

## **Cross-examining mental health experts in child custody litigation.**

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### **Introduction**

[483] Custody litigation evokes in the competing parents many of the emotions that most dramatically impair objectivity. Among the commonly experienced feelings are competitiveness, anger, frustration, insecurity, and distrust. An attorney representing the non-favored litigant should not be surprised [484] when her client cites information not considered; registers complaints regarding procedural irregularities; and/ or declares that the evaluator was not impartial. Examples of evaluator error abound and the rants of disgruntled litigants, though emotionally expressed, often convey objectively verifiable complaints.

Though some individuals are motivated by tactical concerns when they seek the court's designation as a child's custodian, it must be presumed that custody litigants generally believe themselves to be superior parents. Because most litigants are hopeful that they will be favored and feel that they *should* be and because 50% of them are disappointed, anger is to be anticipated. When non-favored parents mentally search for explanations for the recommendation that has been offered, they frequently look outside themselves, and they frequently conclude that the unfortunate outcome of the evaluation lies neither in their parenting deficiencies nor in the competing parent's strengths; rather, it lies in errors made by the evaluator. Some custody litigants are correct, of course, in believing that they have been placed at a disadvantage by the actions of a biased evaluator.

While not every litigant who complains of evaluator bias has, in fact, been a victim of bias and though it is reasonable to presume that evaluator bias is uncommon, unquestioning trust in evaluator neutrality is naïve. The personal values that guide the lives of others and the human weaknesses that affect the lives of others are seen in evaluators as well. Whether in private conversation or courts of law, people who express opinions like to see those opinions accepted and are naturally inclined to offer supporting information and disinclined to offer non-supporting information.

As practiced by many attorneys, there is a sizeable improvisational component to the cross-examination of mental health experts in custody litigation. Extracting from evaluators information not supportive of their positions is a task requiring [485] organization; planning; and, in some cases, litigation support services from a knowledgeable expert. With appropriate pre-trial preparation the serendipitous element can be significantly reduced and flaws in an evaluator's work can be more effectively revealed.

### **Discovery**

Ideally, the initial selection of an evaluator has been an informed decision, and the attorneys involved are familiar with the evaluator's education, training, and experience and have available for their review a copy of the evaluator's *curriculum vitae* and a copy of the evaluator's agreement with the parties. If a detailed *curriculum vitae*

and a copy of the evaluator's agreement are not already on file, request them. In scrutinizing an evaluator's CV, pay attention to the presence or absence of education and training in the forensic specialty area and, in particular, to the presence or absence of indications of preparation for conducting evaluations of comparative custodial suitability. Because the involvement of mental health professionals in forensic matters is relatively new, very few mental health practitioners received their original education and training in the forensic specialty. The vast majority were educated and trained as clinicians. It is inappropriate for a mental health professional whose background is treatment-oriented to accept forensic assignments without first having secured education and training aimed specifically at preparing one for forensic work. If the evaluator's CV does not include a list of workshops attended, such a list should be requested. It is not unreasonable to expect that even a newcomer to the field will have attended workshops addressing custody-related matters *prior to* offering services. A more experienced practitioner is likely to have reached the point of offering such workshops to others. If there is no evidence of the evaluator's having received appropriate advanced training, plan to inquire about this deficiency at trial; formulate questions aimed at making this deficiency apparent to the [486] trier of fact; and, give thought to the manner in which you will demonstrate the importance of this deficiency to the court.

When evaluators claim to be diplomates or indicate that they are board certified, obtain information concerning the organizations by which the credentials have been awarded. The differences among credential-granting boards are significant. With the increase of forensic assignments to mental health professionals has come a proliferation of credential granting organizations, many of which subject applicants to no scrutiny whatsoever. Such organizations operate as though they are presuming that all background information provided by an applicant is accurate. Examinations, if required at all, are taken at home without supervision and the presumption is made that such exams have been independently taken by the applicants. Other diplomate granting boards — for example, the American Board of Professional Psychology — conduct a rigorous credentials review, work sample review, and oral examination.

If evaluators identifying themselves as diplomates or as board certified fail to designate the specialty in which their credentials were awarded, that information should be sought prior to trial. Similarly, if evaluators claiming to hold credentials suggesting advanced and specialized training fail to identify the credential-granting organizations, request this information as well. Finally, when credentials have been awarded by organizations with which attorneys are unfamiliar, they should determine how the organizations can be contacted and should request from these organizations descriptive information outlining the credential granting process. Those who feel that investing one's time in such pursuits is wasteful should be aware that household pets (whose owners are willing to pay the required fees and to make untruthful statements concerning their pets' education and training) can secure board certifications from several organizations, some of which have very impressive names<sup>1</sup> Boards that issue certificates without first having conducted a meaningful assessment of a candidate's [487] expertise are euphemistically referred to as "vanity boards".

With regard to the evaluator's agreement, even though litigants are typically directed by the court to submit to custodial suitability evaluations, a responsible evaluator presents those being evaluated with a document outlining procedures and fees. Attorneys should review such agreements with their clients in order to ascertain whether evaluators have followed the procedures outlined in their agreements.

Remarkably, many evaluators fail to honor the terms of agreements that they themselves have written. If certain procedures were not followed, inquiries can be made concerning any discrepancies between how the evaluation was conducted and how the evaluation *was to have been* conducted. Such inquiries are particularly important if your client has been placed at a disadvantage by virtue of the evaluator's failure to follow the procedures outlined in the agreement.

