

Forensic Expert Roles and Services in Child Custody Litigation: Work Product Review and Case Consultation

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Courts determining the best interests of children in custody disputes frequently request help from mental health experts. This article addresses the three expert services typically provided to the court (evaluator, reviewer, and instructor) as well as the trial consultation services offered to attorneys for the parties. After noting recent developments in scientific methodology and processes that evaluators use to inform and instruct the court, we examine the work product review and consultation services that have emerged to help the court understand the scientific relevance and reliability of the evaluator's work product. But reviewers, instructional experts, and consultants are retained by attorneys, not the court. Ethical reviewers and consultants remain objective and loyal to the data and facts of the case. While others have suggested ethical and professional standards based upon "role" designations, we advocate for recognizing the overlapping nature of these four services and argue that reducing these services to their "role" obfuscates the complexity and multiple facets within each service. Establishing best practices and minimum standards should revolve around the expert's loyalty to the data, the ability to develop

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opinions based upon this factual basis, and the ability to resist pressures that bias or distort this process.

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BEST INTERESTS OF THE CHILD AND EXPERT ROLES

The use of mental health experts and the role of science in child custody disputes face new and evolving challenges. When a child custody dispute cannot be settled informally or through mediation, and the parties have sufficient financial means, it is not uncommon for mental health experts to be involved. If a case needs to be litigated the court may appoint a custody evaluator. The evaluator will be in the role of the court's neutral expert to conduct an objective evaluation and address the issues in the case for the court. With increasing frequency attorneys are utilizing, or retaining, experts to provide trial consultation and/or to review the work product of the custody evaluator (i.e., custody report and file), and to offer testimony. Evaluators, therefore, should approach their task with in anticipation that their work product and opinions will be reviewed by a forensic expert (Austin, Kirkpatrick, & Flens, in press). A review occurs usually after a discerning attorney perceives there are potential problems with the evaluator's methodology, bias, or that the opinions do not seem to correspond with the facts and circumstances of the case.

This article addresses the consultation and work product review services that forensic mental health experts provide in custody cases. We examine the ethical issues associated with the role of a forensic consultant-reviewer in custody cases. We emphasize that reviewers have an ethical duty to be objective, balanced, and accurate in their analysis and in the formulation and communication of expert opinions, even though they are hired or retained by an attorney. A standard of practice for consultant-reviewers has not yet been developed with only a few professional publications on the review role and service (Gould, Kirkpatrick, Austin, & Martindale, 2004; Stahl, 1996; Martindale & Gould, 2008). This issue of the journal is a step toward establishing practice parameters for this emerging forensic role.

Regardless of the particular role assigned, all forensic mental health experts operate under and must be attuned to the best interests of the child legal standard (BICS). This standard is an attractive ideal requiring consideration of each individual child's developmental and psychological needs rather than presumptively accepting parental demands, societal stereotypes, and cultural traditions (Kelly, 1997). The BICS can also be framed as or

transformed into a general variable or concept (Hage, 1972), and this is a necessary operation for custody evaluators who must define, measure, and demonstrate that the parenting plan recommended by the expert is likely to be either beneficial or least detrimental to the child. Prominent scholars in the fields of psychology and law have criticized the use of BICS as too vague, value-laden, and without a sufficient scientific research basis (Melton, Petrila, Poythress, & Slobogin, 2007; Emery, Otto, & O'Donahue, 2005). Nonetheless, courts with great regularity look to mental health experts and custody evaluators to provide guidance for decisions in these difficult cases. Mnookin (1975) long ago astutely observed that while the legal standard of BICS was not without its problems, it was the best alternative to guide decision makers. Kelly and Ramsey (2009) point out any general concept, such as BICS, can be theoretically defined and measured. Custody evaluators measure factors relevant to the children's adjustment and make best interest predictions in virtually every case. Austin (2009) asserts custody evaluations are an "easy target" for critics because of the complexity of the forensic task, but there is a vast research literature relevant to the issues commonly faced by custody evaluators, as well as numerous literature reviews for them to draw from (see Kelly & Emery, 2003).

All forensic experts in some way must address questions that are before the court in terms of what parenting plan will be in the child's best interests, meaning what parenting arrangements will facilitate a healthy behavioral-emotional adjustment and long-term development. A child's best interests can be thought of as reflecting or referring to the child's predicted adjustment and level of development, or the outcomes that are associated with his or her living environment, which in turn is partly determined by the parenting arrangement. When there is a child custody evaluation, the evaluator's task is to make predictions about the child's long-term outcomes on the basis of many factors that are considered. When the evaluator has to explain or defend his or her expert opinions, it is done so by identifying these important factors, or independent variables, and the supporting data on those factors. When the judge writes an opinion in the case it too must take the form of identifying the important factors and supporting evidence that will explain or justify the court-ordered parenting plan. When the reviewer enters a case he or she is advising the retaining attorney on the quality and accuracy of the evaluator's work in making a best interest analysis.

Changes in the last fifty years of child custody law and the proliferation of social science research reflect paradigm shifts and pendulum swings in the prevailing scientific and societal views of what is in the "best interests of the child" (Elrod & Dale, 2008). Developments within the child custody evaluation professional community have worked to keep pace. This professional community is now working with a second generation of standards for evaluation methodology and communication (Association of Family and Conciliation Courts, 2006/2007; American Psychological Association, 1994;

2009) and is informed by second and third editions of authoritative texts (Ackerman, 2001; Gould, 2006; Gould & Martindale, 2007; Rohrbaugh, 2008; Galatzer-Levy, Kraus, & Galatzer-Levy, 2009). The result has been increasingly sophisticated approaches by custody evaluators to the best interests of the child task. The guidelines and literature help define a best practices framework for assessing the quality of a custody evaluation. It is also possible for a reviewer to use the perspective of a minimal standard of practice as well (Kirkpatrick, 2004).

Mental health professionals may now help the court by functioning as (1) an expert child custody evaluator; (2) an instructional expert witness; (3) an expert reviewer of the evaluator (i.e., reviewer); or (4) a trial consultant. This article reflects a step towards defining best practices and minimum standards for these four expert services within the context of child custody litigation. We discuss general issues involved in doing review work such as the ethics of combining case consultation with the retaining attorney and testifying as a reviewer expert. We discuss the ethical considerations involved in determining what opinions an expert can express in custody cases when he or she has not been an evaluator for the court.

We will discuss how authorities have viewed *expert roles* and take the position that it is more helpful and more consistent with the realities of forensic practice in child custody to describe and delineate the forensic *services* being provided by an expert rather than view the process of forensic mental health work in terms of discrete roles and functions. These roles and functions need to be identified, but they overlap in most cases where forensic experts are utilized (Mnookin & Gross, 2003).

EXPERT ROLES AND FORENSIC SERVICES IN CHILD CUSTODY

This is an article about the services forensic experts provide to the court and attorneys and the challenges confronted by experts who venture into the forensic arena. We are concerned only with custody cases that reach the litigation phase and involve a child custody evaluation. This is a very small percentage of divorces. The vast majority of divorcing parents informally settle their parenting issues. We will not discuss the specifics on how mental health professionals should properly conduct comprehensive child custody evaluations. The reference for best standard of practice is well defined by professional guidelines (AFCC, 2006/2007; APA, 2009) and authoritative texts (Gould, 2006; Martindale & Gould, 2007). We focus on the role of mental health experts who offer consultation to attorneys in child custody cases and the services provided by experts who are hired, or “retained,” by attorneys to provide consultation on the mental health issues in the case, and, in particular, the review of the work of a custody evaluator appointed by the court. Experts who provide these services need to be highly trained and

experienced about how to conduct a child custody evaluation and to efficiently inform the court about issues relevant to divorce, custody, and the best interests of children. The reviewer of the evaluation, or the work product (i.e., report and underlying data collected on the family), may or may not eventually testify in the case. We will argue that all retained experts are consulting to some degree and it is virtually impossible to be a testifying retained expert without consulting with the retaining attorney. This is an important issue since some authorities have proposed that it may be best for testifying experts to limit the amount of consultation they provide (Tippins, 2009; Martindale, 2006a). We argue that these limitations reflect choices made by an attorney for purposes of legal strategy rather than ethical concerns such as a dual role issue, e.g., consulting, reviewing, and testifying.

Roles or Services?

Forensic experts who are involved in custody cases can be differentiated in several key ways. First, there are evaluators and consultants. Custody evaluators are almost always appointed by the court. They may testify if there is a hearing in the case. A very high percentage of cases settle after the evaluator issues a report. Consultants are always in the role of a retained expert. An attorney may hire the expert to provide consultation services on the case with the understanding that the expert will not become a testifying expert. This role and service is that of a trial consultant and a non-testifying expert-consultant. In other instances, an expert is retained to conduct a work product review. If the expert forms an opinion that the custody evaluation was seriously flawed, then he or she is likely to become a testifying expert-consultant. Some degree of consultation on testimony and trial strategy is likely to occur. This is the role of testifying expert-consultant as a reviewer. Other experts may be asked to provide educational or instructional testimony for the case on research and professional literature that is relevant to the case. Instructional testimony is usually part of the testimony of both the evaluator and reviewer.

