Published in *Family Law Quarterly*, Vol. 48, No. 1 (Spring 2014) p. 1–34.

Science, Mental Health Consultants, and Attorney-Expert Relationships in Child Custody

MILFRED D. DALE* & JONATHAN W. GOULD**

I. Introduction

Judges adjudicating complex child custody cases and attorneys litigating these disputes are increasingly turning to science and expert mental health consultants for help. Attorneys responding to the court's increasing reliance upon social science evidence have engaged mental health experts in new ways. These new ways may involve consultation with the attorney about the quality of the forensic mental-health evaluation, various forms of litigation support for the attorney, educational and emotional support for the parent, testimony at trial, or some combination of these activities.[1]

This article reviews the need for attorneys to recognize the important role social science has often come to play in child custody decisions and how expert mental health consultants may be needed for effective advocacy. We propose that attorneys adopt a pragmatic, process-oriented, and rules-based approach to decision-making in attorney-expert relationships. Central components in this process are considerations of attorney-client privilege, work product doctrine, and discovery related to the work of experts. Maximizing the utility of experts requires an understanding not only of the social science research literature on child custody issues, but also of how jurisdiction-specific law and profession-specific ethical prin-

* Ph.D., J.D., and an attorney and psychologist in independent practice in Topeka, Kansas.

** Ph.D., A.B.P.P. (Forensic), and a psychologist in independent practice in Charlotte, North Carolina, and author. The authors would like to thank Nicki Fisher, Mary Kay Kisthardt, and Linda Elrod for their helpful comments on earlier drafts of this article.

1. Andrew I. Schepard, Reporter, *Mental Health Consultants and Child Custody Evaluations: A Discussion Paper*, 49 FAM. CT. REV. 723, 737 (2011) [hereinafter *MH Consultants*].

ciples for different mental health experts fit into individualized case plans and trial strategies. Depending upon the jurisdictional rules, individual fact patterns, and case theories or trial strategies, any one of these factors may be temporarily or permanently elevated in importance during a custody case or trial.

The pragmatic approach outlined in this paper recognizes the complex dynamic process of child custody disputes and the attorney's needs for scientific sophistication to help the court adequately distinguish between valid and junk science. When court-appointed experts are involved, attorneys sometimes perceive a loss of control over their case.[2] Attorneys can better maintain appropriate control both by understanding the role of science and by using their own experts. Family law attorneys must "know enough" social science to be effective advocates. Particularly when issues in cases become complex, they must know where to get help and how to use that help. Appropriate mental-health-expert consultation can be invaluable and is, at times, necessary. The different kinds of assistance attorneys can receive from mental health experts can be tailored to the needs of the case. We describe the possible activities and functions that a privately retained expert can perform.

II. The Increasing Use of Social Science in Child Custody Disputes

Like society in general, the law has been increasingly influenced by a "third culture" demanding integration of scientific understanding into legal decision-making.[3] Family law is no exception. Social science research and methods are increasingly important in judicial and legislative decision-making[4] as family law attempts to assimilate an increasingly sophisticated scientific culture.[5] Social science research has often been used in the service of legislative and adjudicative fact finding.[6]

---

2. Anthony Champagne et al., *Are Court-Appointed Experts the Solution to the Problems of Expert Testimony?* 84(4) JUDICATURE 178 (2001).

3. JOHN BROCKMAN, THE THIRD CULTURE (1995).

4. Robert F. Kelly & Sarah H. Ramsey, *Perspectives on Family Law & Social Science Research: Assessing and Communicating Social Science Information in Family and Child Judicial Settings: Standards for Judges and Allied Professionals*, 45 FAM. CT. REV. 22 (2007) [hereinafter *Perspectives*].

5. DAVID L. FAIGMAN ET AL., SCIENCE IN THE LAW: STANDARDS, STATISTICS & RESEARCH ISSUES, VII (2002).

6. Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942) (noting courts balance "legislative facts" from law and policy with "adjudicative" facts from individual cases). *See also* Sanford I. Braver & Jeffrey T. Cookston, *Controversies, Clarifications, and the Consequences of Divorce's Legacy: Introduction to the Special Collection*, 52 FAM. REL. 314 (2003) ("[C]ourts and legislatures frequently pay close attention to reports of research and attempt to intelligently weave empirical results into reforms and updated and sensitive policies.").

Use of social science research to support legislative changes in the past forty years has a history of both successes and failures. Research has been used to formally add to the list of best interests factors in state statutes, or to support presumptions channeling judges toward a favored result (e.g., child safety when there is domestic violence, joint legal and physical custody, remaining neutral or favoring a relocating parent, etc.).[7] Yet caution is needed. Political advocates and lobbyists often select those research results that most strongly support their positions, while ignoring or minimizing important limitations of a supportive study or the contributions of research supporting a different view.[8] The power and specter of bias must be considered because, even after reviewing the same research, practitioners and scholars often reach different conclusions about the meaning of the results or how the results should be applied.

A. Three Major Ways to Think About Science

There are three major ways to think about science. The first and most common way is to view science as "scientific knowledge," as if science were a collection of facts that are so well established that they are generally considered truth.[9] The second definition of science focuses less on facts and more on process. "Scientific methodology" comprises procedures used to generate questions and select methods for empirically and systematically studying the identified phenomena.[10] And finally, science also includes "scientific theories" or systems of logic for developing inferences and interpretations, and analyzing the accumulated information in a manner most likely to produce valid answers to the questions.[11]

Family law attorneys who add understanding of scientific process and behavioral science literature to their legal skills are better able to evaluate the quality of mental health reports and testimony, present courtroom arguments that sharpen their case strategy—including their expert's presentation, and effectively critique the opponent's expert. Family law attor-

7. Lyn R. Greenberg, Dianna J. Gould-Saltman, & Robert Schnider, *The Problem with Presumptions—A Review and Commentary*, 3 J. CHILD CUSTODY 139 (2006).

8. Philip M. Stahl, *Avoiding Bias in Relocation Cases*, 3 J. CHILD CUSTODY 109, 111 (2006) (arguing a "careful reading" of three amicus briefs in a California relocation case illustrated how analyses of "much of the same research data" could result in "opposite conclusions").

9. Daubert v. Merrill Dow Pharms., 509 U.S. 579 (1993) (stating "the word 'knowledge' connotes a body of known facts or ideas . . . accepted as true on good grounds").

10. *Id.* at 580 (noting "the adjective 'scientific' implies a grounding in science's methods and procedures").

11. *See* Robert F. Kelly & Sarah H. Ramsey, *Assessing and Communicating Social Science Information in Family and Child Judicial Settings: Standards for Judges and Allied Professionals*, 45 FAM. CT. REV. 22 (2007). *See also* General Electric Co. v. Joiner, 522 U.S. 136, 146 (1997) (holding that, "A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.").

neys must view and understand mental health testimony from both legal and scientific perspectives.[12] Expert mental health consultants can assist attorneys in gaining this knowledge and understanding.

Still, while social science research can provide valuable contextual information in custody disputes, it cannot tell us what the court's decision should be.[13] Social science research usually studies groups of people. Policy choices are normative choices, formed after weighing competing values and goals.[14] The legal profession cannot expect the black letter of "truth" from social science.[15] A judge's determination is formed after consideration of the facts of a case and the applicable law.[16] For these reasons and others, it is clear that "[t]he law should not, nor could it adopt the scientific perspective wholly and without qualifications."[17]

B. The Science of Court-Appointed Mental Health Experts

Family law until the 1980s followed the traditional legal practice of allowing each side to present evidence and testimony through privately retained experts, a practice that often resulted in "battles of the experts."[18] Testimony from evaluators retained by one party may, however, be given less credibility or weight by judges.[19] As a result, when an evaluation is indicated, most family law courts would prefer to appoint neutral evaluators.[20] Almost all of the current literature regarding custody evaluations assumes the evaluator is a court-appointed neutral with access to both parties and all of the involved children. Using neutral, court-appointed evaluators has been viewed as preferable because such experts should be better able to focus on the best interests of the child rather than the

12. JOHN A. ZERVOLPOULOS, CONFRONTING MENTAL HEALTH EVIDENCE: A PRACTICAL GUIDE TO RELIABILITY AND EXPERTS IN FAMILY LAW 4 (ABA 2008).

13. Sarah H Ramsey & Robert F. Kelly, *Assessing Social Science Studies: Eleven Tips for Judges and Lawyers*, 40 FAM. L.Q. 367, 379–80 (2006) [hereinafter *Eleven Tips*].

14. Sarah H. Ramsey & Robert F. Kelly, *Social Science Knowledge in Family Law Cases: Judicial Gate-Keeping in the* Daubert *Era*, 59 U. MIAMI L. REV. 1, 4 (2004) [hereinafter *Judicial Gate-Keeping*].

15. *Id. See also* ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 29 (2004) [hereinafter INTERDISCIPLINARY MODELS] (noting "Perfect empirical studies that definitively answer questions in individual cases simply do not exist.").

16. Ramsey & Kelly, *Judicial Gate-Keeping, supra* note 14, at 4.

17. FAIGMAN ET AL., *supra* note 5, at vii.

18. MARGARET A. HAGEN, WHORES OF THE COURT: THE FRAUD OF PSYCHIATRIC TESTIMONY AND THE RAPE OF AMERICAN JUSTICE (1997).

19. ALLEN E. BARSKY & JONATHAN W. GOULD, CLINICIANS IN COURT: A GUIDE TO SUBPOENAS, DEPOSITIONS, TESTIFYING, AND EVERYTHING ELSE YOU NEED TO KNOW (2002).

20. Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495 (2001) [hereinafter *High Conflict Custody*].

perspectives of parents.[21] Neutral evaluations have become useful tools in encouraging mediated or negotiated settlements because they are usually more comprehensive and can be less expensive.[22] Because of these perceived advantages, judges grant considerable deference to the recommendations of court-appointed evaluators when developing a custody award or parenting plan.[23]

Unfortunately, the quality of court-appointed expert evaluations, investigations, and reports lacks consistency.[24] On the one hand, parenting plan evaluations have become more sophisticated involving multiple procedures and references to social science literature about children and families of divorce. Second and third generations of books detailing comprehensive evaluation methodologies now exist.[25] The mental health community has developed evaluation protocols for a broad array of scenarios common to custody disputes, such as child alienation,[26] child sexual abuse,[27] domestic or interpersonal-partner violence,[28] gatekeeping,[29] and

21. SCHEPARD, INTERDISCIPLINARY MODELS, *supra* note 15, at 13.

22. Champagne et al., *supra* note 2.

23. Robert F. Kelly & Sarah H. Ramsey, *Child Custody Evaluations: The Need for Systems-Level Outcome Assessments*, 47 FAM. CT. REV. 286, 287 (2009); Timothy M. Tippins & Jeffrey P. Wittmann, *Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 FAM. CT. REV. 193 (2005).

24. James N. Bow, Michael C. Gottlieb, & Dianna Gould-Saltman, *Attorneys' Beliefs and Opinions About Child Custody Evaluations*, 49 FAM. CT. REV. 301 (2011); Robert E. Emery, Randy K Otto & William T. O'Donohue, *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6 PSYCHOL. SCI. IN THE PUBLIC INTEREST 1, 6 (2005); James N. Bow & Francella A. Quinnell, *Critique of Child Custody Evaluations by the Legal Profession*, 42 FAM. CT. REV. 115 (2004).

25. JONATHAN W. GOULD, CONDUCTING SCIENTIFICALLY CRAFTED CHILD CUSTODY EVALUATIONS (2d ed. 2007); MARC J. ACKERMAN, CLINICIAN'S GUIDE TO CHILD CUSTODY EVALUATIONS (3d ed. 2006).

26. Leslie M. Drozd & Nancy W. Oleson, *Is It Abuse, Alienation, and/or Estrangement? A Decision Tree*, 1 J. CHILD CUSTODY 65 (2004).

27. *See* Michael E. Lamb et al., *Structured Interview Protocols Improve the Quality & Informativeness of Investigative Interviews with Children: A Review of Research Using the NICHD Investigative Interview Protocol*, 31 CHILD ABUSE & NEGL. 1201 (2007)*; see also* DEBRA A. POOLE & MICHAEL E. LAMB, INVESTIGATIVE INTERVIEWS OF CHILDREN: A GUIDE TO HELPING PROFESSIONALS (1998); KATHRYN KUEHNLE, ASSESSING ALLEGATIONS OF CHILD SEXUAL ABUSE (1996).

28. William G. Austin & Leslie M. Drozd, *Judge's Bench Book for Application of the Integrated Framework for Assessment of Intimate Partner Violence in Child Custody Disputes*, 10 J. CHILD CUSTODY 99 (2013); Jonathan W. Gould, David A. Martindale, & Melisse H. Eidman, *Assessing Allegations of Domestic Violence*, 4 J. CHILD CUSTODY 1 (2007); Robert Geffner et al., *Conducting Child Custody Evaluations in the Context of Family Violence Allegations: Practical Techniques and Suggestions for Ethical Practice*, 6 J. CHILD CUSTODY 189 (2009).

29. William G. Austin, Linda Fieldstone & Marsha Kline Pruett, *Bench Book for Assessing Parental Gatekeeping in Parenting Disputes: Understanding the Dynamics of Gate Closing and Opening for the Best Interests of Children*, 10 J. CHILD CUSTODY 1 (2013).

relocation.[30] Collections of extensive research reviews on a broad array of relevant topics are available.[31]

On the other hand, even court-appointed evaluators may be biased against the litigants, fail to contact important sources, misinterpret test results, or lack knowledge of the latest research on the needs of children of divorce or separation.[32] The best interests of children are ill-served when flawed reports become the basis upon which the trier of fact rests his or her judicial decision.[33] A parent challenging the findings and recommendations of a court-appointed evaluator faces a formidable task and significant additional emotional stress and expense.[34]

C. Attorney Knowledge of Science Can Make a Difference

An attorney's knowledge about potentially controversial or unreliable scientific approaches can make a difference in adjudication of family disputes. For example, in the 1970s, psychological-parent theory greatly influenced custody decision-making. This theory proposed that children should be placed in sole custody with the parent with whom the child had the strongest existing affective bond, but provided few, if any, legal protections for the nonresidential parent, usually the father.[35] A study of 193 cases found that psychological-parent theory determined the custody decision when it went unchallenged. The study also found that rejection of the theory was more common when courts considered expert evidence on both sides of the question. Judges who were informed regarding the disagreements surrounding the theory were less likely to embrace outcomes consistent with it.[36]

---

30. William G. Austin & Jonathan W. Gould, *Exploring Three Functions in Child Custody Evaluation for the Relocation Case: Prediction, Investigation, and Making Recommendations for a Long-Distance Parenting Plan*, 3 J. CHILD CUSTODY 63 (2006); William G. Austin, *A Forensic Psychology Model of Risk Assessment for Child Custody Relocation Law*, 38 FAM. & CONCIL. CTS. REV. 192 (2000).

31. PARENTING PLAN EVALUATIONS: APPLIED RESEARCH FOR THE FAMILY COURT (KATHRYN KUEHNLE & LESLIE DROZD EDS., 2012); THE SCIENTIFIC BASIS OF CHILD CUSTODY DECISIONS (ROBERT M. GALATZER-LEVY, LOUIS KRAUS, JEANNE GALATZER-LEVY EDS., 2d ed. 2009).

32. Schepard, *MH Consultants*, *supra* note 1, at 730–31.

33. Jonathan W. Gould et al., *Critiquing a Colleague's Forensic Advisory Report*, 1 J. CHILD CUSTODY 37 (2004) [hereinafter *Critiquing Report*].

34. Leslie Eaton, *For Arbiters in Custody Battles, Wide Power and Little Scrutiny*, N.Y. TIMES, May 23, 2004, at 11.

35. JOSEPH GOLDSTEIN, ANNA FREUD, & ALBERT SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973).

36. Peggy Davis, *"There is a Book Out. . .": An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987).

D. Child Custody Disputes: Complexity Amidst Change

Complex custody disputes almost always involve not just one theory or one question, but multiple questions and competing theories about highly disputed facts. These factual disputes and the expert testimony addressing them involve formulating, hypothesizing, and developing opinions to numerous series of questions subsumed under multiple main questions.

> [D]etermining what is in the best interests of the child involves answering numerous subquestions about child factors, interfamilial and parenting factors, parent factors, and extrafamilial factors (citation omitted). Each of these factors is composed of subfactors that address separate factual questions about how the age of the child, the child's gender, and the child's cognitive and emotional development will affect current and future parent-child interactions and functioning.[37]

Best interests determinations are also predictions about moving targets. "The best interests principle requires a prediction of what will happen in the future, which, of course, depends in part on the future behavior of the parties."[38] The lives of children and parents do not stop when the divorce is filed. Completing the legal divorce can take months. Change may be the only constant at the time of divorce and for a considerable amount of time afterwards. Facts, situations, and people can, and often do, change. Family law attorneys must develop trial strategies adaptable to the facts and processes that evolve and unfold according to different timetables. Many attorney-expert relationship factors must be continuously weighed when developing trial strategies that are both cohesive and, when necessary, responsive to changes in the case.

III. Choosing the Right Expert and the Right Kind of Help

Family law cases often involve individual psychological and family problems that fall within the professional competence of psychiatry, psychology, and social work. Decisions on admissibility and the weight to be accorded an expert's testimony may hinge on the attorney's knowledge of whether the expert's testimony is accepted within the relevant scientific community or whether it has been subject to peer review. Today, in evaluating testimony from expert witnesses, the rules of evidence and prevailing case law may reference scientific terms like "base rates," "falsifia-

37. Daniel A. Krauss & Bruce D. Sales, *The Problem of "Helpfulness" in Applying* Daubert *to Expert Testimony: Child Custody Determinations in Family Law as an Examplar*, 5 PSYCHOL., PUB. POL'Y & L. 78, 96 (1999); *see also* LESLIE M. DROZD, NANCY W. OLESEN & MICHAEL A. SAINI, PARENTING PLAN & CHILD CUSTODY EVALUATIONS: USING DECISION TREES TO INCREASE EVALUATOR COMPETENCE & AVOID PREVENTABLE ERRORS (2013).

38. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 236, 252 (1975).

bility," "reliability," and "validity."[39] When faced with complex custody cases and litigation involving mental health experts, family law attorneys must "get smart" and, often times, "get help."[40]

Contemporary custody disputes frequently involve controversial theories and topics where even experts disagree. Family law attorneys need to understand both sides of current debates where the research data is limited, contradictory, or disputed. Family law attorneys who are not familiar with the social science research about factors associated with the best interests of the child standard, the limitations of this research, or with the professional guidelines or standards for evaluations, can be at a major disadvantage, particularly when faced with an adverse recommendation in a child custody evaluation.

Courts are more likely to order evaluations in cases involving complex allegations. For example, contemporary controversies surround cases involving infant attachment and questions of overnight stays of young children in parenting plans,[41] consideration of joint or shared custody when there is high conflict,[42] and disputes where allegations of domestic violence are countered with claims of alienation and restrictive gatekeeping.[43] The list of issues that elicit strong contradictory opinions about what is best for children is a long one.

Legal treatises about child custody emphasize matching the expert's qualifications with the issues in the custody dispute.[44] These treatises provide brief descriptions of the education, training, and methods of various experts, as well as checklists or lists of general questions to ask when choosing an evaluator. Some mental health professionals have scientific training, whereas others do not. Potential expert consultants must be vetted

39. *See* Daubert v. Merrill Dow Pharms., 509 U.S. 579 (1993).

40. American Academy of Matrimonial Lawyers, Bounds of Advocacy, Standard 1.1 (2000) (noting, "An attorney who cannot obtain competence through reasonable study and preparation should seek to withdraw or, with the client's consent, associate with or recommend a more expert lawyer").

