

EXHIBIT 19

Written Public
Comment
Regarding
THE MENTAL
HEALTH
PROTOCOL
July 27, 2007

From: Nordstrom, Chris [mailto:cnordstrom@mt.gov]
Sent: Thursday, July 26, 2007 7:43 AM
To: Timothy.conley@umontana.edu
Subject: LCSW, LCPC Scope of practice concern

Good morning Tim,

I am a practicing Clinical Social Worker at Montana State Prison, and one of 37 Clinical Members of the Montana Sex Offender Treatment Association. After reading through the document drafted by "Davis et al" to the Public Defender Commission, I have great concern regarding the attempt by the Psychological community to restrict LCSW's, and LCPC's from conducting evaluation and assessment procedures for the court. At the present time **MCA 46-18-111 Presentence investigation** indicates that "the investigation must include a psychosexual evaluation of the defendant and a recommendation as to treatment of the defendant in the least restrictive environment, considering the risk the defendant presents to the community and the defendant's needs" It then goes on to indicate that "the evaluation must be completed by a sex offender therapist who is a member of the Montana Sex Offender Treatment Association or has comparable credentials acceptable to the department of labor and industry." Given the fact that at present only two of the thirty-seven clinical members of MSOTA are Ph.D/Psy.D level Psychologists, (neither one of them signed the Davis document) and the rest are LCSW's, and LCPC's, I believe that the Montana Public Defender Commission would be doing the State of Montana a great disservice by restricting these highly qualified clinicians from conducting these highly specialized types of evaluations. I will not be able to make the Friday meeting due to my schedule at the prison, but I will pass this information on to other MSOTA clinicians in the hopes that one or more of them might make the public comment session. If nothing else I hope that you might be able to use this information as one of many examples as to why it would be important not to exclude the LCSW's and LCPC's from this process.

Thank you for your time and energy related to this issue.

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From: Ohman, Peter
Sent: Friday, July 13, 2007 11:13 AM
To: Wendlandt, Laura
Subject: RE: BZN expert

Hi Laura: I met with Dr. Evans this morning about the mental health protocol. I showed him the power point presentation that was shown to the commission to explain why the fees were established at the rate they were. He pointed out that the insurance rates and perhaps others were for clinical and not forensic work. He also told me that proper forensic evaluations required a higher degree of skill and training than clinical work and, consequently, were more expensive. I believe a letter expressing the concerns of some mental health providers is forthcoming.

I saw the list of individuals you spoke with in Bozeman regarding our fees. We are pretty limited on the number of psychologists in Bozeman willing to perform forensic evaluations – pretty much just Jim Murphey and Barton – so I would hate to lose one of them.

Thanks, Peter

From: Lemons, Fred
Sent: Tuesday, June 26, 2007 1:35 PM
To: Wendlandt, Laura
Subject: RE: Attachement C

Hi Laura.

I strongly oppose the fee structure in the attachment. It does not seem applicable to our field (MSOTA evaluators). We require a 2 year internship post license for all applicants whether psychologist, counselor, or social worker. I have been doing evals so long I can whip them out rather quickly. Some less competent or seasoned person may struggle over the assessment for hours and receive much greater compensation. I sell a product, a completed evaluation. Psychosexual Evaluation should have its own flat fee that everyone agrees on. Just a thought...

I disagree with Lic. Psychologists making 50% more than me. I am a co-founder of MSOTA and helped write the standards for evaluation and treatment of sex offenders in Montana. In this field for almost 30 years I have administered at least 8 to 10 thousand MMPIs and MCMI's.

I am not really sure what is wrong with the system as is.

Thanks,
Fred Lemons

-----Original Message-----

From: Bob Bakko [<mailto:bbakko@nwcc-mt.com>]
Sent: Monday, June 25, 2007 10:40 AM
To: Wendlandt, Laura
Subject: Re: OPD MH protocol information

I appreciate you contacting me in regard to this proposed fee schedule for expert witness's. I am deeply disturbed with the proposed schedule and will respond accordingly. I find it discriminatory that evaluations and testing are recommended at a lower rate for LCPC's/ LCSW's than psychologists. I am even more frustrated that LAC's are at the same reimbursement level as LCPC's/ LCSW's when they do not meet the equivalent or parity standards of training or practice. As a doctorate level LCPC I use many of the same instruments and administer forensic evaluations. I receive a lower value for my professional services; this is discriminatory. What about psychosexual evaluations? Most psychologists cannot meet the clinical criteria to administer the standardized requirements or evaluations pertaining to sexual offenders, domestic batterers or violent offenders nor I might add want to. Few licensed mental health professionals have the experience or the training to evaluate or treat this population. Those that do should not be discriminated against.

