

# Cross-examining Experts in Child Custody: The Necessary Theories and Models . . . with Instructions

by

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## **Introduction**

This article articulates a comprehensive view of the processes, models, and theories related to cross-examination of child custody experts. It is written for attorneys faced with the task of examining and cross-examining experts. It examines the unique demands of family law where cases are tried before a judge who has often ordered a child custody evaluation “(CCE)” by a third-party neutral expert.

Part I of this article begins by reviewing how attorneys must develop their theory of the case. The theory of the case is often expressed as a story. It is a set of ideas or themes that tie together the facts and events of the case into a credible whole. It is dynamic; evolving as facts and understandings accrue and sometimes as facts and understandings change. This article outlines how the theory of the case becomes a persuasive tool. Attorneys must test their own theories. These theories must be comprehensive, explain undeniable facts, and make sense out of the behaviors, events, and motives of multiple people. A good theory of the case must be cohesive and plausible, given what is known or expected. To be effective, the theory must be organized and prioritize important elements. It must be coherent and explanatory, able to withstand scrutiny, and logical and persuasive enough to be chosen over the best argument of the opposing party.

Part II of the article describes three areas of substantive knowledge that attorneys must understand to be competent in supporting or challenging mental health experts who have conducted child custody evaluations. The first area is easiest for attorneys. They must understand the rules of evidence for expert witness testimony and how these apply to CCEs. This means understanding the emphasis on reliability of the expert's methodology and the nexus between the facts of the case and the conclusions, inferences, and opinions of the expert. The second and third areas of substantive knowledge reflect things the attorney can benefit from knowing and understanding; namely, the conceptual, procedural, and theoretical aspects of CCEs and the professional best practice guidelines that have developed in this area. While how much science the attorney must know is a debatable issue,<sup>1</sup> scientifically-informed attorneys can have a distinct advantage over those who are less informed. A comprehensive description of CCEs is provided followed by a

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<sup>1</sup> See Dick Thornburgh, *Junk Science—The Lawyer's Ethical Responsibilities*, 25 *FORDHAM URB. L. J.* 449 (1998) (arguing that unethical lawyers are often to blame for introducing junk science into the courtroom); but see David S. Caudill, *Advocacy, Witnesses, and the Limits of Scientific Knowledge: Is There an Ethical Duty to Evaluate Your Expert's Testimony*, 39 *IDAHO L. REV.* 341 (2002-2003) (reviewing the ethical issues regarding an attorney's duty to not knowingly mislead the court regarding matters that the lawyer knows to be false).

section on the professional best practice guidelines that have been developed by various professional organizations. Ultimately, the advice for attorneys is based upon their duty of competence to their client. An easy way to remember the attorney's duty of competence is the phrase: Attorneys need to "get smart, get help, or get out."<sup>2</sup>

Part III outlines three prominent approaches developed by mental health consultants for reviewing and evaluating CCEs. These are organized and systematic models based upon a combination of legal and scientific requirements. Each of these models utilizes ethical codes prescribing minimum standards of professional practice, both generally and specifically in forensic cases, as well as increasingly sophisticated aspirational best practice guidelines promulgated by prominent professional organizations. Attorneys who understand the demands on an evaluator that emanate from the evaluator's profession have another important set of tools for supporting a favorable CCE report or, when necessary, challenging an adverse CCE report.

Part IV provides guidance for attorneys regarding both the historical time-honored approaches to cross-examination and a number of more recent models. This section begins by articulating the tenets of traditional cross-examination, then details a number of advances and additions to this approach. It also covers modern constructive cross-examination models that combine traditional principles with a more positive presentation of one's own theory of the case, including advancing one's theory of the case through adverse experts and an emphasis on the attorney's credibility as an "informal" witness or storyteller.

## **The "Local" Context for Family Law Cases**

The first three rules of family law are: know your judge, know your judge and know your judge.<sup>3</sup>

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<sup>2</sup> MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N, DISCUSSION DRAFT 1983) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The attorney's competence can be achieved through association with another or reasonable preparation.).

<sup>3</sup> Linda D. Elrod, Class notes of Milfred D. Dale from the first day of Divorce Practice class at Washburn University School of Law (2007).

Family law is local law. It is hard to overemphasize the need to know as much as possible about the philosophies, practices, and tendencies of the judge hearing the case.<sup>4</sup> Most family law judges will respect and respond more favorably to an emotionally positive approach rather than an emotionally negative one. Knowing the personality of the judge makes it easier to know where to strengthen the case, what type of evidence to use, and which witnesses will impress the judge the most. The lawyer also needs to know the judge's views on the proper length of the trial or motion hearing.<sup>5</sup> Because the best interests of the child is a fact-intensive individualized determination, family courts and judges are given a large amount of discretion to determine a reasonable and appropriate parenting plan. When trying a case in a new jurisdiction, lawyers should interview local counsel who have practiced in front of the judge for information, not only about local procedures and rules, but about the judicial philosophies of the judge who will decide the case.

“Child custody is one of the few areas in which our otherwise adversarial, party-driven courts routinely appoint a neutral expert to conduct an investigation on its behalf.”<sup>6</sup> Courts regularly appoint a neutral mental health evaluator to report on the functioning of the parents, children, and family dynamics, and to make recommendations about the parenting plan that is in the best interests of the child.<sup>7</sup> At least initially, this was designed to help avoid custody cases becoming a “battle of the experts,” where each side proffered testimony from a privately-retained evaluator. While courts are not required to rely upon the recommendations of the evaluator, many do. When cross-examining a court-appointed expert, the choice of technique must consider whether the evaluator is court-appointed and the court's relationship with that particular expert.

On the one hand, the evaluator's report may be viewed as a preview of the court's ruling because the court may have chosen

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<sup>4</sup> See LINDA D. ELROD, *CHILD CUSTODY PRACTICE AND PROCEDURE*, § 13:2, 1337-38 (2020 ed.).

<sup>5</sup> *Id.*

<sup>6</sup> ANDREW I. SCHEPARD, *CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES* 152 (2004).

<sup>7</sup> *Id.*

the evaluator and is familiar with the evaluator's work.<sup>8</sup> On the other hand, many parties are dissatisfied with child custody court processes generally and child custody evaluations specifically. Many have noted that CCE reports have a "dramatic effect on the trajectory of the litigation and, ultimately, on the form a particular child's life will take after judicial disposition."<sup>9</sup> Many participants and scholars claim that the empirical foundations for evaluator recommendations are suspect or nonexistent.<sup>10</sup> Problems with the quality of CCE evaluations, investigations, and reports have resulted in a cottage industry of experts, comprised mostly of experienced and senior evaluators, who can provide assistance to attorneys in reviewing the scientific methodologies and inferences made by the evaluator.<sup>11</sup>

## **Part I: The Central Role of the "Theory of the Case" in Everything a Lawyer Does**

### *A. The "Theory of the Case": A Fact-Driven Concept that Explains*

James McElhaney wrote about the concept of "the theory of the case."<sup>12</sup> "The theory of the case is the basic underlying idea that not only explains the legal theory and factual background but also ties as much of the evidence as possible into a coherent and credible whole."<sup>13</sup> The theory of the case is the basic concept around which everything else revolves and provides a view-

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<sup>8</sup> *Id.*

<sup>9</sup> Timothy M. Tippins & Jeffrey P. Wittmann, *Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 *FAM. CT. REV.* 193, 193 (2005).

<sup>10</sup> *Id.*; see Robert E. Emery, Randy K. Otto & William T. O'Donohue, *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6(1) *PSYCHOL. SCI. IN PUB. INT.* 1 (2005); see also William T. O'Donohue & April R. Bradley, *Conceptual and Empirical Issues in Child Custody Evaluations*, 6 *CLINICAL PSYCHOL.: SCI. & PRAC.* 320 (1999).

<sup>11</sup> See Milfred D. Dale & Jonathan W. Gould, *Science, Mental Health Consultants, and Attorney-Expert Relationships in Child Custody*, 48(1) *FAM. L. Q.* 1 (2014).

<sup>12</sup> See James W. McElhaney, *The Theory of the Case*, 45 *LITIG. J.* 1 (Spring 2019) (1979).

<sup>13</sup> *Id.* at 1.

point through which the trier of fact can look at all of the evidence in order to decide in the proponent's favor.<sup>14</sup>

According to McElhaney, the lawyer must adhere to one of the most fundamental rules in trial practice. "It comes before the rules of evidence, techniques of persuasion, impressive demonstrative evidence, and sophisticated touches of eloquence. It is simple, understandable, and nearly absolute. Never do anything inconsistent with your theory of the case."<sup>15</sup>

### B. *What the "Theory of the Case" Must Explain*

Theories or arguments about what a party considers to be in the best interests of their child are fact-intensive. When telling the story, the focus should be on the people. For the family attorney, this ultimately means focusing on the child or children and continuously bringing the focus back to what is best for them. The facts that the attorney chooses must explain the motives of key witnesses, account for differences among the witnesses and other evidence, and address why the trier of fact should believe this version of events.<sup>16</sup> The theory must be comprehensive and include any facts that are necessary to convince the trier of fact that the theory and story accurately describe what happened.<sup>17</sup> The theory of the case must possess internal plausibility. This means the necessary elements of the theory are included, the relationships between data and facts are defined, and the setting, characters, and means or motive are adequately developed.<sup>18</sup> An internally plausible story is one that appears to illustrate reality given the lawyers' explanation of the facts and events of the case.<sup>19</sup> The theory must also possess external plausibility, or be believable based on how people typically react.<sup>20</sup>

Attorneys must have a comprehensive and intimate knowledge of the facts of the case to be effective advocates. These

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<sup>14</sup> *Id.* at 2.

<sup>15</sup> *Id.* at 1.

<sup>16</sup> See Anthony J. Bocchino, *Ten Touchstones for Trial Advocacy*, 74 *TEMPLE L. REV.* 1 (2001).

<sup>17</sup> JESSICA D. FINDLEY & BRUCE D. SALES, *THE SCIENCE OF ATTORNEY ADVOCACY: HOW COURTROOM BEHAVIOR AFFECTS JURY DECISION MAKING* 162 (2012).

<sup>18</sup> See R. P. BURNS, *A THEORY OF THE TRIAL* (1999).

<sup>19</sup> FINDLEY & SALES, *supra* note 17, at 163.

<sup>20</sup> *Id.*

facts must be organized within a comprehensive theory of the case. These facts may also serve as valuable portions of the sub-themes or subplots of the case. Attorneys must make numerous decisions as they prepare and present the facts and their theory of the case, whether this will occur during opening statement, direct examination, as part of a constructive cross-examination, or during closing arguments. These decisions include how to prioritize different aspects of the case theory, how to order the presentation of facts and theories, how many points or themes to include, and how much to focus on the case or theory of the opposing party.

The concept of “facts beyond change” is central to developing the theory of the case and a vital element of the attorney’s advocacy. It is essential for the attorney to understand how these case-specific facts relate to every aspect of the case. Because a successful theory cannot ask the trier of fact to ignore facts that they will believe, the theory of the case must always explain “facts beyond change.”<sup>21</sup>

Pozner and Dodd explain this concept and its importance in the following manner:

Facts beyond change are the givens of a lawsuit that will be believed by the jury as fair, accurate, and highly relevant regardless of any party’s best efforts to dispute or modify them. In a positive sense, facts beyond change are the structure that supports and channels our theory. The negative consequence of a fact beyond change is that it limits the possible theories of the case. *A successful theory must either incorporate all relevant facts beyond change, or be unaffected by them. That is, a theory must either build upon the facts beyond change, or stand in harmony with them.* A successful theory can never contradict a fact beyond change, because, if the jurors are confronted with the theory and an actuality (a fact beyond change), and the two cannot exist simultaneously, the jurors must decide the case in accordance with the actuality (the fact beyond change). Remember, a fact beyond change is one that will not be diminished by an effective cross. If cross can affect the jurors’ perception that the fact is fair or accurate or relevant, the fact is capable of dispute and is no longer a fact beyond change.<sup>22</sup>

Similarly, “inferences beyond change” must be taken into account in developing a theory. An inference is a finding de-

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<sup>21</sup> LARRY POZNER & ROGER J. DODD, *CROSS-EXAMINATION: SCIENCE AND TECHNIQUES* (3d ed., e-book 2018).

<sup>22</sup> *Id.* at 2883 (emphasis added).



duced from the existence of other facts. “Certain facts, grouped together, lead the [triers of fact] to an inference or to multiple possible inferences. If there is only one possible inference from a grouping of facts, or only one inference that a [trier of fact] will take away from a group of facts, that inference itself becomes a fact beyond change.”<sup>23</sup>

The theory of the case should allow the trier of fact to empathize or picture themselves in the client’s position. Specific theories are favored over general theories. The theory must be specific enough to allow the triers of fact to hear and integrate the facts they are going to hear during cross-examination into their theory of the case. To persuasively use a theory, it should be expressed as a number of theme lines or phrases that can be used throughout the trial, including during the cross-examinations of opposing witnesses.<sup>24</sup>

### C. *Prioritizing Facts Within the Theory of the Case*

In prioritizing different points or themes in the theory of the case, lawyers should start with their best and most interesting argument.<sup>25</sup> This is best offered in the opening statement to give the judge the lens through which to view the facts and the people in the case. Challenges to adverse experts should remain focused on the facts of the case. Expert witnesses usually know more about the subject matter than the attorney seeking to challenge the witness,<sup>26</sup> but this should not be true about the facts of the case. Fighting the facts, including the facts of the expert’s methods and work in the case, should be the focus. At every phase of the process, it is important to fight the facts, not the opinion.<sup>27</sup> A California appellate court once noted about the focus on facts when challenging an expert that, “Like a house built

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<sup>23</sup> *Id.* at 2897.

<sup>24</sup> *Id.* at 3095.

<sup>25</sup> See Joseph A. Greenaway Jr., *Sua Sponte: A Judge Comments*, 40 LITIG. J. 27 (Winter 2014).

<sup>26</sup> See Thomas C. O’Brien & David D. O’Brien, *Effective Strategies for Cross-Examining an Expert Witness*, 44 LITIG. J. 1 (Fall 2017).

<sup>27</sup> See David Sugden, *The Expert Impeachment Witness: Fight the Facts, Not the Opinion*, EVIDENCE AT TRIAL (Apr. 19, 2018).

on sand, the expert's opinion is no better than the facts upon which it is based."<sup>28</sup>

While there is no reliable way to decide whether judges will see the issue the same way as the party or the lawyer, effective advocates trim and prioritize their arguments.<sup>29</sup> The more the lawyer focuses on weaker or smaller points, the more likely it is that this will detract from the force of their stronger or more significant points.<sup>30</sup> In addition, lawyers should resist the temptation to try to prove too many facts or points during their case-in-chief or during cross-examination. Judges often advise that "flinging arguments at the judge and hoping that one will stick" is not persuasive.<sup>31</sup> For example, in interviews of the U.S. Supreme Court Justices, Brian Garner quoted Justice Antonin Scalia as stating, "Make every respectable point. And no nonrespectable point. Just drop the stuff that isn't strong enough."<sup>32</sup>

#### D. *The Other Party's Theory of the Case*

With respect to the lawyer's theory of the case and the theory of his opponent, Larry Pozner and Roger Dodd posit that "time = importance." In this view, time spent undermining, making unbelievable, and destroying the opponent's theory of the case, is viewed as counterproductive because this is time talking about the opponent's theory of the case rather than on teaching the lawyer's own theory of the case.<sup>33</sup> The focus on one's own theory also allows for a more positive and more controlled presentation of the case. For example, a well scripted cross often affords the lawyer more control than eliciting facts on direct examination. Using the opponent's witnesses can also be more powerful and persuasive than presenting a case through one's own witness.