41. *See* Jennifer E. McIntosh, *Guest Editor's Introduction to the Special Issue on Attachment Theory, Separation, and Divorce: Forging Coherent Understandings for Family Law*, 49 Fam. Ct. Rev. 418 (2011) (recommending no overnights for infants until age three). *But see* Pamela S. Ludolph & Milfred D. Dale, *Attachment and Child Custody: An Additive Factor, Not a Determinative One*, 46 Fam. L.Q. 1 (2012) (arguing children form attachments to both parents, and overnight care should be an individualized, multi-faceted decision).

42. *See* Elrod, *High Conflict Custody*, *supra* note 20, at 508 (outlining the traditional position that joint custody is contraindicated when parents remain in high conflict) *But see* Joan B. Kelly & Robert E. Emery, *Children's Adjustment Following Divorce: Risk and Resilience Perspectives*, 52 Fam. Rel. 352 (2003) (reviewing research claims that children's responses to conflict depend upon the kind of parental conflict, the nature and severity of the conflict, and the presence of protective buffers).

43. *See* Austin & Drozd, *supra* note 28.

44. Linda D. Elrod, Child Custody Practice & Procedure, ch. 11 (2013).

to assure they will qualify as experts whose opinions will help the attorney and the court in the instant case. Professional licenses and reputation, professional affiliations and memberships, and presentations and publications provide important information, but, by themselves, are not enough to identify the best expert. Attorneys must develop criteria for choosing an expert based on their needs in individual cases, the ability to match these needs with expert competencies and qualifications, and the resources clients can commit to this part of the case.

Not every evaluator is qualified to offer services in every situation. Expert consultants should have clinical and evaluation experiences and knowledge of the professional literature specific to the areas the mental health consultant is retained to address.[45] For example, reviewing an evaluation involving child sexual abuse demands knowledge of protocols designed for this task. The same is true of evaluations involving a relocating parent, allegations of domestic violence, or child alienation. When special protocols have been developed for cases similar to the instant case, the expert consultant's experiences and knowledge of these protocols is vital. Experts may qualify to assist the court through testimony based on their knowledge, skill, training, education, or experience.

A. Help for the Attorney: The Privately Retained, Nontestifying Expert Consultant

Attorneys may choose to retain mental health experts for litigation support rather than providing testimony. The services offered by nontestifying experts range from work as a trial consultant, who is fully integrated into the litigation team, to consultants who may render advice and opinions on selected aspects of the case. The attorney's trial strategy and the needs of the case dictate decisions about what the expert is asked to do, how much the expert may become involved in case conceptualization, and how much of the factual goals, theories, and trial strategy may be shared with the expert. Status as a consultant may also be temporary, such as when the attorney retains an expert's services for a task that might lead to court testimony but wishes to review the consultant's work product prior to deciding whether to have the expert testify.

As a trial consultant, the mental health expert's services may be broadly defined. An expert trial consultant can assist the attorney in developing the facts of the case into a set of scientifically informed theories and themes, or in challenging foreseeable theories or strategies of the opposing party. The trial consultant can assist with case conceptualization, identify appropriate professional literature on selected topics for the attorney

45. ZERVOLPOULOS, *supra* note 12.

to review, and give behind-the-scenes feedback about client liabilities and strengths as well as case weaknesses and strengths. A trial consultant can help identify other necessary experts and prepare these experts for testimony. The trial consultant can provide forensic opinions of various records and other indicia of psychological factors central to a best-interests-of-the-child determination.[46] Consultants might also provide in-court support to the legal team.[47]

An expert mental health consultant's knowledge base about the methodology and science of custody evaluations can be invaluable in the hands of a properly prepared and skilled attorney. When an attorney is faced with an adverse report, expert consultants can be helpful in teaching attorneys how to understand the scientific processes used in conducting a child custody evaluation and constructing the child custody advisory report. Understanding professional guidelines and standards for evaluators can help the attorney determine whether the evaluation was conducted in a manner consistent with the scientific literature, ethical standards, and professional practice guidelines for evaluations.[48] Scientific understanding also helps the attorney assess whether the evaluator's opinions are logically consistent with the data gathered during the evaluation process. Mental health consultants may be helpful in teaching the attorney how the behavioral science literature may have been used to organize the evaluation and report, or explain conclusions or recommendations supported by empirical research.

In addition, effective examination and cross-examination of expert witnesses demand an advanced skill set. Skills sufficient for lay witnesses about issues of fact may fail to be effective with expert witnesses. While attorneys may need to learn what is and what is not a competent custody evaluation,[49] experts with extensive evaluation experience know where to look, what to look for, and, just as importantly, how to spot when essential portions of an evaluation are missing.[50] An experienced consultant can

46. Jonathan W. Gould et al., *Testifying Experts and Non-testifying Trial Consultants: Appreciating the Differences*, 8 J. CHILD CUSTODY 32 (2011) [hereinafter *Appreciating the Differences*].

47. Schepard, *MH Consultants*, *supra* note 1, at 730–31.

48. Am. Acad. Matrim. Lawyers, *Child Custody Evaluation Standards*, 25 J. AM. ACAD. MATRIMONIAL LAW. 251 (2013); Am. Psych. Ass'n, *Guidelines for Child Custody Evaluations in Family Law Proceedings*, 65 AM. PSYCHOL. 863 (2010); Am. Psych. Ass'n*, 2010 Amendments to the 2002 "Ethical Principles of Psychologists and Code of Conduct,"* 65 AM. PSYCHOL. 493 (2010); Ass'n Fam. & Concil. Cts., *Model Standards of Practice for Child Custody Evaluations*, 45 FAM. CT. REV. 70 (2007); Am. Acad. Child & Adol. Psych., *Practice Parameters for Child Custody Evaluation*, 36 J. AM. ACAD. CHILD. & ADOL. PSYCHIATRY 57S (1997).

49. Jonathan W. Gould & Debra Lehrmann, *Evaluating the Probative Value of Child Custody Evaluations*, 53 JUV. & FAM. CT. J. 17 (2002).

50. *See* Jonathan W. Gould & L.C. Bell, *Forensic Methods and Procedures Applied to Child Custody Evaluations: What Judges Need to Know in Determining a Competent Forensic Work Product,* 51 JUV. & FAM. CT. J. 21 (2000).

be invaluable in crafting questions that target the strengths and weaknesses of a child custody report. Detailed outlines of questions for reviewing different components of the evaluator's methodology are available in the professional literature.[51]

B. Help for the Court: Privately Retained Evaluators, Educators, and Reviewers

The parties in a custody dispute can also retain experts who will testify in court as a party-retained evaluator, an instructional expert, or a reviewer of the work product of another expert. Because party-retained experts will seldom have access to both parties, these evaluations may be limited. A party-retained evaluator may assess an issue or issues that, in the opinion of the retaining party, the court-appointed evaluator poorly evaluated, missed, or refused to consider. The access to limited data, particularly if this includes being unable to meet with the children and the other party, will mean the ultimate issues of custody and parenting time are beyond the scope of this evaluator's testimony. Even this limited evaluation may have value, however, for purposes of rebutting other testimony, impeaching the court-appointed evaluator, or bringing to the court's attention facts or theories important in the retaining attorney's theory of the case.

The most common service provided by party-retained experts consists of a review of the work product of the court-appointed evaluator. A review usually occurs after an attorney perceives potential problems with the evaluator's methodology, signs of bias affecting the work product, or that the opinions do not seem to correspond with the facts and circumstances of the case.[52] Such reviewers often serve as a valuable check on the quality and influence of the court's evaluator.[53] A reviewing consultant assesses the strengths and weaknesses of a forensic evaluation and the evaluator's report, and then communicates findings back to the retaining attorney. The consulting expert can prepare materials pertaining to the evaluator's procedural safeguards, the thoroughness of the investigation into relevant issues, interviewing techniques and use of different assessments, and the steps used to develop the final report.[54]

---

51. Jonathan W. Gould, *Evaluating the Probative Value of Child Custody Evaluations: A Guide for Forensic Mental Health Professionals*, 1 J. CHILD CUSTODY 77 (2004).

52. William G. Austin et al., *Forensic Expert Roles & Services Child Custody Litigation: Work Product Review & Case Consultation*, 8 J. CHILD CUSTODY 47, 48 (2011) [hereinafter *Expert Roles*].

53. SCHEPARD, INTERDISCIPLINARY MODELS, *supra* note 15, at 154.

54. Gould et al., *Critiquing Report, supra* note 33, at 43 (outlining the specific areas where a consultant can help the attorney deconstruct the evaluator's methodologies).

Parties may also retain an instructional expert, sometimes called a "blind didactic expert"[55] or "social framework expert,"[56] who is provided no knowledge of the facts of the case. The instructional expert testifies about specialized, technical, or research-based knowledge based upon the scientific literature. Instructional testimony may summarize research on a particular issue, define concepts and theories, or describe theoretical frameworks and models.[57]

C. Help for the Client: Education and Support

Preparation of clients is an integral part of effective advocacy. Education and support during the process of a custody dispute, particularly one involving a custody evaluation, is part of attorneys' ethical duty to competently represent their clients.[58] Expert mental health consultants can assist attorneys in providing emotional support to their clients in custody disputes in a number of different ways. Expert litigation education and support can reduce the party's anxiety during an emotionally difficult time by providing details about the legal and evaluation processes. Experts can also identify other resources for the client's needs, teach new dispute resolution skills, or provide advice on different parenting plan alternatives. In one survey of 125 attorneys, fifty-five percent reported referring their clients to mental health professionals to provide guidance during a child custody evaluation.[59]

Entrance of experts into the task of preparing parties for litigation has been controversial. Many fear the expert's education and support will "coach" litigants into less than authentic behavior or into making inaccurate communications to neutral third-party evaluators and the court. The Child Custody Consultant Task Force from the Association of Family and Conciliation Courts (AFCC) identified as unacceptable and unethical any expert consultant's work with a litigant that included rehearsing responses to questions on psychological tests, "coaching" inaccurate answers to anticipated evaluator questions, withholding information that might reflect

55. David A. Martindale & Jonathan W. Gould, *Evaluating the Evaluators in Custodial Disputes in* Forensic Psychology & Neuropsychology for Criminal and Civil Cases (H. Hall ed., 2008).

