

THE CURSE OF THE CUSTODY CASE
Managing Legal/Ethical Issues in Couples/Family/Child Counseling
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Disclaimer

Laws vary considerably from state to state – learn the specific divorce and child custody laws of your state and remain current. Seek local counsel for specific advice.

This program does not provide certification for forensic child custody evaluations.

Power Point Handout
www.burtbertram.com



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Divorce & Custody War

- ☐ Even normally stable people can become "temporarily insane" during a divorce; when you add a child custody struggle... things can get really crazy.
- ☐ As the struggle turns into a war – polarization is inevitable and everyone is encouraged to choose sides.
- ☐ During the divorce and custody war, the counselor can very easily become "collateral" damage.

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- ☐ Just because the divorce is final and/or the custody issues have been determined does not mean that the war is over.
 - Initial custody determination
 - Custody modification
 - Child support modification
 - Politics of remarriage/re-partnering
- ☐ Counselors are well-advised to proceed cautiously any time they become involved with children and divorced parents.
- ☐ Carefully considered risk management strategies and policies can reduce licensure board complaints and malpractice liability exposure.

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Important Terms

- ☐ Divorce / Dissolution of Marriage
- ☐ Uniform Child Custody Jurisdiction & Enforcement Act
- ☐ Guardianship
- ☐ *Guardian ad litem* / "Best Interests" Attorney
- ☐ Ex parte communications
- ☐ Custody / Parental Responsibility
 - Sole custody
 - Shared parenting (Joint Custody) and shared parenting responsibility
 - Rotating child custody (50/50)
- ☐ Parenting Schedule / Contact / Visitation
- ☐ Best Interests of Child
- ☐ Child Support
- ☐ Alimony
- ☐ Adversarial Process vs. Collaborative Law
 - Arbitration
 - Mediation
- ☐ Custody Evaluator / Expert Witness
- ☐ Parenting Coordinator
- ☐ Visitation Center
- ☐ Parental Alienation Syndrome



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VULNERABILITY & RISKS

Custody-related situations and issues frequently pose risks for counselors which lead to licensure board complaints and/or lawsuits...

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Role Confusion

- Counselor
 - Individual Counselor: one or more adults
 - Couples Counselor
 - Individual Counselor: one or more children
 - Family Counselor
 - Group Counselor (adults and/or child)
 - Some combination
- Do not mix Counselor and Evaluator Roles
- Custody Evaluator
 - Credentials
 - Association of Family and Conciliation Courts (AFCC)
 - <http://www.afccnet.org/>
 - Training
 - Counselors should be aware of their states' requirements
 - Example (California):
 - http://www.courtinfo.ca.gov/rules/index.cfm?title=foe&linkid=rule5_225
 - Immunity
 - More likely to apply when court-appointed or under court order

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Confidentiality, Privacy, & Privilege

- Confidentiality
 - What promises can you make to a minor?
 - What agreement can you reasonably expect from parents?
 - What are parental rights to access child's records?
- Privacy
 - HIPAA
 - HITECH - new "teeth" in HIPAA
 - State Laws
- Privilege: Who can waive on behalf of the child and authorize counselor to respond to subpoena or court testimony?
 - One parent? Both parents?
 - *Guardian ad litem*/"best interests" attorney
 - What if one says "yes" and the other says "no"?
- Privilege: how to respond to a subpoena

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Subpoenas

1. Talk to your attorney (and/or school or risk management attorney through your professional liability insurance program). If your attorney agrees, follow the steps below:
2. Contact your client and your client's attorney and discuss the implications of releasing the information. Will client provide written authorization to release information and testify?
3. If "yes," obtain a written, informed authorization to release information (signed by all involved clients).


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Subpoenas (cont'd)

4. If "no," request that client's attorney file motion to quash the subpoena or motion for a protective order. This should eventually lead to a court order.

5. If you do not receive authorization or the client's attorney refuses to file a motion, talk to your attorney. In some cases, your attorney may need to file an appropriate motion. In other instances, "satisfactory assurances" from the person seeking your records that your client has been notified may be sufficient under HIPAA and state law.



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Subpoenas (cont'd)

6. If you are subpoenaed to appear in court (as opposed to a deposition), you may be sworn in and ask the judge for an order re/ whether you must testify and release information.

7. Retain copies of all documents; make notes of relevant discussions. Do not keep notes of discussions with your own attorney in the client's chart (preservation of attorney-client privilege).

Note: These are general guidelines, which may be superseded by specific state laws. Additionally, HIPAA considerations may apply to counselors who are HIPAA "covered entities".