The current terms of art for mental health experts in child custody litigation (e.g., evaluator, reviewer, instructor or educator, and consultant) have traditionally been referred to as different “roles” for which the child custody professional community is attempting to define standards (Martindale, 2006a). There has been discussion in attorney trade journal publications on whether an expert should fulfill both reviewer and consultant roles (Tippins, 2009; Martindale, 2006a, 2010). Forensic psychologists have cautioned about a dual role conflict if an expert provides consultation services before conducting a work product review (Heilbrun, 2001). The problem with a role analysis in addressing ethical issues is that roles may be poorly defined and overlapping in their purpose. We propose that the word “services” be used to describe the participation of experts in child custody litigation and

that the descriptions of these services include three elements: a description of the service, a description of data or subject matter upon which the task is conducted, and a description of the client for whom the task is performed. For example, what has traditionally been referred to as simply a “child custody evaluation” might be more appropriately identified as “a child custody evaluation of the parties for the court.” What has traditionally been referred to as simply a “review” would be “a review of the evaluation report for a party or the court.” A “consultant” would more appropriately be described as “a consultant regarding the evaluation/case for a party.” Further, we suggest that experts who are providing review testimony or instructional testimony are both consultants in their role as retained experts. They are providing the service of forensic expert testimony, and to varying degrees, case consultation. The evaluator, reviewer, and primarily instructional/educational experts are all providing the forensic service of some degree of instructional testimony for the court. These forensic roles are not distinct.

While we believe it is more helpful to discuss types of forensic services that are provided by evaluators and consultants, it is not possible to completely forsake a role analysis for descriptive purposes. It is important to keep focused on the function of the forensic roles, and not just the label that is attached to the forensic role. There is overlap in ways that are not entirely clear with a superficial examination. For example, the evaluator *reviews* material, documents, records, and reports as part of his or her role and function as an evaluator. Conversely, the reviewer *evaluates* the quality of the evaluator’s work product-report and also the professional behavior of the evaluator to determine if the work product quality is discrepant from standard of practice and professional guidelines and standards. In a sense, the evaluator is being evaluated. If, as occasionally will be the case, the evaluator issues a “rebuttal report,” in response to an expert reviewer report, then the evaluator is reviewing and evaluating the reviewer’s work product. These principal forensic roles in custody disputes can thus be overlapping. The four forensic roles found in custody litigation and their functions are described as follows. The evaluator, reviewer, and instructional testimony experts are testifying roles. The trial consultant is a non-testifying expert to advise the attorney. In addition, the reviewer of an evaluation that is of adequate quality probably will not become a testifying expert and even remain anonymous.

Custody Evaluator

The evaluator is almost always court-appointed after an agreement and stipulation by the parties on the choice of an expert child custody evaluator. If attorneys cannot agree on an evaluator, then the court will designate and appoint one. Typically, several names will be submitted to the court. The evaluator, then, is the court’s expert to conduct an objective, impartial, and

neutral evaluation that is appropriate to address the issues and questions for the dispute. The order of appointment usually will describe the issues and scope of the evaluation though usually it will be stated generally and there may be a standard form that simply has several boxes checked to denote the issues and scope, for example, parenting time, decision making, and/or relocation. If there is a very salient issue, such as allegations of domestic violence or substance abuse, then these may be specifically described. Usually, the evaluation will be expected to cover general issues of custody and to be comprehensive. In some jurisdictions (i.e., CA) an order will be issued for a focused-evaluation on one issue and will be very brief in terms of time frame and extent of data collected. The evaluator needs to take care not to exceed the scope of the appointment order, for example, do not investigate relocation if the issue is “not on the table” or contained in the order (see, *In re Marriage of Seagondollar*, 2006). The evaluator can also seek clarification of issues from the attorneys and/or court on what can be investigated or what data can be considered. For example, an evaluator may seek clarification of whether data from a criminal investigation of a parent can be considered in the custody evaluation, if the parent was acquitted. Reviewers usually will examine these issues of scope and consideration of issues and data. Evaluators should always execute a “stipulation” or “statement of understanding” about how forensic and practical matters will be handled in the evaluation so as to make the ground rules and expectations clear. Procedures, fees, and many issues that surround custody evaluations will be described in the stipulation.

If the case goes to trial, it may be expected the evaluator will provide instructional testimony on the research and relevant literature for the court as way to explain the basis or rationale for any opinions and recommendations. The evaluator can also be expected to provide a Case Analysis of the issues in the case in the context of the data and professional literature. This analysis is often accomplished by the use of explanatory concepts (e.g., attachment, parent conflict, parenting style).

The forensic services provided by the evaluator are forensic evaluation and testimony. In some jurisdictions, *ex parte* communication with either attorney during the evaluation or after the release of the custody report may be strictly forbidden by court rules (i.e., CA). In other jurisdictions, consultation with either attorney after the release of the report may occur to facilitate the evaluator’s testimony or clarify opinions expressed in the report. If this occurs, the evaluator is also providing a form of forensic consultation service.

Reviewer

The role of reviewer has been described by a limited literature (Gould et al., 2004; Martindale & Gould, 2008; Stahl, 1996; Austin et al., in press;

Martindale, 2010, 2006a; Tippins, 2009). There is agreement that a principal function of the reviewer is to conduct an objective and balanced review of the evaluator's work product-report and to provide candid and fair feedback to the retaining attorney on the strengths as well as any weaknesses of the evaluation. There is consensus in the extant publications that the reviewer will assess the quality of the methodology and procedures in light of the understanding of standard of practice parameters and relevant professional guidelines and standards (i.e., APA, 1994, 2009; AFCC, 2006/2007). There is consensus that the reviewer can and should address the extent that the evaluator's opinions, conclusions, and recommendations offered seem to correspond to the data that were described in the custody report. It appears there would be consensus that the reviewer can appropriately communicate to the retaining attorney on what the correct or more plausible interpretations are concerning issues in the case. Reviewers can address whether the evaluator seemed to adequately and fairly consider all of the relevant alternative hypotheses, or whether there may be confirmatory bias in favor of a preferred hypothesis. It appears there would be agreement among experts that the reviewer could opine to the attorney on what opinions on the ultimate issues seem to fit the case and data as described in the report, but the reviewer would not express ultimate issue opinions in testimony or a report, as we discuss more fully in the following.

There is consensus in the field that the proper reviewer procedure or protocol is to first make it clear to the retaining attorney that the expert-consultant will conduct an objective review of the custody report and formulate opinions about both the strengths and weaknesses of the evaluation (Martindale & Gould, 2008; Austin, Kirkpatrick, & Flens, submitted). A retainer contract should be executed that makes it clear there is no expectation to only focus on deficiencies and that the objective review will be conducted before any consultation services are provided. This is a necessary first step if the reviewer hopes to have any credibility should he or she become a testifying expert (Austin et al., submitted).

The reviewer has a confidential relationship with the retaining attorney in the initial consultation-review stage due to attorney-client privilege (*Hickman v. Taylor*, 1947). Any work product generated by the expert as part of consultation is protected by the attorney-client work product doctrine. If the reviewer communicates to the attorney that there are serious deficiencies based on a reading of the custody report, then it is likely the reviewer will provide testimony as a service. Once the reviewer is identified to the other side and court as a testifying expert the protections of privilege and the work product doctrine are lost and the rules of discovery apply.

After an intense review of the custody report, if the reviewer finds deficiencies, the reviewer will want to examine the evaluator's case file and do further review and analysis. There is a lack of consensus on the issue of whether reviewers can and/or should express opinions on mediate or

specific issues based on a review of the evaluator's data. This might be construed as opining about the psychological characteristics of one of the individuals who has not been personally examined and evaluated by the reviewer. This issue of the extent that a mental health professional, who is not an evaluator, can express opinions about persons based on reviewing information is probably much more complicated than is usually appreciated. There is a lack of consistency between ethics and law on this issue as well as ambiguities in the APA Code of Ethics. This is discussed in more detail in the following sections.

The data in the evaluator's case file, including the custody report, are available to the reviewer and thus become the reviewer's data as well. There are numerous advantages to the reviewer and evaluator working from the same dataset. A potential and common problem is poor quality in the evaluator's record in terms of legibility of notes and organization of the file so that it becomes difficult to discern what the data are that served as the basis for the evaluator's opinions (see Austin et al., in press). Generally, the reviewer should not seek or receive new data so as not to appear to slip into the role of evaluator (see Martindale, 2006a; Martindale & Gould, 2008). The same could be said for a reviewer who conducts any interviews with parties or children (AFCC, 2006/2007; Martindale, 2006a). The problem with this is probably not an ethical dual role issue, as the AFCC model standards suggest. Rather, the more pertinent issue is that the reviewer who collects new data is unlikely to have adequate and sufficient data on which to base an opinion (APA, 2002; Rule 9.01(a)). This is similar to the fact that one of the main elements in a review would be to determine if there was an adequate basis for the evaluator's opinions (Martindale, 2006b). The reviewer thus would not be helpful to the court.