56. Neil Vidmar & Regina A. Schuller, *Juries and Expert Evidence: Social Framework Testimony*, 52 L. & Contemp. Probls. 133 (1989); Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 Va. L. Rev. 559 (1987).

57. Austin et al., *Expert Roles*, *supra* note 52; *see* Gould et al., *Critiquing Report*, *supra* note 33, at 34 (describing a blind-didactic expert as one who provides information about research without knowing any case specific data).

58. *See* Model R. Prof'l Conduct, Preamble: A Lawyer's Responsibilities (2002).

59. James N. Bow et al., *Partners in the Process: How Attorneys Prepare Their Clients for Custody Evaluations and Litigation*, 49 Fam. Ct. Rev. 750 (2011).

negatively on the litigant, or encouraging temporary and insincere changes in behavior solely for strategic, "positive-impression-management" reasons.[60]

The list of topics about which an expert can educate the party and attorney is a long one. The Child Custody Consultant Task Force identified seventeen areas where a mental health expert could provide litigants (and attorneys) with general education. A substantial literature has developed around each of these topics. These seventeen areas are:

1. the child custody evaluation process, such as the role of the evaluator, the procedures typically used to conduct the evaluation, the kind of information that is typically requested, the limits of the evaluation, general information about testing, and how the opinion may be used by the trial court;
2. developmental needs of children at different stages, including education about how children at various ages understand the events around them;
3. how a child's special needs may affect both parenting and planning for shared parenting;
4. effect of parental conflict on children, including different types of conflict and how a child can be buffered;
5. children's response to divorce and what factors impact it;
6. the pros and cons of different parenting plans and what factors to consider when establishing a plan;
7. attachment issues influencing parenting plans and access decisions;
8. types of services or interventions that might be helpful for a variety of situations, such as domestic violence, alienation, sexual abuse, or substance abuse;
9. the pros and cons of mediation or collaborative divorce;
10. factors that may lead a child to resist contact with a parent, including the role each parent may play;
11. the impact of relocation on children and how potential negative effects can be ameliorated;
12. reviewing documents; correspondence; or records, including medical, school, employment, and criminal records; and discussing what is reviewed with the litigant;
13. assisting a litigant in selecting collateral sources of information to be contacted by the forensic mental health evaluator;
14. helping the litigant to understand the process of the forensic mental health evaluation to relieve some of the personal stress of going through it;

60. Schepard, *MH Consultants*, *supra* note 1, at 729.

15. making referrals for outside services;
16. consulting with the litigant to manage or create reasonable expectations; to identify and assess real concerns in the other parent; to organize and prioritize concerns; and to link requests logically to their history, prior concerns, and to the needs of the child or children in question; and
17. assisting the litigant with the development of a parenting plan for proposal to the other parent.[61]

IV. Combining Science with Ethics and Guidelines to Improve Expert Work-Product Quality

In addition to the increasing reliance upon mental health experts and science, evolving notions of professional ethical principles and obligations have steadily worked their way into the child custody lexicon and practice. In the past twenty-five years, there have been numerous efforts by national professional organizations to improve expert work product by outlining guidelines or standards for child custody evaluations.[62] In 2004, introduction of the "forensic model" for child custody evaluations marked the development of clinical criteria for evaluating evaluations via an integration of scientific principles and principles gleaned from ethical codes and aspirational professional guidelines.[63]

Attorneys faced with examining and cross-examining experts quickly recognized the utility of these advances. Expert consultants could facilitate an attorney's inquiry into the methodologies of evaluators through questions about the scientific reliability and validity of each procedure used. Expert consultants could also help attorneys challenge evaluators using ethical principles. Even though courts have been and continue to be unwilling to legally incorporate ethical norms into evidentiary standards of admissibility, ethical rules or standards may be used by attorneys to challenge the credibility of experts.[64] The failure to act ethically can serve as a red flag regarding potential problems in the competence, objectivity, or reliability of expert testimony.

Combining science, aspirational guidelines, and ethical principles in an analytical model is not a straightforward task, and it is controversial. Child custody evaluations can be scientifically informed, but the individualized (and idiographic) nature of the best-interests-of-the-child task

61. *Id.*

62. *See supra* note 48.

63. David A. Martindale & Jonathan W. Gould, *The Forensic Model*, 1 J. CHILD CUSTODY 1 (2004) [hereinafter *Forensic Model*].

64. Daniel W. Shuman & Stuart A. Greenberg, *The Role of Ethical Norms in the Admissibility of Ethical Testimony*, 37 JUDGES J. 4, 6 (1998).

always involves elements of judicial discretion. Simultaneous use of guidelines or standards designed to be aspirational and ethical codes involving the language of minimal obligations that should supersede an evaluator's independent judgment can create confusion about what should be considered a best practice and what an evaluator is minimally required to do. Within the child custody community, there are very real debates about "ceilings," or best practices, and "floors," or minimum standards, for evaluations and expert consultation in child custody.[65]Attorneys need to know these controversies. To the extent that certain things can be made to appear obligatory rather than discretionary in court, the process of "making the ceiling look like the floor" can be a very effective cross-examination technique. The weight given to expert testimony may depend upon how these issues relate to the expert's credibility and perceived objectivity.

A. The Expert's Oath and Freedom from Advocacy

Like all witnesses, experts take an oath "to tell the truth, the whole truth, and nothing but the truth."[66] The testifying expert's testimony must prove helpful to the court. Unlike the retaining attorney's duty to the client, no testifying expert has any duty of advocacy to either the retaining attorney or party. Experts, regardless of who has retained them, must always strive for accuracy, honesty, and truthfulness. They must resist partisan pressures and impartially weigh all data, opinions, and rival hypotheses.[67] Experts who merely parrot the views of the retaining attorney, or who serve as the retaining attorney's "alter-ego," do not assist the trier of fact.[68]

---

65. H.D. Kirkpatrick, *A Floor, Not a Ceiling: Beyond Guidelines—An Argument for Minimum Standards of Practice in Conducting Child Custody and Visitation Evaluations*, 1 J. CHILD CUSTODY 61 (2004) (arguing that the guidelines of professional associations reflect sufficient consensus for enforceable minimum standards for child custody evaluations).

66. Cardiac Pacemakers, Inc., v. St. Jude Med., Inc., 2002 WL 1801525 (S.D. Ind. July 5, 2002) (overruling jury verdict of $140 million for plaintiff and granting judgment to defendant when plaintiff's principal expert witness deliberately and repeatedly failed to tell the truth on matters that went to the heart of the case and to the heart of his credibility); Viskase Corp. v. Am. Nat'l Can Co., 979 F. Supp. 697 (1997) (vacating judgment and granting a new trial after concluding an expert lied at least fifteen times during trial and in a posttrial affidavit he submitted to try to prevent discovery of his misdeed).

67. American Psychological Association, *Specialty Guidelines for Forensic Psychology*, 68 AM. PSYCHOL. 7 (2013) [hereinafter *Specialty Guidelines*].

68. JOHN A. ZERVOPOULOS, HOW TO EXAMINE MENTAL HEALTH EXPERTS: A FAMILY LAWYER'S HANDBOOK OF ISSUES AND STRATEGIES 33 (2013) (citing Trigon Ins. Co. v. United States, 204 F.R.D. 277 (E.D. Va. 2001), as an example in which experts became the "alter ego" of the retaining attorneys).

Party-retained experts are often confronted with the "bought expert" or "hired gun" accusation.[69] "The potential for opposing counsel to create the appearance of bias can affect the outcome of the case regardless of whether or not the communication in question actually influenced the investigation, thinking, or opinions of the expert in the final analysis."[70] Adversarial allegiance or retention bias, or at least the perception of these problems, is a crucial issue for party-retained, testifying experts.[71] The pull to testify for the side that pays and calls the expert can be explicit or implicit in the relationship with the retaining attorney. Both attorneys and experts must be aware of the pull to affiliate and must continuously self-evaluate the degree of personal and emotional commitment to the outcome of the case.[72] There is a difference between principled retained experts, who will practice in a manner consistent with ethical codes of conduct and professional practice guidelines, and unprincipled experts, who will testify to any opinion that someone pays them to testify about and who will cite research known to be biased or flawed if it favors the retaining party.[73]

B. The Role Delineation Style of Practice: The Broad Appeal of Simplicity

> [T]o a certain extent, an expert's objectivity can be preserved, enhanced, or seriously eroded simply by the way the attorney and the expert orchestrate the preparation and discovery process. The more effectively this orchestration is done, the more the court . . . [is] likely to feel that the expert has not become biased or become an advocate witness.[74]

The dominant paradigm in child custody consultation is the *role delineation* model or practice style. The secret to its broad appeal lies in its simplicity. Proponents of role delineation draw bright lines between roles, first between the roles of consulting and testifying experts, and second between different activities of testifying experts. Many experienced mental health experts have adopted this approach as the "best possible" model

69. STANLEY L. BRODSKY, TESTIFYING IN COURT: GUIDELINES AND MAXIMS FOR THE EXPERT WITNESS 5 (1991).

70. FRED CHRIS SMITH & REBECCA GURLEY BACE, A GUIDE TO FORENSIC TESTIMONY: THE ART AND PRACTICE OF PRESENTING TESTIMONY AS AN EXPERT TECHNICAL WITNESS 205 (2003) [hereinafter GUIDE].

71. Daniel C. Murrie et al., *Are Forensic Experts Biased by the Side That Retained Them*, 24 PSYCHOL. SCI. 1889 (2013).

72. STANLEY L. BRODSKY, THE EXPERT EXPERT WITNESS: MORE MAXIMS AND GUIDELINES FOR TESTIFYING IN COURT 75 (1999).

73. David A. Martindale, *Consultants and Role Delineation*, 24 THE MATRIMONIAL STRATEGIST 4 (2006) [hereinafter *Role Delineation*].

74. Smith & Bace, *supra* note 70, at 205.

or style of practice to child custody consultation.[75] To distinguish it from aspirational guidelines and minimal ethical standards, both of which are incorporated in multiple ways within it, we refer to "role delineation" as a practice style.