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<sup>28</sup> *Kennemur v. California*, 133 Cal. App. 3d 907, 924 (1982).

<sup>29</sup> See Martin J. Siegel, *How to Winnow Arguments on Appeal*, 40 LITIG. J. 30 (Winter 2014).

<sup>30</sup> Matthew F. Kennelly, *Over-Arguing Your Case*, 40 LITIG. J. 1, 3 (Winter 2014).

<sup>31</sup> *Id.*

<sup>32</sup> Bryan A. Garner, *Interviews with United States Supreme Court Justices*, 13 SCRIBES J. LEGAL WRITING 51, 53-54 (2010).

<sup>33</sup> POZNER & DODD, *supra* note 21, at 3869.

Lawyers know which arguments are most difficult for their position or theory of the case and should anticipate the best, not the worst, arguments from the other side. When it is necessary to focus on the opponent's theory of the case, the lawyer should take a "steelmanning" approach. Steelmanning refers to the process of intentionally seeking out the best facts or best form of the opponent's argument, or deriving the strongest possible position from their arguments, then developing one's own challenges to this best argument. Steelmanning stands in contrast to attacking straw man arguments, or arguments that are easily dismissed.

George Bernard Shaw once noted that, "The moment we want to believe something, we suddenly see all of the arguments for it, and become blind to the arguments against it."<sup>34</sup> To protect against this, a member of the litigation team who helps the lawyer find possible vulnerabilities or weaknesses in an argument or theory of the case can be a valuable devil's advocate. This helps the lawyer protect against blind spots, which are easier to identify in others than in ourselves.<sup>35</sup> Lawyers maximize their effectiveness through strict fidelity to the use of facts beyond change within one's theory, by including a devil's advocate on the litigation team, and by focusing on prevailing over the opponent's best or steelman argument rather than raising straw man arguments to easily defeat them.

#### E. *The Lawyer's Role as "Witness" and "Storyteller"*

The lawyer's credibility, demeanor, and presence in the courtroom are extremely important. The lawyer is functionally a witness and a storyteller, both for themselves and indirectly for their client. James McElhaney writes, "the [lawyer's] real purpose of cross-examination is to show the judge and jury that you are the better witness."<sup>36</sup> While never under oath, lawyers functionally "testify" during every aspect of the process, not just during opening and closing arguments. Among other things, cross

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<sup>34</sup> This quote is generally attributed to George Bernard Shaw.

<sup>35</sup> Emily Pronin, Thomas Gilovich & Lee Ross, *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 *PSYCHOL. REV.* 781, 785-91 (2004) (noting that even experts are more likely to view others as potentially biased than they are to see themselves as biased).

<sup>36</sup> JAMES W. MCELHANEY, *MCELHANEY'S TRIAL NOTEBOOK* 444-45 (2006).

examination offers numerous opportunities to credit the lawyer and sometimes only a limited number of opportunities to discredit the witness. Herbert Stern stated this same premise slightly differently. Stern described cross examination as “arguing through the witness, not with the witness.”<sup>37</sup> Gerry Spence analogized the entire trial process, including cross-examination, as a kind of psychodrama, a contest of competing stories.<sup>38</sup> William Barton noted, “Trials are about the generation, collection, consolidation, and utilization of the intangible personal attribute of credibility.”<sup>39</sup> Credibility cannot be “seen” but its effects are usually known to all.<sup>40</sup> A party can have credibility and lose, but a party without credibility cannot win.<sup>41</sup>

While case facts and evidence have been found to be the strongest predictors of trial verdicts, attorneys should not discount the influence of their behaviors and performance on judicial decisions.<sup>42</sup> Lawyers who are unaware of how judges perceive them may be placing themselves and their clients at a strategic disadvantage in the courtroom.<sup>43</sup> It is not only the message but the messenger and how the message is presented that matters. The person-perception and stereotype content research literature emphasize that credibility is an extremely important part of global person impressions.<sup>44</sup> In fact, in one cross-exami-

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<sup>37</sup> HERBERT J. STERN, *TRYING CASES TO WIN: CROSS-EXAMINATION* 2 (1993).

<sup>38</sup> GERRY SPENCE, *HOW TO ARGUE AND WIN EVERY TIME* (1995); see Trial Lawyers College, [www.triallawyerscollege.com](http://www.triallawyerscollege.com), (last visited Jan. 23, 2021).

<sup>39</sup> See William A. Barton, *Different Types of Cross-Examination*, 31(2) LITIG. J. 7, 16 (2012).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> See NEAL FEIGENSON, *LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS* (2000).

<sup>43</sup> See Steve M. Wood, Lorie L. Sicafuse, Monica K. Miller & Julianna C. Chomos, *The Influence of Jurors' Perceptions of Attorneys and Their Performance on Verdict*, AM. SOC'Y. TRIAL CONSULTANTS 23, 24 (2011).

<sup>44</sup> See Bogdan Wojciszke, Roza Bazinska & Marcin Jaworski, *On the Dominance of Moral Categories in Impression Formation*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 1251 (1998) (finding that up to 82% of the variance in person perceptions is related to credibility).

nation model, “looking good” is elevated in importance over the substance of the trial.<sup>45</sup>

In their book, *The Science of Attorney Advocacy: How Courtroom Behavior Affects Jury Decision Making*,<sup>46</sup> Jessica Findley and Bruce Sales summarize attorney behaviors that legal scholars have identified as adding to the perception of the attorney as someone who possesses honesty, integrity, truthfulness, and sincerity:

1. Always telling the truth because the triers of fact rely on the attorney’s word;
2. Not overstating their case;
3. Not promising evidence that they do not have;
4. Not breaking promises made in trial;
5. Not making unsupported arguments;
6. Not trying to sneak excluded evidence in through subterfuge;
7. Conceding unimportant points or issues;
8. Avoiding displays of insincere emotions as an attempt to fool the trier of fact;
9. Showing a genuine belief in the client and the client’s case; and,
10. Using passion to show jurors that the lawyer cares about his or her client and the client’s case.<sup>47</sup>

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<sup>45</sup> See TERENCE F. MACCARTHY, *MACCARTHY ON CROSS-EXAMINATION* (2007).

<sup>46</sup> FINDLEY & SALES, *supra* note 17.

<sup>47</sup> *Id.* at 16-19 (2012); see THOMAS A. MAUET, *TRIALS: STRATEGY, SKILLS, & NEW POWERS OF PERSUASION* (2005); see also DAVID A. BALL, *THEATER TIPS & STRATEGIES FOR JURY TRIALS* (1997); STEPHEN D. EASTON, *HOW TO WIN JURY TRIALS: BUILDING CREDIBILITY WITH JUDGES AND JURIES* (1998); MICHAEL R. FONTHAM, *TRIAL TECHNIQUE & EVIDENCE* (2002); ROGER S. HAYDOCK, *TRIAL: THEORIES, TACTICS, & TECHNIQUES* (1991); STEVEN LUBET, *MODERN TRIAL ADVOCACY* (2000); THOMAS A MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* (3d. ed. 1992); L. TIMOTHY PERRIN, H. MITCHELL CALDWELL & CAROL A. CHASE, *THE ART & SCIENCE OF TRIAL ADVOCACY* (2003).

## **Part II: Three Substantive Areas of Required Knowledge: Evidence, CCE Model, Professional Guidelines**

### *A. The Daubert Trilogy: Admissibility of Expert Testimony (Individualized Factor-Based Approach)*

From 1993 through 1999 in what has been called the *Daubert* trilogy of cases, the Supreme Court significantly revised the Federal Rules of Evidence (FRE) for experts, particularly FRE 702. In 1993 in *Daubert v. Merrell Dow Pharmaceuticals*, the U.S. Supreme Court found FRE 702 to require that expert testimony must be based on sufficient facts or data and that the expert must apply reliable methods and principles to the facts and data of the case.<sup>48</sup> The *Daubert* standard<sup>49</sup> is a flexible factor-based test intended to embrace the liberal nature of the Federal Rules of Evidence by replacing the “general acceptance” test found in *Frye v. United States*.<sup>50</sup> The named factors include (1) whether the knowledge can and has been tested, (2) whether the theory or technique has been subjected to peer review and publication, (3) the known or potential rate of error, and (4) whether the practice is generally accepted.<sup>51</sup> *Daubert* did not eliminate the concept that “general acceptance” was evidence of reliable expert testimony, but it did alter the rule to allow for other equivalent and new methods of determining whether expert evidence is reliable.<sup>52</sup>

*Daubert* emphasized that the reliability analysis and any issues of admissibility would be tied to the particular facts of the case. The court explicitly emphasized that “the inquiry envisioned by Rule 702 is . . . a flexible one.”<sup>53</sup> The *Daubert* standard includes flexibility in allowing all relevant factors to be weighed in any given situation.<sup>54</sup> The Court explained its emphasis was on scientific validity and the evidentiary relevance and reliability

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<sup>48</sup> FED. R. EVID. 702.

<sup>49</sup> See *Daubert v. Merrell Dow Pharm., Inc.* 509 U.S. 579, 587-88 (1993).

<sup>50</sup> 293 F. 1013 (D.C. Cir. 1923).

<sup>51</sup> *Daubert*, 509 U.S. at 593-94.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 594.

<sup>54</sup> *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999).

of the principles that underlie a proposed submission. In *Daubert*, the Court focused on “principles and methodology, not the conclusions that they generate.”<sup>55</sup> In fact, one might argue *Daubert* is more flexible than *Frye* because it allowed experts to use newer methodologies, but more stringent in making the judge the gatekeeper and providing factors to be used to keep junk science out of the courtroom.

The *Daubert* Court noted that courts use what has been described as the “crucible of the adversarial process”, which it defined as:

Cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof, rather than wholesale exclusion under an uncompromising “general acceptance” standard, is the appropriate procedural means for challenging expert testimony. While it is possible that the gatekeeping or screening by the judge might prevent the jury from hearing authentic scientific evidence is simply a consequence of the fact that the Rules are not designed to seek cosmic understanding but, rather, to resolve legal disputes.<sup>56</sup>

In 1997 in *General Electric Co. v. Joiner*,<sup>57</sup> the Court altered the scope of the judge’s gatekeeping responsibilities beyond simply methodological review to include an examination of the expert’s extrapolation from research findings to the facts of the case and what is referred to as the “analytical gap.”<sup>58</sup> **The facts of the *Joiner* case. This** is relevant here because they involve an effort to extrapolate<sup>59</sup> research findings from one area of scientific research and apply it in another area. In *Joiner*, the injured party offered two experts whose testimony in large part attempted to extrapolate findings from animal studies and four epidemiological studies to the circumstances of the human respondent’s claimed exposure to cancer-causing chemicals and subsequent injury. The Court upheld the district court’s exclusion of testimony

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<sup>55</sup> *Daubert*, 509 U.S. at 594-95.

<sup>56</sup> *Id.* at 580.

<sup>57</sup> 522 U.S. 136 (1997).

<sup>58</sup> *Id.* at 146.

<sup>59</sup> “Extrapolate” is defined as to “extend the application of a method or conclusion to an unknown situation by assuming the existing trends will continue or similar methods will be applicable. The scientific terms for this are “generalizability” and “transportability”). LEXICO, *Extrapolate*, <https://www.lexico.com/en/definition/extrapolate> (last visited Jan. 23, 2021) (online dictionary founded by Oxford).

because the plaintiff never explained how and why the experts could have extrapolated their opinions from animal studies to the circumstances of the human plaintiff's claimed exposure and injury. It also found that the epidemiological studies were similarly too attenuated from the facts of the case to be considered a reliable basis for proving causation.<sup>60</sup> The Court concluded,

[C]onclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytic gap between the data and the opinion proffered. That is what the District Court did here, and we hold that it did not abuse its discretion in doing so.<sup>61</sup>

In 1999 in *Kumho Tire Co. v. Carmichael*, the Court held that the trial judge's task as gatekeeper included application of the *Daubert* factor-based analysis to both scientific and non-scientific testimony. The *Kumho* Court recognized that there were different kinds of expertise and that the level of scientific rigor in different relevant professional fields should be taken into account. *Kumho* also involved a failed attempt to extrapolate findings from one area of expertise to another. The case involved a vehicle accident and injuries that the plaintiff claimed resulted from a tire defect that caused the accident. After determining that FRE 702 and *Daubert* applied to the plaintiff expert's skill- or experience-based observations, the Court found the district court had not abused its discretion by excluding the testimony. The Court found that the district court could have found that the expert's testimony "fell outside the range of where experts might reasonably differ"<sup>62</sup> and that the expert's "repeated reliance on the 'subjectiveness' of his mode of analysis"<sup>63</sup> could justify the district court's exclusion of the evidence. The Court emphasized the trial court was "to make certain that an expert, whether bas-

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<sup>60</sup> *Joiner*, 522 U.S. at 144 (the studies showed that infant mice injected with massive doses of PCBs developed a different kind of cancer than Joiner had and showed the mice developed a different kind of cancer than Joiner and failed to show the PCB exposure led to cancer in other animal species such as humans).

<sup>61</sup> *Id.* at 146.

<sup>62</sup> *Kumho Tire Co.*, 526 U.S. at 153.

<sup>63</sup> *Id.*



ing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”<sup>64</sup>

The “same intellectual rigor that characterizes the practice of an expert in the relevant field” is an important phrase for the present analysis because there exists some confusion about what standard should be applied to CCEs and what constitutes the relevant field. Some have argued that the additional demands of the forensic context involve a “greater need for psychologists to adhere to established standards, to be responsive to applicable guidelines, and . . . to utilize the best methodology possible.”<sup>65</sup> However, any call for higher standards in forensic work than the standards for clinical work should not be viewed as reflecting the legal standard for admissibility of a child custody evaluator’s expert work or testimony.

The “same intellectual rigor in the relevant field” of *Kumho* is not the same as the “general acceptance in the relevant field” of *Frye*. In *Kumho*, the Court demonstrated it was “less interested in a taxonomy of expertise and more concerned about directing judges to concentrate on ‘the particular circumstances of the particular case at issue.’”<sup>66</sup> This flexible, individualized, and nondoctrinaire approach is faithful to the intentions of the drafters of the Federal Rules of Evidence, who viewed Article VII as asking courts to apply flexible standards for evaluating expert testimony rather than rigid rules.<sup>67</sup>

## B. *Conceptual Model for Child Custody Evaluations*

### 1. *The evaluator’s search for the theory of the case in the facts aided by science*

Like the attorney’s search for a theory, the child custody evaluator’s task involves developing a theory or theories related to the questions and subquestions of the evaluation based on the facts of the case. However, the expert evaluator’s unique contri-

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<sup>64</sup> *Id.* at 152.

<sup>65</sup> David A. Martindale & Jonathan W. Gould, *The Forensic Model: Ethics and Scientific Methodology Applied to Custody Evaluations*, 1(2) J. CHILD CUSTODY 1, 19 (2004).

