COOPERATING FOR CHILDREN:

MENTAL HEALTH AND THE LAW

INTRODUCTION

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TALKING TO ATTORNEYS

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The Fine Print

- The information provided today is not intended to constitute legal advice, to relate to any specific case or family, or to create any attorney-client relationship. Instead, all information, content, and materials presented are for general informational purposes only.

When can/should I release information to attorneys?

Why is it necessary to release information sometimes?

- Verification
- Best interests of the child
- Competing concerns (privilege v. best interests)
- Privilege "unless required by law"

Indiana Code 31-17-2-8

(1) The age and sex of the child.

(2) The wishes of the child's parent or parents.

(3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.

(4) The interaction and interrelationship of the child with:

(A) the child's parent or parents;

(B) the child's sibling; and

(C) any other person who may significantly affect the child's best interests.

(5) The child's adjustment to the child's:

(A) home;

(B) school; and

(C) community.

(6) **The mental and physical health of all individuals involved.**

(7) Evidence of a pattern of domestic or family violence by either parent.

(8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

(9) A designation in a power of attorney of:

(A) the child's parent; or

(B) a person found to be a de facto custodian of the child.

May I release records with the patient or guardian's consent?

- Indiana Code 16-39-1-1 et seq.
- MUST release to patient upon written request
  - Usually.
  - "…if the provider that is responsible for the patient's mental health records determines for good medical cause, upon the advice of a physician, that the information requested under this section is detrimental to the physical or mental health of the patient, or is likely to cause the patient to harm the patient or another person, the provider may withhold the information from the patient." Indiana Code 16-39-2-4

Can I get around this by NOT keeping records?

- No.
- Indiana Code 16-39-2-1 requires certain records be kept.

What constitutes a written request?

- Release of information form
- Presumed valid for 180 days unless otherwise specified
- May be revoked

What if a patient or guardian does not consent?

- Release only upon court order

Isn’t a subpoena sufficient?

- Probably not.

What if I have a release from just one parent?

Court orders for Release of Records

- Process described at Indiana Code 16-39-3-1 et seq.
- Attorney or party seeking release must file a petition for release with the court
- Can I be there?
  - You must be invited and have at least fifteen days' notice.
- Do I have to be there?
  - You do not have to attend unless you receive a subpoena for testimony
- Can I hire an attorney?
  - You can but are not required to
- Hearing is confidential
- Order is not necessarily all or nothing – can provide for limited release

How does the Court decide whether to order release?

“At the conclusion of the hearing, the court may order the release of the patient's mental health record if the court finds by a preponderance of the evidence that:

(1) other reasonable methods of obtaining the information are not available or would not be effective; and

(2) the need for disclosure outweighs the potential harm to the patient. In weighing the potential harm to the patient, the court shall consider the impact of disclosure on the provider-patient privilege and the patient's rehabilitative process.”

Indiana Code 16-39-3-7.

Drug and Alcohol Treatment Records

Termination of Parental Rights/CHINS/DCS Cases

GETTING SUBPOENAED

Judge Stafford

Can I ignore a subpoena for testimony?

- No.

Can I ignore it?

- No.

  "Sub" = under

  "Poena" = penalty

- Seriously, No.
- All of us have to obey subpoenas or "Move to Quash" them *(see your attorney about whether your subpoena can be quashed).*

Ok, Fine. What should I Do?

- Let your client (or minor client's legal custodians) know. *
- Contact the attorney who issued the subpoena.

**** You are ensuring you know who has legal custody/guardianship of your minor clients, right?)***

THIS IS ALL JUST GENERAL LEGAL INFORMATION.

For legal advice, you will need to consult your own attorney.

What can I say to the Attorney?

- Your hourly rate for testifying (unless canceled X days in advance?).
- The precise time they want you to appear and where (which court building, live, zoom, etc.).
- Your request for a list of direct questions at least X days in advance or a phone conference with the subpoenaing attorney at least one week in advance.
- Whether you believe you need to be ordered by a Judge to testify about certain matters (see "Talking to Attorneys").

Really? I can charge?!?

- Indiana statute provides that an ordinary witness is entitled to five dollars ($5) per day for attendance in court plus roundtrip mileage at the rate paid to state officers. Ind. Code § 33-37-10-3 (2007).
- If the $5 doesn't accompany the summons, you are not obligated to attend.

$5 Won't Cut It.

- In addition, Trial Rule 26(B)(4)(c) allows reasonable fees for expert witnesses. You'd be an expert if you are being examined as to your professional opinion and impression as opposed to facts. The determination of that is up to the Court.

  (c) Unless manifest injustice would result,

  (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivision (B)(4)(a)(ii) and (B)(4)(b) of this rule; and

  (ii) with respect to discovery obtained under subdivision (B)(4)(a)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (B)(4)(b) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

So What Can I Charge?

- In addition, Trial Rule 26(B)(4)(c) allows reasonable fees for expert witnesses. You'd be an expert if you are being examined as to your professional opinion and impression as opposed to facts. The determination of that is up to the Court.

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  (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivision (B)(4)(a)(ii) and (B)(4)(b) of this rule; and

  (ii) with respect to discovery obtained under subdivision (B)(4)(a)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (B)(4)(b) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

Is there Case Law on This?