The ethical reviewer strives to be helpful to the court and aligned with the data and to provide a balanced analysis of the issues. What is not clear is whether a reviewer should receive and review new data that either stem from new events after the completion of the custody evaluation, or that were data overlooked or not obtained by the evaluator (e.g., school records, DPS records). One viewpoint is that the reviewer role should only encompass a review of the evaluator's methodology and steer clear of any reviewing of material outside of the evaluator's case file (Martindale, 2006b; Martindale & Gould, 2008). The alternative view is that the reviewer should be able to consider, that is, review, "new data" either from new events or obviously pertinent data that were overlooked by the evaluator, in order to be helpful to the court (Austin et al., in press). We also suggest that the court would expect the reviewer expert to opine about new, ostensibly important data. The reviewer could opine about the data in a descriptive way, for example, what the new data are and the implications for the evaluator's opinions. The evaluator, if provided with the data, could opine about the implications for his already expressed opinions. This issue of reviewing new, important data

as a reviewer demonstrates the problem of being too focused on roles and prescribed or proscribed behaviors that attach to that role. If the focus is on the forensic service of reviewing pertinent data and documents, either within or outside of the evaluator's case file, then the issue returns to whether there was an adequate basis for the expert's opinion.

Another issue concerning reviewers considering new data is when retained experts listen to courtroom testimony in an extended custody trial. Experts routinely listen to the testimony of other experts in custody trials and even more so in civil litigation. Judges often expect the experts to do so for the purpose of trying to reconcile differences in opinion. Experts on direct and cross-examination will be asked questions about the other expert's testimony. The testimony of the evaluator becomes part of the evaluator's expert output for the court and so it is not problematic for the reviewer to respond to the testimony. It is part of the review process. When the evaluator is asked to respond to the reviewer's rebuttal testimony, then the evaluator is reviewing or "evaluating" the testimony of the reviewer. The evaluator may also have read a report by the reviewer. When a reviewer listens to the testimony of other experts (e.g., therapist, parenting coordinator, school counselor) and fact witnesses, then these are "new data" for the reviewer. Seldom would the evaluator sit in court and listen to other experts (who are not rebuttal experts) or fact witnesses. The evaluator may have interviewed most of such witnesses for the evaluation and report.

This raises the question of whether the reviewer-retained expert may or should opine about the data gleaned from listening to and observing evidence presented in trial. In this instance, admissibility of such testimony would be viewed under the helpfulness standard. The judge and attorneys would be aware that the expert is observing and either had not yet been called as a witness, or could be called as a rebuttal witness and potentially make use of these new, evidentiary data. In a recent case, two of the authors were retained, reviewed experts and listened to testimony in 18 days of trial in a high profile, high conflict case. The witnesses included the parties, a long list of experts who testified on salient issues, teachers, school psychologist, treating psychiatrists, occupational therapists, and a parenting coordinator. Both attorneys and the judge expected the reviewers/experts to respond to questions based on the three weeks of trial.

The issue of whether reviewers should be able to opine on issues based on observing and assimilating testimony of others is not addressed in the literature or professional guidelines. Courtroom-generated data clearly constitute new data. If the reviewer's role is restricted to a methodological critique, then there it might seem there is no reason for the reviewer-retained expert to observe any testimony other than that of the custody evaluator. However, other expert witnesses sometimes reveal data in court that were not obtained by the evaluator or they might dispute the data that were reported by the evaluator.¹ In the aforementioned case, the evaluator

destroyed the written notes and created a typed summary of each interview. Professionals who were collaterals in the evaluation testified that the summaries were not correct descriptions of what they had communicated to the evaluator. If the reviewer-retained expert's role is defined that he or she will address mediate issues in the case, based on the evaluator's data, or respond to hypothetical questions about a fact pattern, as permitted in all jurisdictions, then the new data from courtroom observation can be helpful to the court. A key question, then, for the field of child custody and organizations that promulgate professional guidelines is how or should a retained forensic expert be able to address such new data. The court will clearly think this will be helpful and should be permissible. Is this a situation where law and professional ethics are in conflict and the expert witness should refrain from considering the data and therefore choose not to be helpful to the court? The limits and ethics of reviewers' opinion testimony are discussed in future sections.

Instructional Testimony

Instructional (or educational) testimony is defined as expert testimony, including opinion testimony that is explicitly designed to inform and educate the court about specialized, technical, or research-based knowledge as opposed to case-specific testimony. It may involve a summary of research on a particular issue, description of concepts, theory or theoretical frameworks, and forensic models that are relevant to child custody issues. As noted in this article, all testifying experts provide instructional testimony to some degree (Mnookin & Gross, 2003), but they will vary on the emphasis in their testimony and the degree, if any, that the instructional testimony is applied to the facts of the case via use of hypothetical questions.

Some experts provide exclusively instructional or educational testimony. Evaluators enhance case-specific testimony by including a discussion of concepts and research to explain opinions and justify specific recommendations. A reviewer may combine instructional testimony on important issues in the case with case-specific testimony about the forensic quality of the custody evaluation. For example, a reviewer may educate the court about research on overnights in addition to critiquing how the evaluator formulated opinions about this issue based on the data gathered and case circumstances.

When experts combine instructional testimony with their role an overriding goal is to be helpful to the court. Instructional testimony complements and is compatible with the main function of the role of evaluator and reviewer alike. Informing the court about research, theory, and practical considerations surrounding the process of crafting suitable parenting plans is an added benefit to the court. If research hypotheses are relevant and prominent in a case, then the court will benefit from different experts applying the

research to the facts of the case, when questions are posed to the expert in hypothetical form.

Mnookin and Gross (2003), in a very scholarly treatment of expert testimony of all sorts, describe instructional testimony and distinguish it from “fact-specific opinion” testimony based on an “assessment” of the data in the case. They indicate that trying to understand the different expert roles “can make the boundaries fuzzy” because all expert testimony is designed to educate the court:

Experts, to state the obvious, educate—they provide lay people [and judges] with useful information. In court, the only function of an expert witness . . . is to educate, in this very general sense: to supply information that helps the trier of fact make decisions . . . instruction [means providing] general information about some common issue or phenomenon . . . rather than specific information about a particular problem or case . . . Instruction provides background knowledge, but not the case-specific answers. An expert witness who gives purely instructional testimony in a trial can literally repeat the same performance in a different courtroom with a different cast of characters, in another case with a parallel issue with different specific facts. Instructional testimony may lead to an inference that suggests or even requires a specific decision in a case, but it is not itself information about any specific case (pp. 160–161).

Mnookin and Gross (2003) indicate that the boundaries get “fuzzy” between the expert who has conducted the specific assessment in the case and the expert who gives general testimony, then responds to hypothetical questions about a fact pattern, which is allowed under the Federal Rules of Evidence (2008, Rule 702). They cite the well-known example of the expert who is asked about the cause of death of a “hypothetical person” based on a set of presumably hypothetical facts, “but the actual question would incorporate a whole series of *particular* facts that happened to be in evidence in the case at hand, and the expert would provide an opinion assuming these many ostensibly hypothetical facts to be true” (p. 161).

The reviewer must become fully informed about the case-specific information. When there are deficiencies in the evaluation the reviewer is providing assessment of the quality of the assessment of the case-specific data and issues. A reviewer could generally do an adequate assessment of the quality of the methodology in the evaluation without the entire case file, and often the interview notes are not legible. However, in order to adequately determine if the evaluator’s opinions correspond to the data, then one obviously needs to review the data. The reviewer will provide case analysis on the issues as part of this assessment in terms of the adequacy of the evaluator’s analysis. The reviewer will sometimes provide instructional testimony as part of educating the court on salient issues that the evaluator may have addressed or on research related to these or other issues. The reviewer’s

testimony thus may be providing *instruction* and also addressing case-specific information that was part of the evaluation. As Mnookin and Gross (2003) point out, “Whatever the dividing line between instruction and assessment, most experts—and certainly most expert witnesses—go back and forth across it and provide both types of information” (p. 161). This statement reflects our position on why it is more helpful to discuss forensic services and the purpose of the service for the court and retaining attorney rather than saying the service is specific to a forensic role.

When experts are dedicated, instructional testimony experts they can be described as providing “case blind didactic testimony” (Martindale & Gould, 2008):

A case-blind educator provides information concerning some well-researched dynamic and leaves it to the court to decide how (if at all) the dynamic that has been explained is applicable to the issues in dispute. The concept is not a new one; other writers (for example, Vidmar and Schuller, 1989) have used the term “social framework testimony.” Our preference for the term “case-blind didactic testimony” lies in the fact that the words “case-blind” emphasize the importance of diligently maintaining constructive ignorance of the facts of the case (p. 536).

Martindale and Gould put forth an interesting concept, but this practice is rare and probably limited to those situations where a retaining attorney believes the court needs to be educated on the research or a particular concept, or perhaps a forensic model for evaluators. When the expert is “blind” to the facts, then the expectation would be that the testifying expert’s credibility would be enhanced. If, however, a hypothetical question and fact pattern would be posed, then that strategic advantage might be lost. It is much more common for the testifying expert to be aware of the facts of the case when general testimony is provided. Usually, the expert will be asked to apply the research to a hypothetical fact pattern.

Non-Testifying Consultant

The final forensic role in child custody litigation is that of the expert who strictly offers consultation service for the retaining attorney as a non-testifying consultant. The range of services include educating the attorney and her client about the professional literature on important issues; helping with trial strategy and with the development a “theory for the case” for litigation; and drafting questions for direct and cross-examination of witnesses. The consultant often would sit near the attorney during trial to provide advice. The work product produced by the non-testifying consultant would be covered by attorney-client work product privilege and could not be discovered by the other attorney. The consultant usually would also meet with

the attorney's client and could gather information from the client for the purpose of trial preparation.