<sup>66</sup> *Kumho Tire Co.*, 526 U.S. at 141.

<sup>67</sup> See Margaret A. Berger, *The Supreme Court’s Trilogy on the Admissibility of Expert Testimony*, in REF. MANUAL OF SCI. EVIDENCE 21 (2d ed. 2000).

butions to the case concern bringing the science of their discipline to the facts of the case as a means of helping the court beyond the assistance that the attorneys representing the parties can provide.<sup>68</sup>

In 1975, Robert Mnookin commented that the best-interests-of-the-child principle is unique in that, “While it provides a purpose or objective, it leaves a decision-maker the task of figuring out how to achieve that objective and the weight to be accorded to that objective when there are other principles pointing in other directions.”<sup>69</sup> Thinking of the best interests principle in terms of tasks and objectives can be helpful when attempting to operationalize the task.

The best-interest-of-the-child psycholegal task requires an assessment of multiple persons (e.g., the parties, the child[ren]), and other significant adults in the home involving individual and comparative analyses of required and relevant factors (identified by statute or caselaw and context) to develop a parenting plan. The parenting plan must meet three objectives: (1) Provides for the future health, welfare, and developmental needs of the child or children; (2) Reasonably balances the constitutional and statutory rights of the parents and interested parties and the child; and, (3) Provides an enforceable allocation of parental responsibilities to and for the child via a parenting plan.

To these tasks and objectives, the child custody expert seeking to produce a scientifically-informed report needs to understand how to evaluate and use social science research. In 2019, an AFCC Task Force developed “Guidelines for the Use of Social Science Research in Family Law Cases” that outlined principles for responsible use of empirical research.<sup>70</sup> This document provides guidance for how to identify reliable research, how to determine the relevance of the research to the question before

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<sup>68</sup> See JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE 702-41, § 702.03[2][a] (Lexis 2d ed. 2013) (“Proffered expert testimony should be excluded when it will not help the trier of fact to any degree beyond the assistance that the lawyers representing the parties could provide during their closing arguments”).

<sup>69</sup> Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 231 (1975).

<sup>70</sup> AFCC Task Force on the Guidelines for the Use of Social Science Research in Family Law, *Guidelines for the Use of Social Science Research on Family Law*, 57(2) FAM. CT. REV. 193 (2019).

the court, and how to generalize from research findings while also noting the limitations of these efforts.<sup>71</sup> In addition to knowing the relevant research, expert evaluators must understand what has been called the “G2i” (group to individual inference) problem of “determining whether and how scientific knowledge derived from studying groups can be helpful in the individual cases before them.”<sup>72</sup>

Grisso referenced the relationship between theory and empirical research, noting

The foundation of science is theory, not empirical prediction. The value of empirical research is to test a theory’s ability to produce hypotheses that make sense of what we see around us. A theory is strengthened by multiple empirical validations of hypotheses that it has generated, which in turn allows us to use that theory to guide our judgment in clinical work. Science depends on theory development, because no amount of empirical research can ever test all of the relationships that arise in complex physical and social processes.<sup>73</sup>

Expert evaluators use science, both empirical research and theory, at two different levels in every instance. At the social framework evidence and testimony level, experts can offer the court social framework evidence and testimony regarding general scientific propositions.<sup>74</sup> But social framework testimony, even about frameworks for which there is extensive group aggregate research, is not enough by itself to answer questions in individual cases. Science generalizes while courts particularize.<sup>75</sup> Not every individual in any aggregate group empirical research sample demonstrates characteristics consistent with the ultimate conclusions of the researcher, or even of the average participant in the research sample. The term the “belief in the law of small num-

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<sup>71</sup> *Id.*

<sup>72</sup> David L. Faigman, John Monahan & Christopher Slobogin, *Group to Individual (G2i) Inference in Scientific Expert Testimony*, 81(2) U. CHI. L. REV. 417, 417-18 (2014).

<sup>73</sup> Thomas Grisso, *Commentary on “Empirical and Ethical Problems with Custody Recommendations:” What Now?* 43(2) FAM. CT. REV. 223, 227 (2005).

<sup>74</sup> John Monahan & Laurens Walker, *Social Authority, Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 488 (1986); Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 570 (1987); Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CAL. L. REV. 877, 879 (1988).

<sup>75</sup> Faigman, Monahan, & Slobogin, *supra* note 72, at 417-18.

bers” refers to the bias present when research consumers assume that the averages in samples apply to all of the population from which the sample was generated.<sup>76</sup>

The particularization process in individual cases has been referred to as expert diagnostic evidence where the expert applies the general propositions to individual cases.<sup>77</sup> This involves a combination of awareness of the group aggregate research with respect to base rates, error rates, and the probabilities that factors are empirically associated with each other or with some kind of unifying theory in the individual case. This ability to use theory at the general and individual levels is central to the scientific aspects of the child custody expert’s task. When properly used, the logic of a theory becomes a scientific tool that can provide “a set of coherent principles and constructs for making sense of certain psychological and social phenomena” (i.e., a social framework testimony)<sup>78</sup> and a sound logical rationale based on the facts and observations of the case for the expert’s opinion (e.g., diagnostic testimony).

Examining individual case theories asks the questions:

Is the theoretical basis for the expert’s opinion based on:

- A common sense, logical, and rational approach to the question;
- Theories which are peer tested and generally accepted by other similarly qualified experts while adjusting for new theories that are grounded in logic and common sense;
- Unsubstantiated speculation lacking any evidentiary foundation?
- Is there substantial admissible evidence supporting the foundation for the opinions expressed?<sup>79</sup>

## 2. *Operationalizing the best interests principle*

The modern child custody evaluation is probably the most complex and difficult type of all forensic evaluations. In contrast to most examinations in which one person is evaluated, in the typical child custody evaluation, the mental health professional examines a number of persons (e.g., mother, father, child or chil-

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<sup>76</sup> See Amos Tversky & Daniel Kahneman, *Belief in the Law of Small Numbers*, 76(2) PSYCHOL. BULL. 105 (1971).

<sup>77</sup> Faigman, Monahan, & Slobogin, *supra* note 72, at 418.

<sup>78</sup> Grisso, *supra* note 73, at 227.

<sup>79</sup> Mark Simons & Thomas Trent Lewis, *Applying People v. Sanchez to Experts in Family Law Cases*, ASSOC. CERTIFIED FAM. L. SPECIALIST 1, 7 (Winter 2019).

dren, and potential or actual stepparents). Additionally, given the expansive nature of the underlying psycholegal issues (i.e., the best interests of the children and the ability of the parents to meet those interests), the examinees must be assessed regarding a variety of behaviors, capacities, and needs. Finally, because the stakes are so significant (i.e., residential placement of the children and decision-making authority with respect to their welfare), emotions in cases of contested custody typically run high, further compounding what is an already complicated evaluation process.<sup>80</sup>

Competent child custody evaluators must operationalize the best interests task and objectives. This includes the use of multiple methods to gather data and facts on factors and psycholegal questions.<sup>81</sup> Through use of the multitrait-multimethod matrix interpretation principles of data analysis,<sup>82</sup> the evaluator triangulates the data for accuracy. “The behaviors of the parties and their children and their relationships usually have multiple determinants. There may be few, if any, linear or simple cause-and-effect relationships.”<sup>83</sup>

Complex custody disputes involve not just one theory or question but multiple questions and competing theories about highly disputed facts.<sup>84</sup> These factual disputes require formulating, hypothesizing, and developing opinions on numerous series of questions that are often subsumed under multiple main questions.

Determining what is in the best interests of the child involves answering numerous subquestions about child factors, in-

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<sup>80</sup> Randy K. Otto, John F. Edens & Elizabeth Barcus, *The Use of Psychological Testing in Child Custody Evaluations*, 38 FAM. & CONCILIATION CTS. REV. 312, 312-13 (2000).

<sup>81</sup> Milfred D. Dale & Desiree Smith, *Making the Case for Videoconferencing and Remote Child Custody Evaluations (RCCes): The Empirical, Ethical, and Evidentiary Arguments for Accepting a New Technology*, PSYCHOL., PUB. POL'Y & L. 1, 3-4 (Advance Online, 2020).

<sup>82</sup> See Donald T. Campbell & Donald W. Fiske, *Convergent and Discriminant Validation by the Multitrait-Multimethod Matrix*, 56(2) PSYCHOL. BULL. 81 (1959).

<sup>83</sup> *Id.* at 2.

<sup>84</sup> Milfred D. Dale & Jonathan W. Gould, *Science, Mental Health Consultants, and Attorney-Expert Relationships in Child Custody*, 48(1) FAM. L. Q. 1 (2014).

terfamilial and parenting factors, parent factors, and extrafamilial factors. Each of these factors is composed of subfactors that address separate factual questions about how the age of the child, the child's gender, and the child's cognitive and emotional development will affect current and future parent-child interactions and functioning.<sup>85</sup>

In addition, CCEs typically involve multiple moving targets: that is, the parties, their children, their circumstances, and their situations may be in a constant state of change in response to the parents' separation or other aspects of the ongoing dispute. The evaluator must assess and investigate required factors and topics, be responsive to opportunities for additional details—which may emerge at any point in the process—and adjust inquiries as the data confirms or disconfirms various hypotheses. The process of any evaluation is dependent upon a perpetual adaptation of the evaluator's ability to operationalize best interests considerations and questions, the evaluator's competence in the use of each of the multiple methods of data collection, and the evaluator's ability to integrate large amounts of data into a comprehensive understanding of the issues in the case.<sup>86</sup>

While there are scientific principles to guide portions of the work, a CCE is still a fact-intensive inquiry and investigation using multiple methods to seek an individualized answer. Diligently applying the conceptual model, the multitrait-multimethod data analysis, and the investigative mindset is the evaluator's best defense against missing something, against challenges of possible biases, or against performing a less than adequate evaluation.

### 3. *CCE scope: Best interests factors & case-specific psycholegal questions*

In CCEs, evaluators collect data and facts that are used to develop opinions about relevant factors or psycholegal questions, including opinions about the ultimate issues of custody, residency, and parenting time. Evaluators are also encouraged to develop case-specific psycholegal questions to define the scope of

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<sup>85</sup> Daniel A. Krauss & Bruce Sales, *The Problem of 'Helpfulness' in Applying Daubert to Expert Testimony: Child Custody Determinations in Family Law as an Exemplar*, 5(1) *PSYCHOL., PUB. POL'Y & L.* 78, 96 (1999).

<sup>86</sup> See Dale & Smith, *supra* note 81, at 2.

the investigation and guide the inquiry.<sup>87</sup> Clearly defined questions help the evaluator choose assessment methods or measures directly relevant to these questions.<sup>88</sup> By including specific questions in court orders or stipulations, judges and attorneys increase the likelihood that evaluators will stay on course, investigate the issues of concern, and, in preparing their reports, provide information that bears directly upon the issues before the court.<sup>89</sup> This process requires considerable pre-evaluation preparation.

Child custody evaluators are often asked to evaluate allegations of risky and/or abusive behaviors such as domestic or intimate partner violence, child sexual abuse, various forms of child maltreatment, or claims of parental alienation or alienated children, as well as a multitude of other behaviors believed to place children at risk for harm, neglect, or adjustment problems. Efforts to assess the historical truth of an allegation, for example, usually involve interviewing all of the involved parties and combining this data with information from relevant records or information from other third-party informants.

In making a best interests determination, courts must consider all the factors that may be identified by statute or case law, as well as any relevant factors raised by the parties. If offering an opinion on the ultimate issues of custody and parenting time, evaluators are also expected to consider these factors, and when possible and appropriate, evaluators may use social science research to support their choice of methods, inferences, and opinions.

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<sup>87</sup> Jonathan W. Gould & David A. Martindale, *Specific-Questions Guide to Child Custody Investigations*, LAW J. NEWSL.: THE MATRIMONIAL STRATEGIST (2009), <https://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2009/04/28/specific-questions-guide-to-child-custody-investigations/?slreturn=20201122210820>.

<sup>88</sup> JONATHAN W. GOULD & DAVID A. MARTINDALE, *THE ART AND SCIENCE OF CHILD CUSTODY EVALUATIONS* 101 (2007).

<sup>89</sup> See Gould & Martindale, *supra* note 87.

#### 4. *Multiple methods of data collection*

In conducting comprehensive child custody evaluations, evaluators apply theory, research, and scientific methodology.<sup>90</sup> Evaluators seek information from five types of independent data sources: (a) document or record review; (b) interviews, including individual interviews of the parties and, when appropriate, the children, as well as joint and group interviews, when appropriate; (c) psychological testing; (d) direct observations of parent-child relationships via home or office visits; and (e) contacts with collateral sources or witnesses.

Before proceeding, it is important to recognize that agreement about these types of data collection does not always translate into agreement about the actual methodologies that are used. Different evaluators collect different data, and different evaluators may assign different weight to data.<sup>91</sup> Some evaluators may rely differently on different portions of the evaluation in developing their hypotheses and opinions. For example, non-psychologists are less likely to include psychological testing in their evaluation procedures. These evaluators must answer the same questions but may use records, interviews, observations, and contacts with collaterals to address the questions for which a psychologist uses testing. Evaluators unable to effectively use one methodology (e.g., testing) will be expected to develop ways to investigate issues using tools within their competence. The shortcomings of any individual data collection tool require the evaluator to design methods of investigating the relevant issue in other ways. The evaluator's approach throughout the evaluation process involves choices. For each important issue or data point, does the evaluator immediately query and follow up or accept an answer in order to move on? Does the evaluator compare data or a fact to a claim or hypothesis and again query and challenge, or do they accept and move on?

The record keeping of evaluators can become an issue. Some have claimed forensic evaluators have a heightened duty to docu-

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<sup>90</sup> See LESLIE DROZD, NANCY OLESON & MICHAEL SAINI, *PARENTING PLAN & CHILD CUSTODY EVALUATIONS: INCREASING EVALUATOR COMPETENCE & AVOIDING PREVENTABLE ERRORS* (2013).

<sup>91</sup> Jonathan W. Gould, H.D. Kirkpatrick, William G. Austin & David A. Martindale, *Critiquing a Colleague's Forensic Advisory Report*, 1(3) *J. CHILD CUSTODY* 37, 39 (2004).



ment their work.<sup>92</sup> Some evaluators take copious notes, while others contemporaneously type questions and answers into a computer during interviews. Some evaluators audio record interviews, and others do not. Currently, evaluators who choose to record must have written permission of the parties. It is unclear, however, whether the parents could provide permission for the evaluator to record a child or whether an attorney or some other kind of representative would be needed to assist a child in making the decision about consent to the evaluator recording such contacts.

##### 5. *Multitrait-multimethod matrix: Data analysis and interpretation*

In managing their data collection, constructing hypotheses, and developing conclusions or opinions about the factors and psycholegal questions, evaluators have applied the multitrait-multimethod matrix, triangulation strategies, and the concepts of convergent and discriminant validity. In CCEs, the multitrait-multimethod matrix refers to use of multiple data collection methods and a process for analyzing the data.<sup>93</sup>

This method recognizes that the behaviors and competencies of individuals are multiply determined,<sup>94</sup> and that the study of complex phenomena requires an active process of developing possible hypotheses and inferences from an evolving data set. Within this process, evaluators seek to avoid bias by maintaining even hovering attention to these multiple hypotheses,<sup>95</sup> remaining vigilant to established methods and protocols that they have established, and adjusting the hypotheses as new data and issues are collected. Any deficiency in data collection in one area can be remedied by additional inquiry or by applying a different methodology to get that information. The multitrait-multimethod

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<sup>92</sup> See Martindale & Gould, *supra* note 65.