The role delineation practice style involves a conservative, risk-avoidant approach to possible multiple activities or relationships and towards attorney-expert communications. By limiting the testifying expert to a single activity or role, the approach takes a strict approach to two important objectives: (1) to maximize the credibility of any testifying expert, and (2) to protect against possible unwanted discovery of attorney-expert communications.

A controversial aspect of the role delineation approach is that it posits two "dual role prohibitions." First, the role delineation approach views functioning as a testimonial expert witness and simultaneously functioning as a behind the scenes trial consultant to a legal team as incompatible.[76] Such experts risk "being seen as biased and lacking objectivity in court because they [may] have chosen to help one side in their efforts to prevail."[77] Role delineation adherents are also opposed to a consultant performing these two activities or roles because, when one who has consulted testifies at trial, there is the potential that all information obtained during the course of the consultation becomes discoverable and open to questioning at trial by the adverse litigant.[78]

A second place for "role delineations" is within the category of testifying experts. Adherents posit that mental health experts who conduct reviews should not collect any of their own data or have any contact with the parties or collaterals because these contacts might decrease the expert's objectivity. For example, the role delineation position holds that reviewers should not conduct second evaluations and are expected to "limit their opinions to matters of evaluator methodology, data analyses, and the nexus between information provided and opinions expressed."[79] Any secondary activities beyond the review of the evaluation and testimony based on this review bring additional credibility questions into play. The chief concern is that a retained expert might evaluate or gather infor-

75. Martindale, *Role Delineation, supra* note 73; David A. Martindale & Jonathan W. Gould, *Ethics in Forensic Practice*, *in* 11 HANDBOOK OF PSYCHOLOGY: FORENSIC PSYCHOLOGY (RANDY OTTO ED., 2d ed. 2013) (claiming that, "It is our view that when psychologists engage in forensic psychological practice, 'minimally competent' ought never be an option. We must stride towards 'best possible' in each forensic psychological activity.").

76. Martindale, *Role Delineation, supra* note 73.

77. Schepard, *MH Consultants*, *supra* note 1, at 733.

78. *Id.* at 732–33.

79. Martindale, *Role Delineation*, *supra* note 73.

mation from only one side of the dispute, then offer an opinion without appropriately noting the limitations in their evaluation.[80]

C. Maximizing Credibility

A third practice often associated with the role delineation approach involves strict prohibitions against contact between the expert and all others (e.g., the litigation team, the litigants themselves, family members, or allies).[81] Contacts between the expert and others may be viewed as a multiple relationship that must be avoided. Because retained testifying experts are likely to be testifying about the good or flawed methodology of others and the ways methodological errors may lead to misguided recommendations, their methodology will be evaluated with respect to both perceived and real threats to objectivity.[82]

> If persuasive litigants meet with experts who have been retained by the litigant's attorneys, the risk is created that when the experts testify, they will inadvertently deliver their testimony in a way that will make them sound like advocates. When this occurs, expert testimony is rendered less effective.[83]

When opposing counsel attempts to portray different kinds of contacts as signs of bias or a failure to remain objective, role delineation practices may minimize damage to the expert's credibility.[84] Several practices may be used to minimize the potential for contact between the expert and others. One method is the "mystery client" strategy where the expert performs her analysis and investigation without knowing the identity of the party who retained her.[85] The process of creating as much professional distance and objectivity as possible before an opinion is reached can to a large extent be controlled by following a strict protocol for the expert's evaluation of the issues and evidence associated with the case.[86] For example, such a protocol might call for the expert to review documents with no sharing of theories or technical issues in the case prior to the expert consultant's work or report.[87] In addition, distancing the testifying expert from discussions of case strategy, case planning, and other elements of the case may increase the likelihood the court will view a party-retained expert as

80. See AM. PSYCHOL. ASS'N (APA) ETHICAL PRINCIPLES FOR PSYCHOLOGISTS AND CODE OF CONDUCT R. 9.01 Bases for Assessments (describing the duty to base opinions on information and techniques sufficient to substantiate findings). See also R. 9.06 Interpreting Assessment Results, which notes the need to "indicate any significant limitations of their interpretations."

81. Martindale, *Role Delineation, supra* note 73, at 4.

82. *Id.*

83. *Id.*

84. *Id.*

85. SMITH & BACE, GUIDE, *supra* note 70, at 205.

86. *Id.*

87. *Id.*

neutral and helpful.[88] The idea is that judges may view testifying experts as less biased when contact with the retaining attorney and others involved in the case does not occur or has been minimized.[89]

The role delineation practice style is a successful approach that has had a powerful influence on the field. The strengths of the approach lie in its focus on practices that maximize the expert's credibility and the work product protections for the expert's work. Many mental health experts insist upon limiting their work to one set of activities or one "role" as a form of risk management. They believe role delineation is beneficial for the forensic practitioner, for attorneys advocating for clients, for the courts, and for the litigants themselves.[90] There are, however, limitations.

D. Beyond the Role Delineation Approach

> There are guiding ethical principles that are far more important than ubiquitous prohibitions for therapists, consultants, evaluators, and supervisors to follow in order to truly assist clients and other consumers who are in need of high-quality services from ethical professionals.[91]

The role delineation practice style is not the only option when attorneys retain experts for consultation and testimony. The law has no prohibitions against experts performing multiple activities or roles. Not all things called "dual roles" are unethical.[92] Some of what are currently called "roles" are better described as activities[93] or services.[94] When this is recognized, the "dual role" prohibitions are more easily dispelled. For example, an expert who provides a work product review, consults with the attorney about that review, assists in developing an effective direct examination of the work product review, and provides court testimony for the same retaining attorney is not performing four "roles." This expert is going through a number of appropriate activities or services within the attorney-expert relationship that enable her to effectively testify about a review of the work product of another expert.[95] The law allows attorney-expert consultation prior to proffering the mental health expert as a testifying witness. In addition, the ethical obligations of an attorney demand

88. *Id. See also* Martindale, *Role Delineation, supra* note 73; PHILIP M. STAHL & ROBERT A. SIMON, FORENSIC PSYCHOLOGY CONSULTATION IN CHILD CUSTODY LITIGATION: A HANDBOOK FOR WORK PRODUCT REVIEW, CASE PREPARATION, AND EXPERT TESTIMONY 106 (2013).

89. Martindale, *Role Delineation, supra* note 73.

90. *Id.*

91. BRUCE W. EBERT, MULTIPLE RELATIONSHIPS AND CONFLICT OF INTEREST FOR MENTAL HEALTH PROFESSIONALS: A CONSERVATIVE PSYCHOLEGAL APPROACH 2 (2006).

92. *Id.* at 5.

93. *Specialty Guidelines*, *supra* note 67.

94. Austin et al., *Expert Roles*, *supra* note 52, at 51–52.

95. *Id.* at 63.

consultation with the expert prior to testimony as part of the attorney's preparation and advocacy for her client.[96] Going to court without knowing the testimony of one's expert is not competent representation.

Our position is that role concepts are not sufficiently precise for the kinds of differentiated, ethical decision-making needed in the forensic context. Attempts to develop clear definitions, guidelines, or standards for the "roles" of "consultants," "educators or instructors," "evaluators," and "reviewers" have been unsuccessful.[97] Role theory explains "roles" by presuming that persons in certain social positions hold expectations for their own behavior and those of other persons.[98] A "role" may be defined as "a particular set of norms that is organized around a function,"[99] or as "behavior referring to normative expectations associated with a position in a social system."[100] While the concept of "role" is one of the most popular ideas in the social sciences, sociologists note persistent differences over definitions for individual role concepts, difficulties forming consensus about assumptions to be made about any specific role, and diverse explanations for role phenomena.[101] All of these problems plague application of role theory to child custody consultation.

Negative assumptions made by role delineation proponents about how the expert's neutrality and objectivity are affected may not always be true. The *possibility* of bias or prejudice is not a *finding* of bias or prejudice and does not preclude parties from proffering privately retained experts. Research on source credibility has found that witness credibility is made up of four factors: confidence, likeability, trustworthiness, and knowledge.[102] The integrity of party-retained testifying experts is dependent upon, among other things, the expert's ability to remain objective and loyal to the data and facts of the case, the ability to develop opinions based on the data and facts, and the ability to resist pressures that bias or distort the process.[103] There is unanimity, however, that the duty to advance a client's objectives diligently through all lawful measures, which is inherent in a client-lawyer relationship, is *inconsistent* with the duty of a

96. Model R. Prof'l Conduct Rule 1.1 Competence. "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation."

97. Schepard, *supra* note 1.

98. B.J. Biddle, *Recent Developments in Role Theory*, 12 Am. Rev. Soc.. 67 (1986).

99. Frederick L. Bates & C.C. Harvey, The Structure of Social Systems 106 (1975).

100. V.L. Allen & E. van de Vliert, Role Transitions: Explorations and Explanations 3 (1984).

101. Biddle, *supra* note 98.

102. Stanley L. Brodsky, Michael Griffin, & Robert J. Cramer, *The Witness Credibility Scale: An Outcome Measure for Expert Witness Research*, 28 Behav. Sci. Law 892 (2010).

103. Austin et al., *Expert Roles*, *supra* note 52, at 63.

testifying expert (emphasis added).[104]

E. Decisions Regarding the Expert's Activities: Clarity Comes from Rules, Not "Roles"

> The public is better served when standards of practice for service providers . . . are clearly articulated.[105]

The answer to whether a particular expert's additional activity, "dual role," or multiple relationships is unethical is "it depends." Within the United States, no professional association or licensing board has concluded that all multiple relationships are either unethical or illegal.[106] It is clear that moving beyond the "one expert—one activity" approach must be done carefully and that the benefits of this approach may need to be balanced against potential risks, including those outlined by the role delineation practice style.

The actual ethical rules themselves offer more clarity than roles in thinking about the ethics of mental health experts. Determinations of whether an expert is acting ethically or unethically hinge on an analysis, not of whether the second role or relationship exists, but upon a factual inquiry about the nature of the expert's activities and the impact on the client with whom the professional relationship exists. The most prominent source for the ethical criteria to be used in evaluating the expert's conduct will be the appropriate state licensing regulations, some of which have adopted different aspects of national ethics codes.