"There is also a distinction between a witness to facts, and a witness selected by a party to give his opinion on a subject with which he is peculiarly conversant from his employment in life. The former is bound, as a matter of public duty, to testify to facts within his knowledge. The latter is under no such obligation; and the party who selects him must pay him for his time, before he will be compelled to testify. *Webb* v. *Page,* 1 Car. & K. 23."

Buchman v. State, 59 Ind. 1, 3 (1877)

Should I worry about the Rules of Evidence When Testifying?

- No.
- For example, there are precisely one million exceptions to the hearsay rule.
- That's the attorney's job. They should prep you in advance if they want you to worry about it.

What about Cross Examination?

- Remember that it's the other attorney's job to try to poke holes in what you said. It's not about you, it's about pushing at the evidence to see what stands up. Like scientific inquiry, only not. Sigh.
- Therefore, no need to be defensive, and ok to freely admit the limits of your knowledge or the limits of your recommendations.
- For example, if the other side says, "Isn't it true that you have only been a therapist for 3 years???!" And that's true, just say "yes" and let them move on.
- On cross, usually best to limit your answers to yes/no if possible, or at least to 2-3 sentences. If you have more, perhaps say, "That's a more complex answer than yes/no—do you want me to answer?" and then they're stuck listening to the answer.

What about Objections?

- If one side says, "Objection" then your job is to stop talking until directed to answer by the Judge. Just sit there while they sort it out.
- It's the attorneys' job to argue the objection to the judge and then the Judge will either 'sustain' or 'overrule' the objection. If the objection is overruled, you'll answer. If sustained, then the examining attorney will go on to the next question.
- You won't remember the question by the time the Judge rules, so just ask the attorney to repeat the question.

BEST PRACTICES FOR THERAPISTS

Melissa Richardson & Jacqueline Jordan

What are the best practices for working with a child whose parents are involved in litigation?

- Both parents are included in the process
- Both parents should sign consent to services
- Both parents should sign the necessary releases of information

Do both parents need to consent to treatment?

- Yes *

* *Who has legal custody?*

What is the role of a parent/parents in the child's therapy?

- This should be determined based on the child's progress in therapy.
- This would be a case-by-case determination depending on what outcomes are desired.
- The child will have individual sessions. The child may have sessions with one or both parents.
- When applicable, all protective orders and no contact orders will be followed.

Is there a role for a parent's attorney?

- If the therapist is subpoenaed, the attorney should prepare them for what to expect in a hearing.
- Attorney may keep the therapist informed of any new orders
- To let the therapist know what can be shared in court versus what is hearsay

What is the impact of a policy that says services will not be provided if there is pending litigation?

- The child may not be able to work through the difficulty of living in two homes.
- The child may not have a safe place to express their thoughts and feelings.
- The child will potentially continue to be in the middle of the parents' disagreements

WHAT ARE THE PROS AND CONS OF TALKING WITH A GAL?

Kristin Garner & Melissa Richardson

Pros

- A therapist has insight and knowledge about a child that no one else does. Therapists often play a critical part in a guardian ad litem's investigation.
- Open lines of communication with a GAL allows the GAL to make more accurate recommendations for the child.
- Speaking to the GAL may prevent either attorney from requiring you to testify at Court.
- Speaking to the GAL is much easier than testifying. There are no evidence rules to follow and a Judge is not present.
- Most guardian ad litems are not therapists and they need your professional input to assist in deciding what is in the child's best interest.
- A therapist may be the only neutral professional in a child's life.

Pros, cont.

- The therapist may be able to answer questions the GAL has about the child's personality, functioning, and likes/dislikes to better aid the GAL with speaking to the child.
- The GAL may be able to share the information learned from the therapist in a way that will preserve the therapist's relationship with the family.
- Depending on the age of the child, the GAL may not interview the child individually and instead may rely on the child's therapist.
- Play therapists obtain insights about a child that are not available from any other source.
- Therapists can report on progress towards goals that is otherwise very hard for a GAL to assess.
- The therapist may learn more about the case, the child, or the parents which assists the therapist.

Cons

- Conversations with the GAL are not confidential and will be reported to both parents and the Court.
- Records shared with the GAL are not confidential, although GALs can ask to maintain confidentiality of mental health records.
- Speaking to the GAL may cause an attorney to subpoena you for Court so they can cross examine you.
- You may be seen as "assisting" one parent over the other. This could harm your ability to work with a parent moving forward.
- You may be asked to disclose things the child has told you in confidence.

- As a Guardian ad Litem, if I need a therapist's input, and the child's current therapist refuses to speak to me, I may have to recommend the child obtain a new therapist. If the child trusts their therapist, this could be detrimental to the child.

What is needed to speak to a GAL?

- The Court Order may specifically provide that the therapist shall speak to the GAL.
- The therapist can ask for a copy of the court order appointing the GAL.
- A therapist can require that the legal custodian of the child sign a release for the therapist to speak to the GAL.
- If the parent will not sign the release, the therapist can ask the GAL to obtain a court order.
- The therapist can speak to the GAL about any concerns they have about speaking to the GAL and see what solutions are available.

QUESTIONS?