As a matter of routine pre-trial preparation, attorneys should request (or, if necessary, subpoena) evaluator files. In preparing such requests, care should be taken to close any loopholes and to leave no room for misunderstandings<sup>2</sup>. Obtain all information on file concerning the matter. If, for any reason, contemporaneously taken session notes have been re-done, make clear that both the newly created notes and the original, contemporaneously taken notes are being requested. If only one set of notes is provided and is represented as being the evaluator's contemporaneously taken notes, present the notes to your client and ask that the notes be visually inspected. The client should be advised to reflect upon the type of paper and type of writing instrument used as notes were being taken. An effort should be made to ascertain by visual inspection whether the notes presented as being contemporaneously taken are, in fact, what they are purported to be.

**[488]** The search for indications of bias is most efficiently begun by comparing the contents of an evaluator's contemporaneously taken notes with the evaluator's description of factors supporting the opinion(s) offered. In reviewing an evaluator's notes and advisory report, look for evidence of deficiencies in the favored parent that appear in the evaluator's notes but are not alluded to in the report. Similarly, evidence of parenting strengths in the non-favored parent that appears in the notes but does not find its way into the report suggests bias. In addition to reviewing contemporaneously taken session notes, notes taken during discussions with collateral sources should be examined with the aforementioned discrepancies in mind. The role of an expert (whether court-appointed or retained by one of the parties) is to assist the trier of fact. Doing so requires that evaluators report all pertinent information, including information supportive of a recommendation different from that offered in the advisory report. Custody evaluators are reasonably expected to be thorough in reporting the information that they have gathered. Where an examination of contemporaneously taken notes and the advisory report reveals significant discrepancies, the matter should be vigorously pursued.

Far too many experts re-do their notes (by entering them in a computer, for example) for the alleged purpose of making them more legible and, after having done so, destroy the originals. The creation of a new set of notes is not objectionable as long as the contemporaneously taken notes are preserved and made available for inspection. Mental health professionals practicing within the forensic arena are obligated to be mindful of the manner in which information gathered by them will be utilized. As notes are being taken; as other types of records are being created; as supporting documents are being gathered; and, as decisions are being made concerning control of the file, it must be borne in mind that all items in an evaluator's file are subject to discovery. With specific reference to notes taken during evaluative sessions, there is no justification for the failure to retain (and produce upon **[489]** request) one's contemporaneously taken notes, nor is there any basis either in law or in professional ethics for maintaining "personal notes" that one views as being not part of the file and, therefore, not subject to discovery.

When evidence has been destroyed (even if by a court-appointed evaluator, rather than by a partisan), do not presume that the destruction was innocent. The legal concept of spoliation incorporates the opposite presumption. When evidence in any form has been destroyed, it is reasonable to presume that the spoliator has acted in the belief that he will benefit from the destruction. In the case of custody evaluators, reconstruction of notes affords an unethical expert the opportunity to engage in creative editing. Information not supportive of one's position can be deleted and information that bolsters one's views can be inserted. Additionally, evidence of one's errors can be eradicated.

None of the mental health professions demand that its members tape record evaluative sessions. Some evaluators, however, choose to do so. Interestingly, some of those who tape record sessions subsequently erase the tapes. Some might argue that mental health professionals should not be required to *preserve* that which they were not required to *create*. I would disagree. Records of any type created by forensic examiners constitute evidence. For that reason, once a record of any type has been created, there is an obligation to preserve it. The same duty applies to practitioners who view their task as clinical in nature but who should reasonably anticipate that their records will be needed in an adjudicative forum.

In reviewing the evaluator's report, contemplate the procedures and methodology from a lay perspective. If some aspect of an evaluator's procedure strikes you as not having been "balanced", perhaps your impression is correct. It should be clear from an examination of the evaluator's procedures that she is cognizant of the phenomena that adversely affect objective decision-making<sup>3</sup> and that reasonable steps [490] have been taken to avoid the various pit-falls. A responsible evaluator must have a healthy respect for the generally known and well-documented obstacles confronting decision-makers. For example, the tendency for information gathering to be influenced by (and, possibly, distorted by) previously formed impressions has been discussed in the psychological literature for more than five decades<sup>4</sup>. This phenomenon, referred to as *mental set*, is related to the *primacy effect* -- best known as the "first impressions" dynamic. Unless something in a litigant's initial presentation immediately arouses suspicion, there is a natural (albeit unintentional) tendency to accept the essential accuracy of the fact pattern as it is related by the individual from whom background information is initially obtained. Evaluators who assert that knowledge of the primacy effect enables them to "factor it in" are being disingenuous. Mental health professionals are well aware that knowledge of a psychological dynamic does not prevent it from operating. Unless an evaluation has begun with a meeting attended by both litigants, someone has obtained the advantage afforded by the primacy effect.

Know the evaluator whom you will be cross-examining<sup>5</sup>. In some jurisdictions, a handful of practitioners are performing the vast majority of custodial suitability assessments. If the evaluator whose work you are questioning is a high-volume practitioner, endeavor to obtain a reasonable number of his previous advisory reports and scan them for identical passages. Think like a statistician. What is the probability that the descriptors employed in portraying the interaction between Mr. Smith and his two sons (ages 3 and 5) accurately describe the interaction between Mr. Jones and his two daughters (ages 8 and 11)? Where similarities between reports are numerous, it is reasonable to explore corner-cutting by the evaluator. Have important individual differences been explored or have litigants been assessed in a cursory manner;

categorized; and, subsequently, described by means of paragraphs plucked from the memory of the evaluator's computer?