As discussed in the following, there are different viewpoints in the field on whether or to what extent a testifying expert should provide consultation services to the retaining attorney. The pros and cons will be discussed. When the testifying expert, a reviewer, also provides consultation, then a draw-back from a legal strategy point of view, for example, the retaining attorney's perspective, is that the work product would be discoverable or available to the other side (Tippins, 2009).

Case Analysis as Part of Expert Opinions and Testimony

We define case analysis as the description, consideration, and analysis of the salient case issues, psycho-legal questions, and mediate and ultimate issues in the context of the case. It often involves integrating relevant research, conceptual frameworks, and practical considerations with the issues of the case. Case analysis involves either an implicit or explicit analytical process in every custody evaluation and we recommend it should be an explicit component in the work product review as well. Part of what the reviewer is assessing is the quality of the evaluator's case analysis. If the evaluator used a concept or series of concepts or drew upon the research literature to frame the issues and data for the court and to offer explanations for the opinions, then the reviewer will assess how the "social framework" was constructed and applied, as well as if it was a relevant and useful framework. A framework can be misleading or based on a weak or inconsistent research literature. For example, an evaluator might use Parental Alienation Syndrome to describe a mother's attempts to limit the father's involvement or to want to set conditions for parenting time. The reviewer might suggest, however, that a history of intimate partner violence, as contained in the evaluator's investigation, provided rational reasons for the mother's actions and a better framework and concept would have been to view the mother as a "protective gatekeeper" (Austin & Drozd, 2006; Austin, Flens, & Kirkpatrick, 2010). All of the testifying forensic roles usually include case analysis and educative testimony to some degree. Case analysis is a central forensic service that is integrated into the roles of evaluator and reviewer in their reports and testimony.

Combining Forensic Expert Services

A limited literature has addressed whether forensic experts can ethically combine the forensic roles of case consultation and giving expert testimony. The main concern is whether the process and sequence of providing consultation services somehow creates bias or other distortions into the expert's opinion (Heilbrun, 2001). It seems mandatory that a reviewer should first conduct an objective review before agreeing to engage in case consultation, for example,

advising about case issues and strategy, and preparing questions for expert examination (Martindale & Gould, 2008; Heilbrun, 2001). In a role analysis, this issue would be framed as the advisability of operating in a “hybrid role” that combines the functions of reviewing work product, consultation, testimony, and providing instructional testimony. We believe this issue is better described as an expert combining forensic services and trying to do so in an ethical manner as prescribed by the APA code of ethics (APA, 2002, Rule 9.01) so the expert is required to base opinions on necessary and sufficient information.

Forensic experts always combine services as described previously. When the reviewer or evaluator includes case analysis and instructional testimony there is no conflict in function. The experts are trying to be helpful to the court. Conflicts potentially arise when the retained expert provides more than one forensic service and there is reason to believe that something has compromised or impaired the expert’s objectivity. Our view is that some degree of consultation is necessary to facilitate the efficient production of the expert’s testimony and opinions. The principle of the retained expert striving to be helpful to the court by remaining true to the data is discussed in the following sections. We suggest that consultation with the retaining attorney is necessary to be most helpful to the court though there could be a debate about what types of consultation are advisable for the reviewer. We suggest the reviewer should assist the attorney in the preparation of questions for his or her direct examination in order to be effective and helpful to the court.

Two authorities, publishing in attorney trade journals, have recommended that it would be best, or ideal, if the reviewer-testifying and forensic consultation roles are bifurcated and not mixed in these functions (Tippins, 2009; Martindale, 2006a, 2010). Both Tippins and Martindale emphasize the need for the proper sequence for the reviewer to first conduct an objective review before considering an offer to provide consultation services and that this approach should be in a retainer contract (Martindale, 2010). Neither authority seems to feel there is anything inherently unethical about providing both services to the attorney, even though it might be construed as a “dual role” situation for the expert. Both authorities point out that the issue of combining roles (e.g., services) relate to the perception of credibility and the testifying reviewer-consultant being subject to discovery. Therefore, the main drawback with combining services would be one of legal strategy and effectiveness of the expert witness. Both authorities indicate the ethical reviewer can be helpful to the court and potentially effective if there is balanced analysis and allegiance with the data rather than assuming the attorney’s advocacy position. Both authorities also recommend that the best approach is to bifurcate the roles so there is a testifying reviewer-expert who does not consult and a consulting expert who does not testify. The two experts, then, would be part of the attorney’s “litigation team” (Tippins, 2009). Our position is that

it is unrealistic to believe the testifying reviewer would not provide some degree of consultation to enhance the efficacy of her testimony, even though it might be that little or no written work product would be produced. Tippins (2009) acknowledges that most clients cannot afford to hire two experts. Martindale (2010) also points out while retained experts-reviewers can conduct objective reviews and that stay aligned and loyal to the data, the reviewer must be able to resist the built-in pressure to try to please the person who is paying for the services which Martindale describes as “retention bias.”

Retained, testifying experts are often not perceived as objective in the same way as the court’s appointed neutral expert in the sense that the court expects the expert’s testimony will generally be supportive of retaining attorney’s legal position. However, for the ethical reviewer, it should be the case that he or she is testifying because their objective view of the data is consistent with the position of the attorney who offers them as an expert. This is part of the need of the expert to be true to the sworn oath for testimony. Retained experts are supposed to give an objective and fair analysis of the data in the evaluator’s file, the research literature, and an accurate application to the issues in the case. It is up to the court to decide if the retaining expert’s testimony is reasonably objective, accurate, and credible despite the fact that the retained, testifying expert is being retained, presented by, and paid by the retaining attorney.

The cross-examining attorney will try to portray the retained expert as a “hired gun,” even if steps are taken for the expert not to provide any consultation. Providing consultation services in addition to testimony has the added drawback that the testimony may be perceived as less credible because the expert may be perceived by the court as too aligned with the position of one side. But this is not always the case, particularly when experts remain objective and true to the data of the evaluation. The court often is an astute discerner of competent, balanced, and accurate testimony. The data are what they are, so to speak, and the issues are what they are. The court will usually know which expert “got it right” in the description and analysis of the data. The downside to the expert combining forensic services of testimony and consultation, then, is one of effectiveness and perceived credibility. It is not unethical to do so according to any professional guidelines or standards. When other types of professionals provide forensic testimony (e.g., medical malpractice), it is often the case that consultation is combined with testimony. The expert may even start out strictly as a consultant and then it is decided he will provide testimony.

Our experience is that testifying reviewers, who also provide consultation, can be very effective witnesses and perceived by the court as credible depending on their qualifications, reputation, and the balance and accuracy in their testimony. While the retaining attorney may cringe at the thought of his consulting expert’s work product being disclosed (e.g., questions prepared for direct or cross-examination), the ethical retained expert would

not despair because the focus would be on being true to the data and issues. The reviewer who helps the attorney prepare questions for his own testimony, or that of others, is helping to facilitate the discovery of relevant and important evidence for the court. The reviewer-consultant role and function thus can be viewed as being helpful to the retaining attorney and court. It would appear when the retained expert first conducts the objective review before moving into providing complementary consulting services, then this would be acceptable practice. When the expert starts off with consulting and then moves toward reviewing and testifying, then this would be an unacceptable sequence of forensic services if the reviewer's objectivity is lost. We feel if there was a bright line rule that reviewers could not also consult with the retaining attorney, then there would be rare for attorneys to retain reviewers.

Some commentators view combining of testimony and consultation as a dual role issue. It would seem Heilbrun (2001) takes this position only if consultation services, or consulting role, precedes the objective work product review. The AFCC Model Standards (Rule 8.5) discusses a dual role problem for reviewers (ironically, titled "Role Delineation in Consulting") only in regard to reviewers needing to avoid having a relationship with either party in the litigation in light of the professional relationship with the retaining attorney. Combining work product review, expert testimony, and consultation for the same retaining attorney is not a multiple role. They are separate services provided to the same person and in the same general consulting role with the attorney.

This situation, in our opinion, would not fall within the APA standard involving multiple relationships. The APA Code addresses the issue of multiple relationships in terms of the likelihood of impairing objectivity, effectiveness, or exploiting others: "A psychologist refrains from entering a multiple relationship if the multiple relationship could reasonably be expected to impair the psychologist's objectivity, competence, or effectiveness in performing his or her functions as a psychologist, or otherwise risks exploitation or harm to the person with whom the professional exists. Multiple relationships that would not reasonably be expected to cause impairment or risk of exploitation or harm are not unethical" (APA, 2002, Rule 3.05(a), p. 1065). One could argue that combining testifying and consulting would inherently impede objectivity, but authorities have written eloquently how retained experts routinely face and can overcome this challenge by being true to the data and issues and providing balanced reasoning and analysis for the courts, as is common practice in civil litigation (Shuman & Greenberg, 2003). Forensic psychologists routinely work within this context of tension between law and professional ethics and follow the dictum of the forensic Specialty Guidelines to strive for objectivity in analysis and opinions no matter who has requested the forensic services (Committee on Ethical Guidelines for Forensic Psychologists, 1991). The provision in the APA Code about the risk of exploiting the person in the

professional relationship is a realistic concern, but it should be manageable for the ethical expert.