<sup>93</sup> Campbell & Fiske, *supra* note 82.

<sup>94</sup> Robert Waelder, *The Principle of Multiple Function: Observations on Over-Determination*, 5(1) PSYCHOANALYTIC Q. 45 (1936).

<sup>95</sup> See SIGMUND FREUD, THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 10 (1953-1974) (referencing the technique, first articulated by Freud within psychoanalysis, to describe how analysts – and others using expressive, non-directive therapy – should listen to their patients with even hovering or suspended attention as to the possible meanings of each of the patient’s behaviors or verbalizations).

approach is the evaluator's best defense against claims of bias or overreliance on simple answers to complex questions.<sup>96</sup>

Data analysis strategies using the multitrait-multimethod matrix heavily rely upon triangulation.<sup>97</sup> Triangulation involves using more than one approach or more than one data source to study, in this instance, a factor or question. Triangulation enhances reliability and validity by cross-checking or cross-referencing data or by combining different perceptions of the same event to provide a more robust and holistic picture.<sup>98</sup> Triangulation also includes cross-checking data from multiple methods, sources, theories, and/or data types to get a more detailed and balanced picture of the situation.<sup>99</sup> The term "convergent validation" is used to describe when data from independent procedures support or validate the same conclusion or opinion, and the term "discriminant validation" is used to describe when data from independent procedures fail to support the same conclusions or opinions.<sup>100</sup> There also may be times when evaluators must explain seemingly divergent data. CCEs also usually involve one or more hypothesis or theory about the meaning of various facts and events in the case. "Forensic practitioners ordinarily avoid relying solely on one source of data, and corroborate important data whenever feasible."<sup>101</sup> In addition, while unique facts can be disclosed or discovered during any part of a CCE, there is generally no one-to-one correspondence between any single

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<sup>96</sup> See Tess M.S. Neal & Stanley L. Brodsky, *Forensic Psychologists' Perceptions of Bias and Potential Correction Strategies in Forensic Mental Health Evaluations*, 22 *PSYCHOL., PUB. POL'Y & L.* 58 (2016).

<sup>97</sup> See William G. Austin & H. D. Kirkpatrick, *The Investigative Component in Forensic Mental Health Evaluations: Considerations for Parenting Time Assessments*, 1(2) *J. CHILD CUSTODY* 23 (2004).

<sup>98</sup> Lesley Vidovich, *Methodological Framings for a Policy Trajectory Study*, in *QUALITATIVE EDUCATIONAL RESEARCH IN ACTION: DOING AND REFLECTING* 78 (Tom O'Donoghue & Keith Punch eds., 2003).

<sup>99</sup> HERBERT ALTRICHTER, ALLEN FELDMAN, PETER POSCH & BRIDGET SOMEKH, *TEACHERS INVESTIGATE THEIR WORK: AN INTRODUCTION TO ACTION RESEARCH ACROSS THE PROFESSIONS* 147 (2008).

<sup>100</sup> Campbell & Fiske, *supra* note 82.

<sup>101</sup> Am. Psychol. Ass'n, *Specialty Guidelines for Forensic Psychology*, 68(1) *AM. PSYCHOL. ASS'N* 7, 15 (2013) ("When relying upon data that have not been corroborated, forensic practitioners seek to make known the uncorroborated status of the data, any associated strengths and limitations, and the reasons for relying upon the data.").

evaluation methodology and any best interests factor or psycholegal question. This is especially true when evaluating various kinds of competencies (e.g., parenting competence), where data from multiple sources are relevant.

Evaluating each hypothesis or theory involves a combination of scientific and clinical thinking.<sup>102</sup> The scientific method calls for testing alternative hypotheses or theories and collecting evidence that confirms or disconfirms either an individual hypothesis or unifying theory. Coherence-based reasoning also applies to the evaluator's data analyses as one attempts to integrate numerous, complex, and sometimes contradictory inferences into a coherent theory about the case.<sup>103</sup> Understanding the implications of any particular hypothesis or theory and the interrelationships between the data and facts of the case is central to determining whether any fact confirms, disconfirms, supports, or disproves that particular hypothesis or theory.

In sum, each evaluator must design a study of the best interests factors and the psycholegal questions that are relevant to each case. There are both common elements to every CCE and unique, case-specific elements to every CCE. The approach is not totally experimental. Whereas scientific experiments seek to eliminate or minimize experimenter bias through methodological design, the custody evaluator's task is to manage a dynamic process while remaining balanced, objective, and as free as possible from bias.

### C. *Professional Best Practice Guidelines*

It is important to note that, in most situations, there are no binding or published documents reflecting professional "standards" for child custody evaluations, only guidelines. Several professional organizations have promulgated guidelines. For example, the American Psychological Association has published guidelines for forensic psychology, generally,<sup>104</sup> and for child cus-

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<sup>102</sup> See Madelyn S. Milchman, *The Complementary Roles of Scientific and Clinical Thinking in Child Custody Evaluations*, 12 J. CHILD CUSTODY 97 (2015).

<sup>103</sup> See Steven Charman, A.B. Douglass & A. Mook, *Cognitive Bias in Legal Decision Making*, in *PSYCHOLOGICAL SCIENCE AND THE LAW* (Neil Brewer & Amy Bradfield Douglass eds., 2019).

<sup>104</sup> Am. Psychol. Ass'n, *supra* note 101.

tody evaluations, specifically.<sup>105</sup> The Association of Family and Conciliation Court's (AFCC) *Model Standards of Practice for Child Custody Evaluations* and the American Academy of Matrimonial Lawyer's *Child Custody Evaluation Standards* also provide guidance for evaluators and attorneys. Use of the word "standards" in some professional documents can be confusing. For example, both the AFCC and AAML documents include the word "standards," but neither of these organizations have any enforcement mechanisms and each document acknowledges it does not have force of law.<sup>106</sup>

It is important to distinguish between aspirational guidelines and standards. The American Psychological Association's (APA) *Criteria for Practice Guideline Development and Evaluation*<sup>107</sup> note that:

The term guidelines refers to statements that suggest or recommend specific professional behavior, endeavor, or conduct for psychologists. Guidelines differ from standards. Standards are mandatory and, thus, may be accompanied by an enforcement mechanism; guidelines are not mandatory, definitive, or exhaustive. Guidelines are aspirational in intent. They aim to facilitate the continued systematic development of the profession and to promote a high level of professional practice by psychologists. A particular set of guidelines may not apply to every professional and clinical situation within the scope of that set of guidelines. As a result, guidelines are not intended to take precedence over the professional judgment of psychologists that are based on the scientific and professional knowledge of the field (Ethics Code, Std. 2.04, APA, 2002d; APA, 2010a).<sup>108</sup>

It is easy to become confused about aspirational best practice guidelines, ethical thresholds, and enforceable standards, particularly where advocates within the adversarial processes of the legal process may have an interest in making anything less

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<sup>105</sup> Am. Psychol. Ass'n, *Guidelines for Child Custody Evaluations in Family Law Proceedings*, 65(9) AM. PSYCHOL. ASS'N 863 (2020).

<sup>106</sup> Task Force for Model Standards of Practice for Child Custody Evaluations, *Model Standards of Practice for Child Custody Evaluations*, 45 FAM. CT. REV. 70 (2007); see also AMERICAN ACADEMIC OF MATRIMONIAL LAWYERS, *CHILD CUSTODY EVALUATION STANDARDS* (2011); S. P. Herman, *Practice Parameters for Child Custody Evaluation*, 36(10) J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY, SUPPLEMENT 578 (1997).

<sup>107</sup> Am. Psychol. Ass'n, *Professional Practice Guidelines: Guidance for Developers and Users*, 70(9) AM. PSYCHOL. ASS'N 823 (2015).

<sup>108</sup> *Id.*

than aspirational best practices look like an ethical or professional failure. In 2014, two of the authors of this paper (Dale & Gould) wrote about this and referred to this form of advocacy as “making the ceiling look like the floor.”

Simultaneous use of guidelines or standards designed to be aspirational and ethical codes involving the language of minimal obligations that should supersede an evaluator’s independent judgment can create confusion about what should be considered a best practice and what an evaluator is minimally required to do. Within the child custody community, there are very real debates about “ceilings,” or best practices, and “floors,” or minimum standards, for evaluations and expert consultation in child custody. Attorneys need to know these controversies. To the extent that certain things can be made to appear obligatory rather than discretionary in court, the process of “making the ceiling look like the floor” can be a very effective cross-examination technique.<sup>109</sup>

In general, it is certainly fair for a party challenging an adverse evaluation report to argue there are perceived methodological or inferential shortcomings based on what they perceive might have been a potentially better methodology. Aspirational guidelines can provide ideas for such a challenge. One would also expect the party favored by the report to proffer that the evaluator’s methodology was sufficiently reliable even if all of the aspirational guidelines were not followed. What is most important is a recognition that aspirational guidelines are best practices that must be distinguished from minimum ethical thresholds and that it is inappropriate to present a failure to follow aspirational guidelines as if this was automatically an ethical violation. The standard for competent practice is conduct of a reasonably prudent forensic practitioner engaged in similar activities in similar circumstances and should be viewed along a continuum of adequacy. “Minimally competent” and “best possible” are usually different points along that continuum.<sup>110</sup>

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<sup>109</sup> Dale & Gould, *supra* note 84, at 15.

<sup>110</sup> See Am. Psychol. Ass’n, *supra* note 101, at 8.

### **Part III. Models for Reviewing Evaluators and Evaluations**

Each of the models for reviewing evaluations emphasize an evidence-based approach to data gathering, data integration, and opinion formation. There is also an emphasis on professional and scientific knowledge guiding the evaluator's analysis of the data rather than formulating opinions about parenting and parent-child relationships based upon personal or idiosyncratic ideas that have little, if any, support in the peer-reviewed literature. Three models for reviewing evaluations are outlined below.

#### *A. The "Forensic Model": Jonathan W. Gould and David Martindale*

In 2004 in a seminal article, "*The Forensic Model: Ethics and Scientific Methodology Applied to Custody Evaluations*," David Martindale and Jonathan Gould argued that CCEs can be more consistent, more predictable, and more helpful if scientific principles are used by the evaluator.<sup>111</sup> The *Forensic Model* clearly distinguished between child custody evaluations as forensic evaluations and clinical approaches to treatment. The essential components of the *Forensic Model* are:

- (a) The evaluator's role, the purpose of the evaluation, and the focus of the evaluation are defined by the court;
- (b) Where possible, the evaluator obtains (at the outset) a list of specific psycholegal issues concerning which the court seeks advisory input;
- (c) The evaluator conducts all professional activities in accordance with regulations and/or guidelines promulgated by state regulatory boards;
- (d) The procedures employed by the evaluator are informed by . . . documents developed by organizations that conceptualize the child custody evaluation as an inherently forensic psychological activity;
- (e) The selection of instruments is guided by [professional standards] and particular attention is given to the established reliability and validity of instruments under consideration;

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<sup>111</sup> Martindale & Gould, *supra* note 65.

- (f) Detailed records of all aspects of the evaluation are created, preserved, and made available in a timely manner to those with the legal authority to inspect or possess them; and,
- (g) All professional activities are performed with a recognition of the investigative nature of the task, an acknowledgment of the limitations inherent in our evaluative procedures, and understanding of the distinction between psychological issues and the specific psycho-legal questions before the court, and an appreciation of the need not to engage in therapeutic endeavors before, during, or after the evaluation.<sup>112</sup>

In the *Forensic Model*, scientific method refers to “the rules or standards and community practices by which science proceeds.”<sup>113</sup> For each data point or method used by the evaluator, Martindale and Gould suggested comparing the evaluator’s act or process with their ethical code, any available best practices guidelines, and any research that might aid in the determination of relevance or reliability. The *Forensic Model* emphasizes the standards and guidelines of various professional groups and posited that the evaluator (and anyone reviewing the evaluator) needs to be familiar with the APA’s *Ethical Principles of Psychologists and Code of Conduct*,<sup>114</sup> *Guidelines for Child Custody Evaluations in Family Law Proceedings*,<sup>115</sup> *Standards for Educational and Psychological Testing*,<sup>116</sup> and *Record-Keeping Guidelines*;<sup>117</sup> *The Specialty Guidelines for Forensic Psychology*;<sup>118</sup> and the AFCC’s *Model Standards of Practice for Child Custody Evaluation*.<sup>119</sup>

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<sup>112</sup> *Id.* at 2.

<sup>113</sup> Sarah H. Ramsey & Robert F. Kelly, *Social Science Knowledge in Family Law Cases: Judicial Gatekeeping in the Daubert Era*, 59 U. MIAMI L. REV. 1, 4 (2004).

<sup>114</sup> See Am. Psychol. Ass’n, *Ethical Principles of Psychologists and Code of Conduct*, 57 AM. PSYCHOL. ASS’N 1060 (2002).

<sup>115</sup> See Am. Psychol. Ass’n, *supra* note 105.

<sup>116</sup> See AM. PSYCHOL. ASS’N, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING (1999).

<sup>117</sup> See AM. PSYCHOL. ASS’N, RECORD KEEPING GUIDELINES (1993).

<sup>118</sup> See Am. Psychol. Ass’n, *supra* note 101.

<sup>119</sup> Ass’n Fam. & Conciliation Cts., *Model Standards of Practice for Child Custody Evaluations*, 45 FAM. CT. REV. 70 (2007).

The *Forensic Model* seeks to make scientific method and the data generated by the scientific method central to child custody evaluations.<sup>120</sup> “In explaining, predicting, and controlling the world around us, science is by far the most powerful intellectual technique known.”<sup>121</sup> Understanding human behavior begins with the development of systematic procedures used for reliable observation and recording. When child custody evaluators attend to the methodological integrity of their data gathering process, the court is able to place greater weight on the scientific foundation of the evaluation process.<sup>122</sup> What is scientific includes both process and fact. Science is a *process* for developing and investigating theoretical explanations about the world that are subject to further testing and refinement.

Insomuch as science can be viewed as “fact,” it is the outcome of scientific process, or an orderly body of knowledge with clearly articulated principles.<sup>123</sup> The task of Federal Rule of Evidence 702 may be best understood as regulating the supply of facts to the judge “in a manner that states a preference for science as the preeminent methods for discovering facts.”<sup>124</sup> One important task of a child custody evaluator is as a gatekeeper of reliable psychological data upon which the court may rely. The reliability that comes from scientifically informed processes is the foundation for both psychological investigation and expert psychological testimony.

Scientific methods and procedures are intended to reduce human error. When conducting child custody evaluations, evaluators need to be concerned with scientific method and process. The scientific methodology used in forensic mental health assessment, in general, and used in child custody evaluations, in particular, places a high value on intellectual honesty. Being as objective and scientific as possible includes an explicit acknowledgement that one’s beliefs could be wrong and that the scientific

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<sup>120</sup> See JONATHAN W. GOULD, *CONDUCTING SCIENTIFICALLY CRAFTED CHILD CUSTODY EVALUATIONS* (2d ed. 2006); see also GOULD & MARTINDALE, *supra* note 87; see also Gould & Martindale, *supra* note 65.

