict of interest because she was flattered by her relationship with Ms. Hapless.

MHPs who work in legal context know that delays may result if they maintain strict boundaries and professional procedures, and costs may increase if they refuse to undertake multiple roles or shortcuts. Failing to maintain appropriate boundaries may provide a

short-term gain, but the risks over the long term are far greater. MHPs should seriously consider the consequences of such decisions before acting. Relevant professional practice standards (American Psychological Association, 2002; Martindale et al., 2007) prescribe a process in which the MHP must take deliberate steps to consider the implications of their decisions and any potential threats to objectivity. Consultation with a trusted colleague can provide the space in which to consider such decisions in a calmer and safer environment where alternatives can be explored and implications assessed. Documenting such consultation is an additional protection for the MHP. Neither law nor professional practice codes require that MHPs' decisions always be correct, but MHPs are required to consider their judgments carefully. A thorough record of the consultation, and the process involved in decision-making, will go a long way toward demonstrating that the MHP met these obligations. When addressing these issues, it is useful to consider how others will view the MHP's anticipated conduct if cooperation breaks down and litigation ensues.

Proactive Thinking and Informed Consent

All of our examples involved some problems related to informed consent. Dr. Betwixt had an obligation to inform the parties of the potential implications of her becoming involved in the mediation and to alert them at each step of the process as she became more involved in the parties' settlement process. Dr. Well-Intentioned accepted a treatment situation that was ill-defined and potentially inappropriate to the legal context, without establishing the limitations of privilege or respecting the Father's right to be informed and involved in treatment. Dr. Naif was not aware of the need to explain her relationship with Ms. Hapless to Ms. Serpente. Dr. Feel-Good did not talk with Ms. Justice about their potentially conflicting ethical obligations, nor did she inform the potential clients of these issues.

Mental Health Professionals are frequently presented with court orders that are vague or incomplete, or with requests for service that go beyond what is contemplated in the initial order. Many ethical problems can be prevented altogether by clarifying the orders and the MHP's role with judges, lawyers, parties, and clients prior to initiation or expansion of services. This provides the MHP with an opportunity to educate consumers about the MHP's procedures, obligations and

limitations, and to ensure that the services being requested can be appropriately provided by a single professional. A documented and thorough informed consent process may not prevent all complaints from unhappy litigants, but it can minimize such problems and make them easier to resolve successfully when they do occur.

Some practitioners advocate asking parents to sign agreements, outside of the legal process, that waive the parent's right to call the professional as a witness or gain access to their children's statements. We respectfully disagree with this approach, as parties may feel pressured to sign such agreements without adequately considering the legal implications. The result may be an unenforceable agreement and a promise to a child that turns out to be misleading. When dealing with parties who are represented by counsel, MHPs should avoid presenting parties or clients with contracts, waivers or agreements without first sending copies to their attorneys. Doing so allows the parents to consult with their representative, ask questions and clarify issues in advance. It also avoids any appearance that the parent signed the agreement under duress.

Parents involved in family law matters often make decisions under stress, focusing on short-term objectives. While this is understandable, MHPs have known for some time that informed consent is a process (Bennet et al., 2007; Gottlieb, 1997; Pope & Vasquez, 2007) and that it should be revisited whenever relevant issues arise. Careful documentation of informed consent is imperative and may effectively refute accusations that clients or parties were not adequately informed about the MHP's services.

Critical Evaluation of Information

Many MHPs are accustomed to accepting information uncritically from clients, and may expand this perspective to the attorneys who retain them, to distressed parents, and particularly to children. In forensic contexts, however, critical evaluation of information is essential. It may be helpful for MHPs to adopt a disciplined, methodical approach to considering allegations from parents, children, and counsel, i.e. identifying several alternative possibilities for each piece of information presented. Rival, conflicting hypotheses are more likely to lead to balanced assessments and valid recommendations, advice, or assistance to families. Single-hypothesis thinking, particularly with children, can lead to serious contamination of children's information and greater risks to children and families.

MHPs must also consider information or allegations through the lens of normal development, common processes in families and the arguments likely to be advanced by parents and counsel who oppose the MHP's opinion, or the presenting parent's position. This makes it more likely that they will consider relevant possibilities, ask relevant questions, support realistic problem solving by parents and children and provide objective assessments and supportable recommendations. Blind advocacy by mental health professionals is rarely helpful to parents, children, counsel, or the system.

Mental health professionals need to be aware of the potential biasing effects of their information base or professional relationships. The alliance between an MHP and his/her client, or a friendly relationship with an attorney may make it more difficult to ask challenging questions and consider multiple hypotheses. Parents involved in custody disputes often adopt the most ominous interpretation of information about the other parent, even when more benign interpretations are possible. Anxious or angry parents may over-interpret vague statements or behavioral difficulties in children, presenting the MHP with a combination of the data observed and the parent's biased interpretation of that data. MHPs may slow this escalation, and assist both parents and children with better problem solving, if they systematically identify and explore the other issues or circumstances that may have led to the behavior or observations in question.