EXPERT TESTIMONY AS SOCIAL INFLUENCE

All forensic testifying experts are engaging in a process of social influence and persuasion (Shuman & Greenberg, 2003). They are communicating with the court and trying to influence the opinion of the decision maker on a variety of mediate and ultimate issues in the case. The expert wants the court to view him or her as knowledgeable, comprehensive, and insightful on issues that need to be addressed. The expert wants the court to believe that he or she figured out the main issues and basically “got it right” on the ultimate issues. In the case of custody disputes this process of social influence takes the form of describing the issues in the case, presenting data on the results of investigation of the parties and children, and providing very specific recommendations on a parenting plan the court should address. In most jurisdictions, the judge presiding over a child custody dispute expects evaluators to formulate and express ultimate issue opinions and recommendations. Experienced evaluators are accustomed to judges generally following their recommendations thus completing the process of social influence.

Experts, evaluators and reviewers, want to be helpful to the court, but they also want to be effective. Both experts may be offering instructional testimony on issues and the professional literature. The evaluator offers opinions on a best interest parenting plan and gives testimony on the rationale for the recommended plan for parenting time and how decision making should be shared. The reviewer’s communication and attempt at social influence with the court come in the form of opinions on the quality of evaluation, including whether the data support the evaluator’s ultimate issue opinions. The reviewer will communicate if the methodology and overall quality of the evaluation meets minimum standards in terms of methodology and analysis. It is not often that the court will disregard completely the forensic findings and opinions, but this does happen when there is a very poor evaluation and the reviewer provides influential testimony. The reviewer provides an important checks and balances function for the court.

HELPFULNESS IN THE ROLE AND EVALUATOR AND REVIEWER

The main purpose of expert testimony is to be helpful to the court. This is true for the role of the testifying court evaluator and all testifying retained experts. Whether the purpose of the retained expert is to provide rebuttal testimony to the evaluator’s testimony and/or give general, instructional testimony, the overriding principle to guide the evaluator should be to try to be helpful to the court. This is accomplished by every expert attempting to be true to the

data and issues, and to present a balanced analysis for the court. Only in this way will the court view the expert as credible. Only by attempting to provide a balanced analysis that treats the data and issues with objectivity will the expert be effective and persuasive. The reviewer needs to solve the puzzle of how to be effective and persuasive by appearing to be aligned with the data and not the advocacy of the retaining attorney (Tippins, 2009). Everyone is aware that the retaining attorney has hired the expert to provide forensic services (as opposed to being appointed by the court) and expects the reviewer's testimony will be favorable to her position and client so it is a challenge for the retained expert to achieve credibility in the eyes of the court. This is a commonplace legal context for the forensic mental health expert in civil litigation.

An "integrated approach" to providing ethical testimony in the role of the retained expert is presented by Shuman and Greenberg (2003). It will be easier for the retained expert who only provides general, educational testimony, for example, describing the research and professional literature, to be perceived as credible compared to the reviewer. For example, if the expert appears to testify about the issue and research on overnight parenting time for very young children and does not critique how the evaluator handled this position, then the issue of alignment probably becomes a non-issue. Our ethics require us to be objective in our interpretation of data and analysis. This point can be made by the reviewer in testimony and a forensic report which may serve to bolster credibility. The Specialty Guidelines (Committee on Ethical Guidelines for Forensic Psychologists, 1991) describes the need for objectivity no matter who has requested the forensic services:

In providing forensic psychological services, forensic psychologists take special care to avoid undue influence upon their methods, procedures, and products, such as might emanate from the party to a legal proceeding by financial compensation or other gains. As an expert conducting an evaluation, treatment, consultation, or scholarly/empirical investigation, the forensic psychologist maintains professional integrity by examining the issue at hand from all reasonable perspectives, actively seeking information that will differentially test plausible rival hypotheses (p. 341).

The controlling federal case on admissibility for expert testimony (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 1993) described the main rule on expert testimony in the Federal Rules of Evidence (Rule 702) as the helpfulness standard (*Daubert*, p. 2796). Most states pattern their rules of evidence after the federal rules. On this issue, then, the law and professional ethics converge. If the court believes the reviewer, or any retained expert, is balanced, objective, and accurate in his or her opinions, then credibility will be established.

The federal standard on admitting and weighting expert testimony (*Daubert*, 1993; FRE, 2008) is defined in terms of adequacy of the data,

reliable procedures or methods, and correct application of principles and methods. It would seem that this would be consistent with a practical application of gatekeeping by family law judges. Courts want to determine if the evaluator collected the necessary types of data from multiple sources and using multiple methods; if the analysis was cogent, appeared balanced, and offered without bias; and if the salient questions were reasonably addressed. Reviewers would be expected to apply the same questions in the work product review.

When, or if, the court examines the admissibility of expert testimony by a reviewer it would not be on criteria of reliability or the typical *Daubert* criteria (1993) because there has not been an evaluation. The concept of reliability would not be relevant. Testimony that is strictly a review of methodology and assessment of the quality of the evaluation will be gauged in terms of the general interpretation of helpfulness. If the reviewer provides instructional testimony on research and professional consensus of opinion on an issue (e.g., child alienation), then this could be challenged on the grounds of relevance and validity of the research cited.

SCIENTIFICALLY GROUNDED EXPERT TESTIMONY AND ADMISSIBILITY

Expert testimony by evaluators is expected to be scientifically-grounded to some degree (Gould, 2006; Gould & Martindale, 2007) which is not say that custody evaluations do not depend on clinical-forensic skill and experience. Evaluators exercise discretionary judgment on what questions to ask and data to collect and utilize clinical judgment to form hypotheses that need to be investigated. Psychologist child custody evaluators (and reviewers) need to be mindful of their "Code of Conduct" that states as a standard "Psychologists' work is based upon established scientific and professional knowledge of the discipline" (APA, 2002, Rule 2.04, p. 1064).

There clearly is an art as well as a science dimension to forensic custody evaluation. The evaluator needs to have knowledge that is grounded in the scientific research literature in psychology and related fields. The evaluator needs to employ reliable and valid procedures for collecting data. Interviews and observations of parents and children, and interviews with third parties, are the main source of direct data for the evaluator. These are qualitative, descriptive data not derived from scientific procedures. The overall evaluation protocol, however, needs to be systematic, comprehensive, and use multiple methods and multiple sources of information so that it is likely to produce the necessary and sufficient data to answer the required questions. Psychological testing will be the most scientific data in an evaluation. The evaluator needs to be mindful not to use blatantly unreliable procedures and base decisions in whole or part on those unreliable procedures.

For example, if an evaluator used human figure drawings and relied upon the drawings to draw conclusions about a child or parent, then there would be a risk of those opinions being disregarded by the court. When it is competently designed and implemented, the overall package of the custody evaluation will be seen by the court as sufficiently reliable and robust in order to be admitted into evidence and considered. How scientific a custody report is will vary with the expertise and approach of the evaluator. Courts will at least view custody evaluations, reports, and testimony as potentially useful “specialized knowledge.” Shuman and Sales (1998) suggested that custody evaluation expert testimony would fall in the category of “clinical opinion testimony” and, thus, would not need to be held to a standard of being sufficiently scientifically grounded, or based upon reliable and valid scientific methodology and knowledge.

The standard or degree of rigor that courts use to assess the admissibility of expert child custody work product and testimony is important for both the evaluator and reviewer to know. The evaluator needs to plan and gauge his or her approach and choice of methodology on an understanding of this issue if he or she wants to be effective and persuasive as an expert. The reviewer similarly needs to be cognizant of this issue and the standard being employed by the court as the regulator of expert testimony in order to effectively communicate with the court about the quality of the evaluator’s work product. Generally, issues of admissibility and weight assigned to expert opinion testimony need to have a reliable and valid basis. The reviewer can assist the court in this assessment of the evaluator’s work product.

In FRE (2008), Rule 702 states:

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case” (p. 127).

The three tenets in this core rule govern issues of admissibility and/or giving weight to expert testimony. They alert the evaluator and guide the reviewer in the assessment of the evaluator’s work product. The custody evaluation with poor methodology that is conducted by a qualified evaluator is unlikely to be excluded by the court, but it may be given little or no weight if the court finds the reviewer’s testimony convincing.

CONFIRMATORY BIAS AND THE ETHICAL EXPERT

In a survey of judges and attorneys, Bow and Quinnell (2004) reported that the issue that most concerned the legal professions in custody evaluation was

the need for objectivity by the court evaluator. It is not uncommon for experienced Reviewers to encounter work products where there appears to be bias operating in terms of data interpretation and opinions. Evaluators are the court's expert and they are charged with an obligation to conduct a neutral and objective evaluation. Bias may arise from personal experience with a litigant during the evaluation; from selectively considering preferred hypotheses or social frameworks; from misguided interpretations of a primary explanatory concept; or from a selective view of empirical generalizations from the research literature.