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20 July, 2007

Montana Public Defender Commission
44 West Park Street
Butte, MT 59701

RE: Public Comment on Mental Health Evaluation and Consultation Fee Schedule

To the Commission:

We, with a single exception, are a group of licensed Montana psychologists who have been providing forensic mental health evaluation and expert testimony services to the legal community in Montana for many years. The one individual who is the exception is a psychologist who has been considering beginning to provide such services. Aside from that single individual, over the years we have all done quite a bit of work at the request of a wide variety of attorneys functioning in the capacity of Public Defender. As a group we believe we are well qualified to comment on this issue.

We wish to express our concern regarding the fee schedule for forensic mental health services which has been implemented by the State Office of the Public Defender effective July 1, 2007.

Because the field of forensic mental health assessment is a relatively new area of professional specialty and because we believe that important misconceptions exist regarding the nature of forensic work, it is our belief that it may be helpful to place the comments which follow in an appropriate context.

Over the last 20 years or so the field of forensic mental health assessment has grown into a *highly specialized area of professional work*, with an extensive specialized scientific literature, a specialized set of assessment procedures, and unique specialty guidelines.¹ Nonetheless, a common misconception which persists to a greater or lesser degree nationwide, as well as, and perhaps to a greater degree in Montana, is that any psychologist, psychiatrist, or other type of mental health professional is prepared by virtue of their clinical education to provide the type of evaluation and expert testimony services needed by the legal community. *This is simply not the case.*

¹ Committee on Ethical Guidelines for Forensic Psychologists (1991). Specialty guidelines for forensic psychologists. *Law and Human Behavior*, 15(6), 655-665.

Utilization of such “clinical” mental health professionals who do not have specialized forensic skills to provide forensic consultation, examination, and testimony services becomes extremely problematic in practice because such professionals are not familiar with necessary legal concepts, issues, definitions, procedures, relevant case law, and specialized forensic assessment principles and procedures. As a result, consultation provided, reports written, and testimony provided by such professionals often does not adequately address the legal questions which may ultimately come before the court.

Almost any attorney who has worked with a variety of different mental health professionals will be able to recount an experience of retaining an inadequately prepared mental health professional to conduct a forensic examination and provide testimony. In many cases, ultimately, these services are found to be inadmissible as a result of ignorance on the part of the examiner with regard to legal procedural requirements, or if admitted, are found to miss the point of the legal issue before the court and/or to introduce more confusion than clarity into the proceedings.

Forensic psychologists and psychiatrists typically charge a higher rate for their services than do non-forensic clinicians for several reasons. Forensic work requires additional preparation and ongoing training. Psychologists and psychiatrists who choose to do forensic work are held to a *much higher level of professional accountability* than are other clinicians. Forensic mental health professionals are expected to be familiar with, and to stay up to date with, relevant statute and case law. Moreover, forensic work is much more complex, intellectually demanding, stressful, and requires a higher level of familiarity with ongoing scientific research than does ‘run-of-the-mill’ clinical work.

We believe the newly imposed fee schedule rate of \$125.00 an hour for services provided by psychologists and psychiatrists is well below the national average of fees charged by forensic psychologists and psychiatrists and we know that it is well below the current hourly rate charged by many Montana psychologists who have been doing work for the Public Defender’s Office. In fact, it is notably below the usual and customary fees charged by many psychologists and psychiatrists for day-to-day clinical work (i.e., psychotherapy, clinical psychodiagnostic evaluation, medication management).

If forensic psychologists and psychiatrists are not adequately reimbursed for their services to the State of Montana, they will look elsewhere for work or look to other activities to achieve their professional goals. There are currently a limited number of psychologists and psychiatrists in Montana who are both willing, and competent, to provide forensic mental health examination and expert testimony services. If the State of Montana decides to reimburse professionals who do forensic work at a rate equal to, or below, the rate of reimbursement which the same professionals can receive by doing less demanding and stressful work, there will be little incentive for psychologists and psychiatrists in Montana who currently do forensic work to continue to provide services to the State Office of the Public Defender and there will also be little incentive for competent psychologists and psychiatrists who currently do not do forensic work to enter into this type of work.

As such, a predictable outcome of making the current reimbursement schedule permanent will be a decrease in the availability and quality of services provided by competent forensic mental health professionals to the State Office of the Public Defender. This of course would seem to defeat the objective of the State Office to provide an increased quality of service to indigent defendants. It would also seem to fly in the face of historical efforts to ensure that indigent defendants are provided with “a

competent [forensic expert] who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense,” *Ake v. Oklahoma*, 470 U.S. 68 (1985), and “the right of indigents to the same adversarial psychiatric assistance that wealthy persons retain,” *Smith v. McCormick*, 914 F.2d 1153, (9th Cir. 1990).