> Although all major mental health professions have a prohibition against entering into multiple relationships that are harmful and/or exploitative to the client, the forgotten aspect of these prohibitions, in essence, is that only those multiple relationships that are harmful to or against the interests of the client are prohibited.[107]

Generally, "[f]actors to be considered in determining which relationships are ethical and which are not include analytical determinations such as conflict of interest, exploitation, loss of objectivity, harm to a patient, or contamination of the relationship itself."[108] There is simply no replacement for following the words of a sage law professor, "Don't think great thoughts. Read the rules."[109]

---

104. ABA Standing Comm. on Professional Conduct, Formal Op. 97 (1997).

105. Martindale & Gould, *Forensic Model, supra* note 63, at 4.

106. EBERT, *supra* note 91, at 2.

107. *Id.*

108. *Id.* This statement summarizes positions articulated in the guidelines and standards promulgated by national professional organizations.

109. James Concannon, *Civil Code and Time Computation Changes Effective July 1*, 70 J. KAN. BAR ASS'N 20 (2010).

F. Increasing Agreement Therapists Should Not Testify about Forensic Issues

In child custody disputes, the most common references to multiple relationship problems concern therapists doing things many believe only evaluators should do. If requested to do so by a patient or ordered to do so by a court, a therapist may properly testify to facts, observations, and clinical opinions for which the therapy process provides a trustworthy basis.[110] But there are many temptations for a therapist to go beyond the data. Therapists may attempt to "help" clients through testimony about ultimate issues of custody, residency, or parenting time without performing an evaluation involving contact with both parents and the children.[111] Professional organizations have published guidelines and standards for therapists and evaluators that should help keep these two services distinct from one another.[112]

Keeping these two activities separate, however, does not always happen and often provides a rich area for challenge or cross-examination. In their role as advocates, attorneys for clients who cannot afford a separate forensic evaluation often call therapists to testify. To a court or judge facing an overwhelming docket, a large percentage of *pro se* litigants, and difficult decisions based upon limited information, ethical arguments about dual roles may fall to the temptations of having some information from a therapist, rather than no information at all, even if some opine this information is inherently unreliable.

The expectations and procedures of therapy are viewed as distinct from a forensic evaluation in the professional forensic community, but many judges, attorneys, and even the therapists themselves often lack training in the unique boundaries differentiating clinical from forensic practice. The temptation to use therapists as forensic experts on behalf of patient-litigants exists because of beliefs about efficiency, candor, neutrality, and expertise.[113]

---

110. Stuart A. Greenberg & Daniel W Shuman, *Irreconcilable Conflict Between Therapeutic and Forensic Roles*, 28 PROF. PSYCHOL.: RES. & PRACT. 50, 51 (1997) [hereinafter *Irreconcilable Conflict*].

111. Lyn R. Greenberg et al., *Is the Child's Therapist Part of the Problem: What Judges, Attorneys, and Mental Health Professionals Need to Know About Court-Related Treatment for Children*, 37 FAM. L. Q. 39 (2003).

112. Hon. Linda S. Fidnick et al., *Association of Family and Conciliation Courts White Paper Guidelines for Court-Involved Therapy: A Best Practice Approach for Mental Health Professionals*, 49 FAM. CT. REV. 557 (2011); *see also* Lyn R. Greenberg & Jonathan W. Gould, *The Treating Expert: A Hybrid Role with Firm Boundaries*, 32 PROF. PSYCHOL.: RES. & PRACT. 469 (2001).

113. Greenberg & Shuman, *Irreconcilable Conflict, supra* note 110, stating:

> Using a therapist to provide forensic assessment appears efficient because the therapist has already spent time with the patient and knows much about him or her that others are

Judges might find objections to the therapist's testimony based upon "role" to be unpersuasive, but may listen more closely when reasons resembling the rules of evidence and legal constructs are offered. For example, an astute cross-examination might point out that the education and training in providing therapy channels therapists' thought processes in ways that are counterproductive to the evaluation task of forming an objective opinion that will help the court.[114] Questions can also be raised about one's ability to forensically evaluate an individual while simultaneously offering advice or attempting to help them.[115] Others note that the type and amount of data routinely observed in therapy is rarely adequate to form a proper foundation to determine any complex psycholegal issue.[116]

Attorneys may effectively challenge the objectivity of testimony given by therapists. Courts may allow experts to testify and then give their testimony little weight because of a failure to adhere to professional standards or deviations from standard practice. For example, in *Azia v. DiLascia*, an expert performed as a special master, then as the child's therapist prior to offering a custody recommendation during court testimony.[117] The trial court accorded the mental health professional's testimony "little weight because of her failure to recognize any ethical considerations in accepting the child as a patient after being a special master and her failure to realize the potential psychological effects of asking the child her preference."[118] Being familiar with the practical and professional dilemmas of experts can make a difference.

Another variant of this problem is when therapists involve themselves as forensic investigators of issues like child sexual abuse. In a case where a therapist initially treated a child in play therapy, then accepted a court-assignment to conduct a forensic evaluation, the court reviewing the

---

yet to learn and not without substantial expenditures of time and money for an additional evaluation. A therapist appears to gain candid information from a patient-litigant because of the patient's assumed incentive to be candid with the therapist to receive effective treatment. . . . Thus, the facts forming the basis for a therapist's opinion may initially appear more accurate and complete than the facts that could be gathered in a separate forensic assessment.

114. David A. Martindale, *From Treatment Provider to Evaluator: Overcoming Cognitive Encapsulation*, 10 J. CHILD CUSTODY 141, 142 (2013).

115. *Id.* at 147 (referring to the tendency for therapists to bring a therapeutic mindset into court as a form of "cognitive encapsulation," reflecting a failure to cognitively shift one's mindset or orientation to fit the different demands in the forensic setting).

116. Greenberg & Shuman, *Irreconcilable Conflict, supra* note 110.

117. Azia v. DiLascia, 780 A.2d 992 (Conn. App. Ct. 2001) (holding that "[t]he ethical rules applicable to the profession of a witness are permissible for judicial notice because a professional, who is a member of an association, is held accountable to know those ethical roles").

118. *Id.* at 997.

resulting licensing board complaint opined:

> the standard of care does not permit a treating psychologist to serve as a forensic psychologist at the same time, because the goals of these roles conflict; a treating psychologist seeks the well-being of the client, and a forensic psychologist is responsible for assisting the trier of fact in a forensic investigation.[119]

V. Attorney-Expert Communications: Privilege, Work-Product Doctrine, and Discovery

Integrating experts into an attorney's trial strategy requires familiarity with jurisdiction-specific rules of civil procedure and the rules of evidence regarding attorney-expert communications. Of particular relevance are the protections of attorney-client privilege and work product doctrine, the extension of these protections to the work of experts, and how these issues impact attorney-expert communications and conduct.

Effectively adding an expert mental health consultant to the litigation process requires that the attorney understand not only how the consultant might help develop the factual goals, themes, and theory of the case, but also how to protect these from untimely or unwanted discovery. In developing a trial strategy, attorneys manage attorney-client and attorney-expert communications and the associated documents via two evidentiary principles: attorney-client privilege and work-product doctrine. The attorney's trial strategy must be cognizant of these two principles. In addition, the attorney must know the jurisdiction-specific rules for discovery of the work of different kinds of experts, and how these variables play out at different stages of the process or under different factual scenarios.

A. Protecting Attorney-Expert Communications via Attorney-Client Privilege

Four elements are required to establish the existence of the attorney-client privilege: (1) a communication; (2) made between privileged persons; (3) in confidence; (4) for purposes of seeking, obtaining, or providing legal assistance to the client.[120] The client, not the attorney, holds the privilege.[121] The protections of attorney-client privilege do not automatically attach to every attorney-client communication.[122] The privilege cannot be recognized if the conduct of the attorney does not qualify to be privileged, if there is an exception to the privilege, or if it has been waived.[123] The privilege may not

119. *In re* Marsha J. Kleinman, 2012 WL 2950822 (N.J. Adm. July 13, 2012).

120. Restatement of the Law Governing Lawyers § 118 (Tent. Draft No. 1, 1988).

121. Edna Selma Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 3 (4th ed. 2001).

122. *Id.* at 28.

123. *Id.* at 264.

have been created if the communication is disclosed to a third party at the time it was made because the confidentiality element is lacking. Or, a disclosure to third persons after making a privileged communication may constitute waiver of the privilege, whether done intentionally or unintentionally. Most courts apply any waiver of privilege to the disclosed communication and "all other communications related to the 'same subject matter.'" This rule attempts to avoid unfair selective disclosures while also preserving other aspects of the privilege.[124]

Common law recognized the necessity of including the attorney's agents, such as experts, in the privilege. States have followed the lead of federal courts in extending a derivative privilege to experts if, as agents of the attorney, their communications with the client assist the attorney in rendering legal advice. For the expert to successfully claim a derivative privilege, the same four elements must be established with respect to the expert's communications. In determining questions about derivative privilege, courts may also inquire into the purposes for which the expert is retained and how the expert has gone about collecting information for transmission to the attorney.[125]

The expert will most likely establish derivative privilege (1) if retained by the attorney rather than by the client, (2) if the communication is with the attorney or client and is confidential, and (3) if the expert's assistance helps the attorney render legal advice. When the expert is paid by the client or the expert's communications involve something other than assisting the attorney render legal advice, courts are unlikely to establish the communication in question as privileged.