<sup>121</sup> MODERN SCIENTIFIC EVIDENCE: THE LAW & SCIENCE OF EXPERT TESTIMONY 47 (David L. Faigman, et al. eds., 2d ed. 2002).

<sup>122</sup> Ramsey & Kelly, *supra* note 113, at 4.

<sup>123</sup> MODERN SCIENTIFIC EVIDENCE: THE LAW & SCIENCE OF EXPERT TESTIMONY, *supra* note 121, at 47.

<sup>124</sup> *Id.*



process with its emphasis on considering rival alternative hypotheses is designed to protect us from fooling ourselves.<sup>125</sup> Because of the complexity of CCEs, they may be particularly vulnerable to use of poor methodologies and different kinds of biases.<sup>126</sup> This complexity can also make these evaluations difficult for attorneys and the courts to understand. In contrast to most examinations that focus on evaluating one person, the typical child custody evaluation involves examination of a number of persons (e.g., mother, father, child or children, and potential or actual stepparents) and interviews with additional collateral informants. Emotions in cases of contested custody typically run high, further compounding what is an already complicated evaluation process. The high emotions often affect how parents behave during interviews, how they respond when administered psychological tests, and how they communicate with their children and with each other. Parents often attempt to paint an overly positive picture of themselves, a more negative picture of the other parent, and a glowing description of the children's experiences with them.<sup>127</sup>

Given the profound importance of the underlying psychological issues (i.e., the best interests of the children and the ability of the parents to meet those interests), attorneys cross-examining the evaluator need to examine the depth of investigation into the nature and quality of parenting across multiple domains. Attorneys need to examine the degree that evaluators have reliably assessed parenting behaviors and parent-child interactions across a variety of situations.

Best practice guidelines illustrate how scientific principles can be applied to specific tasks. Forensic mental health evaluators can easily underestimate the prevalence and severity of distorting influences on their work without developing the correct safeguards for minimizing distorting biases. How the evaluator approaches an examination of parenting, who the evaluator in-

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<sup>125</sup> See Scott O. Lillienfeld, *Can Psychology Become a Science?*, 49 *PERSONALITY & INDIVIDUAL DIFFERENCES* 281 (2010).

<sup>126</sup> See Jonathan W. Gould & Milfred D. Dale, *Reviewing Child Custody Evaluations: Using Science to Maximize Reliability & Minimize Bias*, in *FORENSIC PSYCHOLOGY AND NEUROPSYCHOLOGY FOR CRIMINAL AND CIVIL CASES* (H. Hall ed., 2d ed. forthcoming 2021); see also David A. Martindale, *Confirmatory Bias and Confirmatory Distortion*, 1 *J. CHILD CUSTODY* 31 (2005).

<sup>127</sup> DANIEL J. HYNAN, *CHILD CUSTODY EVALUATION: NEW THEORETICAL APPLICATIONS AND RESEARCH* (2014).

interviews, what questions the evaluator asks, and how the evaluator records the questions and answers of the evaluation can be critical in helping the court understand the quality of the investigative rigor of the evaluation. These factors affect the evaluator's ability to accurately assess the family dynamics and assist the court in developing a parenting plan for the families' future.

The *Forensic Model* posits that comprehensive cross-examination of an expert's child custody evaluation can reveal to the court the strengths and deficiencies of the evaluator's work. A comprehensive cross-examination can offer commentary on the methodology employed by the evaluator, the assessment devices utilized, the interpretation of assessment data, and the nexus between information gathered and opinions expressed. A focused cross-examination may reveal to the court what is and what is not the most reliable and trustworthy data based upon the professional and scientific knowledge of the child custody profession.

Cross-examination should focus on the reliability and relevance of the information gathered during the evaluation, the manner in which the evaluator integrated current professional and scientific knowledge of the discipline into the report, and the degree to which the expert opinions proffered in the evaluation appear logically or scientifically related to the collected data. An effective cross-examination should address three broad areas and, within each of these, several specific elements: (1) methodology, (2) formulation of opinions, and (3) communication of findings and opinions to the court.

Below are twelve dimensions or factors that may be the focus of a comprehensive cross-examination:

1. The use (or lack thereof) of appropriate procedural safeguards. Issues in this category include ascertaining whether the purpose of the evaluation, the scope of the evaluation, those to whom the report is to be disseminated, the manner in which the report is to be disseminated, and those to whom the file will be made available have all been specified in writing in advance of the evaluation. Additionally, such issues as the sequence in which evaluative sessions have been conducted should be examined.
2. The techniques employed in interviewing the parents. The attorney examines whether systematic procedures

were employed that would increase the probability that the evaluator will obtain pertinent historical information and current information bearing on functional abilities related to parenting and will not be distracted by information that is not pertinent to the evaluative task.

One often ripe area of cross-examination is asking what data were gathered during parent, child, and collateral interviews that *directly* addressed answering the questions that defined the scope of the evaluation. Although there is little empirical examination of forensic interviewing of parents engaged in child custody evaluations, the evaluator should gather information sufficient to address the specific questions guiding the evaluation. The specific questions should be identified either in the court order or in correspondence from the attorneys.

The cross-examining attorney should examine whether the evaluator asked each parent about the allegations posed by the other parent and what additional collateral sources were pursued that might help support his/her position. The attorney should also examine whether the evaluator asked each parent to address reasonable alternative explanations (plausible rival hypotheses) and the parents' view of how their proposed solutions serve the best interests of their children.

3. Cross-examination should also address the manner by which information has been obtained from children. The attorney should examine the interview techniques that were employed, to see whether they were tailored to the cognitive development and expressive and receptive language abilities of the child. Additionally, the cross-examining attorney should consider the reliability and validity of any special techniques employed.

The cross-examining attorney should inquire about any video or audio tape recordings of the child interviews. Significant research has revealed threats to reliability from notetaking and from attempts to accurately recall who said what during an interview.<sup>128</sup> When

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<sup>128</sup> See Rita T. Cauchi, Martine B. Powell & Carolyn H. Hughes-Scholes, *A Controlled Analysis of Professionals' Contemporaneous Notes of Interviews of Alleged Child Abuse*, 34 CHILD ABUSE & NEGLECT 318 (2010); Stephen J.

searching for bias, for example, one should compare the contents of the evaluator's contemporaneously taken notes with the evaluator's description of factors supporting opinions included in a report or testimony.<sup>129</sup>

4. Another rich area for cross-examination is the methods employed in conducting observational sessions between the two parents and between each parent and the children and how such observation information was recorded. To be maximally useful, observations should be conducted in some systematic manner, evaluators should know in advance what types of information they wish to gather, and whatever data are gathered should be gathered in a structured manner.

The examining attorney should examine whether the parent-child observations were structured in a manner to gather information useful in answering the specific questions guiding the evaluation. The attorney should also explore whether the evaluator was engaged in the parent-child observation – that is, actively participating in discussions with parents and/or children rather than passively observing – thereby changing the parent-child observation to a parent-child-evaluator observation. Inquiry should also focus on what steps the evaluator took to minimize involvement in the observational interactions.

The attorney should explore whether the evaluator conducted follow-up interviews with the parents and children, if old enough, to explore the degree to which the parent-child observations are representative of everyday behavior. Although the attorney should never assume the accuracy of the parent or child's perspective on

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Ceci & Maggie Bruck, *Why Judges Must Insist on Electronically Preserved Recordings of Child Interviews*, 37 CT. REV. 10 (1999); Michael E. Lamb, Yael Orbach, Kathleen J. Sternberg, Irit Hershkowitz & Dvora Horowitz, *Accuracy of Investigators Verbatim Notes of Their Forensic Interviews with Alleged Child Abuse Victims*, 24(6) LAW & HUM. BEHAV. 699 (2000).

<sup>129</sup> David A. Martindale, *Cross-examining Mental Health Experts in Child Custody Litigation*, 29(4) J. PSYCHIATRY & L. 483, 488 (2001).

the representativeness of the observational data,<sup>130</sup> comparing parent and child perspectives on the representativeness of their observed interactions against information obtained from collateral sources is critical.

5. The cross-examining attorney should examine the extent to which pertinent documents were utilized by the evaluator and the ways in which such information might have influenced the evaluator's approach to the assessment. Evaluators must take great care not to view uncritically certain types of documents as constituting verification of oral reports from litigants. Some documents presented to evaluators are no more than written records of oral reports made earlier to different people.

Information presented to evaluators will have an influence on how they proceed in data gathering, data interpretation, and opinion formation. The effects of relevant and irrelevant information on the evaluator's understanding of the issues in the case are important areas for examination. Examining the degree to which the evaluator has included in the evaluation report information that is irrelevant to the issues before the court yet paint a favorable or unfavorable picture of a parent should be explored.

Too many evaluators include in their written reports information that is unrelated to the issues before the court. This irrelevant contextual information<sup>131</sup> may bias the evaluator in understanding the issues, and may bias the reader in viewing the qualities about the parent that are unrelated to whether the individual is a competent parent, i.e., a parent's history of pole dancing or history of early pregnancy during high school.

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<sup>130</sup> Jonathan W. Gould & Christopher Mulchay, *Child Custody Evaluations*, in OXFORD HANDBOOK OF PSYCHOL. & L. (David DeMatteo & Kyle Scherr eds. forthcoming 2021).

<sup>131</sup> Itiel E. Dror, *The Paradox of Human Expertise: Why Experts Get It Wrong*, in THE PARADOXICAL BRAIN 177 (Narinder Kapur ed. 2011); see Itiel E. Dror, *Cognitive and Human Factors in Expert Decision-Making: Six Fallacies and the Eight Sources of Bias*, 92 ANALYTIC. CHEM. 7998 (2020); see also Itiel E. Dror, *Human Expert Performance in Forensic Decision Making: Seven Different Sources of Bias*, 49 AUSTRALIAN J. FORENSIC SCI. 541 (2017).

6. Cross-examination should also address the manner in which the evaluator selected collateral sources of information, obtained information from those sources, and assessed the reliability of the information obtained. William Austin and H.D. Kirkpatrick<sup>132</sup> have called attention to the fact that as psychological distance from the custody dispute increases, so, too, does objectivity. School personnel are likely to provide more objective information than neighbors. Yet, evaluators who limit their collateral source inquiries to those who are deemed to be objective are likely to overlook information that, despite its delivery by subjective sources, is nevertheless potentially enlightening.
7. A fruitful area of examination is often the methods employed by the evaluator to corroborate information on which he or she relied. Despite overwhelming evidence that psychologists are not particularly impressive as human lie detectors,<sup>133</sup> far too many evaluators trust their clinical intuition to tell who is being forthright and who is being disingenuous. The cross-examining attorney should examine which parent-assertions were verified through third party information.

Often overlooked by attorneys is a critical examination of the criteria employed in the selection of assessment instruments. Although in some jurisdictions the criteria to be employed in assessing custodial suitability are statutorily defined, in many jurisdictions, evaluators must decide for themselves what constitutes effective parenting and what observable indices can be utilized.

Tess Neal and her colleagues recently reviewed the use of psychological assessment tools in the courtroom and concluded:

We find that many of the assessment tools used by psychologists and admitted into legal contexts as scientific evidence actually have

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<sup>132</sup> See Austin & Kirkpatrick, *supra* note 97.

<sup>133</sup> See Charles F. Bond, Jr. & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10(3) PERSONALITY SOC. PSYCHOL. REV. 214 (2006); see also Bella M. DePaulo, Kelly Charlton & Harris Cooper, *The Accuracy-Confidence Correlation in the Detection of Deception*, 1(4) PERS. SOCIAL PSYCHOL. REV. 346 (1997).

poor or unknown scientific foundations. We also find few legal challenges to the admission of this evidence. Attorneys rarely challenge the expert evidence and, when they do, judges tend not to subject psychological assessment evidence to the legal scrutiny required by law.<sup>134</sup>

Neal et al. reported that there is no relationship between the psychometric qualities of a test and its likelihood of being challenged in court. Their data suggested that some of the weakest tools tend to get a pass from the courts. “Our bottom-line conclusion is that evidentiary challenges to psychological tools are rare and challenges to the most scientifically suspect tools are even rarer or are nonexistent.”<sup>135</sup>

8. Also often overlooked by attorneys is the manner in which assessment instruments were administered. Evaluators should administer assessment instruments in accordance with the instructions in the manuals that accompany the instruments and should be responsive to the admonitions that appear in the *Standards for Educational and Psychological Testing*. Deviation from standard administration instruction undermines the reliability of the test data and, as a result, adversely affects the trustworthiness of opinions drawn from those data.
9. Another area ripe for cross-examination is the accuracy of the evaluator’s scoring and interpretation of assessment data. Many evaluators have become dependent upon computer-generated interpretive reports, despite the clarity of APA Ethical Standard 9.09(c), which reminds psychologists that they “retain responsibility for the appropriate application, interpretation, and use of assessment instruments, whether they score and interpret such tests themselves or use automated or other services.”<sup>136</sup> Theodore Millon, Roger Davis and Carrie Millon have noted that automated reports use configurational interpretations that have not been empirically val-

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<sup>134</sup> Tess M.S. Neal, Christopher Slobogin, Michael J. Saks, David L. Faigman & Kurt F. Geisinger, *Psychological Assessments in Legal Contexts: Are Courts Keeping “Junk Science” Out of the Courtroom*, 20 PSYCHOL. SCI. PUB. INT. 135, 155 (2019).

<sup>135</sup> *Id.* at 154.

<sup>136</sup> Am. Psychol. Ass’n, *supra* note 114, at 1972.

idated, reflect interpretive stereotypes rather than individualized descriptions, and, because they restrict interpretations to significant clinical elevations, tend to portray only the more negative or problematic portions of the examinee's personality.<sup>137</sup> More recent concerns have been raised by Sol Rappaport, Jonathan Gould, Milfred Dale, David Martindale, and James Flens.<sup>138</sup>

11. Cross-examining attorneys should also examine the degree to which the evaluator engaged in activities that protected the integrity of the evaluation process. Model standard 8.1 of the AFCC's *Model Standards of Practice for Child Custody Evaluation* calls attention to the fact that "[t]he responsible performance of a child custody evaluation requires that evaluators be able to maintain reasonable skepticism, distance, and objectivity." An evaluator's objectivity may be impaired when they currently have, have had, or anticipate having a relationship with others involved in the case (e.g., the parents or children being evaluated, the attorneys for the parties or the children, or the judges). These potential conflicts can introduce bias or potential bias into the process, allowing reviewers to call attention to the ways in which evaluator objectivity may have been impaired as a result.
12. Finally, the cross-examination should investigate the evaluator's compliance with ethical standards, laws, and regulations governing the creation, maintenance, and production of appropriate records. Ethical guide-

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<sup>137</sup> THEODORE MILLON, ROGER DAVIS & CARRIE MILLON, *MCMIII-MANUAL* 134 (2d ed. 1997).

