The Ethics of Social Work Fact and Expert Witness Testimony: Holstering the Hired Gun

Handouts

National Organization of Forensic Social Work
29th Annual Conference
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Baltimore, Maryland
1:00 pm - 5:00 pm
Pre-conference Workshop
P1

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Agenda

- Is Forensic Practice Social Work Practice?
- COEs
- Practice standards
- In the beginning
- On the stand
- After the testimony
- What can be done?
**DISCLAIMER**

- I am not a lawyer.
- No statements made by me should be considered advice on how to deal with the legal aspects of a specific ethics complaint
- Cases in my study from a limited number of states
  - CONSULT YOUR OWN STATE STATUTES AND ETHICS CODES
  - Not all slides used in the presentation are contained in this handout packet. Additional material will be provided at the workshop session
NASW Code of Ethics and state licensing board ethics codes do not address ethical practice of forensic social work practice. State licensing boards rarely have members knowledgeable about forensic practice even though responsible for sanctioning practitioners when clients file complaints. Other professions (e.g., psychiatry and psychology) have more highly developed standards for forensic practice than social work, and social workers who are challenged are likely to be held to standards used by other professions.

This session identifies ethical principles associated with forensic practice of social when providing fact and expert witness testimony.

Basics of NOFSW Code of Ethics covered
Generally accepted ethical practice standards not codified in social work ethics codes
The standards from other professions that may be applicable to forensic social workers will be covered.
Issues of qualifications, preparation for testimony, documentation used in testimony (especially evaluation standards), fees, conflicts of interest, relations with attorneys, how to handle attorney challenges to ethics while testifying, level of evidence needed to meet the Daubert and Frye tests
MY COA Case and Ethics
MAY 5, 2000 in Annapolis Maryland on Rowe Boulevard

TPR of severe harm LCSW-Cs can (1) Dx, (2) testify as expert witnesses (3) testify to ultimate issues
1st case disbarred BPD lawyer

Court of Appeals of Maryland 9/99 No. 134
See also NASW amicus brief
Expert Witness Context

- Offering testimony is not a discrete act.
- It is the culmination of a forensic clinical process that has significant complexity in the modern environment. (I remember when lawyers came to court with a legal pad and a manila file folder)
- The complexity requires increased
  - focus on ethical behavior at all levels
  - of forensic practice
Dual Requirement of Forensic Ethics

- Social work forensic practitioners often must conform to more than one code of Ethics (COE). For example:
  - NASW COE
  - NOFSW COE
  - State licensing board COE (Some states have their own COE)
Dual COE Requirements Can Produce Conflicts

• The NASW COE and the NOFSW COE require loyalty to agency this requirement can be heighten conflict in forensic.

• For example, when one works for an in-house family law division under the supervision of the court
Initiating Global Forensic Ethics

- Ethics auditing begins when the decision is made to enter forensic practice
  - Having professional affiliations that guide your practice (NOFSW) [Such organizations limited in social work]
  - Being trained in and consistently using practice protocols and guidelines for all areas of practice you work in (custody, child welfare, competency, etc) [Such practice guidelines limited in social work]
Case Specific Ethics: initial Phase

- Always have a written letter of agreement with the person or organization that pays you
- Have the person co-sign the agreement
- Avoid having agreements with the client directly
- Always better to work through the attorney
Case Specific Ethics: All Phases

• Confidentiality
  – Never leave your materials unattended while at the court house
  – Avoid corridor consultation
Case Specific ethics: On the Stand

• Never makes jokes during testimony
• Never speculate about memory
  – Better to say I do not remember or
  – use qualifiers [“To the best of my recollection,” “I could be mistaken,” “It was somewhere between xx and xx as best as I can recall”]
• Never accept a case in which the attorney states they want to know your opinions before they hire you.
Summary of NOFSW COE
Revised 3/28/1987