B. Work-Product Doctrine: Protecting Trial Preparations of the Attorney and Expert

The work-product doctrine reflects protections from discovery of the attorney's preparations for trial and can encompass the assistance from expert mental health consultants. The work-product doctrine protects from discovery-qualified communications and documents created during pretrial preparations. Because attorneys must rely upon the assistance of investigators and other agents in compiling materials for trial, the "doctrine protect[s] materials prepared by agents of the attorney as well as those prepared by the attorney himself."[126] In most states, statutes codify the work-product doctrine by defining different kinds of work product and the discovery rules for each.[127]

124. *Id.* at 378.
125. *Id.* at 153.
126. United States v. Nobles, 422 U.S. 225, 238–39 (1975).
127. *See, e.g.,* FED. R. CIV. P. 26. Counsel and experts should also be alerted to state varia-

Courts recognize two categories of work product: "ordinary" work product and "opinion" work product. Ordinary work product includes certain aspects of the preparations of the attorney and the attorney's agents. Ordinary work-product protections are extended to (1) documents or tangible things that are otherwise discoverable (i.e., not privileged), which are (2) prepared in anticipation of litigation or for trial (3) by or for another party or that party's representative.[128] Many jurisdictions literally translate discovery statutes that only mention "documents" as deserving work product protections, while others cite to the common law of *Hickman v. Taylor* to extend work-product protections to oral communications.[129]

Opinion work product refers to the mental impressions, conclusions, opinions, or legal theories of an attorney or any other representative of a party concerning the litigation.[130] Claims of opinion work product are limited to protecting the strategy of counsel from compelled discovery. Facts may not be protected from discovery as opinion work product.[131]

Statutes addressing discovery of the work of experts identify differential treatment of nontestifying experts and testifying experts. Regarding nontestifying experts, overcoming any ordinary work-product protections requires the party seeking discovery to show a substantial need for the materials and an inability to obtain the substantial equivalent of the materials by other means.[132] Opinion work product enjoys a higher level of protection, even when applied to nontestifying experts.[133] Even when a court orders disclosure of ordinary work product, many statutes protect the opinion work product of the attorney by allowing redactions of disclosed materials (e.g., "In ordering discovery of such materials when the

tions and to possible local court rules regarding discovery. KAN. STAT. ANN. § 60-226 (b) (5).

128. EPSTEIN, *supra* note 121, at 480.

129. *See* Hickman v. Taylor, 329 U.S. 495, 512–13 (1947) (noting, "as to oral communications made by witnesses to Fortenbaugh [counsel], whether presently in the form of his mental impressions or memoranda, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production. The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks. Such testimony could not qualify as evidence, and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer.").

130. EPSTEIN, *supra* note 121, at 481.

131. JACK H. FRIEDENTHAL, MARY KAY KANE, & ARTHUR R. MILLER, CIVIL PROCEDURE 411 (4th ed. 2005).

132. FED. R. CIV. P. 26 (b) (3).

133. EPSTEIN, *supra* note 121, at 481. *See also* Upjohn Co. v. United States, 449 U.S. 383, 400–02 (1981) (noting that, where an attorney's notes included more than just a record of the oral statements of witnesses, a far stronger showing of necessity and unavailability by other means was required).

required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the party concerning the litigation.").[134]

Applying work-product doctrine to testifying experts is much less uniform and much more complicated. Attempts to reconcile the conflict created when an attorney shares mental impressions or legal theories with a testifying expert and when an adverse party seeks discovery of all of the information considered by an expert generally fall into one of two schools of thought: the "discovery-oriented" approach and the "protection-oriented" approach.[135]

C. The Discovery-Oriented Approach to Attorney-Expert Communications

The discovery-oriented approach, also called the "bright line" approach, requires that, except in unusual circumstances, all information provided to an expert by the attorney whether "opinion" work product or otherwise, should be produced to the other side.[136] In 1993, amendments to Rule 26 of the Federal Rules of Civil Procedure required disclosure of all communications (including all draft reports) between all testifying experts and the retaining attorney. Under this approach, privileged or protected communications lose their privileged status when disclosed to and considered by a testifying expert. The 1993 amendments (and similar changes in more than forty states) fueled the role delineation approach.

> At issue is the independence of the expert's analysis and testimony.
>
> What obviously is threatened by such communications [between testifying experts and retaining attorneys] is the independence of the expert's thinking, both her analysis and her conclusions. The risk is that the lawyer will do the thinking for the expert or, more subtly, that the expert will be influenced, perhaps appreciably, by the way the lawyer presents or discusses the information. These risks would be eliminated if only the data were presented to the expert. The risk would be reduced, arguably considerably, if it were known that all communications from counsel that accompany the transmission of data (and that are relevant to the matters about which the expert will testify) would

134. GA. CODE ANN. § 9-11-26(b)(3).

135. Gall v. Jamison, 44 P.3d 233 (Colo. 2002). Very few states have case law on attorney-client privilege and work product doctrine. The case law that does exist makes frequent references to common law and federal cases that outline competing policy concerns. *See* Christa L. Klopfenstein, *Discoverability of Opinion Work Product Materials Provided to Testifying Experts*, 32 IND. L. REV. 481 (1999) (reviewing the history of discovery rules related to opinion work product in federal courts, including differing textual interpretations of the federal rules of civil procedure, splits of authority across jurisdictions, and committee revisions designed to achieve differing policy objectives).

136. Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384 (N.D. Cal. 1991).

> be reviewable by other experts (retained by opposing parties or appointed by the court) and made known to the trier of fact.[137]

In the discovery-oriented approach, "[t]he opinion work product rule is no exception to discovery under circumstances where the documents contain mental impressions and are examined and reviewed by expert witnesses before their expert opinions are formed."[138] Sharing materials and information with a retained expert may affect the credibility of the expert.[139] Protections are waived when otherwise protected materials are used in ways that might influence and shape testimony. The discovery-oriented approach emphasizes that a party must be permitted to inspect the shared documents in order to effectively cross-examine the expert on the degree an opinion may be informed by the retaining attorney's disclosure of limited facts, highlighting of particular facts, or emphasis on certain studies or scholarly literature.[140] Some claim the discovery-oriented approach hampers attorney-expert collaboration because the attorney may withhold information from the expert.[141] A bright line regarding discovery and testifying experts is said to preserve judicial economy by promoting efficiency, fairness, and the truth seeking process.[142]

D. The Protection-Oriented Approach to Attorney-Expert Communications

The 2010 amendments for Federal Rules of Civil Procedure Rule 26 embrace the protection-oriented approach.[143] The protection-oriented approach embodies policies favoring the privacy of attorney opinion work product.[144] Federal cases describing the protection-oriented approach emphasize that the factual or ordinary work product of the testifying expert is discoverable, but the mental impressions, conclusions, opinions, and theories of the attorney are protected.[145] The 2010 amendments

137. *Id.* at 394.

138. Boring v. Keller, 97 F.R.D. 404, 406 (D. Colo. 1983); *see also* William Penn Life Assurance Co. v. Brown Transfer & Storage Co., 141 F.R.D. 142, 143 (W.D. Mo. 1990) (holding documents produced to a testifying expert were not protected work product).

139. Boring v. Keller, 97 F.R.D. at 406.

140. *Id.*

141. Nexxus Prods. v. CVS New York, Inc., 188 F.R.D. 7 (D. Mass. 1999).

142. Boring v. Keller, 97 F.R.D. at 406. *But see* Kloppenstein, *supra* note 133 (reviewing instances where federal court interpreted the 1993 amendments in different ways and where courts provided protections for opinion work product).

143. At least seven (7) states have adopted the 2010 amendments to Rule 26: Kansas, New Jersey, Ohio, Oklahoma, South Dakota, Utah, and Vermont.

144. Helton v. Kincaid, 2005 WL 1324729 (Ohio Ct. App. June 6, 2005).

145. Bogosian v. Gulf Oil Corp., 738 F.2d 587, 588–89, 595–96 (3d Cir. 1984) (holding opinion work product shared with a testifying expert was not discoverable absent a showing of substantial need and undue hardship).

provide protections for attorney-expert communications, regardless of whether the form of the communications are oral, written, electronic, or otherwise, except for three topics. With respect to the testifying expert, the expert must provide a report, but all forms of communications are covered under work product, except to the extent that the communications: (1) relate to compensation for the expert's study or testimony; (2) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (3) identify the assumptions that the party's attorney provided and that the expert relied on in forming opinions to be expressed.[146]

The Advisory Comments to the 2010 amendments to Rule 26 illustrate the new rules were a response to problems with unlimited discovery and the role delineation of experts:

> The Committee has been told repeatedly routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts—one for purposes of consultation and another to testify at trial—because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analysis. At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impede[s] effective communication, and experts adopt strategies that protect against discovery but also interfere with their work. . . . The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures of attorney-expert communications.[147]

By focusing an expert's attention on the significant issues in the case, an attorney can improve the expert's learning curve and lessen litigation costs.[148] Those supporting this approach fear the discovery-oriented approach demonizes the natural communicative process between an attorney and the retained expert, and has the potential to distract the court from a focus on the facts and methodologies of the case. One court noted:

> The central inquiry on cross examination of an expert witness . . . is not the question of if and to what extent the expert was influenced by counsel; rather it is this: what is the basis of the expert's opinion. Cross examination on the adequacy or reliability of the stated basis of the expert's opinion can be conducted effectively absent a line of questioning on counsel's role in assisting the expert.[149]

146. FED. R. CIV. P. 26(b)(4)(c). (*See* Advisory Committee notes stating, "This exception [Rule 26(b)(4)(C)(iii)] is limited to those assumptions that the expert actually did rely on in forming opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception.").

147. *Id. See* Advisory Committee Notes on 2010 Amendments.

148. Krisa v. Equitable Life Assurance Soc'y, 196 F.R.D. 254, 259 (M.D. Pa. 2000).

149. Nexxus Prods. v. CVS New York, Inc., 188 F.R.D. 7, 10 (D. Mass. 1999).

In sum, attorneys must often develop their case theories and trial strategies amidst complex evidentiary and ethical principles. There are numerous factors to consider. One's trial strategy may at times emphasize protections from disclosure of the attorney's mental impressions and case theory, then strategically focus on "disclosing" or presenting the same through witnesses. Selective and strategic disclosure of work product is frequently part of a legitimate trial strategy.[150] The importance of protecting privileged and attorney or expert work product varies with the degree that the facts, goals, and theories need to be (or can be) protected in light of discovery rules and the procedural posture of the case. It is certainly possible that there is little information not already known by the opposing party, either because the parties were living together or because of prior efforts to negotiate an outcome through mediation or other forms of alternative dispute resolution.