Custody litigants are an extreme group in a number of ways. First, statistically, most child custody cases settle without a court hearing, estimated to be about 90% of all cases (e.g., Melton et al., 2007). Of the cases that do not settle, only in a small percentage of these lead to a CCE. Thus, it is this small group that gets funneled toward an evaluator. Second, custody litigants report a high frequency of intimate partner violence (Newmark, Harrell, & Salem, 1995) and this can elicit negative feelings by an evaluator; this can be called, "parent conduct bias." Third, it is accepted by forensic evaluators that there will be a high percentage of difficult personalities or even parties with personality disorders within this population. For these reasons, the evaluator needs to guard for negative reactions (Martindale & Gould, 2007) or even counter-transference (Pickar, 2007). Evaluators, not infrequently, will find these folks to be not very likeable. The "likeability bias," either being "turned-off" by the actions and/or personality of an offensive litigant or being impressed by positive qualities and/or charm of a litigant, is not uncommon. Evaluators need to be very vigilant and on guard for this affective bias. A less likeable parent may be the more effective parent who does a better job in managing the needs of the child. Reviewers sometimes find, unfortunately it seems, the evaluator simply liked one parent more than the other and this seems to account for the recommendations to the court.

Reviewers can provide a useful service to the court and the litigation by monitoring the evaluator's report for potential bias. In this sense, Reviewers are a type of conscience for the profession and watchdog for the court. Perhaps the most common error and source of bias is that of not considering, in an open and fair way, all of the relevant, alternative rival hypotheses on each important issue. The concept of confirmatory bias was borrowed from cognitive psychology and introduced to the field of child custody (Martindale, 2005). Due to review work that is being provided across the United States, it is not unusual for judges and attorneys to express familiarity with the concept and issue of confirmatory bias. This term refers to the natural human cognitive process to interpret and filter information in way that favors a preferred hypothesis. When this process is operating, confirmatory information is noted and weighted, while disconfirming data are discounted, ignored, or given little weight. It is assumed this is an unintentional or unconscious process. When it appears the evaluator is intentionally ignoring information,

then the sister concept of confirmatory distortion (Martindale, 2005) applies and can be used to describe this phenomenon to the court. For example, in a recent case, the evaluator testified that psychological testing was the least important data source in the evaluation. As a result, extreme psychological testing profiles were given little weight on the implications for parenting and co-parenting. This was the evaluator's opinion, even though there were corroborating data from other sources and procedures that could have been predicted from the actual psychological testing data. In another case, the evaluator described how he tried to talk a mother out of wanting to relocate with her young child from one state to another, so there was a preconception or negative mindset about relocation. When there is clear and potent confirmatory bias or confirmatory distortion operating, the quality of the work product will be poor and there will probably be a fatal flaw in terms of the custody evaluation's helpfulness to the court. Confirmatory bias is operating when the evaluator clearly is not gathering or interpreting data in a balanced and even-handed way.

Using preferred concepts and not relying on the research literature can also produce a confirmatory or distorted cognitive process. For example, it is not unusual to concepts such as primary caregiver, primary attachment figure, parental alienation, or "batterer" to be a primary force in data interpretation and formulating opinions. Concepts and research can be extremely helpful in framing issues for the court, educating the court, and interpreting the data if they do not interfere with fair consideration of alternative hypotheses. Concepts help the evaluator interpret and explain data. They assist the reviewer in critiquing the evaluator and in providing instructional testimony, but "concept-generated confirmatory bias" can occur for either the evaluator or reviewer. Substantive issues, and the evaluator's personal and professional opinion about that issue, can also create a cognitive lens to drive a one-sided analysis. Evaluator's opinions about relocation, which can be based on scientific research, can result in a distorted analysis of the issue. Our experience as evaluators suggests an anti-relocation basis is widespread even though very few states have a legal presumption for relocation by the children with a custodial parent (Atkinson, 2010). This type of "issue-generated confirmatory bias" (Bala, 2004) is also encountered when other substantive issues are salient and the focus of the case. In addition, recent advances in the field on intimate partner violence (IPV) have encouraged evaluators and other professionals to approach this issue with an open mind and an understanding that there are many behavioral variations when IPV has occurred in relationship (Kelly & Johnson, 2008; Ver Steegh, 2005). Some evaluators still follow the view that all IPV represents "battering" in a stereotyped approach to the issue.

Our experience is that testimony by reviewers can also come across as biased just as evaluator's are frequently perceived as biased. It is understandable when the reviewer appears to be marching to the beat of the retaining

attorney. Reviewers who are not following their ethical guidelines of strict adherence to objectivity and following the data (Committee on Ethical Guidelines for Forensic Psychologists, 1991) can thus play into the preconception of the defensive evaluator or others in the case that the reviewer is nothing more than a “hired gun.” And, well, he or she may be, if the reviewer is caught up in his or her own bias and distorting data interpretation from the evaluator’s file with the goal of supporting the advocacy position of the attorney rather than advocating for the data (Tippins, 2009).

ETHICAL REVIEW WORK: HIRED GUN OR FORENSIC QUALITY CONTROL?

Evaluators often look upon Reviewers as a “hired gun” or as someone who is tainted and inherently biased in favor of the retaining attorney. The retained expert-reviewer may be seen as a mercenary. The other attorney will usually try to portray the retained expert-reviewer in this way. However, as noted previously, an evaluator who is reviewed may not see or ever even know about a reviewer who found the work product to be satisfactory, gave the retaining attorney candid feedback that the evaluation was acceptable on methodology, and opined that the evaluator seemed to get it right for the court on the ultimate issues. The ethical reviewer who describes the strengths as well as weaknesses for the retaining attorney may instead be asked to continue as a consultant, or be discharged from further service. We find that attorneys often are astute consumers of mental health work products. They generally identify situations where the evaluation is inadequate, or that “I know bias when I see it.” Thus, the frequency of evaluations/reports that are of excellent quality rarely may be identified for a review. The astute referring/retaining attorney presumably also will know an accurate and well-balanced report/evaluation when he or she sees it.

Because a review of the quality of the evaluator’s work product is not a dichotomous assessment, a review typically finds some weaknesses in method and procedure, but also strengths. It also may be the case that while the evaluation contained questionable use of procedures, data gathering, or formulation of opinions, the reviewer concluded that the evaluator “basically got it right for the court” on the bottom line of the recommended parenting plan. For example, the evaluator may have misinterpreted the psychological testing data, but it appears the necessary and sufficient data were competently collected so that the ultimate issue recommendations seemed to be adequately supported. The ethical reviewer will not suggest that the attorney rush through a small opening created by one methodological flaw to try to discredit the entire report. Doing so would be to waste the court’s time on irrelevant detail.

The ethical responsibility of the reviewer is to be true to the data that are collected by the evaluator and to objectively consider all plausible

interpretations of the data. Our ethical responsibility as reviewers is the same as the evaluator; to “get it right” for the Court with an eye towards the Court’s role to make a determination on the best interests of the child. The ethical analysis and testimony of the reviewer requires the same type of stringent adherence to objectivity and to be scientifically-grounded in the analysis just as the evaluator.

Ethical reviewers and consultants cannot remove themselves from their scientific training to pursue the “truth.” By being truthful in their testimony and following the data, the reviewer as a testimonial expert can be helpful to the court and the legal process and therefore indirectly be helpful to the children and parties. Perhaps the strongest argument that can be made that for ethical reviewer testimony is the obvious point that the expert is under oath to tell the truth. The reviewer cannot escape the adversarial context of litigation which is designed to help the court uncover the truth and the best interests of the children by way of hearing advocacy from two competing advocates. The testimonial expert, evaluator or reviewer, does not get to ask the questions. By testifying in a truthful and balanced manner on the work product quality and data in the case file, it is inevitable that the attorney who is performing either direct or cross-examination will want to highlight the strengths of his or her case. Questions the expert wants to be asked may not be posed, but there is high probability they will be. After all, when the expert is cross-examined it is the attorney’s turn to “testify” by asking leading questions and uncovering every relevant issue. What the expert wants to communicate should not be constrained too much if both attorneys are doing their job well. Plus, some judges are disposed to grant experts fairly wide latitude in answering questions. We have found that the best outcome in reviewer testimony is when the judge “psychologically hires” the reviewer’s opinion and asks questions of the reviewer from the bench.

While the ethical duty of the retained, testifying expert is to be true to the data and issues and to be helpful to the court, the expert would not be testifying if the thrust of the testimony was not going to be helpful to the retaining attorney and his or her client, for example, one of the litigants. For this reason, the other attorney on cross-examination will try to paint the reviewer as a “hired gun” and will ask how much money the expert is receiving for his services. In very complicated cases with large case files, the fees can be quite impressive so the other attorney will argue there is a correlation between the size of the fees and how favorable the testimony is for the other side. Martindale (2010) suggests there can be “retention bias” where the expert may feel “subtle pressure to please those who have paid for our services” (p. 6). He adds, “It becomes the obligation of retained testifying experts and the attorneys who retain them to take reasonable steps to reduce the impact of retention bias.” The way to overcome unintentional pressure to please would seem for the retained, testifying expert to stay mindful of the issues, the obligation to be helpful to the court, and to be true to the data

in the case file and evidence presented, if the reviewer observes testimony. Tippins (2009) points out the credibility of the testifying, retained expert will be enhanced if the expert is perceived as advocating for the data and not for the litigation position. Judges are looking for accurate testimony regardless of the forensic role of the expert. The passage from the Specialty Guidelines (Committee on Ethical Guidelines for Forensic Psychologists, 1991), as quoted previously, needs to be kept in mind as an ethical mantra. This standard on the evaluator's neutrality and close adherence to the case data should be part of a reviewer's professional policy and should be described in the retainer contract with the attorney.