- **Responsibility To NOFSW members shall:**
  - Promote well-being and avoid doing harm [Preamble]
  - Provide non-discriminatory services [Preamble]
  - Provide services only in scope of training, education, experience [Canon 1]
  - Not misrepresent credentials or competence [Canon 2]
  - Be current in practice knowledge [Canon 3]
  - Inform professionals and public about NOFSW [Canon 4]
  - Distinguish private statements & NOFSW statements [Canon 5]
  - Identify potential conflicts among laws, treatment goals [Canon 6]
  - Protect confidentiality and minimize client harm when doing research [Canon 7]
  - Insure client participation in research is voluntary [Canon 8]
Summary of NOFSW COE: To

- **Responsibility To Employers/Colleagues shall:**
  - Adhere to voluntary commitments to employing agencies [Canon 10]
  - Report unethical conduct of other professionals [Canon 11]
  - Not do unethical conduct against client, colleague, agency [Canon 12]
  - Treat colleagues with respect and dignity [canon 13]
  - Conduct fair and equitable evaluations of supervisees [Canon 14]
  - Consult with colleagues upon request [Canon 15]
  - Not solicit clients for agency or private practice [Canon 16]

- **Responsibility to Clients shall:**
  - Not discriminate [Canon 17]
  - Identify source of referral, inform of evaluation purpose, & explain confidentiality [Canon 18]
  - Not provide treatment dangerous to physical or psychological health [Canon 19]
  - Seek consultation when appropriate [Canon 20]
Summary of NOFSW COE

• Make referrals with client notification when appropriate [Canon 21]
• Avoid potential conflicts by not accepting clients [Canon 22]
• Explain involuntary terminations and facilitate referral [Canon 23]
• Protect documents/records confidentiality and disclose information only with client written informed consent [Canon 24]
• Set reasonable and customary fees [Canon 25]
• Make services available to indigent clients [Canon 26]
  – NOTE: NOT LIABILITY EXEMPT WHEN PROVIDING VOLUNTARY SERVICE
• Receive remuneration for services [Canon 27]
• Not engage in illegal activities fraud or deceit [Canon 28]
• Not accept anything of value for a referral [Canon 29]
• Not allow personal problems or dysfunction interfere with client service and seek treatment when needed [Canon 30]
• Not engage in sexual contact with clients or others under their authority [Canon 31]
**Summary of NOFSW COE**

- Report documented child or adult maltreatment [Canon 32]
- Perform duty to warn when client threatens to harm others [Canon 33]
- Get written consent for videotaping/recording interviews [Canon 34]
- Provide only necessary information about under age clients to parents and others [Canon 35]
- **Responsibility to society shall:**
  - Impact legislation affecting forensic social work practice [Canon 36]
  - Promote quality services and high standards [Canon 37]
  - Not commit perjury [Canon 38]
  - Not delegate duties/responsibilities to unqualified persons [Canon 39]
  - Not use professional knowledge/skills in a way detrimental to public well-being [Canon 40]
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Typical Social Work Regulatory Board Ethics Code

- No dishonesty, fraud, deceit, or misrepresentation
- Misrepresent professional qualifications, education, experience, or affiliation
- No exploit relationships with clients or patients for personal advantage or satisfaction
- No engagement in solicitation which amounts to fraud, intimidation, or undue influence
- No sexual other relationship with client
- Notify client of risks, rights or opportunities
Typical Social Work Regulatory Board Ethics Code

• No termination or interruption of service
• No violation or diminishing the client's civil or legal rights
• Share no confidences regarding the client
• Share any fee or receive or share a referral fee with respect to the client
**Typical Social Work Regulatory Board Ethics Code**

- No misrepresentation relating to qualifications or services
- No fee for service arrangement, keep adequate financial record, and financial management plan
- Report any unethical conduct by another licensed social worker
Typical Grounds of Denials, Reprimands, Suspensions, and Revocations

- 1. Obtains a license for self/others through fraud, deceit or misrepresentation
- 2. Fraudulently or deceptively use a license
- 3. Mentally or physically incompetent
- 4. Commits act of gross negligence, incompetence, or misconduct in the practice of social work
- 5. Knowingly violates practice act provisions
**Typical Grounds of Denials, Reprimands, Suspensions, and Revocations**