Humility

Some of the MHPs in our examples found themselves in difficulty because they assumed that their own point of view was better and/or more noble than that of others and/or their own professional ethical standards. Certainly, there are occasions when MHPs will find themselves in a serious conflict between their own values and their professional standards and/or the law, and may even feel tempted to violate the law or relevant standards. Such intractable conflicts occur very infrequently (Knapp et al., 2007). Nevertheless, similar issues may arise in more subtle contexts, as when an MHP chooses to interpret ethical standards, or exclude certain information or procedures, in a manner consistent with the MHP's preconceived agenda or bias. An MHP perceiving such a conflict needs to carefully evaluate whether his/her own objectivity is impaired by biased information or limited consideration of relevant ethical standards.

No one would argue that the current family law system is perfect and, as discussed above, short-term solutions present appealing temptations to professionals who are aware of the impact of intractable conflict on children. Professionals may also be tempted to assume that their own ethical standards are superior to those of other professions. Court-related cases often require a level of detail, methodical consideration, and adherence to rules that try the patience of well-meaning professionals eager to promote the "right" resolution for a child and family, and convinced that no one could possibly question the MHP's objectivity, virtuousness, and ability to assist the family. Such assumptions can quickly prove invalid if conflict increases or the MHP's conduct is questioned. The rules and structures of the legal system can cause delay and complications, but may also provide the "checks and balances" that both protect people's rights and promote accountability for MHPs who may themselves have an extraordinary amount of power and influence in the legal process. In the light of retrospective evaluation, an MHP's decision to violate such rules may be perceived as poor judgment, arrogance, and a violation of parties' rights that ultimately extends, rather than resolves, conflict.

Knapp et al. (2007) have discussed the rare circumstance in which an MHP may make an informed, considered decision to violate an ethical standard or legal rule. We would argue, however, that a decision to provide services in a legal matter brings with it a higher level of obligation to conform to the rules and standards of that arena. We are, in a very real way, "playing in their sandbox," and consumers have the right to expect that we play by the rules. Ultimately, that approach provides the best protection to our profession, our own integrity, and the children and families we serve.

CONCLUSION

MHPs take on significantly greater responsibilities when they work within the legal system than they do in daily practice. These responsibilities involve enhanced professional knowledge and competence, as well as increased ethical awareness. Ethical issues are especially vexing in the legal context because many more people are involved, and MHPs may contribute to decisions that have lasting impact on children and families.

Mental health professionals bear the primary responsibility for enhancing their competence and adhering to the ethical standards of their own profession. At the same time, some of these issues may be useful for counsel and judicial officers to consider. As legal professionals become more aware of MHPs' professional obligations, they may be able to craft more appropriate orders, make more appropriate requests for services, reduce costs and delay, and effectively challenge mental health service that does not meet professional standards.

None of us can anticipate every ethical problem that can arise in a family law case. Nevertheless, there are common elements to family law cases that cause certain types of problems to occur more frequently than they arise in clinical practice. Since these problems can be anticipated, we have a responsibility to adopt procedures that will prevent or address them. These obligations include thinking ahead, anticipating problems that may arise, maintaining careful informed consent procedures, adhering to role boundaries, and being aware of our own feelings and biases.

Our title was intended to be mildly humorous, but sometimes humor can be instructive. When MHPs undertake roles in legal matters, they agree to "play in the legal sandbox" where the rules, professional responsibilities and expectations are very different from those of daily practice. Consumers have a right to expect that MHPs who assume these roles have some understanding of the rules and procedures of the other profession. We are not expected to be lawyers, but we do have an obligation to understand "how to play in their sandbox." When MHPs fulfill those expectations, they provide better services to all concerned.

NOTES

1. Merriam-Webster definition, "Marked by intimacy or a willingness to confide."
2. Merriam-Webster.
3. ABA Model Rule 1.2 (a) provides, "(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify." Not all jurisdictions' rules of professional responsibility are based on the ABA model roles but a majority is.

4. In California, for example, substantive *ex parte* communications between an evaluator and counsel are prohibited by California Family Code Section 216.

5. We are mindful as to the difference between "standards," which provide a minimum acceptable level of professional conduct, and "guidelines," which are aspirational in nature. We primarily direct our comments to issues involving standards, as these are intended to exemplify minimum levels of acceptable practice, consistent with our recommendations here. Where professional standards and aspirational guidelines converge, we so note.

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SUBMITTED: October 11, 2007
REVISED: June 13, 2008
ACCEPTED: October 20, 2008