To our knowledge the State is not imposing similar fee limitations on examiners when they are retained to conduct examinations at the request of a county attorney or on order from a court. As such, we encourage the Commission to consider the impact of the current, and other possible fee restrictions (i.e., authorization of inadequate flat-fee per examination rates), on the likelihood of subsequent ineffective assistance of counsel challenges to convictions as well as on the likelihood of future legal action against the State of Montana similar to the action which resulted in the development of the State Office of the Public Defender in the first place.

With regard to this latter issue, we note the concern expressed by the ACLU regarding funding of the State Office:

“[b]ut the ACLU cautioned that the passage of the legislation is only a first step. Montana must adequately fund the new system... [a]s it stands now, we believe that the current funding for the new law may be inadequate,... [b]ased on our experience nationally, adequate funding and good administrators are the two keys to success.” (ACLU Press Release: ACLU Hails Montana's Public Defense Bill as Leading National Trend, 6/8/2005).

Inadequate funding of forensic examination services also appears to contradict the State Office's decision to embrace the ABA's *Ten Principles of a Public Defense Delivery System* inasmuch as *Principle 8* states that “[t]here is parity between defense counsel and the prosecution with respect to resources...” The commentary to *Principle 8* goes on to explicitly note that “access to forensic services and experts” is an example of such resources.

The concern which we have expressed with regard to the issue of decreased quality of work product is not hypothetical or theoretical in nature. One of us has recently spoken with an individual in a neighboring state who works in an administrative capacity for a state agency that has instituted similar fee limitations on forensic examinations, and this person reported that once those limitations were imposed the forensic examiners who had provided the highest quality of services discontinued providing services to his agency and that the overall quality of the examination services which his agency now receives is much reduced.

Additional validation of this reality is the fact that, as of this writing, a number of highly competent Montana psychologists who have done work for the Public Defender's Office in the past have told us that, if the current fee schedule is made permanent, they plan to discontinue doing any work for the Public Defender's Office at all. As a parallel example we encourage the Commission to consider the difficulties that presently exist with regard to establishing a pool of clinicians who are willing to provide day-to-day clinical psychotherapeutic and evaluation services at State rates, as administrators at various levels of the Department of Public Health and Human services are able to attest.

Given the concerns and issues discussed above, we encourage the Commission to consider either substantially increasing the maximum allowable hourly charge or to consider abandoning the approach of establishing a maximum allowable hourly charge altogether.

A reasonable alternative approach would be to continue the current practice of soliciting estimates of the cost of an examination and then choosing the provider who provides an estimate in keeping with what the Public Defender's Office thinks is a reasonable price to pay for the desired service. We suspect that other alternative solutions are possible as well and would welcome the opportunity to work with the Commission to develop an alternative solution that would hopefully address the concerns noted in this comment as well as meet the State's need to exercise fiscal restraint in a strategic and responsible manner.

In the event that the Commission should nonetheless decide to set a final maximum hourly fee schedule, whether using the current maximum allowable rates or some hopefully higher maximum allowable rate, we believe that it would be important to share some additional concerns with regard to the fee schedule as currently constructed.

The first of these concerns has to do with the references in the fee schedule to Current Procedural Terminology (CPT) codes.

The inclusion of CPT codes in a fee schedule for forensic services is inappropriate and potentially confusing. For example, the rows detailing the fees for Screening Examinations reference the 90801 CPT code. This code is used by insurance companies to identify a service labeled in the CPT code book as "Diagnostic Interview Examination," and is described in the CPT code book as consisting of a history, mental status, and a disposition.

When a forensic examiner is asked to conduct a "screening" or "preliminary" examination of a defendant *the issues being examined are much broader* than mere diagnosis, mental status and disposition. The issues being addressed extend beyond the clinical realm for which CPT codes were designed and are appropriate to "psycholegal issues" such as whether or not there is reason to doubt a defendant's *fitness to proceed* or whether a defendant's *mental disease or defect as defined in statute* is such that there may be reason to suspect that it may be *relevant to issues of criminal responsibility or sentencing mitigation*.

CPT codes are used to describe clinical services provided to a patient/client in a clinical diagnostic and therapeutic context, and do not translate into the forensic context with any degree of real correspondence. This lack of an easy and direct correspondence between clinical CPT codes and forensic services is reflective of the distinction made above between clinical and forensic mental health services. It is also not unlike the more well-known incongruity between legal definitions of mental disease and defect and the clinical definition of mental illness as defined in the Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition, Text Revision (DSM-IV-TR).

Just as the presence of a clinical DSM-IV-TR diagnosis is not equivalent to a finding under Montana law that a defendant is suffering from mental disease or defect², a CPT code description of a clinical service or procedure is not equivalent to, or descriptive of, forensic services or procedures. An additional quotation from the DSM-IV may help to illustrate this point:

“When the DSM-IV-TR categories, criteria, and textual descriptions are employed for forensic purposes, there are significant risks that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis.” (DSM-IV-TR, page xxxiii).