**[491]** Experience and ongoing education (in the form of attendance at workshops, etc.) can stimulate changes in an expert's perspective on certain issues. Though inconsistencies between what an expert has testified to in an earlier case or advised in the course of a presentation offered to local attorneys and her currently expressed views will not always prove fruitful in attempts to impeach her, familiarizing yourself with an expert's past pronouncements is useful and *some* changes in an expert's position warrant exploration.

It is reasonable to expect that experts will be cooperative rather than combative, and open rather than secretive. A responsible impartial examiner does not erect obstacles in the path of lawful discovery. Things are not always as they should be. Therefore, items received in response to requests (or subpoenas) should be checked against those enumerated in the request. If you have doubts concerning whether or not you have received all requested items, inquire. If assurances are offered that all items considered by the expert have been provided, any remaining doubts should be mentally filed and raised at trial.

Inquiring at trial concerning the completeness of the file as it was submitted involves no strategic risk. If the response reassures you that all information considered by the expert in the formulation of his opinion has been made available for your inspection, you lose nothing tactically for having inquired. If the response suggests that there is information that you have not seen, you have, by raising the issue, alerted the court to the possibility that the testifying expert has not complied with the rules of discovery and that, by extension, the expert may not be impartial.

Attorneys should keep certain documents on file for convenient reference when needed. In most states, the regulatory agency that oversees the health professions has promulgated unambiguous standards governing the creation and maintenance of records. It is often useful to compare what has been **[492]** presented with what is required. Note should be made of any failure to conform to state regulatory standards. Not surprisingly, when significant errors have been made by evaluators, it is often as a result of a failure to respect the admonitions found in their profession's ethics code and in other documents intended to provide guidance to responsible professionals<sup>6</sup>. These documents too should be available in attorneys' offices.

### **Interviews with children**

If children are old enough to converse with an evaluator, at least two private sessions should be conducted with them. Children should be transported by parent A on one occasion and by parent B on the other occasion. It is only by doing this that it becomes possible to note any inconsistencies between what they say after having been transported by parent A and what they say after having been transported by parent B. This is of particular importance in cases where allegations have been made concerning attempts to inappropriately influence the children. When children have been interviewed only once, attorneys should ask their clients about the arrangements that were made for transporting the children. If the favored parent was the transporter of the children, information concerning pre-session activities should be delicately sought. Without interrogating the children, the client should make a reasonable effort to ascertain

whether the parent transporting the children engaged them in any particularly pleasant activities beforehand and whether the transporting parent discussed with the children what should be said to the evaluator. Consider the following scenario. On Sunday evening, Parent A returns with Junior from a week in Disney World. Junior is energized, but Parent B insists that he go to bed on time because there is school tomorrow. Upon Junior's return from school on Monday, Parent B insists that he do his homework because he has an appointment with the evaluator that evening. Parent A transports Junior to his only appointment [493] with the evaluator and, along the way, they reminisce about their week together at Disney World.

Advancing cogent arguments in support of a custody/visitation arrangement that will be in the children's best interests requires that an evaluator do more than simply ask the children what their wishes are and communicate those expressed wishes to the court in an advisory report. An evaluator must utilize questions likely to elicit the information needed to evaluate the *legitimacy* and the *long-term implications* of the children's stated preferences. When, on the basis of other available information, you are reasonably certain that children have not been effectively interviewed, that pertinent inquiries have not been made, and that the position of the client being represented would have been supported if appropriate questions had been posed, you should consider cautious probing. Though cross-examination of this type entails some risk, it is an approach worth considering when your client can specify questions which, if they had been posed by the evaluator, would have elicited information supportive of her position.

### **Assessing significant others**

In reviewing the advisory report, be certain that any individual(s), other than hired child-care providers, currently playing or likely to play a parent role were fully evaluated. In particular, if a parent has made known his intention to remarry an already-on-the-scene person, that person should have been evaluated. Parenting demands team work. If Parent A plans to remarry J. Doe upon receipt of a divorce decree and if an evaluator favors Parent A, the evaluator is, in reality, recommending the parenting team of Parent A and the soon-to-be new spouse. Recommending a two-person team having evaluated only one member of the team constitutes formulating an opinion on the basis of insufficient information.

### **[494] Information gathering**

Formulating an opinion in a custody/visitation dispute requires that the examiner be attentive to both the quantitative and qualitative aspects of data gathering. For the foundation upon which a recommendation rests to be secure, much information must be gathered and the caliber of the information must be such that it will withstand reasonable scrutiny. It is generally agreed that data should be obtained through interviews, through the administration to the parties of psychodiagnostic assessment instruments, through available documents, and through collateral sources<sup>7</sup>.

One of the most essential distinctions between clinical and forensic evaluation is the investigative mind-set that is so critical to forensic endeavors. A forensic examiner cannot be a passive recipient of proffered information. An evaluator is obligated to actively seek information beyond that which is presented by the parties or by their legal representatives. Data collected in a recent study<sup>8</sup> suggest that approximately 28% of the

evaluative time expended by those responding to a survey was devoted to information verification (obtaining information from documents, from disinterested collateral sources, and from other non-parties).

Records that may contain pertinent information include: those maintained by current or previous therapists; those kept on file by schools that, in addition to outlining academic performance and social functioning, will frequently contain notes from parent-teacher teacher conferences and other information regarding parental involvement; those of employers that *may* contain information concerning characteristics pertinent to parenting as well as to job performance; medical records; and, charge account records.