- 6. Engage in conduct inconsistent with generally accepted professional standards in the practice of social work
- 7. Violates provisions of title/regulations governing practice adopted and published by the Board
- 8. Convicted of or pleads guilty or nolo contendere to felony or crime involving moral turpitude, whether or not any appeal or other proceeding is pending to have the conviction or plea set aside
Typical Grounds of Denials, Reprimands, Suspensions, and Revocations

• 9. Provides professional services while:
  – Under influence of alcohol or
  – Using narcotic or controlled dangerous substance, or other drug in excess of prescribed amounts or without valid medical indication

• 10. Is disciplined by a licensing or disciplinary of any state, country, branch of the armed services, or VA for an act that is grounds for disciplinary action under this section
Typical Grounds of Denials, Reprimands, Suspensions, and Revocations

• 11. Practices social work with an unauthorized person or supervises or aids an unauthorized person in the practice of social work

• 12. *Knowingly* makes or files a false report or record in practice

• 13. Knowingly fails to file or record any report as required by law, or willfully impedes or obstructs the filing or recording of the report, or induces another to fail to file the report
**Typical Grounds of Denials, Reprimands, Suspensions, and Revocations**

- 14. Submits a false statement to collect a fee
- 15. Knowingly fails to report suspected child abuse
- 16. Refuses, withholds from, denies, or discriminates against an individual with regard to the provision of professional services on the basis of race, age, gender, sexual orientation, disability, religion, or ethnic origin or because the individual is HIV positive
Typical Grounds of Denials, Reprimands, Suspensions, and Revocations

• 17. Fails to cooperate with investigation conducted by the Board

• 18. By threats, force, or improper means, intimidates or influences, or attempts to intimidate or influence for the purpose of:
  – Causing a person to withhold or change testimony in hearings or proceedings before the Board
  – Hindering preventing, or delaying a person from making information available to the Board in furtherance of an investigation by the Board
Typical Grounds of Denials, Reprimands, Suspensions, and Revocations

- 19. Knowingly fails to report suspected abuse or neglect of a vulnerable adult
- 20. Fails to comply with the requirements of any order entered by the Board as a result of any disciplinary matter with the Board, including payment of costs
- 21. Fails to maintain adequate patient records
Risk Factors

- High conflict custody disputes (Complex practice have seen very poor social work reports that used no standardized measures or protocols)
  - Florida and West Virginia have passed legislation to protect psychologists from regulatory complaints
- Lawyers and spouses of lawyers (unethical lawyers encourage clients to file complaints to get professionals out of cases)
- Borderline PD
- Bipolar clients (during manic episode)
- Clients who have severe anger control problems
- Mothers of children removed from their care
- No involvement with the complainant
- Length of involvement with client (Brief or extended)
Nature of Complaints

- Complaints are usually rambling multiple allegations which practitioners must answer all allegations no matter how absurd *(Average complaint 4-7 pages)*
  - Fraud
  - Negligence
  - Gross negligence
  - Confidentiality
  - **Violation of practice standards** *(Social work has no practice standards compared to other professions)* REASONABLENESS STANDARD of Reamer OUT - NOW - LEGAL STANDARD OF MAJORITY OF PRACTITIONERS, IN THAT DISCIPLINE, WITH THIS PROBLEM, WITH THIS POPULATION, IN THIS SETTING, IN THIS LOCALE.
  - Sexual misconduct
  - Incompetence
  - Bias
The Response

• Read the complaint letter very carefully
  – In one case, COMPLAINANT said contacted professional by telephone for appointment but listed telephone number of professional wrong on complaint form
  – In one case, COMPLAINANT made contradictory statements about receiving the custody evaluation report
  – IMPORTANT to show lack of credibility of COMPLAINANT w/o attacking

• Create sympathy for you by board
  – E.g., When COMPLAINANT refer to you as a liar