<sup>138</sup> Jonathan W. Gould, David A. Martindale & James R. Flens, *Responsible Use of Psychological Tests: Ethical and Professional Practice Concerns*, in *THE OXFORD HANDBOOK OF CHILD PSYCHOLOGICAL ASSESSMENT* (D. Saklofske, C. Cecil Reynolds & V. Schwean eds., 2013); Jonathan W. Gould, David A. Martindale & James R. Flens, *Responsible Use of Psychological Tests in Child Custody Assessment*, in *SCIENTIFIC BASIS OF CHILD CUSTODY EVALUATIONS* 85 (R. Galatzer-Levy, L. Kraus & B. Galatzer-Levy eds., 2d ed. 2009); See also Sol R. Rappaport, Jonathan Gould & Milfred D. Dale, *Psychological Testing Can Be of Significant Value in Child Custody Evaluations: Don't Buy the Anti-Testing, Anti-Individual, Pro-Family Systems Woozle*, 30 *J. AM. ACAD. MATRIM. LAW.* 405 (2018).



lines admonish psychologists engaged in forensic psychological activities to maintain their records with an eye toward their review by others.

B. *The Psychology-Law Analysis (PLAN): John Zervopolous*

In 2008 in *Confronting Mental Health Evidence: A Practical Plan to Examine Reliability and Experts in Family Law*,<sup>139</sup> John Zervopolous introduced the PLAN approach for reviewing child custody evaluations. This book, and a companion book, *How to Examine Mental Health Experts: A Family Lawyer's Handbook of Issues and Strategies*,<sup>140</sup> are now both in their second editions. The PLAN (psychology-law analysis) model integrates two features of *Daubert* caselaw and mental health testimony.<sup>141</sup> In this approach, the reviewer of an evaluation must consider an analysis of the expert's qualifications and an analysis of the methods and procedures used by the expert.

The four-step PLAN approach includes (1) determination of the expert's qualifications; (2) determination of whether the expert's methods conform to relevant professional practice standards (methods reliability); (3) determination of the empirical and logical connections between the data obtained from the use of reliable methods and the expert's social-science based conclusions (reasoning reliability); and (4) determination of the connection between the expert's conclusions and the proffered expert opinions.<sup>142</sup>

Like the *Forensic Model*, Zervopolous posits that a proper comprehensive cross-examination should utilize both legal and psychological perspectives. The cross-examining attorney must address the legal factors related to the rules of evidence, applicable statutes or rules, and knowledge of relevant case law addressing the admissibility and reliability of expert witness testimony. The psychological factors include the expert's professional ethics, professional practice guidelines, and the relevant scientific and

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<sup>139</sup> See JOHN ZERVOPOLOUS, *CONFRONTING MENTAL HEALTH EVIDENCE: A PRACTICAL PLAN TO EXAMINE RELIABILITY AND EXPERTS IN FAMILY LAW* (2d ed. 2015).

<sup>140</sup> See JOHN ZERVOPOLOUS, *HOW TO EXAMINE MENTAL HEALTH EXPERTS: A FAMILY LAWYER'S HANDBOOK OF ISSUES AND STRATEGIES* (2014).

<sup>141</sup> See ZERVOPOLOUS, *supra* note 139.

<sup>142</sup> *Id.*

professional literature. “In short, courts, when assessing the reliability and quality of expert testimony, do not apply legal principles in a vacuum. Rather, courts apply legal principles (the legal perspective) to the methodology and reasoning (the psychological perspective) that support testifying experts’ opinions.”<sup>143</sup>

Zervopolous stresses the importance of the cross-examining attorney knowing the subject matter of the expert’s testimony. The attorney can retain a consultant to assist in organizing relevant literature, drafting examination questions, and assisting at deposition and/or trial. All too often, cross-examining attorneys are unfamiliar with the subject matter and employ a general approach to their cross. While many clients do not have the monetary resources to retain a trial consultant, attorneys should consider developing relationships with mental health professionals familiar with state-of-the-art CCE literature and practices. A phone call or email asking for citations to current literature can add immeasurably to an effective cross-examination without adding significant cost.

The PLAN approach emphasizes the concept of *trustworthiness* as a legal term that may be more acceptable to attorneys and the courts. Zervopolous argues that *trustworthiness*, while not having a precise definition, “is quickly understood. It has the feel you want to convey to the court: *Is the expert’s testimony sufficiently trustworthy to inform the trier of fact as they decide the issues in the case?* Let *trustworthiness* orient your critiques of expert testimony.”<sup>144</sup> Zervopolous suggests interchangeably using the terms *reliability* and *trustworthy* in both argument and cross-examination.

In cross-examining an expert on qualifications, Zervopolous recommends obtaining a current copy of the expert’s resume or curriculum vita and asking questions about the expert’s expertise concerning the specific issues in the case about which the expert intends to offer opinions. Questions about the number of child custody evaluations the expert has conducted are often less useful than asking about the number of relocation cases, or domestic violence cases, or same-sex marriage cases. Also consider examining the expert’s specialized training in each procedure utilized

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

in the assessment. For example, ask about the expert's specialized training in forensic interviewing of parents, forensic interviewing of children, forensic use and interpretation of each psychological test administered in the evaluation, use of collateral information in child custody assessment, and forensic psychological ethics.

Another area of examination is the expert's professional objectivity. Questions exploring the expert-attorney relationship, or the expert-litigant relationship might reveal information that can be used to argue bias.<sup>145</sup> Some attorneys use their retained consultants as testifying experts, "blurring the line that distinguishes the purposes of those two different expert roles."<sup>146</sup>

There is no clear professional consensus regarding the line between trial consultant and testifying expert. Earlier scholarship drew a bright line between the trial consultant role and the testifying expert role.<sup>147</sup> Subsequent scholarship has challenged the rigid notion of roles and suggested that examining the activities in which the mental health expert is involved is a more useful approach. As Dale and Gould have previously argued, all testifying experts need to consult with the attorney who retains them prior to agreeing to testify in order to clarify the purpose and scope of testimony.<sup>148</sup> There may be other consulting activities that do not introduce bias or conflict, but may often serve to undermine the perception of the testifying expert's credibility.

Another topic for cross-examination in the qualifications area is the expert's history of testifying. Examination might focus on whether the expert has been disqualified from testifying in previous cases or has not been qualified as an expert in particular areas. Explore the expert's fees in the case, the nature of the expert's relationship to the attorney in past cases, the extent to which the expert has reviewed material relevant to the case, and whether the material reviewed reflects a comprehensive examination of the file material or whether the reviewed materials

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> See Jonathan W. Gould, David A. Martindale, Timothy M. Tippins & Jeffrey P. Wittmann, *Testifying Experts and Non-Testifying Trial Consultants: Appreciating the Differences*, 8(1/2) J. CHILD CUSTODY 32 (2011).

<sup>148</sup> See Dale & Gould, *supra* note 84.

have been cherry-picked resulting in the expert having a one-sided understanding of the facts in the case.

Step Two in the PLAN model is determination of the reliability of the expert's methods of data gathering. Legal challenges may utilize applicable statutes and case law. It is also important to examine the expert's use of methodology and whether it is sufficiently reliable for use in forensic settings. Cross-examination should address the selection of data-gathering tools and the support found in the relevant literature for the use of each data-gathering tool in similar cases. For example, there are peer-reviewed articles describing the frequency of use of specific psychological tests and measures in child custody evaluations and the usefulness (read: reliability) of those assessment tools when used in a child custody context. There also may be case law addressing the admissibility of certain psychological tests as scientific instruments, i.e., MMPI-2.

“Good data is [sic] a product of reliable methods; If the methods are inadequate, the data's quality is compromised; Compromised data cannot support reliable expert conclusions and opinions.”<sup>149</sup> Psychological challenges to the expert's methodology can be based on the applicable professional standards. These include use of applicable ethical standards and professional practice guidelines such as those promulgated by the American Psychological Association (APA) and the Association of Family and Conciliation Courts (AFCC). Another valuable resource is the peer-reviewed literature addressing generally accepted methods or protocols. Among the relevant peer-reviewed literature are the numerous studies in which survey data have been reported about the general approach to custody assessments endorsed by those engaged in child custody assessment and the books and articles describing how to conduct child custody evaluations.

There is a generally accepted methodology utilized in child custody evaluations. Child custody evaluations include multiple interviews with each parent, interview(s) with each child and/or direct observation of each parent with each child (or children); interviews with collateral witnesses; record review of relevant documents and court filings; and psychological testing when ap-

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<sup>149</sup> ZERVOPOLOUS, *supra* note 139, at 28.

appropriate. A frequent area of rich examination is collateral interviews. Too often, child custody evaluators interview individuals who know the parent and do not ask for examples of specific behaviors observed. Instead, the collateral persons who are interviewed will often provide opinions about the parent or about the parent-child relationship without providing relevant information about the behaviors that form the basis of their opinions. Another area rich for examination is the use of psychological tests and the degree to which the tests are commonly used in child custody assessment and whether the tests have peer-reviewed information about their use in child custody assessment. Note the distinction between whether a test is commonly used versus whether data support its use in the child custody context.

Step Three of the PLAN model evaluates the empirical and logical relationship between the data gathering during the evaluation and the expert's social science-based conclusions. Zervopoulos refers to this as reasoning reliability.<sup>150</sup> "*Conclusions* are psychology-based inferences that experts decide best link and explain their evaluation data and case facts. *Opinions* apply those conclusions to legal standards addressed in the case."<sup>151</sup>

Cross-examination should focus upon the connections among the data gathered during the evaluation with the inferences made based upon those data and the expert opinion developed from those inferences. The cross-examining attorney must explore the degree to which the expert opinions are based upon inferences drawn from all of the data rather than drawn from a selective set of data. Too often, expert witnesses exclude from their analyses data and inferences drawn from those data that do not support their expert opinion. Examining the data that have been excluded from the expert's analysis is often as useful as examining the data that have been included in the expert's analysis.

The *Joiner* Court<sup>152</sup> described the analytic gap test: "A court may conclude that there is simply too great an analytic gap between the data [for example, interpretations of child's drawings] and the [conclusion] opinion proffered [for example, the opinion that the child has been abused]."<sup>153</sup> The larger the gap

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<sup>150</sup> *Id.* at 31.

<sup>151</sup> *Id.* at 31-32.

<sup>152</sup> *Joiner*, 522 U.S. at 146.

<sup>153</sup> ZERVOPOLOUS, *supra* note 139, at 32.

between the data and the inference, the less confidence in the trustworthiness of the expert's opinion. If the gap is too great, the expert's opinion is no more than speculation.<sup>154</sup>

During Step Three, cross-examination should also focus attention on the expert's consideration of reasonable alternative explanations of the data. A hallmark of the scientific process is consideration of rival alternative hypotheses. An expert is expected to rule out alternative possible causes with reasonable certainty<sup>155</sup> and the failure to consider plausible alternative hypotheses and/or causes renders expert opinion as little more than speculation.<sup>156</sup> North Carolina appellate courts have cited similar language and asked the trial court to determine whether the expert has adequately accounted for obvious alternative explanations.<sup>157</sup>

It is important for attorneys to obtain the evaluator's entire file to examine whether there are any notes indicating consideration of plausible alternative hypotheses. Deposition testimony might also be sought to determine whether the evaluator considered reasonable alternative explanations. Effective cross-examination of an expert's consideration of reasonable alternative explanations of the data, whether conducted during a deposition or at trial, might include asking the expert to explain the scientific basis of each reasonable alternative explanation and how the data from this particular evaluation argues in favor of one alternative over another.

Step Four in the PLAN model examines the connection between the expert's conclusions and opinions. Two critical factors are addressed in Step Four. The first factor to examine is whether the expert has properly defined the legal standard. For example, has the expert utilized a definition of the legal standard that reflects the expert's personal beliefs and values rather than correctly articulating the legal standard in the jurisdiction? In relocation cases, examine whether the expert was guided by the factors articulated in a state's relocation statute or in a best inter-

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<sup>154</sup> *Id.* at 32.

<sup>155</sup> *Merrell Dow Pharm., Inc. v. Hayner*, 953 S.W.2d 706, 720 (Tex. 1997).

<sup>156</sup> *E.I. Dupont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 599 (Tex. 1995).

<sup>157</sup> *See State v. McGrady*, 787 S.E.2d 1 (N.C. 2016).

est analysis did the expert evaluate each of the relevant best interest factors identified in statute or case law?

The second factor to examine in Step Four is whether the recommendations are relevant, reliable, and practical.

Recommendations are *relevant* if they remain within the scope of the evaluation's specific referral questions from the court. Recommendations are *reliable* if they derive from sound conclusions developed from reasoning that sufficiently connects the conclusions with data derived from reliable methods. Recommendations are *practical* if they can be implemented effectively in the family's daily life.<sup>158</sup>

### C. *The Custody Assessment Analysis System (CAAS): Jeffrey Wittmann*

In 2013 in *Evaluating Evaluations: An Attorney's Handbook for Analyzing Child Custody Reports*,<sup>159</sup> Jeffrey Wittmann articulated the Custody Assessment Analysis System (CAAS). The CAAS system is developed from a combination of the author's multi-year experience as a retained expert reviewing child custody evaluations conducted in jurisdictions across the country and relevant treatises and research on assessment issues. Perhaps because Wittmann is based in New York, which retains the *Frye* general acceptance standard for admissibility of expert testimony, the CAAS system focuses on comparing the evaluator's conduct to ethical standards and professional guidelines. Wittmann argues that the references in the ethical codes and guidelines for the variables in the CAAS system should be considered as "professional norms" against which evaluator performance can be compared.<sup>160</sup>

The CAAS system organizes examination of a child custody evaluation around four general dimensions, each of which consists of three to five variables. The four dimensions are (1) management of professional relationships; (2) data adequacy; (3) technique adequacy; and (4) reasoning adequacy. Each of the general dimensions is broken down into more specific factors that delineate areas of targeted examination.

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<sup>158</sup> ZERVOPOLOUS, *supra* note 139, at 36.

<sup>159</sup> JEFFREY P. WITTMANN, *EVALUATING EVALUATIONS: AN ATTORNEY'S HANDBOOK FOR ANALYZING CHILD CUSTODY REPORTS* (2013).

<sup>160</sup> *Id.* at 5.