Because conflicting claims are so common in custody disputes, evaluators frequently rely on information provided by collateral sources. For that reason, effective cross-examination **[495]** is essential whenever there is reason to question the accuracy and/or completeness of information communicated by the evaluator. An expert may rely upon and accurately report information that is false; may be careless either in recording or in reporting information obtained from collateral contacts; or, may knowingly distort information provided by a collateral source. Additionally, an evaluator may fail to obtain information that should have been obtained.

Most evaluators ask that litigants submit lists of collaterals whom the litigants believe can provide pertinent information. Typically, such lists contain the names of allies as well as the names of presumably disinterested professionals (such as teachers, pediatricians, etc.). Review these lists and compare them with the evaluator's list of collaterals who were contacted. Unless each collateral on your client's list was contacted, you should inquire with respect to who was contacted, who was not, and why those not contacted were omitted.

Evaluators as a group have recognized the need for specialized education and training. As a result, certain information-gathering errors are being encountered with less and less frequency. Nevertheless, there are still situations in which information secured either from documents or from collateral sources represents nothing more than information provided by a litigant and passed along – now enhanced by a misleading aura of objectivity. Two common examples follow. (1) A police report the contents of which are limited to a statement taken from a litigant by a responding officer. (2) A therapist being interviewed as a collateral source opines that a litigant is very patient in dealing with her child. The evaluator, however, neglects to inquire about the basis for this opinion. The therapist has never observed the litigant interacting with her child and has, apparently, unquestioningly accepted the litigant's statements. The evaluator reports the therapist's opinion as though it were an opinion independently formulated by a mental health professional on the basis of his own observations.

**[496]** Information can be gathered from collateral sources in a variety of ways. Knowledgeable and experienced experts disagree among themselves concerning the most effective means by which to increase the quantity and quality of information gathered. It is in discussions of an expert's use of information from allies that disagreement is most pronounced. Information can be gathered orally or in written form. Those from whom information has been sought can be presented with specific questions prepared in advance or can be offered an open opportunity to share whatever information they deem pertinent. Evaluators can combine a structured approach with an open-ended approach. Some evaluators pose the same questions to all those from

whom information is sought. Of greatest importance is the evaluator's rationale. Can she cogently articulate her reasons for having gathered information in the particular manner in which it was gathered? Have accurate records been maintained? Are there indications that the evaluator was selective in what she made note of?

In reviewing an evaluator's report, watch for summaries of information provided by classes of people. Examples include: "Neighbors informed me . . ."; "Co-workers described Mr. Ajax as . . ."; "School personnel agreed that . . .". Evidentiary demands require that evaluators identify each collateral source from whom information has been obtained and disclose what information was obtained from each source. If you are troubled by the paucity of an evaluator's notes and believe them to be incomplete, you should request and carefully inspect the evaluator's time logs. It is reasonable to expect that among the records kept by evaluators will be logs similar to those maintained by attorneys. If an evaluator's time logs reveal that he commenced a phone conversation with Johnny's teacher at 10:00 A.M. and concluded the conversation at 10:40 A.M., a one-sentence summary of the 40-minute discussion is inadequate. Requests made to an expert favoring the other party that he try to recall more of his conversation with Johnny's teacher afford him the opportunity to [497] bolster his position. The potential tactical benefit, however, may well outweigh the risk.

Under cross-examination, evaluators whose notes are sparse will frequently recall information that does not appear in their notes. An evaluator's acknowledgment that she has relied upon information not in the file provides the cross-examining attorney with an opportunity to expose deficiencies in the expert's documentation of her work. Effectively demonstrating that an expert's notes and/or other records are deficient can significantly affect the weight placed on the expert's testimony and, where egregious omissions or errors exist, can lead to the disqualification of the expert.

Federal Rule of Evidence # 703 declares that experts may utilize facts not in evidence if those facts are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. . . ." The reasoning that underlies FRE # 703 has led most courts to grant wide latitude to experts as they relate information provided to them by others. It is often argued that this freedom from the restrictions usually imposed by the hearsay rule is warranted because experts should not be encumbered as they explain the manner in which their opinions were formulated and that hearsay information is related for this purpose only and not for the truth of it. Experienced attorneys can undoubtedly recall situations in which this privilege has been abused. Information communicated either in an advisory report or from the witness box influences the trier of fact. If that information is inaccurate, the fact-finding process is compromised.

### **Psychological testing**

The vast majority of mental health professionals conducting evaluations of comparative custodial fitness are clinicians who have entered the forensic arena for a variety of reasons. Some have brought to forensic work psychodiagnostic assessment [498] instruments generally considered useful in clinical work. Several of the instruments long-favored by clinicians are, however, ill-suited to the evidentiary demands of forensic work. Many, while useful in generating hypotheses are neither reliable nor valid.

In a clinical setting, a psychodiagnostic assessment marks the beginning of an ongoing relationship in the course of which there will be opportunities for subsequent reassessment. As new information disconfirms old hypotheses, appropriate adjustments can be made. In a forensic setting, the report in which one's assessment is described marks the end of a relationship. No opportunities to reassess are provided. Because of this critical difference between clinical assessment and forensic assessment, it cannot be presumed that instruments popular among clinicians are suitable in forensic work.