• Answer all allegations

• Find out who is on board, their backgrounds, how they might think (1and 2 public information)
COMPLAINTS CAN BE FILED WITH NASW

HANDLED LIKE LICENSING BOARD COMPLAINTS

INSURERS USE THE NASW CONFIDENTIALITY GUIDELINES IN HANDLING COMPLAINTS

NOT CLEAR IF INSURERS COVER NASW COMPLAINTS
Prevention

• There is no prevention preparation for a complainant
  – Quote: “if you do forensic work you will be reported to the Board”
  – Keep telephone logs for 10 years
  – Never send documents by e-mail in word processing format
  – Respond to all denials for appointments by 1st class priority mail with proof of delivery
  – Some judges, if requested, will order that clients not harass the professionals involved in the case.
Preparation Actions “Prepervention”

• Perform only Court-ordered evaluations
• Work only on retainer basis *(NC requires for EWT)*
• Use detailed informed consent
• Video tape all evaluations
• Put disclaimers in reports
  – This was not a custody evaluation
  – State you did not interview some persons
  – Use qualifying words *(alleged, most likely, it appears that…)*
Preparation Actions “Prepervention”

• Use detailed informed consent
  – Explain focus of your practice
  – Release of Information (for court, email, fax)
  – Obtain authorization for videotaping
  – Obtain authorization for testing
  – Statement of consent for evaluation / Tx
  – Require signature and give client a copy of the consent
  – Require client complete background information form
Informed Consent

• Inform confidentiality not guaranteed and Exceptions:
  – Disclosure of physical abuse, sexual abuse, or neglect
  – Client threatens to harm person or damage property
  – Court orders revealing information
  – Parent request information about a child’s evaluation/Tx
  – Paid for by public/private agency, MCO third party
  – State/federal agency statistical reporting
  – In emergency to protect life or health
  – Participating in group/family therapy
  – Review with a colleague for consultation
  – Involved in legal action regarding evaluation or treatment
  – Cellular telephone, FAX, or e-mail safeguards provided, but no guaranteed absolute confidentiality of mutual (to and from) communications
  – If asked to reveal information effort to discuss in advance. If not possible, reasonable efforts after disclosure to inform what revealed, to whom, for what purpose.
Preparation Actions “Prepervention”

- Keep all communications received from clients
  - One subject discarded a letter of praise from client
- Have detailed informed consent
  - Put accuracy disclaimer notice in reports
  - Disclaim responsibility for use of reports by third parties
  - Retain records until you die (seriously, no statute of limitations on board complaints)
- List degrees but do not put license number on documents unless required by law
- Do not encourage clients to file complaints
Preperavention

- Meticulously enter every contact with the client
- Always keep good contact notes
- Be religious about updating Tx plans
- To do a custody evaluation that will adequately protect against a board complaint the cost will be $12k to $20k
  – This is cost prohibitive
Preperavention

• Attempt to get prior evaluations when you learn of them
• Beware of competing evaluations
  – Some lawyers and agencies will obtain multiple evaluations w/o disclosing
  – If client discloses to you attempt to get the evaluation report (E.g. Hague case from Russia)
  – AVOID DIAGNOSIS OF MR, PD and DD w/o MMPI or PAI
**Preperavention**

- Never do therapy and evaluator role in same case
- Use client completed intake form
- Never do evaluations in states you are not licensed in
  - Apply for temporary license
  - Unclear if can testify out of state in one state COA ruled you can
- Give rationale for any judgments, opinions made
Preparation

• Keep records forever
  – claims can be made 20+ years later
  – E.g. divorce case of clinical social worker 7 years later
  – Poor records are indicative of poor practice

• Legible- May be deposed if illegible

• No notes in margins

• Attorneys and board will read your records if subpoenaed

• Maintain records in more than one format (written and computer)

• Internet and computer storage of records is fraught with problems (my problem with hard drive failure here. Apple would not give me my hard drive if replaced)

Hx PREMISE IF NOT RECORDED IT DID NOT HAPPEN
Know Your State’s Statutory Definition of Clinical Social Work Practice?