Martindale (2006a) points out that there are different types of "hired guns" in the role of retained expert, or ethical and unethical review testimony:

There is an important distinction between principled hired guns and unprincipled hired guns. Unprincipled hired guns will testify to any opinion that someone pays them to testify to, will cite research that they know to be flawed, and will be unconcerned that they are misleading judges. Principled hired guns are knowledgeable and familiar with applicable research; able to discern the difference between sound methodology and flawed methodology; able to interpret test data without computer-generated interpretive reports; and, have formulated opinions on various issues based upon their studies. Inevitably, there will be times when an opinion held by the practitioner is precisely the opinion that a particular attorney wants a judge to hear. When the principled expert is paid to come to court and explain that opinion to the judge, the expert is being paid for time expended and nothing more. The principled retained expert takes seriously the most basic obligation of an expert witness—the obligation to assist the trier of fact (p. 4).

The tension between the various views of retained experts-reviewers as hired guns—can be diffused if the reviewer remains mindful of the helpfulness principle. The attitude of the judge towards the rebuttal expert, after all, is more important than the perceptions or assumptions of the evaluator. Martindale (2006b) again describes how the issue of helpfulness underlies ethical reviewer testimony and serves to enhance the expert's credibility:

Testimony by reviewing experts is most effective when they are perceived by the court as practitioners with a genuine interest in educating judges concerning good methodology, flawed methodology, and the ways in which methodological errors can lead evaluators to make misguided recommendations. If experts who are endeavoring to educate judges regarding methodological flaws in evaluations are asked on cross-examination whether they have met with or discussed the case with any of the interested parties, the usefulness of the experts' testimony is dependent upon their responses. Just as evaluators must employ sound methodology or face the consequences of not having done so when they

encounter a skilled cross-examining attorney, so too must Reviewers employ sound methodology or face well-deserved jabs at their credibility during cross-examination. Experts who have had contact with litigants, family members, or allies are likely to be perceived as less objective, as less devoted to sound methodology, and, therefore, as less credible (p. 4).

OPINIONS REVIEWERS CAN OR SHOULD OFFER

Rules of evidence (FRE, 2008, Rule 702) permit experts to offer opinions on mediate or ultimate issues except for the question of mental status at the time of offense for criminal defendants (i.e., *mens rea*). There is controversy in the field of child custody on whether evaluator experts should address the ultimate issue (Tippins & Wittmann, 2005; Bala, 2005), but there appears to be a consensus that judges expect the court's expert will make specific recommendations on parenting time, decision making, and other salient issues (Stahl, 2005; Gould & Martindale, 2005; Martin, 2005).

While there are voices in the field that question how scientifically-grounded custody evaluators can be (Emery et al., 2005), it is clear that federal and most state rules of evidence direct the court to use the lens of a scientific or reliable foundation for testimony. The methods of the expert need to rely on general acceptance, reliability, and/or a systematic approach to the issue before the court so the opinions are more likely to be accurate and/or reliable. The FRE states experts "may testify . . . if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case" (p. 126). The FRE and comparable state rules do not differentiate between court-appointed and retained experts and the expectation in the drafting of the rules was probably that most often the experts would be retained experts in either civil litigation or criminal proceedings. There are few constraints on what opinions the expert can express as long as the criteria of relevance, reliability, and helpfulness are met. There is no distinction between experts who have conducted a case-specific assessment vs. instructional expert testimony (i.e., see Mnookin & Gross, 2003 discussed previously). However, as we will see, the discipline of psychology and its ethics code asserts this distinction is very important. It is this tension in the ethics code that poses difficulties and limitations for the opinions the reviewer can or should express.

While the literature on the reviewer role and services is limited and guidelines not yet developed, there appears to be disagreement on what opinions reviewers can or should offer in a custody case. We feel the field of child custody evaluation and the discipline of forensic psychology needs to closely examine this issue. The issue concerns to what extent the retained expert, who has not performed a direct assessment, can opine on the issues

directly in dispute in the case and/or offer interpretations and opinions concerning the case-specific data. Specifically, if the reviewer has closely examined the custody report and the entire case file, should the reviewer be limited to opining only on the quality of the evaluator's methodology? That would seem to be only partially helpful to the court. Can the reviewer opine if the evaluator's opinions correspond to the underlying data, or in other words, if the evaluator correctly interpreted the data? It appears the emerging literature from noted experts in the field agree the reviewer should be able to opine about the evaluator's methodology and if the data support the proffered opinions (Martindale, 2010; Martindale & Gould, 2008). However, these experts and pioneers in the field seem to hold the position that the reviewer ought not to offer opinions on substantive issues in the case based on the data reviewed and certainly should not opine about the psychological characteristics of the individuals who have not been personally examined.

The legal parameters vary substantially between jurisdictions on whether a reviewer should be able to opine based only on a review of records, documents, and so forth, and without a direct assessment of an individual. For example, in North Carolina, case law specifically holds that an expert can opine about an individual based on a sufficient review of records and written information and without having directly evaluated the individual in question (*State of North Carolina v. Daniels*, 1994). However, in many other jurisdictions the mental health expert needs to personally examine the person in order to give expert testimony about a mental condition or diagnosis (*Holloway v. State*, 1981; *People v. Wilson*, 1987). The psychological or psychiatric interview has long been viewed as an integral part, and possibly necessary component, before an expert offers an opinion about a clinical diagnosis (*Rollerson v. United States*, 1964).

The issue here is multifaceted. It concerns whether the expert who has not personally evaluated a party or child can or should offer an opinion about personal or psychological characteristics, offer a diagnosis, or address the ultimate issues for the court. It is well established that experts can give opinions in response to questions about hypothetical issues and facts if the facts have been admitted into evidence or are expected to be placed into evidence. The U.S. Supreme Court ruled in *Barefoot v. Estelle* (1983), a fairly famous death penalty case:

Jury should not be barred from hearing views of the state's psychiatrists along with opposing views of the defendant's doctors as to defendant's dangerousness . . . expert opinions, whether in form of opinion based on hypothetical questions or otherwise, ought in general to be deduced from facts that are not disputed, or from facts given in evidence, but may be founded upon statement of facts proved in the case rather than upon personal knowledge, and even in cases involving death penalty there is no constitutional barrier to applying ordinary rules of evidence governing use of expert testimony including use of hypothetical questions . . . (p. 463).

Thus, experts, who have not performed a direct assessment, but are fully informed about the facts in the case (and a custody evaluator's entire file) may opine in response to hypothetical questions about fact patterns that essentially refer to the real facts or data in the case. Responding to questions in hypothetical form thus creates an ethical safe haven and is permitted under FRE 702, *Barefoot v. Estelle 1983*, and most state case law. In this context, the APA Code of Conduct (2002) needs to be closely examined to give guidance to reviewers as to what types of opinions they should express. It should be noted that the field of psychology seems to impose much more stringent standards on its members on this issue than any other profession. In addition, we are unaware of any national organization guidelines on forensic practice for any other mental health profession, e.g., licensed professional counselors or social workers.

This issue of the limits of expert opinion, where there has not been a personal assessment, is one where what may be permitted legally by rules of evidence, case law, and trial courts may be discrepant from professional ethics, and specifically, the APA Code (2002). But, the issue is far from clear. It is a situation where experts must try to reconcile any conflict or tension between professional ethics and what may be legally permitted (Shuman & Greenberg, 2003).² Our position is the APA Code does not preclude reviewers from expressing a wide range of opinions on the data contained in the evaluator's case file and evidence that may be heard in court based on the three parts of Rule 9.01, so long as there is sufficient and adequate basis for doing so (e.g., Rule 9.01(a)). These opinions need to be closely attached to the data reviewed concerning behavioral patterns and function and not be loosely applied to a person's general characteristics or a diagnosis. A colleague remarked to us that this rule (9.01(c)) seemed to be ambiguous if a reviewer could opine about individuals' characteristics (but not patterns of behaviors or events or results of psychological testing). We believe 9.01, as interpreted in its plain language, is not ambiguous if the three parts are interpreted in concert, as APA clearly intended since part (b) refers to part (c).

The APA Code, Rule 9.01(a) states:

Psychologists base the opinions contained in their recommendations, reports, and diagnostic or evaluative statements, including forensic testimony, on information and techniques, sufficient to substantiate their findings (p. 1071).

We suggest this is the primary guidance for all expert opinions by psychologists. They need to be informed opinions based on adequate data.

The APA Code, Rule 9.01(b) states:

Except as noted in 9.01(c), psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements or conclusions (p. 1071).

We suggest the field of psychology has focused almost exclusively on this part of 9.01 as if the third part of the rule did not exist. Part (b) has been the “Holy Grail” of psychological evaluation, and we do not disagree with the position that personal evaluation is extremely important. The question here and for the field is whether it is a *necessary* condition to form opinions about individuals, behavior patterns, and issues to be considered to have directly assessed the person. Personal or direct evaluation is what psychologists generally do, but there are many contexts where opinions are called for without a personal, direct examination. For example, could the psychologist, after reviewing a school psychology report with all the testing and observational data available, not render an opinion if the student had a learning disability? The third part of 9.01 (and as noted in part “b”) shows that it was the intent of APA that direct examination should not be a necessary condition to opine about an individual. This is not an ambiguous statement.

The APA Code, Rule 9.01(c) states:

When psychologists conduct a record review or provide consultation or supervision and an individual examination is not warranted or necessary for the opinion, psychologists explain this and the sources of information on which they based their conclusions and recommendations (p. 1071).