Clinical assessment is conducted for the purpose of describing and subsequently classifying symptoms; identifying enduring personality characteristics that may either facilitate or complicate treatment efforts; and, discerning maladaptive patterns of behavior. Such assessment is conducted in order to make informed therapeutic intervention possible and, in some instances, to gauge the progress of therapy. With only few exceptions, the individuals being evaluated have come to the practitioner's office of their own accord, perceive the practitioner as someone whose task is to assist them, and are motivated to be disclosing and candid. The purpose of forensic assessment is entirely different. The evaluator's goal is to obtain information bearing upon a specific psycho-legal matter and not to be distracted by information that, in a clinical context, might be significant but fails to provide answers to the questions that are the focus of the litigation.

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The assessment devices used by mental health professionals in custody-related matters are either self-report inventories (objective tests) or projective devices (subjective tests). Self-report inventories are tests in which inquiries are made of the [499] examinee concerning symptoms, behavior patterns, perceptions, attitudes, beliefs, etc. Responses are subsequently scored by computer or by means of answer keys. Projective devices require that the examinee respond to ambiguous stimuli (such as ink-blot, in the Rorschach test), and the examinee's responses must be interpreted by the examiner. The probability that different examiners will interpret the same data in the same manner can be ascertained and reported in the form of an *inter-judge reliability coefficient*.

Imwinkelried cites case law that supports a cross-examining attorney's right to "demand an affirmative showing [by the expert] of [an] instrument's accuracy."<sup>9</sup> Inter-judge reliability coefficients for projective tests have not been impressive. In Anastasi's view, "the final interpretation of projective test responses may reveal more about the theoretical orientation, favorite hypotheses, and personality idiosyncrasies of the examiner than it does about the examinee's personality dynamics."<sup>10</sup> In describing projective tests of general mental/emotional health, a text described as "A Deskbook for Judges" observes that they "generally exhibit low reliability and poor validity."<sup>11</sup> The authors conclude that such instruments "are of little forensic value and are useful only for clinical speculation and hypothesis generation." "Some of these tests . . . [are susceptible to] egregious misuse [and are] of no more probative value than tea-leaf patterns in the bottom of a cup."<sup>12</sup>

Tests intended to measure *functional abilities* that bear directly upon custodial suitability have not been reviewed favorably. LaFortune and Carpenter list the seven most frequently used assessment instruments that "focus on parenting skill and the parent-child relationship" and that are "touted by their authors as helpful in clinical

determinations of parental fitness.”<sup>13</sup> LaFortune and Carpenter declare: “[T]he validity of these measures is unestablished at best and seriously flawed at worst.”<sup>14</sup> Although the hope is expressed that improvements in these instruments may make them useful in [500] the future, the authors conclude that their use at present “cannot be recommended.”<sup>15</sup> The frequency with which certain instruments are utilized may be attributable more to marketing and related phenomena than to psychometric integrity.

It is not uncommon for evaluators who have utilized instruments lacking in both reliability and validity to suggest that their use of more established instruments as well should put to rest any concerns that might be raised concerning the questionable instruments. Their reasoning is fallacious. Flawed information is problematic. With regard to assessment data, formulation of a sound opinion is more likely if one utilizes two or three instruments that are reliable and that gather data pertinent to the decision that must be made than if one uses multiple instruments some of which may be of questionable reliability or may gather data that do not bear directly on the matter before the Court<sup>16</sup>.

### **Formal assessment of children**

Assessing the children who are the focus of a custody dispute is particularly problematic. If, in formulating her opinion and supporting her recommendation, an evaluator has placed significant weight on the psychological characteristics of a child, critically examine the manner in which the child’s characteristics and/or special needs were ascertained.

First, the instruments typically utilized in evaluating children are strongly influenced by *situational variables*; that is, performance is affected by recent events, transitory moods, etc. Where the role of situational variables is strong (as is the case with family drawings)<sup>17</sup>, it is unlikely that useful information can be derived from the assessment instrument. Data gathered through the use of objective assessment instruments not unduly influenced by situational variables are more likely to provide information concerning the children’s current psychological functioning. Second, even where the best available [501] instruments have been utilized, the utility of test data in assessing *enduring* personality characteristics or persistent (as opposed to transient) psychopathology is questionable. Once parents enter into disputes concerning the custodial placement of children, the children’s life circumstances change dramatically. The children are now living in a world in which there may be significant conflict accompanied by open expressions of anger; where their living circumstances may change unpredictably; and, where the expression of certain emotions may be actively discouraged while the expression of other emotions is reinforced. If assessment is conducted during this period in children’s lives, we must question the degree to which the data obtained are reflective of the children’s pre-conflict functioning or predictive of their future functioning.

### **Computer-generated reports**

All writers develop an expressive style. When reading the section of the advisory report addressing impressions of the parties that have been developed on the basis of test data, look for indications that the expressive style differs from that which

characterizes the other sections of the report. It is not uncommon to encounter reports in which statements interpreting test data have been taken verbatim from computer-generated interpretive reports. Mental health professionals utilizing psychological assessment instruments are expected to accept responsibility for the interpretation of test data even if the tests have been scored by a computer and even if a computer-generated interpretive report has been provided. The reason is self-evident: The authors of the computer programs that interpret test data are typically not available for cross-examination.

If you question the basis for interpretive statements, however, you take a calculated risk. Even skillfully framed inquiries can provide experts with opportunities to reinforce opinions expressed earlier on direct examination. Because I believe [502] the interests of children are best served when triers of fact are fully informed of the bases for all opinions, I advocate posing such

questions. I must point out, however, that it cannot be presumed that the information elicited will reveal that the evaluator unquestioningly accepted a computer's purported wisdom, nor can it be presumed that your client's position before the court will always be strengthened by such inquiries.