• ‘Practice clinical social work' means to engage professionally and for COMPENSATION in the application of social work principles and methods for the alleviation of social, mental, and emotional conditions through treatment designed to provide psychotherapy for a mental disorder.

• Some states limit scope of definition to for compensation others do not

• You need to know your state statutory definition
Issues

- Is forensic practice by social workers social work practice?
  - Most practice statutes do not define forensics as a component of social work practice
  - Maryland Attorney General ruled forensics is not social work practice
  - There is a distinction between expert qualifications and licensing status
    - There is a distinction between expert qualifications and licensing status
    - Qualified as an expert witness based on knowledge, training, experience
    - Licensing status may be a factor in that determination, but it is hardly conclusive on the expert witness.
  - Whether an activity falls within practice scope of a licensed profession or occupation does not determine whether a particular member of the profession or occupation is qualified to offer expert testimony on that topic
  - Rule 5-702 while the rule references knowledge, skills experience, training and education as a possible base to qualify as an expert as a witness, it makes no reference to licensing status
  - Licensing status does not determine whether an individual has the requisite knowledge, experience training or education to offer an opinion on a particular subject.
Know Your State Code of Ethics

- Licensing exam based on NASW ethics code
- A number of licensing boards have their own code of ethics. (One state in letter of admonishment said board did not use NASW COE to guide decisions)
- ASWB exam not helpful in insuring ethical practice specific to individual states.
What Individual Can Do

- Social workers do not take interest in promoting their own professional self interest
- Request licensing boards appoint forensic members (hard to do B/O boards are politically appointed)
- NOFSW should have an expert witness panel available to do licensing board consultation. May or may not help.
- Lobby legislature for protective legislation
What Profession NOFS Can Do

- Lobby ASWB for forensic sensitivity
  - No forensic questions on licensing examinations.
- Get the forensic journal published
- NOFSW develop directory of universities offering forensic programs and courses
- NOFSW affiliate/ liaison with schools of social work including holding conferences there
- Develop support hot line APA has one through liability carrier
- Develop experts, researchers, presenters in our own discipline rather than relying on other disciplines (Legal practice standards mandate this)
Work for Passage of Civil Immunity

- In Florida 80% of administrative complaints filed with the state psychology board come from people involved in child custody evaluations.
- Some psychologists stopped doing custody evaluations.
- Florida passed legislation providing good-faith protection for court-appointed psychologist evaluators in child custody cases.
- The legislation prevents anonymous reports to the Board of psychology. The complainants must petition the appointing judge to determine whether the psychologist violated standards of practice. The complainant must pay cost if the psychologist is exonerated and psychologist must pay if found at fault.
- West Virginia has passed similar legislation.
In Conclusion

- Licensing boards view mission as “protection of the public” (This is a vague non specific mission)
- Should be narrowed to promotion of effective appropriate practice of social work and protection of clients from harm done by practitioners
- Boards do nothing to promote practice standards
- Comment of one harassed helper: “I am done. I quit. I am tired of being treated like a common criminal by MY Board simply because I have spent 18 years trying to help maltreated children. The Board showed me no respect and ignored my professionalism. The Board took no action against me, but the complaint process was so demeaning and unfair I have decided I will not put myself in that position again. I am out of here.”
Measures Used in Custody Evaluations


- MMPI-2 Minnesota Multiphasic Personality Inventory
- Millon Clinical Multiaxial Inventory-III
- Rorschach Inkblot Test
- PSI Parenting Stress Index
- PCRI Parent Child Relationship Inventory
- TAT Thematic Apperception Test
- WAIS-3 Wechsler Adult Intelligence Scale, 3rd edition
- Sentence Completion
Measures Used in Custody Evaluations

• IQ screening tests
• CSBI Child Sexual Behavior Inventory
• PAI Personality Assessment Inventory
• NEO Personality inventory
• CAPI Child Abuse Potential Inventory
• Abel Screening Assessment
• MSI-I-II Multiphasic Sex Inventory (I or II)