To demonstrate that the main issue in any discussion about what opinions a forensic mental health expert can and should express (or a clinical psychologist/psychotherapist for that matter) is the adequacy of the foundation for the opinions and whether or not the opinion is free of bias or other distorting influences. The forensic context of the retrospective assessment of mental states in litigation (Simon & Shuman, 2002) is based the review of documents and records, or perhaps collateral interviews as well. Ogloff and Otto (1993) point out “Effective mental health assessments typically require the participation of the examinee . . . However, some legal questions arise that necessitate an examination of a decedent’s mental state prior to his or death” (p. 607). Forensic experts have long been asked to and permitted to opine about the mental states of the deceased in testamentary capacity evaluations. When the question before the court concerns the state of mind of an individual when he executed a will and whether “undue influence” or “coercive persuasion” was placed on that person by another person (Simon, 2002a), then the court naturally would like some assistance from psychology or psychiatry. The person is obviously not directly evaluated. The expert reviews records and statements of third parties about the circumstances facing the person when the will was executed and the behaviors of the person accused of manipulating the vulnerable elderly person, now deceased. In order for the expert to render an opinion on the decedent’s state of mind, he or she has to believe there was the necessary and sufficient information available. Another similar forensic example involves the assessment of a

deceased state of mind to determine the cause of death on the issue of whether it was a suicide, perhaps at the request of an insurance company. The evaluation involves a “postmortem suicidal risk assessment” and opinions about the cause of death and the person’s state of mind, including or related to the person’s psychological characteristics and clinical diagnosis, if any (Simon, 2002b). In other contexts, psychologists are called upon to perform a “psychological autopsy” and express an opinion sometimes for the purpose of criminal prosecution (Ebert, 1987; Ogloff & Otto, 1993).

We suggest there is an ethical foundation for reviewers, especially if they are combining instructional testimony with a work product review, to offer opinions, not just about methodology and about the synchrony between the evaluator’s opinions and data. We assert the quality and appropriateness of an expert’s opinions concerns the sufficiency of the database for the expressed opinion. We believe the APA Code clearly permits reviewers to issue considered and well-reasoned opinions about mediate issues and specific interpretations of the meaning of data. Generally, the reviewer will not want to offer opinions that are explicitly about a person’s psychological characteristics or to suggest a diagnosis. However, for example, if the evaluator suggested a parent had a narcissistic personality disorder and this was a reason for limiting parenting time, then the reviewer might opine if the data supported the evaluator’s opinion on the clinical diagnosis. Conversely, if the evaluator gave little weight to a pattern of behavioral data and psychological testing that clearly was consistent with a narcissistic personality disorder, including data on its impact on parenting behaviors, then the reviewer would want to address that issue. To refrain from saying there were overwhelming data in support of a hypothesis that the parent’s behaviors and testing were consistent with a personality dysfunction and that there were indications of impaired parenting function would seem to be ignoring the elephant in the room and not being helpful to the court. Out of deference to ethical etiquette, however, the retaining attorney would want to phrase the question to the expert in hypothetical form. When reviewers come to know a family through an intensive review of a child custody case file, we suggest, the reviewer comes to understand the family and the important issues. We suggest reviewers recognize that generally there really is no benefit to offering opinions on specific characteristics of the parents or children, or to explicitly offer a diagnosis, but there can be benefit to offering opinions in response to hypothetical questions on a variety of mediate, or focused issues that will be helpful to the court.

We suggest there is not a logical or discernible difference between the evaluator responding to hypothetical questions, and the reviewer doing the same based on the same, sufficiently detailed dataset and fact pattern. The evaluator has the benefit of direct observation that yields nonverbal information, but if there is an exact record in the case file (e.g., electronic recordings), then this difference largely disappears. When an evaluator goes to court to testify it may have been many months or over a year since the evaluation

was completed. Our experience is that the evaluator-expert witness not infrequently is vague or rusty about details in the data. The difference between the thorough reviewer and evaluator can start to diminish. The reviewer may know the evaluator's data better than the evaluator. We do acknowledge the important difference between an evaluator and reviewer, but they should be operating from the same dataset. We do not recommend that reviewers should opine specifically about parties' psychological diagnoses or characteristics, but hypothetical questions are very legitimate as established by the highest court. We feel reviewers can help clarify for the court the interpretation of the evaluator's data and the issues in the case. A useful perspective is that the evaluator almost always *reviews* documents and records as part of the custody evaluation, and the reviewer always *evaluates* the child custody report and case file.

Courts do not want the hands of helpful experts to be tied so they feel constrained to not address the data and issues. In most cases, where there have been problems with the forensic quality of the custody evaluation identified, the reviewer should provide (1) a balanced analysis of the strengths and weaknesses of the evaluation; (2) reinforce the opinions of a quality evaluation or identify any fatal flaws; (3) be able to opine about mediate issues on the correct interpretation of data on salient issues; (4) respond to hypothetical questions about a fact pattern that resembles the case-specific data that the reviewer has learned; (5) provide instructional testimony and case analysis; (6) offer opinions about a person's psychological characteristics or diagnosis only in a hypothetical form; (7) not opine on the ultimate issues about custody, even if presented in hypothetical form; and, (8) be able to provide opinions about interpreting the data reviewed on behavioral patterns, meaning of events and actions, psychological testing, and records. We suggest the psychologist-forensic reviewer needs to be able to directly interpret and opine on data that are reviewed if there is an adequate and sufficient basis for those opinions. The advisability on what opinions are offered by the reviewer expert probably should come from a pragmatic analysis of the context of the case and the extent of information available to the reviewer-expert just as *Daubert* (1993) proposes a pragmatic analysis for trial court judges. The ethical reviewer should recognize when there is a sufficient knowledge base for the opinions expressed.

PRACTICE TIPS

1. Custody evaluators need to be mindful of the standard of practice, professional guidelines and standards, and the professional literature in approaching every case.
2. Custody evaluators should anticipate the possibility that they will be subject to a work product review as they design and conduct every evaluation.

3. Reviewers need to conduct their practice with keen mindfulness about being an ethical reviewer while acknowledging the reality that they will be perceived as biased and aligned with the position of the retaining attorney.
4. Reviewers should strive to be perceived by the court as aligned with the data in the case, or giving high quality and insightful analysis.
5. Helpfulness to the court should be the guiding principle for reviewers. Helpfulness depends on conducting an objective review of the custody report and giving balanced, candid feedback to the retaining attorney.
6. Reviewers need to discuss with the retaining attorney the expectations concerning the consulting service to be provided as a testifying expert. Will the reviewer help prepare questions for his or her direct examination? Discuss trial strategy? Educate the attorney, and subsequently the court, about relevant research on issues in the case? Help prepare questions for the evaluator or other witnesses in order to facilitate the elicitation of the “best testimony” for the court?
7. Reviewers need to be mindful that the attorney-client and work product privileges will disappear when they are identified as a testifying expert. This fact means the reviewer needs to be mindful on what types of written work product is produced as part of consulting with the attorney.
8. Reviewers and evaluators need to vigilantly follow the ethical standards that require their opinions to be based on sufficient and the necessary information in order to answer the questions for the court.

SUMMARY

The forensic roles that experts fulfill and the services they provide in child custody litigation were described. These roles are custody evaluator, reviewer of the evaluator’s work product, provider of instructional-educational testimony, and the non-testifying forensic consultant. We recommended that emphasis be placed on the types of forensic services that experts provide instead of roles since experts provide multiple services in most cases. We distinguished between testifying and non-testifying experts. Emphasis was placed on the role of the reviewer of the work product of the child custody evaluator. It is essential that reviewers first conduct an objective review of the custody report before providing any consultation services. Helpfulness to the court and objectivity in analysis was presented as the guiding principle for both the neutral court evaluator and the retained expert in the role of reviewer. Instructional testimony is sometimes the focus of a retained, testifying expert, but is found to some degree in all expert testimony. How the retained expert in the role of reviewer can establish credibility depends on the adherence to the principles of helpfulness and objectivity. Judges will recognize balanced and well-reasoned analysis and

testimony and the accuracy of opinions in light of the data and evidence in the case. Other dimensions of expert testimony and issues concerning the ethics of providing testimony in the role of reviewer were discussed: (1) what opinions reviewers can express; (2) if reviewers can consider data not gathered by the evaluator, including courtroom testimony; (3) the need to help the court assess the reliability and validity of an evaluator's methodology and approach in light of legal standards and rules of evidence; (4) application of the APA Code of Ethics to reviewer services and testimony; and, (5) the function of reviewers to assist in monitoring custody evaluations as forensic quality control as opposed to seeing reviewers as hired guns. The article reminds the reader of the need for ethical review work in child custody cases based on professional standards, and also, the oath that each testifying expert swears to before taking the witness chair.

NOTES

1. While standard of practice requires custody evaluators to create and maintain a very high quality case record, this often is not the case. Interview notes often are approximations or narrative and not verbatim. The only "true interview data" would be collected by electronic recording, which is easy to accomplish, but few evaluators do so.

2. Professional organizations have weighed in is support of the position of requiring direct, personal examination of a person to offer opinions about psychological-psychiatric diagnosis in the form of guidelines, standards, and amicus briefs in appellate cases, American Psychological Association, American Psychiatric Association, and American Bar Association.

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