### Expert opinions

Prior to commencing an assessment of comparative custodial fitness, an evaluator must decide what he will look at. Unless this is done, his gaze may be diverted. If you don't know where you're going, the probability of getting there is substantially diminished. In states in which the factors to be considered by evaluators are not statutorily defined, it is essential that evaluators determine what criteria they will employ in examining the otherwise nebulous *psychological best interests* of the child.

All forensic experts bear the burden of specifying the data that form the foundation upon which their professional opinions rest. In a matter involving custodial suitability, the expert should specify the criteria that were employed, the data that were gathered, and the manner in which those data bear upon the criteria. The use of predetermined and clearly articulated criteria increases the ability of evaluators to focus their attention on legally relevant abilities and characteristics and not to be distracted by litigants' likeability (or lack thereof) or by disagreements that may have occurred between evaluators and litigants in the course of the evaluation.

Oliver Wendell Holmes, Jr., in an article written for the *Harvard Law Review*, in 1918, observed: "We have been cock-sure of many things that were not so."<sup>18</sup> Confident experts are sometimes mistaken. Some advisory reports contain little more than hints at how the evaluator's opinion was [503] formulated. The reader of such reports is, implicitly, being asked to have blind trust in the evaluator's expertise.

When the *Daubert* case<sup>19</sup> was remanded by the U. S. Supreme Court to the 9th Circuit Court, the evidence proffered by the Dauberts and Schullers was, again, rejected by the Court.<sup>20</sup> Judge Alex Kozinski, writing for the Court, declared: The Court's task "is to analyze not what the experts say, but what basis they have for saying it."<sup>21</sup> Not to

make clear the manner in which one's opinions were formulated is a disservice to those who must utilize the report as a guide to their decision-making.

Experts have been known to justify their omission of certain information by asserting that its inclusion would be confusing to a non-psychologist. The fact that mental health professionals are appropriately discouraged from utilizing jargon does not relieve them of the obligation to explain that which requires explanation.

There is an important difference between an expert opinion and a personal opinion. When an expert has formulated an opinion, it is reasonably presumed that the expert has drawn upon information accumulated and published over the years. The defining attributes of an expert opinion relate not to the credentials held by the individual whose fingers type the words or from whose mouth the words flow; rather, the requisite characteristics relate to the procedures that were employed in formulating the opinion and the body of knowledge that forms the foundation upon which those procedures were developed. If the accumulated knowledge of the expert's field was not utilized, the opinion expressed is not an expert opinion. It is a personal opinion, albeit one being expressed by an expert.

#### **[504] Review and rebuttal**

Though battles between experts frequently do little to bring light to the situation, the best interests of children are ill-served when flawed reports go unchallenged and become the basis upon which the trier of fact rests her Judicial Decision. Where an expert's opinions have not been formulated through the utilization of appropriate procedures and are not supported by reliable data, exposing these deficiencies is essential. Not only is it *possible* to conduct a meaningful review of an evaluation working only with the original evaluator's file, in some jurisdictions it is a procedure that is deemed preferable to involving families in multiple evaluations<sup>22</sup>.

Where the non-favored party believes the opinion of the expert to be flawed, that party's legal representative should be afforded every opportunity to fully explore that possibility. The attorney for the non-favored party should be permitted to present the report to an expert of his choosing in order that the report can be critically examined. A knowledgeable mental health professional with access to a report and time to analyze it can discern procedural flaws; draw attention to the use of inappropriate assessment instruments or the inappropriate use of standardized instruments; uncover internal inconsistencies; point out opinions that do not appear to be supported by data; and, perhaps most importantly, identify errors in the interpretation of test data. A rebuttal expert can also review the pertinent literature, summarize it, and explain its applicability to the matter being adjudicated.

#### **At trial**

Evaluations should not be performed by mental health professionals who have served as treating practitioners for one or more of the individuals being evaluated or for the children who are the focus of the custody dispute. Conducting therapy and providing expert testimony are incompatible activities<sup>23</sup>. **[505]** The performance of each activity compromises one's effectiveness in the performance of the other activity. If the evaluator has also functioned as a treating practitioner, you should make a motion seeking the evaluator's disqualification. For similar reasons, if a psychotherapist offers testimony concerning a patient, it is likely that the information is in some manner incomplete and it is probable that the alliance with the patient will impair objectivity. If *opinion* testimony from a treating practitioner is permitted, conduct a

vigorous and extensive cross-examination. Forensic experts are expected to investigate the accuracy of information provided by those being evaluated. Treating practitioners, on the other hand, do not verify information offered by their patients and recorded in session notes. For this reason, pose questions that will elicit from clinical practitioners an acknowledgment that information relied upon in the formulation of their opinions has not been verified. Additionally, seek an acknowledgment that the therapeutic alliance upon which successful therapy is heavily dependent impairs a treating practitioner's objectivity. When clinical witnesses refuse to make such acknowledgments, no tactical harm has been done as a result of one's having asked. Any reasonable jurist will see such denials for what they are -- reflexively offered but baseless reassurances of objectivity.