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Treatment Quagmires

- ☐ What to do when one parent says "Treat" and the other says "Don't counsel my child"
 - How to determine which parent has legal authority
 - What to do if both parents have legal authority
 - What to do if one threatens legal action
- ☐ Non-Traditional Parents
 - Grandparents
 - Step-parents
 - Domestic partner-parents

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Allegations of Child Abuse

- ❑ What should counselor do when one parent alleges a child has been physically or sexually abused by the other parent and/or another person while in the care of the other parent?
- ❑ What responsibility does the counselor have to make a determination of the truth (accuracy) of the allegation?

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Counselor Becomes Advocate

- ❑ Client Advocacy & Social Justice
- ❑ Stay in your role
- ❑ Avoid diagnosis of party whom you did not see and evaluate
- ❑ Encourage parent to obtain an independent evaluation/assessment

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Parental Alienation Syndrome

- ❑ Controversial
- ❑ No DSM determination
- ❑ Defined

"The parental alienation syndrome (PAS) is a disorder that arises primarily in the context of child-custody disputes. Its primary manifestation is the child's campaign of denigration against a parent, a campaign that has no justification. It results from the combination of a programming (brainwashing) parent's indoctrinations and the child's own contributions to the vilification of the target parent."

Gardner, R.A. (1998). *The Parental Alienation Syndrome*, Second Edition, Cresskill, NJ: Creative Therapeutics, Inc.

- ❑ Can easily place the counselor at risk when caught in the cross-fire of warring parents

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Legal & Ethical Decision-Making Model

Wheeler & Bertram, 2009

Inspired by:
Corey, Corey, & Callanan, 2007
Remley & Herlihy, 2005
Welfel, 2002

1. **Define the Problem/Dilemma:** What are the core concerns (legal, ethical, clinical, or a combination)?
2. **Relevant Variables:** Who are the people? What are the issues, dynamics, and multicultural considerations?
3. **Law/Codes/Policy:** What federal/state laws, ethics codes (especially ACA Code of Ethics), and applicable institutional policy apply to the facts?
4. **Personal Influences:** What personal values, bias/prejudice, or counter-transference may be affecting perception?
5. **Outside Perspective:** Whenever possible, engage in colleague consultation and/or supervision and/or obtain legal advice.
6. **Options & Consequences:** What are the possible courses of action and intended consequences? Also consider the unintended consequences.
7. **Decide - Take Action:** Implement the decision and be prepared to reconsider options.
8. **Document Decision-Making & Follow-up:** Provide written evidence of clinical/ethical decision-making and results of implementation.

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Case Vignette #1

Counselor had a long history with a particular family. He saw the parents, together and individually, in the past. He is currently in a counseling relationship with the 16-year-old son, who wants nothing to do with the father because of the father's bullying nature. Part of the work with the 16-year-old was having the father come in with the teenaged child. The father is suing the mother for alienation of affection. The wife wants a statement about the father; can the counselor give a statement to be used in court?

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Case Vignette #2

Counselor is seeing a 5-year-old boy. Parents have joint custody; both signed consent to treat. Father took child to a psychiatrist before seeing the counselor. The psychiatrist diagnosed ADD and offered medication. The mother disagreed. The mother has called the counselor, requesting records. The father is trying to get sole custody. How should the counselor proceed?

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Case Vignette #3

Counselor received a call from a woman who is married to a man who has 10-year-old son from a prior marriage. The woman stated that the biological mother has legal custody and the father has visitation. The woman also said a psychologist refused to see the child but she was told that a counselor should be able to see the child, who needs counseling. Should the counselor schedule an appointment to see the child?

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Case Vignette #4

Counselor saw 8-year-old girl for 6 months. Father's attorney issued subpoena for counselor to testify and produce certified copy of the records. Mother said she doesn't want the information released because she doesn't feel it's in the child's best interests. What should counselor do?

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References & Resources

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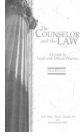
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Resource for Remediation

(Our labor of love)

- 1) Purchase and read *The Counselor and the Law* (5th Ed.). Call ACA at 800-422-2648, x222, Monday-Friday, 8 a.m. - 7 p.m. (order # 72857).



- 2) Purchase and take online test for 6 continuing education credits. See www.counseling.org/cat1. ACA members receive a special discount on purchase of the test. Print out a copy of your CEU certificate as soon as you've passed the test.

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Resource for Remediation

- 3) If you are insured through the ACA-endorsed professional liability insurance program, you're eligible for a 10% discount on your professional liability insurance program for 3 consecutive years. After completing and passing the exam, fax a copy of your CEU certificate, along with your policy number, to: 1-800-758-3635. Alternatively, you may mail your CEU certificate and policy number to: HPSO, 159 East County Line Road, Hatboro, PA 19040. The discount will be applied for 3 consecutive years at your next renewal and cannot be combined with other discounts on the policy. Questions may be directed to HPSO at 1-800-982-9491 or by e-mail at service@hpsocom or to the ACA Insurance Trust at 800-347-6647 x284.

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