Although this quotation refers to the DSM-IV-TR and diagnostic issues rather than to the CPT code book and procedural issues, the use of CPT codes in a forensic context raises parallel concerns with regard to the procedures which a forensic examiner may utilize in a forensic examination.

In addition, the use of CPT codes in the forensic context perpetuates the unfortunately common misconception that there is no significant difference between clinical and forensic mental health assessment. For practitioners new to doing forensic work the use of CPT codes in the forensic context may result in the mistaken belief that the CPT code adequately describes the nature of the service they are expected to provide. Finally, the use of CPT codes in the forensic context may result in the mistaken belief on the part of attorneys, defendants, and inexperienced examiners that health insurance benefits can be accessed to pay for forensic services.

We encourage the Commission to strike all references to CPT codes from the fee schedule. If this for some reason is not done, a second CPT concern which should be addressed is the inclusion of the 96100 code in the listing for “Computer generated/flat fee” in the Specialized Examination section. The 96100 code is an obsolete code no longer in use and as such any reference to that code should be stricken.

Another concern has to do with the listing of fees for LCSWs and LCPCs which indicates a reimbursement rate for the use of diagnostic tools by LCSWs for Screening and Chemical Dependency (CD) examinations and for LCPCs for CD examinations. It is not clear from the fee schedule exactly what is meant by “diagnostic tool” but we suspect that what is being referred to is actually a broad category of clinical and specialized forensically-relevant assessment tools. These specially designed and restricted tools are commonly used to assist with psychodiagnosis as well as for obtaining objective data regarding other issues related to fitness to proceed, response style, capacity to waive *Miranda* rights, suggestibility, compliance, and so on. Under Montana law “psychological testing and evaluation or assessment of personal characteristics such as intelligence, personality, abilities, interests, aptitudes, and neuropsychological functioning” (§ 37-17-102 M.C.A.) is *within the scope of practice of psychologists*. LCPCs are limited to “assessment, which means selecting, administering, scoring, and interpreting instruments designed to assess an individual's aptitudes, attitudes, abilities, achievement, interests, and personal characteristics and using nonstandardized methods and techniques for understanding human

² In fact, the Cautionary Statement provided on page xxxvii of the DSM-IV-TR (2000) makes this clear: “The clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as *individual responsibility*, disability determinations, and *competency*.” (Italics added).

behavior in relation to coping with, adapting to, or changing life situations” (§ 37-23-102 M.C.A.). *The scope of practice of LCSWs in Montana does not include any form of psychological testing, evaluation, or assessment.*

Clarification in Montana law is needed with regard to the differences between the type of “psychological testing and evaluation or assessment” procedures which psychologists are able to engage in and the “assessment” procedures which LCPCs are qualified to engage in. Nonetheless, there is a general consensus that psychologists are qualified to use assessment tools by virtue of their training, supervision and experience that LCPCs are not qualified to use – particularly those tools which would be considered to be “psychological tests” such as objective personality tests and intelligence tests. Further, psychologists are qualified to incorporate findings from such instruments as well as other assessment data into the overall findings of an evaluation, examination, or assessment in contexts in which it would be *inappropriate* for an LCPC to do so. Psychologists are qualified to engage in such activities because psychologists have much more extensive education with regard to the development, construction, administration, and interpretation of test instruments and because the nature of psychologists’ training includes more extensive and sophisticated experience with psychological testing and interpretation.

It is also important to note that the definition of the type of “assessment” which is within the scope of practice of LCPCs does not include the word “diagnosis,” which implies that the assessment tools which LCPCs are qualified to use do not include assessment tools which are designed for the purpose of facilitating diagnosis.

As such, including entries for LCSWs in the fee schedule rows for use of “diagnostic tools” in the Screening section and entries for LCSWs and LCPCs in the fee schedule rows for “other assessments” in the CD Specific Evaluation section of the fee schedule is inappropriate and inconsistent with the scope of practice of LCSWs and LCPCs as defined in Montana law.

In summary, we encourage the Commission abandon the current effort to establish maximum allowable hourly fees which forensic examiners are allowed to charge, or, to at least substantially increase the maximum allowable hourly charge established by the current fee schedule to a reasonable national standard. If the hourly fee schedule is not entirely eliminated, we encourage the Commission to remove all references to CPT codes from any future fee schedules, as well as to remove all references to fees paid to LCSWs and LCPCs for diagnostic or other types of testing.

We encourage members of the Commission to contact the primary author of this comment (Dr. Davis) or any one of us, if we can provide any additional information that may be helpful to the Commission with regard to this issue.

Respectfully submitted,

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Michael Butz, Ph.D.
Jeffery Cory, Ph.D.
Nancy Errebo, Psy.D.
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