Formulate questions that will elicit from an honest evaluator an acknowledgment of the known methodological limitations inherent in evaluations of comparative custodial suitability. For example, one of the most significant sources of error inherent in any forensic evaluation (no matter how carefully it has been conducted) is that any assessment involves sampling. One does not observe individuals during all their waking hours, in a variety of contexts, and over a prolonged period of time. Litigants are observed for a few brief periods, ordinarily in the office of the mental health professional performing the evaluation. Evaluators are, in essence, observing samples of each litigant's behavior. In opinion polling, if the sample (those actually polled) has been constructed appropriately, the [506] sample is deemed representative of the population from which it has been drawn and the findings can be generalized; that is, it is reasonable to infer that the opinions expressed by those who comprise the sample mirror (within some margin of error) the opinions held by those who comprise the broader population from which the sample was drawn. Within the context of assessment, the periods of time during which evaluators observe, interview, and test individuals constitute samples.

With an awareness of methodological shortcoming such as that described above, an attorney can ask: "Is it not true that . . . ?" While I am aware of the conventional wisdom that, in cross-examining a witness, it is risky to pose questions to which one does not already know the answer, the risk here is minimal. When attorneys, in framing their questions, describe commonly known deficiencies in our methods, evaluators do little but undermine their own credibility if they assert that the problems referenced in the inquiry have had no adverse effect upon the reliability or validity of the information gathered by them.

### **Summary**

Though attorneys are not diffident in most matters, the deference displayed toward court-appointed experts is frequently unwarranted. First, court-appointment does not guarantee either objectivity or impartiality. Second, the methodological integrity of an evaluation is more strongly influenced by evaluator training than by purity of motive. Some of the most egregious procedural errors have been made by evaluators with a passionate concern for the well-being of children. Be wary of crusaders and saviors.

As you prepare for cross-examination, consider preparing a check-list that will serve to remind you to explore each of the [507] relevant areas. Unless you are satisfied that there is no reason to do so, investigate the issues that follow. (I) **Education and Training.** Has the expert received appropriate professional preparation? In particular, is there suitable education, training, and experience in the forensic arena? Is the information that appears on the expert's *curriculum vitae* accurate and intended to promote an understanding of her accomplishments or is it replete with exaggerated claims? An expert who exaggerates in describing herself may exaggerate in describing the data that support her opinions. (II) **Responsiveness to Professional Standards.** Has the expert been responsive to the standards and guidelines promulgated by his profession? Most importantly, has the expert performed only a forensic function or has he attempted to mingle the clinical and forensic roles? (III) **Fairness.** Do the procedures employed suggest balance and fairness? Has there been *ex parte* communication? Has one party been afforded more opportunities to present her position? Have deficiencies in the favored parent been downplayed? Have deficiencies in the non-favored parent been inordinately emphasized? (IV) **Use of Collateral Source Information.** Has the expert made appropriate use of collateral source information? Are there records that should have been obtained and reviewed that do not appear on the expert's list of documents reviewed? Are there individuals from whom the expert should have gathered information whose names do not appear on the expert's list of collateral sources? (V) **Formal Assessment.** Were assessment instruments prudently selected? Were tests administered under suitable conditions? Were all pertinent test data considered? Is there any indication that data not supportive of the expert's position were ignored? Were the data independently interpreted by the [508] expert or did he appear to rely upon wisdom generated by a computer? (VI) **Observations.** Were appropriate observations made? Did the evaluator observe the parents interacting? Did the evaluator observe each parent interacting with each child? If home environment was raised as an issue, was a home visit made? If so, were detailed notes taken? (VII) **Bases for Opinions.** Has the evaluator made clear the manner in which her opinion was formulated? (VIII) **Sufficient Information.** If the evaluator has refrained from addressing the ultimate issue, has he provided all the information needed by the court?

Opinions formed on the basis of a well-conducted assessment should withstand the scrutiny of a vigorous cross-examination. With only rare exceptions, competent evaluators respond well to cross-examination. When an evaluator reacts poorly to legitimate inquiry, you can be fairly certain that you're asking the right questions; uncovering flaws of which the trier of fact should be made aware; and, serving the interests both of the child(ren) and of your client.

## Endnotes

(1) An article headlined "A Resume Distinguished By What It Didn't Mention", appearing in *The New York Times* of 9/6/01 (pp. 1ff.), describes the manner in which an individual serving a 13-year sentence for the attempted murder of his wife applied for and obtained board certification from the American Board of Forensic Examiners and the American Board of Forensic Medicine. The *Times* reports (p. C6): "In his application, he [declared] that he was on a 'sabbatical' from his job . . . And he gave a 'business address' that was actually that of the state prison."

(2) Attorneys who have requested psychological test data from psychologists may have encountered resistance. Currently, several of the documents guiding psychological practice admonishes psychologists not to release test data to individuals not qualified to interpret them. Those documents include the following: Committee on Legal Issues, American Psychological Association (1996). [509] Strategies for private practitioners coping with subpoenas or compelled testimony for client records or test data. *Professional Psychology: Research and Practice*, 27, 245-251; Committee on Psychological Tests and Assessment, American Psychological Association (1996). Statement on the disclosure of test data. *American Psychologist*, 51:6, 644-648; <> As this article is being written, however, the American Psychological Association is in the final stages of revising its Ethics Code. Though there is some strong opposition to removing the aforementioned restriction on the release of test data, the most recent draft (draft # 5) provides for the release of test data to attorneys. Even if the position of the APA doesn't change, it is still advisable to aggressively seek production of the entire file. Ordinarily, persistence brings success.