VI. Attorney-Expert Contracts: Clarifying Activities and Responsibilities

Once the attorney is armed with an understanding of evidentiary and ethical issues, attorneys and experts can develop contracts reflecting case strategies that effectively utilize the competencies and strengths of the expert within these parameters. Tension over expert activities and roles may also reflect issues of who controls the activities of the expert. On the one hand, experts have an ethical obligation to be aware of how their work may affect others.[151] They are also justifiably concerned that serious problems can accompany multiple roles and that role shifting can do real damage to the reputations of experts who must practice another day before the same judges in the same jurisdiction.[152] On the other hand, some feel the parties should be able to decide the expert's activities after they have been given informed consent about the dangers of possible loss of objectivity or communication protections.[153] The agreements between the attorney and the expert (and there may be more than one) set the framework and the tone for the attorney-expert relationship.[154]

Contracts between attorneys and mental health experts should make explicit any additional ethical duties the expert has related to the attorney-

150. EPSTEIN, *supra* note 121, at 610–11.

151. AM. PSYCHOL. ASS'N (APA) ETHICAL PRINCIPLES FOR PSYCHOLOGISTS AND CODE OF CONDUCT R. 3.05 (stating, "psychologists strive to be aware of the possible effect of their own physical and mental health on their ability to help those with whom they work").

152. SMITH & BACE, GUIDE, *supra* note 70, at 96.

153. Schepard, *MH Consultants, supra* note 1, at 730.

154. Robert L. Kaufman, *Forensic Mental Health Consulting in Family Law: Where Have We Come From? Where Are We Going?* 8 J. CHILD CUSTODY 5, 20 (2011).

expert relationship (e.g., as the attorney's agent) and should also recognize the expert's discipline-specific ethical obligations. Attorney-expert contracts should have an educational component that outlines how the duties attorneys owe their clients may obligate the expert.[155] Contracts should explicitly address how the attorney and expert will manage issues related to attorney-client privilege, work-product protections, and confidentiality.[156] For example, the attorney's duty of confidentiality extends to the privately retained expert when the expert becomes an agent of the attorney. Experts must know that attorney-client privilege and confidentiality extend beyond the litigation into perpetuity.

From an evidentiary perspective, contracts with expert mental health consultants should be integrated into the attorney's trial strategy to provide maximum value to the attorney and the attorney's client. These contracts should enhance and facilitate the attorney's dynamic efforts to put the client's facts and theory of the case before the court. According to the American Society of Trial Consultants Professional Code, when the attorney retains the expert, attorney-client privilege and work-product doctrine protections are more likely to apply. When the party retains the expert, the expert's work does not fall under these protections.

> A. Attorney as Client:
>
> The trial consultant who is retained by the attorney: (1) works under the direction and supervision of the attorney; (2) cooperates with the attorney to assure all consultant-attorney communication is subject, to the extent provided under law, to attorney/client privilege and work-product doctrine.
>
> B. Litigant as Client:
>
> The trial consultant who is retained by the litigant informs the litigant, prior to retention that the consultant's work will be treated as professionally confidential, but probably is not subject to legal protection from disclosure under any attorney/client privilege, work-product, or other doctrine.[157]

While the importance of these protections may change over the course of the case, trial strategy choices regarding how to use the expert are maximized by having the expert contract with the attorney rather than the client.

---

155. MODEL R. PROF'L CONDUCT R.1.6: Confidentiality of Information (outlining the scope of confidentiality as well as the instances where an attorney may reveal information relating to the representation of the client).

156. MODEL R. PROF'L CONDUCT R. 5.3: Responsibilities Regarding Nonlawyer Assistance (detailing that a lawyer must ensure the nonlawyer's conduct "is compatible with the professional obligations of the lawyer").

157. The Professional Code of the American Society of Trial Consultants (updated August 1, 2013), *available at* http://astcweb.org/public/article.cfm/astc-professional-code.

Contracts should spell out the nature and scope of the expert's work. It may be possible at the beginning of the case to identify the expert's task as that of a general trial consultant, as a testifying expert, or as a consultant on a limited or selected topic (e.g., reviewer of custody evaluation, reviewer of psychological testing). Identifying an expert for each task or for a specific psycholegal question simplifies attorney management of issues regarding attorney-expert communications and production of documents as these relate to privilege, work-product protections, and confidentiality, but this may be neither possible nor affordable. Multiple experts may also be considered or retained, depending upon the needs of the case, the competence of the experts, and the evidentiary strategies of the case.

Any change in the nature or scope of the retained expert consultant's work, either by design (e.g., planned phases or stages of expert work) or by changes in trial strategy, should trigger a review of the contract. Because it is often not advisable, possible, or preferable to predetermine the nature and scope of the expert's tasks for the entirety of the case, contracts may be renegotiated or restructured during the attorney-expert relationship as the situation evolves. Contracts may reflect a legal strategy that dictates the expert consultant's work will be completed in phases or stages. For example, if the attorney retains an expert to review a custody evaluation, whether favorable or adverse to the client, the attorney's conduct should protect the expert consultant's review within the attorney-client privilege and work-product doctrine until the facts and opinions of the expert's review are known. It is only then that the attorney can decide how to proceed with this expert, if at all, and make informed decisions about how the expert's work fits into the attorney's theory of the case, trial strategy, and advocacy for the client.[158] Any review of the contract should determine whether the contract is terminated, extended with a new explicit understanding, or completely restructured. Changes might include revisions in the nature and scope of the expert's task and any new expectations of either the attorney or the expert.

Contracts where expert testimony is possible should reflect the possibility of testimony, even if testimony is not certain or is conditioned upon other issues. Making the possibility of testimony explicit in the contract serves as a reminder that communications within the attorney-expert relationship at the time of the first contact and into later stages of the case may later become discoverable by the other party. This provision should serve as a caution against conduct (e.g., such as communications about trial strategy or discussion of facts known only by one side of the case) that

158. *See* Gould et al., *Critiquing Report*, *supra* note 33, at 44–45.

might later be used to impeach or undermine the credibility of the expert.

Contracts should also consider the expert's duty to the court and discipline-specific ethical obligations. The expert is not an advocate, but takes an oath to tell the court "the truth, the whole truth, and nothing but the truth." Even privately-retained testifying experts are judged under a helpfulness standard in relation to assisting the court, not how much their testimony assists the retaining attorney or client.

Many of the best mental health experts have their own contracts that outline procedures and the conditions under which they will provide services. These experts view their contracts as beneficial because they allow the expert a degree of control over their activities and work product. For experts, there are professional risks associated with working within the adversarial legal system where others might perceive inappropriate advocacy, loss of neutrality, or potential bias. The best experts seek to avoid a reputation as an "unprincipled hired gun." In addition, experts working in child custody cases are at a higher risk for ethics and licensing board complaints than forensic experts in other areas.[159] Particularly in child custody where the process is organized around best-interests-of-the-child principles, mental health experts wish to remain focused on the child's needs in the dispute and to protect against being pulled into working in ways adverse to children and families.

Contracts originating from mental health experts usually incorporate professional guidelines and standards in ways that enhance admissibility, credibility, and reliability of the expert's work product and testimony. These contracts can reflect "best practices," or "best possible" scenarios, that simultaneously maximize evidentiary protections and the expert's credibility and perceived objectivity.[160] Most child custody experts prefer to be court-appointed and often have extensive experience functioning as the court's expert. When privately retained as a consultant or testifying expert, the expert's past experiences as a third-party neutral can be invaluable in developing and implementing trial strategy. A good expert's reputation is likely based upon a practice style reflecting competence and high ethical standards.

Finally, contracts must address the financial terms of the contract. Financial issues include establishing hourly or task-specific fees, payments for expenses, payments of retainers, the amounts of and use of retainers, provisions for replenishing retainers, and timetables for payment in complex or extended cases (e.g., payments at intervals, prior to

159. Karl Kirkland & Kristin L. Kirkland, *Frequency of Child Custody Evaluation Complaints and Related Disciplinary Action: A Survey of the Association of State and Provincial Psychology Boards*, 32 PROF. PSYCHOL.: RES. & PRACTICE 171 (2001).

160. Martindale & Gould, *Ethics in Forensic Practice*, *supra* note 75.

specific events like submission or reports or testimony, and at the end of the case). Contracts should spell out additional provisions for terminating the contract, either for cause, by agreement, or by a default provision such as a notice period. Obligations after termination of the contract should also be addressed. Contracts should also include a provision for how to manage disputes over payment of fees. Such provisions may include agreements to use an arbitrator or mediator prior to pursuit of litigation.

VII. Conclusion

As the science of child custody grows in influence and sophistication, family law attorneys have to remain scientifically informed in order to be effective advocates. Use of court-appointed experts has proven helpful in resolving many custody disputes, but this practice has not proven to be a panacea. Child custody evaluations and the use of science to inform legal decision-makers about custody, residency, and parenting plans remain inconsistent. Attorneys have found it increasingly helpful and sometimes necessary to engage expert mental-health consultants to not only counter expert testimony adverse to their clients, but also to integrate evolving and new conceptual understandings into their trial strategies.

In contemporary custody disputes, attorneys must develop their case theories and trial strategies amidst a plethora of ethical and evidentiary principles. At any one point in time, there are numerous complex and dynamic considerations. One's trial strategy may at times emphasize protections from disclosure of the attorney's mental impressions and case theory, then strategically focus on "disclosing" or presenting the same through witnesses. The importance of protecting privileged and attorney or expert work product varies with the degree that the facts, goals, and theories need to be (or can be) protected in light of discovery rules and the procedural posture of the case. There may be little information not already known by the opposing party. How expert mental-health consultants best fit into this puzzle is an evolving question. The nature of best-interests-of-the-child determinations remains an extraordinarily complex, moving target. We do know, however, that these decisions weigh potential benefits against potential risks. In the end, what may seem optimal for the case is not always possible, what is possible is not always advisable, and what is advisable is not always optimal.