The CAAS requires,

at a minimum, (1) an understanding of the ethical and preferred-practice standards of the evaluator's discipline; (2) clarity about the boundaries of the specialized knowledge base of the profession; (3) access to the key treatises and research that should undergird the evaluator's method and reasoning; (4) an understanding of the nature of certain technical processes such as the nature of computer test interpretation that can suggest evidentiary challenges; and (5) an appreciation for the literature that elucidates the biases and judgment errors that can derail the forensic reasoning process.<sup>161</sup>

The CAAS offers comprehensive lists of dimensions or factors for each evaluator activity. The CAAS system "requires knowing the assessment principles and the custody-relevant portions of the empirical literature in the psychological library, knowledge not easily acquired in the push and pull of legal practices."<sup>162</sup>

The CAAS is conceptualized as a "red flag" analysis: a catalog of weaknesses or threats to reliability that appear to characterize a particular custody or access assessment.<sup>163</sup> Pinpoint citations to the supporting ethical codes, guidelines, or professional literature are offered for each possible threat to reliability. While all evaluations likely have some degree of error contamination, the CAAS's "most useful contribution is to aid in deciding if the particular errors and threats to reliability present in a given report rise to a level suggesting that the report is vulnerable to attack or should be either weighed lightly by the court or thrown out completely."<sup>164</sup>

## **Part IV: Cross-Examination Models**

### *A. Destructive Cross-Examination: Irving Younger & Stephen Easton*

Traditionally, Irving Younger is viewed as having established the gold standard for destructive cross-examination,<sup>165</sup> a process within which thinly sliced fact statements are offered as declara-

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 14.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> See Irving Younger, *The Art of Cross Examination*, in *THE ART OF CROSS EXAMINATION: ESSAYS FROM THE BENCH AND BAR* (Charles Gibbons



tive statements in the form of “questions.”<sup>166</sup> For many years, Younger was considered the quintessential “teacher of trial lawyers” about the craft of trying lawsuits.<sup>167</sup> He insisted that lawyers learn ten commandments for cross-examination questions and learn them so well they became second nature. By writing every cross-examination question consistent with these ten commandments, cross-examining lawyers could control adverse witnesses through a process that, in theory, allowed for one of only four possible answers to any question on cross: “yes,” “no,” “I can’t answer that question yes or no,” or “I don’t know.”<sup>168</sup> For Younger and other advocates of destructive cross-examination, if the question does not comply with the commandments, it should not be asked.

Stephen Easton developed into somewhat of a standard bearer for Younger’s legacy and, like several others, wrote to update this approach to cross-examination. In a 2002 paper honoring Younger, Easton added ten suggestions, each in response to one of Younger’s original ten commandments.<sup>169</sup>

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ed. 2014) (proceedings of a speech given by Prof. Younger at the American Bar Association’s Annual Meeting in Montreal, Canada on Aug. 12, 1975).

<sup>166</sup> See Barton, *supra* note 39, at 8.

<sup>167</sup> See Stephen D. Easton, *Irving Younger’s Ten Commandments of Cross-Examination: A Refresher Course with Additional Suggestions*, 26 AM. J. TRIAL ADVOC. 277 (2002).

<sup>168</sup> See Barton, *supra* note 39, at 8.

<sup>169</sup> See Easton, *supra* note 167.

**Table 1**

	Irving Younger's Ten Commandments	Stephen Easton's Suggestions
1	Be Brief	Do Not Just Tell Them, Show Them!
2	Ask Short Questions, Using Plain Words	Get One Fact Per Question
3	Ask Leading Questions	Write Questions That Must Be Answered "Yes"
4	Ask Only Questions to Which You Already Know the Answer	Be Ready to "Prove Up" Your Questions Immediately
5	Do Not Let the Witness Merely Repeat Direct Testimony	Bait and Set the Trap Before Springing It
6	Do Not Let the Witness Explain	Secure the Right to Control the Witness
7	Listen to the Witness's Answer	Record Important Testimony in Witness's Own Words
8	Do Not Quarrel with the Witness	Do Not Improve the Witness's Prior Statements
9	Avoid the "One Question Too Many"	Stay Well Clear of "the Door"
10	Save the Argument for Summation	Resist the Temptation to Wrap Your Cross into a Neat Package
	Stop	

Younger posited that the largest purpose of cross is to set up arguments you wish to make during closing. He suggested limiting cross-examination to three points with each witness. Easton added that proper preparation requires annotating each cross-examination question with a reference to the supporting evidence. Having the means to "prove up" your question somewhere in your files is not enough. The questioning lawyer should ask "yes" questions, not "yes or no" questions. Particularly at trial, the lawyer should provide information in their question instead of requesting it. The lawyer should "tell" rather than ask. In addition, if there is anything other than a "yes" answer, the lawyer

must be able to immediately access the evidence supporting the question.<sup>170</sup>

Easton recommends writing cross-examination questions in advance, word for word.<sup>171</sup> Each question should then be reviewed and edited for compliance with the commandments and suggestions because “a simple change of a word or phrase can turn an otherwise effective cross-examination question into a violation of one of the commandments.”<sup>172</sup> Writing more questions than will actually be used allows the lawyer to be prepared and, when necessary, to decide to skip questions if or when issues become less important. Effectively drafting questions “on the fly” in the courtroom is only possible if the lawyer has an intuitive knowledge of the commandments. Easton notes, “Great cross-examinations are created in the office, not the courtroom.”<sup>173</sup>

### B. *Destructive Cross-Examination of Experts – Stephen Easton*

Easton’s book, *Attacking the Adverse Expert*, describes his approach to this task.<sup>174</sup> He suggests:

During the attack portion of a destructive cross-examination, the lawyer should ask himself two questions about every possible question they are considering asking the expert:

1. Can I force the expert to admit this truth (or look silly if he denies it)?
2. Will this truth help me establish that he is wrong about the key issue(s) in the case?<sup>175</sup>

Establishing that an expert is wrong is a process where the seeds for this assertion are planted in the lawyer’s opening statement, where cross-examination questions set up the expert for attack and force the expert to admit to errors or incorrect elements in his analysis, and where the proof of these errors occurs in the lawyer’s case in chief. The questioning lawyer should thwart the temptation to try to prove that the expert is wrong but instead attempt to identify “truths” supporting his challenge to which the expert must admit. The questioning lawyer must be

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<sup>170</sup> *Id.* at 283-84.

<sup>171</sup> *Id.* at 281.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 282.

<sup>174</sup> STEPHEN D. EASTON, *ATTACKING ADVERSE EXPERTS* (2008).

<sup>175</sup> *Id.* at 494.

prepared to prove up at any time any assertions of errors alleged to have been made by the expert. Any analysis of erroneous statements made by the expert in cross-examination should be included in the attorney's case-in-chief and during rebuttal on the way to providing the basis for closing argument.

Easton suggests it is important to not under-attack or over-attack. The questioning attorney must force the expert to admit undeniable truths or look silly denying them. Establishing that the expert's theory and testimony are incorrect may be proven by inconsistent prior statements (from depositions or even other cases), by contrasting these statements with statements of other experts in learned treatises, or by simply proving the expert is wrong about the facts or the theory that he or she applied to the facts of the case.

Easton also recommends identifying "credibility themes" tied to specific weaknesses in the expert's report or testimony. These might include: (1) references to the adverse expert not being sufficiently knowledgeable about the subject matter or the facts of the case; (2) challenges to the expert's objectivity including the possibility of dishonesty, bias, or prejudice; and/or (3) assertions the expert did not adequately investigate or does not possess the facts of the case for what the proponent of his testimony has suggested his testimony should be.<sup>176</sup> Easton also recommends that the questioner "stop before the last step" and to use closing argument rather than any portions of cross-examination to explain points made or arguments supported during cross-examination.

Other writers have also added to Younger's ten commandments. For example, Charles Hvass, Jr. drafted three additional commandments, noting that cross-examination questions should always (1) help your case; (2) hurt the witness; or, (3) if all else fails, neutralize the witness.<sup>177</sup>

Numerous legal scholars caution about the risks of destructive cross examination. Destructive cross risks making the attorney look overly partisan, as if they are not interested in the whole truth, but only in their client's one-sided and thin-sliced

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<sup>176</sup> *Id.* at 492.

<sup>177</sup> See Charles Hvass Jr., *The New Commandments of Cross-Examination*, 28(4) *LITIG. J.* 26 (2002).

version of the truth.<sup>178</sup> The goal is to be seen by the trier of fact as the one pursuing justice, not just winning.

Easton cautions that destructive cross-examination can backfire. Since the attack occurs on the expert's territory, it is not advisable to launch a full attack on the expert's scientific analysis unless winning this battle is certain.<sup>179</sup> James McElhaney, an advocate for constructive cross-examination provides the following cautions about destructive cross-examination.

Whatever the reasons, a destructive cross-examination is often a mistake, and its price is high. It can create sympathy for the witness when there was none before. Worse, it can create animosity toward the lawyer who does it. A destructive cross-examination may push a witness into making his testimony more adverse than it would have been. And a needlessly hostile cross-examination over something that does not seem to matter creates the impression that you are completely unreasonable, a perception that can infect their jury's view of your entire case. It all suggests that you should conduct a destructive cross-examination only when you must. That means you will declare war on a witness only when you have weighed the benefits against the risks, and have decided they are worth it.<sup>180</sup>

### C. *Destructive Cross-Examination in Child Custody: Timothy Tippins*

Perhaps the most well-known advocate of destructive cross-examination in child custody cases is Timothy Tippins. The focus on child custody evaluations separates Tippins' writings from those of others cited in this article. For Tippins, the targets for cross-examination of an evaluator or expert extend beyond the expert's performance of a child custody evaluation to include the "science" upon which the expert purports to rely. This, in and of itself, is not necessarily problematic. In fact, Tippins has worked, written, and presented extensively with Dr. Jeff Wittmann, author of the Custody Assessment System, as well as with Dr. David Martindale and Dr. Jonathan Gould, authors of the *Forensic Model*. But the level to which Tippins demands evaluators be "scientific" makes his approach controversial.

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<sup>178</sup> See Barton, *supra* note 39.

<sup>179</sup> EASTON, *supra* note 174, at 492.

<sup>180</sup> James McElhaney, *Trial Notebook: Constructive Cross-Examination*, 14(2) LITIG. J. 49, 49 (1988).

Tippins writes about the limitations of using science in child custody evaluations. In many ways, Tippins is the cross-examination “point person” for a perspective that views child custody evaluators who make recommendations as guilty of reaching beyond what the science of their disciplines can legitimately support.<sup>181</sup> For Tippins, cross-examination involves identifying and isolating each inference embraced by the expert’s opinion and requiring the evaluator to support each inference by citation to the empirical research. Tippins asserts that the major premise for expert inference comes from the knowledge base of the expert’s profession and that this premise provides the possibilities for the minor premise, or the constellation of case-specific data points collected through the evaluation process.<sup>182</sup> Tippins has advocated for

A tightly drafted appointment order that mandates specific citation of supporting professional literature will put evaluators on notice that the court is aware of the essentiality of empirical support and adherence to scientific method and that it will hold them accountable for scientific shortcoming. By mandating that such citations be included in the written report, the custody court can have the salutary effect of reigning in those evaluators who have lost touch with the scientific method that was once the benchmark of their profession.<sup>183</sup>

Tippins’s position is that evaluators should not offer custody opinions or recommendations because the status of the relevant psychological literature supporting an evaluator’s opinion on the ultimate issue is tenuous or non-existent.<sup>184</sup> Tippins notes that “no empirical work has been done in which a matched set of children with similar test and interview data is placed into different custodial arrangements to examine the overall effectiveness of one placement over another.”<sup>185</sup> However, the extent to which Tippins pursues these principles and his requests for strict empirical proof for everything an evaluator does is controversial and

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<sup>181</sup> See Emery, Otto & O’Donohue, *supra* note 10; see also O’Donohue & Bradley, *supra* note 10.

<sup>182</sup> Timothy M. Tippins, *Custody Evaluations – Part VI: Mastering the Professional Literature*, 88 N.Y.L.J. 3, 4 (2004).

<sup>183</sup> *Id.*

<sup>184</sup> See Tippins & Wittmann, *supra* note 9, at 193.

<sup>185</sup> *Id.* at 216.

seen by many as an unrealistic limitation that ignores the court's need for expert assistance with best interests determinations.<sup>186</sup>

Tippins is also a strong advocate for transparency regarding the child custody evaluation process, the evaluator's records, and the evaluation report.

The only way proper cross-examination can be planned and a responsive rebuttal case built is through analysis of the evaluator's report and its conclusions, the underlying basis of the adverse opinion and the totality of the circumstances surrounding the evaluation. Therefore, the first and most critical step is to carefully analyze the entire evaluation process, not simply the report but the entire process, that led to the conclusions expressed in the report, as well as each and every potential basis for its conclusions and facts that contraindicate those conclusions. This requires that the practitioner obtain all underlying information, the raw data upon which the evaluator has based his or her conclusions.<sup>187</sup>

#### D. *Modern Constructive Cross-Examination: Larry Pozner & Roger Dodd*

In *Cross-Examination: Science and Technique*,<sup>188</sup> Larry Pozner and Roger Dodd develop a comprehensive methodology they describe as modern "constructive cross-examination." This methodology emphasizes using opposing witnesses to build the theory of the case over challenging opposing witnesses on the opponent's theory of the case. Modern constructive cross-examination has its roots in the "yes/no question" tradition of destructive cross-examination, but there are clear philosophical and technique differences. In modern constructive cross, the attorney is conceptualized as a teacher or guide rather than an advocate set on persuading people.

Pozner and Dodd emphasize promoting the lawyer's theory of the case through the "marshalling of facts in support of a se-

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<sup>186</sup> See Joan B. Kelly & Janet R. Johnston, *Commentary on Tippins and Wittmann's "Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance"*, 43(2) FAM. CT. REV. 233 (2005) (noting this commentary focuses on "several points of disagreement and suggesting alternative remedies for the shortcomings and ethical problems described in child custody evaluations"); see also Nicholas Bala, *Tippins and Wittman Asked the Wrong Question: Evaluators May Not Be "Experts," But They Can Express Best Interests Opinions*, 43(4) FAM. CT. REV. 554 (2005).

<sup>187</sup> *Tippins*, *supra* note 182, at 4.

<sup>188</sup> See POZNER & DODD, *supra* note 21.

ries of previously identified goals.”<sup>189</sup> It involves organizing packages or “chapters” of facts to enable the triers of fact to learn and follow the lawyer’s theory of the case. This case theory is shared in the opening statement and reinforced throughout each aspect of the case (e.g., direct examinations, cross-examinations, and closing argument). The primacy of facts in building the theory of the case is important. “Facts create theories, facts support theories, facts limit theories, and facts extinguish theories.”<sup>190</sup> Certain facts are rewarded by the law and courts, others are not. Identifying factual goals and theories early in the case puts the lawyer in a better position to find and use facts that support the client. In sum, “the facts come first, and the theory follows.”<sup>191</sup>

Under the modern theory of constructive cross, opposing witnesses are used to build the attorney’s theory of the case. “Constructive cross expands the purpose of cross; it is an opportunity to introduce or reinforce facts that build the lawyer’s theory of the case, not simply to limit the damage the opponent has done to that case or to attack the points the opponent has attempted to make in support of their own theory of the case.”<sup>192</sup> A central task of constructive cross with an opposing witness is to use leading questions to get the witness to admit or verify facts that support the theme line or phrase. The focus is always on the underlying facts that support one’s theory of the case, not conclusions. Lawyers using modern constructive cross continuously ask themselves two questions: (1) “Does this witness possess facts that can build or strengthen my theory of the case?” and (2) “Has this witness hurt my theory of the case, and if so, do I have material available that will allow me to challenge the witness in those areas?”<sup>193</sup>

In constructive cross, the topic in court is the lawyer’s theory of the case during both direct and cross examination. Pozner and Dodd posit that “time = importance.” In this view, the traditional approach to cross, that spends time undermining, making unbelievable, and destroying the opponent’s theory of the case,

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<sup>189</sup> *Id.* at 1443.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 2919.

<sup>192</sup> *Id.* at 3807.

<sup>193</sup> *Id.* at 3801.



spends too much time talking about the opponent's theory of the case rather than on teaching the lawyer's own theory of the case.<sup>194</sup> This approach can also allow for a more positive and more controlled presentation of the case because a well scripted cross often affords the lawyer more control than eliciting facts on direct examination. Pozner and Dodd emphasize that using the opponent's witnesses can also be more powerful and persuasive than presenting a case through one's own witness.