(3) Arkes, H. R. (1981). Impediments to accurate clinical judgment and possible ways to minimize their impact. *Journal of Consulting and Clinical Psychology*, 49, 323-330; Borum, R., Otto, R. K., & Golding, S. (1993). Improving clinical judgment and decision making in forensic evaluation. *Journal of Psychiatry and Law*, 21, 35-76; Garb, H. N. (1994). Cognitive heuristics and biases in personality assessment. In L. Heath, R. S. Tindale, J. Edwards, E. Posavac, F. Bryant, E. Henderson, Y. Suarez-Balcazar, & J Myers (Eds.), *Applications of heuristics and biases to social issues* (pp. 73-90). NY: Plenum.

(4) Leeper, R. W. (1935). A study of a neglected portion of the field of learning: The development of sensory organization. *Journal of Genetic Psychology*, 46, 41-75.

(5) For a detailed discussion, refer to Wilder, J. A. (2000). Evaluating the evaluator: The lawyer's view. *Family Advocate*, 23:1, 25-27.

(6) Important documents that guide mental health professionals involved in custody-related work include the following: American Academy of Child and Adolescent Psychiatry Practice Parameters for Child Custody Evaluations (1997). *Journal of the American Academy of Child and Adolescent Psychiatry*, 36:10 (supplement), 57S-68S; American Educational Research Association, American Psychological Association & National Council on Measurement in Education (1999).

*Standards for educational and psychological testing*. (2<sup>nd</sup> ed.) Washington, DC: American Psychological Association; American Psychological Association (1974). *Standards for Providers of Psychological Services*. Washington, DC: Author; American Psychological Association (1987). *General Guidelines for Provision of Psychological Services*. Washington, DC: Author; American Psychological Association (1992). Ethical principles of psychologists and code of conduct. *American Psychologist*, 47, 1597-1611; American Psychological Association (1993). *Record [510] keeping guidelines*. Washington, DC: Author; Association of Family and Conciliation Courts (1994). *Model standards of practice for child custody evaluation*. Madison, WI: Author; Committee on Ethical Guidelines for Forensic Psychologists (1991). Specialty Guidelines for Forensic Psychologists. *Law and Human Behavior*, 15:6, 655 – 665; Committee on Professional Practice and Standards, American Psychological Association (1994). Guidelines for child custody evaluations in divorce proceedings. *American Psychologist*, 49, 677-680; Interdisciplinary Committee on Child Custody (1986). *Recommendations for child custody evaluation regulation*. Denver: Author. Additionally, several state regulatory agencies have promulgated guidelines in which appropriate and inappropriate custody evaluation procedures are described. Attorneys should ascertain whether or not the state in which they practice has issued such guidelines.

(7) Committee on Professional Practice and Standards, American Psychological Association (1994). Guidelines for child custody evaluations in divorce proceedings. *American Psychologist*, 49, 677-680

(8) Ackerman, M. J. & Ackerman, M. C. (1997). Custody evaluation practices: A survey of experienced professionals (revisited). *Professional Psychology: Research and Practice*, 28, 137-145.

(9) Imwinkelried, E. W. (1992). *The methods of attacking scientific evidence (2nd ed.)*. Charlottesville, VA: Michie.

(10) Anastasi, A. (1988). *Psychological testing (6th ed.)*. New York: Macmillan.

(11) National Interdisciplinary Colloquium on Child Custody (1998). *Legal and mental health perspectives on child custody law: A deskbook for judges*. Danvers, MA: Westgroup, p. 369.

(12) *ibid.*

(13) LaFortune, K. A. & Carpenter, B.N. (1998). Custody evaluations: A survey of mental health professionals. *Behavioral sciences and the law*, 16, 207-224, p. 222.

(14) *ibid.*

(15) *ibid.*

(16) Heilbrun, K. (1995). Child custody evaluation: Critically assessing mental health experts and psychological tests. *Family Law Quarterly*, 29, 63-78.

[511] (17) Knoff, H. M. & Prout, H. T. (1985). *Kinetic Drawing System for Family and School*. Los Angeles: Western Psychological Services.

(18) Holmes, O. W. (1918). Interview, 32 *Harvard Law Review* 40, 41-42.

(19) *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993)

(20) *Daubert v. Merrell Dow Pharmaceuticals, Inc. (on remand)*, 43 F.3d. 1311 (9th Cir. 1995).

(21) *op.cit.*, at 1316

(22) New Jersey's Board of Psychological Examiners has distributed guidelines in which it is suggested that formulating an opinion with respect to an earlier evaluation might be done by means of a file review rather than by subjecting the family members to an additional evaluation. Refer to Board of Psychological Examiners (1993). *Specialty Guidelines for Psychologists Custody/Visitation Evaluations*. Newark: Division of Consumer Affairs, N. J. Dept. of Law and Public Safety.

(23) Appelbaum, P. (1997). Ethics in evolution: The incompatibility of clinical and forensic functions, *American Journal of Psychiatry*, 154, 445-446; Clark, C.R., (1990). Agreeing to be an expert witness: Considerations of competence and role integrity. *Register Report*, 16:2, 4-6; Greenberg, S. A. & Shuman, D. W. (1997). Irreconcilable conflict between therapeutic and forensic roles. *Professional Psychology: Research and Practice*, 28, 1; Strasburger, L., Gutheil, T., & Brodsky, A. (1997). On wearing two hats: Role conflict in serving as both psychotherapist and expert witness, *American Journal of Psychiatry*, 154, 448-456.

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