Like the other systems for cross examination, the modern constructive cross approach provides guidance for how to write and frame questions for the witness. The three rules are: (1) leading questions only; (2) one new fact per question; and (3) a logical progression toward specific goals. The adept cross-examiner never uses questions that invite uncontrolled, unpredictable, or unending answers, such as questions that begin with: who, what, when, where, how, why, or explain.<sup>195</sup> Words that describe the theory or theme lines of the case are woven into the chapters, which are sequenced in an order that aids communication of the theories and themes. *Cross-Examination: Science and Technique* is a comprehensive trial guide that educates about specific cross-examination techniques (like trilogies, loops, and double looping), as well as how to handle objections or other difficulties that arise in court.

#### E. *The Rules of the Road Approach and Technique: Rick Friedman & Patrick Malone*

In *The Rules of the Road*, Rick Friedman and Patrick Malone articulate an approach to constructing a case strategy that can be used as a technique with witnesses, including expert witnesses.<sup>196</sup> The Rules of the Road technique was initially designed for plaintiffs attorneys in civil cases who have the burden of proving all of the elements in their cases and who viewed ambiguity, confusion, and complexity as helpful to defendants, not plaintiffs. This technique is easily extended to all aspects of child custody cases where the very nature of the best interests of the child task is ambiguous, confusing, and complex. The focus is on

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<sup>194</sup> *Id.* at 3869.

<sup>195</sup> *Id.* at 6801.

<sup>196</sup> RICK FRIEDMAN & PATRICK MALONE, *RULES OF THE ROAD: A PLAINTIFF LAWYER'S GUIDE TO PROVING LIABILITY* (2d ed. 2010).

creating a case story involving case themes that define and solve the ambiguities and confusing elements of the problem before the court, including the ultimate issues. The approach is “to breathe life into ambiguous legal standards and create an indisputable standard for everyone . . . to see. The standard must be as clear as the double yellow line on a highway.”<sup>197</sup>

At its most basic level, the purpose of the Rules of the Road technique is to educate the trier of fact about basic principles that *require* the dispute to be resolved in the client’s favor. The term “*require*” could be applied to “rules” referencing laws where there is mandatory authority the court must follow, or “rules” that become persuasive authority or principles leading the trier of fact to believe and award a desired outcome.

Constructing, refining, and updating the “Rules” in the case is a dynamic process that begins upon meeting the client and extends throughout case preparation and discovery. Each good rule must have five attributes. A Rule of the Road in a custody case should:

1. *Include a requirement that the witness did, or did not do, something.* The rule must be prescriptive, not descriptive, and aimed squarely at its target;
2. *Be easy for the judge to understand.* While the sources of rules vary considerably, simplicity is the advocate’s friend as they attempt to define and solve what might otherwise seem ambiguous, confusing, or complex without the rule;
3. *Include a requirement the other party cannot credibly dispute.* To be useful, a rule must be endorsed by the other party and its witnesses or be so persuasive that the other party loses credibility by resisting it;
4. *Include a requirement the other party has violated or otherwise breached the spirit of the rule.* “Ideally, [the attorney] will be able to prove, beyond all doubt, that the [other party] violated a specific Rule in very definite ways. You never want to use a Rule with which the [other party] can prove it complied”<sup>198</sup>; and,

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<sup>197</sup> *Id.* at 3.

<sup>198</sup> *Id.* at 28.

5. *Be important enough in the context of the case that proof of its violation will significantly increase the chance of a favorable court decision for your client.* “Not every Rule violation is worthy of attention at trial”<sup>199</sup> because “your case does not get better in proportion to the number of Rules you add to your list.”<sup>200</sup> The focus is on keeping things simple and solving problems.

Throughout discovery, the attorney is looking to add rules to the list, garner support for rules already drafted, and identify agreement or disagreement from the opposing experts regarding your Rules.<sup>201</sup> Improving Rules usually means making them more specific and concrete in terms of what they require of the opposing party or the opposing party’s expert.<sup>202</sup> The Rules, not the Rule violations, should be the focus of the case story.

In this approach, Friedman and Malone distinguish between principles and rules. They describe a principle as a major truth about the other party’s behavior or conduct that might lead to possible problems (such as injuries or serious other trouble). While principles can be used within cross-examination, rules include the requirement that the other party has violated the principle and/or rules. Rules gain their moral force from the possibility of future harm if they are not followed.<sup>203</sup>

The seven Rules of the Road for one’s own expert or a friendly expert help to *Daubert*-proof the expert. These seven rules are:

- Rule 1: Find a methodology appropriate for the expert’s field, and make sure the expert follows it.
- Rule 2: Find literature support for the expert’s theory.
- Rule 3: Make the expert read the relevant literature.
- Rule 4: Go to the top in your search for experts.
- Rule 5: Avoid experts who won’t explain the basis for their opinions.
- Rule 6: Enlist help from the other side’s experts (via agreements, concessions, or stipulations about methodologies).

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<sup>199</sup> *Id.* at 29.

<sup>200</sup> *Id.* at 30.

<sup>201</sup> *Id.* at 79.

<sup>202</sup> *Id.* at 104.

<sup>203</sup> *Id.* at 56.

- Rule 7: Attack the other side's experts.<sup>204</sup>

Discovery (including but not limited to depositions) is seen as a place where Rules may be refined and where new Rules may be developed. These processes are also a place to secure agreement or disagreement from the opposite party or their experts, as well as the “why” reasons for agreement or disagreement. After reviewing Rules issues, discovery techniques are also invaluable for identifying violations of the Rules.

And finally, the Rules of the Road approach and technique seeks to “spoon-feed” to the judge the case story, the evidence organized by rules, and the opposing party's violation of the rules with the goal of making your rules the Judge's rules.<sup>205</sup>

Questions to pare down a lengthy cross-examination include:

- What is here that you do not need?
- For what do you not have sufficient impeaching material, so that the line or point should be dropped?
- What is cumulative?
- What questions are directed to a witness who lacks personal knowledge or other necessary foundation?
- What is too risky to ask?
- Have any why questions crept into the examination that will enable the witness to make a harmful speech?
- Is there anything else here that will just give the witness an opportunity to make a harmful speech?
- What is better covered with another witness?<sup>206</sup>

#### F. *The “Look Good” Constructive Cross: Terence MacCarthy*

Terence MacCarthy suggests an approach to cross-examination that he admits is “contrarian” in nature, but is designed for use “on every witness, and particularly on experts.”<sup>207</sup> The “system” proposed by MacCarthy focuses on style in cross-examination and is “contrary to the conventional wisdom, contrary to

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<sup>204</sup> *Id.* at 59-70.

<sup>205</sup> *Id.* at 129.

<sup>206</sup> See Charles J. Faruki, *Cross-Examination that Hurts the Witness, Not You*, 33(3) LITIG. J. 38, 39 (2007).

<sup>207</sup> MACCARTHY, *supra* note 45, at 7.

what you have been taught, and contrary to how most of you are now doing cross-examinations.”<sup>208</sup>

Unlike other forms of cross-examination, MacCarthy’s main goal is not “to destroy the witness.”<sup>209</sup> Instead, MacCarthy’s main goal is for the lawyer doing cross to “look good.”<sup>210</sup> “Looking good” makes the jury like the cross-examining lawyer and “is more important than the substantive points you seek to make” during cross-examination.<sup>211</sup> MacCarthy argues that juries see form, not substance; therefore, the cross-examiner should be more focused on form than substance. To demonstrate this point, MacCarthy suggests that lawyers and witnesses are on a teeter-totter, and the witness automatically starts in the “up” position of the teeter-totter. The lawyer’s goal is to reverse that teeter-totter. Every time the lawyer “looks good,” their side goes up a notch and the witness’s side goes down a notch. Every time the witness looks bad, the witness goes down a notch, and the lawyer goes up a notch. “Importantly, ‘looking bad’ is more impactful than ‘looking good.’ The movement in terms of notches is multiplied.”<sup>212</sup> Since the teeter-totter moves when the lawyer looks good and the witness looks bad, the lawyer must find a way to make the witness look bad while making the lawyer look good. If the cross-examiner focuses on “destroying the witness,” the witness may look bad, but the lawyer looks worse as the jury views the lawyer as a bully.<sup>213</sup>

To accomplish this, the lawyer must focus on how he or she communicates during cross-examination. MacCarthy provides three basic housekeeping rules: 1) avoid standing behind lecterns during cross-examination, 2) do not read from notes, reference them quickly, and then move your eye contact back to the jury, and 3) do not hold a writing instrument in your hand while cross-examining – if something is important enough to write down, it is important enough to write on the blackboard for the jury to see.<sup>214</sup> In addition to the three housekeeping rules, the concepts

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<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 8.

<sup>210</sup> *Id.* at 39.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 43.

<sup>213</sup> *Id.* at 34.

<sup>214</sup> *Id.* at 46.

of primacy and recency, which are generally applied to opening and closing statements, should be used in cross-examination as well. During cross, lawyers should avoid the stereotypical introductions and pleasantries that are seen in almost every modern cross-examination, and instead, lawyers should start with an important and positive theme, and end with the same.<sup>215</sup>

Once lawyers are past the previous points concerning basic communication, MacCarthy's system of cross-examination has three parts: 1) short, 2) statements, and 3) control.<sup>216</sup> These parts create an equation: SHORT + STATEMENTS = CONTROL. This equation emphasizes that control of the witness is the outcome, not the goal.

"Short" refers to the style of questions a cross-examiner should ask. There are three reasons to use short (approximately one to five words) questions: 1) the length of the question generally determines the length of the answer, the long question is "stupid," creating more confusion than clarity, and 3) the lawyer will be less likely to look bad using short questions.<sup>217</sup> One can make questions short by eliminating prefixes, eliminating suffixes, and using transitions.<sup>218</sup> These short questions should be statements that can (and should) be answered "yes" or "no" and they should tell a clear story. If the cross-examination goes well, the witness will never have a chance to expound on their "yes" or "no" answer because the question would not allow for it.

"Statements" refers to the kind of question that should be asked. Instead of asking regular or open-ended questions, cross-examiners should use statements phrased as questions. This is a kind of "leading question" but is not the typical leading question that ends with something to the effect of "isn't that correct?"<sup>219</sup> Instead, cross-examiners say the part of the story they want the witness to agree with or disagree with, and use their voice to make the "statement" a "question."<sup>220</sup> How statements are crafted is especially important. Since the goal is to look good and tell a story, cross-examiners want to avoid any statements that

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<sup>215</sup> *Id.* at 45-46.

<sup>216</sup> *Id.* at 65.

<sup>217</sup> *Id.* at 66-67.

<sup>218</sup> *Id.* at 67.

<sup>219</sup> *Id.* at 73.

<sup>220</sup> *Id.* at 80.

are not clearly provable, and only state facts, not opinions.<sup>221</sup> In this approach, if the statement gives the witness any leeway to expound on their answer, the statement needs to be re-crafted.

“Control” is the outcome of using short statements during cross-examination. It is not the main goal, and it is possible that the witness will refuse to be controlled. However, by using short statements, “[t]here will come a time in this system when we give the witness a choice between being controlled or looking like an idiot.”<sup>222</sup> If this system is used correctly, the cross-examiner will have total control of the witness since they will only answer “yes” or “no” as the lawyer tells the story.<sup>223</sup> A lawyer should not use abrasiveness to control the witness (this will make the lawyer look bad), but instead control should be accomplished by speaking in a quicker pace and listening for phrases that can be easily used against the witness if they stray from “yes” or “no.”<sup>224</sup> For example, witness statements expressing uncertainty or less than full confidence in the assertions adverse to the lawyer’s theory of the case can be emphasized as part of the challenge to the witness’s credibility.

MacCarthy posits that there are some exceptions to these rules, but they are minimal.<sup>225</sup> Generally, the system works for three reasons: 1) “It allows the cross-examiner to tell a story,” 2) “It allows the cross-examiner to make a good impression,” and 3) “It allows the cross-examiner to reasonably control the witness.”<sup>226</sup> Under this theory, when cross-examining, you are “‘looking good’ and telling your ‘story’ by using ‘short statements.’”<sup>227</sup>

### G. *The Endgame in Cross-Examination: Steven Lubet*

In describing the “endgame” for cross examination, Steven Lubet noted that the lawyer’s closing point on cross-examination must be undeniable, documented and proven, and consist of “bedrock fact” without anything that approaches a characteriza-

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<sup>221</sup> *Id.* at 91.

<sup>222</sup> *Id.* at 113.

<sup>223</sup> *Id.* at 114.

<sup>224</sup> *Id.* at 115.

<sup>225</sup> *Id.* at 135-42.

<sup>226</sup> *Id.* at 143.

<sup>227</sup> *Id.* at 144.

tion. According to Lubet, one's closing point must be stated with conviction:

It is crucial that you plan carefully the last point that you intend to make on cross-examination. It must be a certain winner, the proposition on which you are willing to make your exit. Indeed, you should write the last few questions at the bottom of your notepad, underlined and in bold letters. Your final point should stand alone, with nothing to obscure it or distract you from it. Then, if disaster strikes, you can skip to the bottom of the page, deliver your fail-safe zinger proudly announce, "Your witness, counsel," and sit down.<sup>228</sup>

## Conclusions

The *Daubert* trilogy and the emphasis on scientific methodology and process have significantly impacted child custody evaluators. Evaluators were quickly encouraged to be more scientific or at least scientifically informed in the procedures used to collect data and in the analysis of those data in light of the peer-reviewed literature and the particular needs of the family.<sup>229</sup> Approaches to cross-examination of the child custody evaluator that developed were reflected first in the *Forensic Model*, then later in the PLAN and CAAS approaches. All of these approaches combined the legal evidentiary changes regarding the admissibility of expert witness testimony with ethical principles, professional and scientific knowledge in the field, and professional practice guidelines in an attempt to make evaluations more reliable and the opinions of experts more trustworthy. For the past fifteen years, attorneys have been using these models as tools to understand and challenge child custody evaluators and child custody evaluations. The models have become invaluable aids to developing coherent and effective cross-examination strategies.

The techniques of cross-examination that attorneys have developed have evolved from the inflexible (and sometimes unrealistic) application of the rules of destructive cross to approaches that gather facts and concessions from the opposing or adverse witness to telling the client's story through others – even the adverse expert. From within the legal community, this evolution has often been additive. Rather than totally replacing the time-

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<sup>228</sup> See Steven Lubet, *Cross-examination: Endgame*, 17(2) LITIG. J. 40, 40 (1991).

<sup>229</sup> See GOULD, *supra* note 120.



honored techniques, new techniques are added and sometimes combined with these approaches, making choice of technique more contextual than commitment and rigid adherence to a single approach. To the extent the facts and situation allow the lawyer to look good, the lawyer should seek to capitalize on that dynamic. In sum, the modern family lawyer has a duty to learn how to cross-examine expert evaluators because “[i]f there are good grounds to prove that the adverse expert representing your opponent is wrong, it is part of your job as a lawyer to convince a [judge] that this is so.”<sup>230</sup>

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<sup>230</sup> EASTON, *supra* note 174, at 3.

