Reviewing Child Custody Evaluations: Using Science to Maximize Reliability and Minimize Bias

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Introduction

Since the 1980s family courts adjudicating custody disputes have preferred the appointment of neutral experts to complete child custody evaluations over the traditional legal practice of allowing each side to present evidence through privately retained experts. Neutral, court-appointed evaluators have been preferred based upon an assumption that their neutrality is less likely to be influenced by either attorney and that their neutrality should allow for better focus on the best interests of the child rather than the perspectives of the parents (Schepard, 2004). Experience has taught us that even court-appointed evaluators can become biased, fail to contact important sources, misinterpret test results, or lack knowledge about the research on the needs of children of divorce or separation (Gould, 2004). Too often, evaluators focus on the parents' conflict rather than on the best interests of the children (Ackerman, Kane, & Gould, 2019). The best interests of children are ill-served when decisions by the trier of fact are based upon biased, flawed, incomplete reports (Gould, 2004). While child custody evaluations play an important role in assisting family courts working to resolve disputes over the best interests of the child, considerable

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controversy exists among legal and mental health professionals about the utility of these evaluations, how they should be conducted, and how they should be weighed by courts.

Family law attorneys have begun to voice more publicly their frustration with the poor quality of reports completed by child custody evaluators. In 2004 in New York, in response to much publicly expressed discontent, Chief Judge Judith S. Kaye appointed a Matrimonial Commission to review all aspects of matrimonial litigation and make recommendations for improving how the courts handle such litigation in both Family Court and Supreme Court (Miller, 2006).

In 2012, attorney Joy Feinberg voiced concerns about the poor and inconsistent quality of child custody evaluations that she and many of her attorney colleagues have begun to voice with increasing frequency:

> Attorneys helped to create the cottage industry of child custody evaluations as early as the 1960s. Both courts and attorneys desperately wanted guidance from mental health professionals to better the lives of children caught in their parents' divorce. By 2012, when the **quality and value** of child custody advisory reports has been consistently attacked, the attorneys and judges who are consumers of your work – will seek to end the child custody assessment cottage industry unless it improves significantly – moving beyond personal beliefs and bias to scientific and factual based opinions. Without quality work product, there is little need to have psychological evaluators in the system.

In a 2011 study of the concerns attorneys have about child custody evaluations Bow, Gottlieb, and Gould-Saltman (2011) found that attorneys' most frequent complaints about child custody evaluations "focused on [the] evaluator's indecisiveness, illogical conclusions, ignorance regarding the Best Interests of the Child Standard, and making or not making recommendations" (Bow et al. 2011, pp. 306–307). During a recent AFCC workshop presentation, Judge Gould-Saltman noted that what she believes the court needs most from a custody evaluator is

> a recitation of facts relevant to the issues of parenting sufficient to show me that the evaluator had sufficient relevant data with which to form any opinions. I then primarily rely on the evaluator's analysis of those data based upon the evaluator's knowledge, education, and experience. It's that expert analysis that marks the difference between an expert opinion and my own analysis of those same data if it had been brought to me by testimony on a witness stand.
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> **(D. Gould-Saltman, personal communication, November 17, 2016)**

The child custody community has identified numerous concerns about evaluations and their uses in court. More professionals, at all educational levels, are performing child custody evaluations without having obtained formal training. Many practitioners are performing evaluations that do not meet the needs of the courts that have appointed them. With increasing frequency, judges have expressed concern over the poor quality of the reports being submitted to them by evaluators; and problems with the custody evaluation process have become the subject of front-page articles in newspapers as prestigious as *The New York Times* (Eaton, 2004).

In addition, evaluation practices involving familiar but unreliable methods and procedures designed for clinical rather than forensic use are commonplace (Garber & Simon, 2018; Rappaport, Gould, & Dale, 2018). Many view the varying quality of child custody

evaluations, both locally and nationally, as a problem that devalues evaluators and evaluations, and may lead courts to order fewer evaluations. Evaluations of inconsistent or unpredictable quality are often not helpful. Given the stakes involved in addressing the needs of children from divorcing and separating families, courts, the families in court, and the other professional consumers of child custody evaluations have a right to expect a higher level of competence from forensic mental health professionals who market themselves as experts.

As dissatisfaction with the work of custody evaluators has grown, more and more attorneys have turned to privately retained mental health experts to approach the task of challenging, or defending, the findings and recommendations of court-appointed evaluators. In a previous paper, we proposed a process-oriented, rules-based approach to decision-making with privately retained experts. This approach envisioned a dynamic process within which the activities of experts were incorporated into the individualized case planning and trial strategies of attorneys (Dale & Gould, 2014). Depending upon the jurisdictional rules and practices, individual fact patterns, and case theories or trial strategies, the attorney could engage mental health consultants in different ways.

Child Custody Evaluations: The Most Complex of Evaluations

In this chapter, we continue the thesis that child custody evaluations can be more consistent, more predictable, and more helpful if scientific principles and methods are used by the evaluator (Gould, 1998, 2006). Scientific method refers to "the rules or standards and community practices by which science proceeds" (Ramsey & Kelly, 2004, p. 5). Both hard science and the social sciences employ the scientific method to produce knowledge (Ramsey & Kelly, 2004).

Scientific methods and procedures are intended to reduce human error. When conducting child custody evaluations, evaluators need to be more concerned with scientific method and process. The scientific methodology used in forensic mental health assessment, in general, and used in child custody evaluations, in particular, places a high value on intellectual honesty. Being as objective and scientific as possible includes an explicit acknowledgment that our beliefs could be wrong and that the scientific process with its emphasis on considering rival alternative hypotheses is designed to protect us from fooling ourselves (Lillenfeld, 2010).

Because child custody evaluations are viewed as the most complex and difficult type of forensic evaluation (Otto et al., 2000), they may be particularly vulnerable to use of poor methodologies and different kinds of biases. This complexity can also make these evaluations difficult for attorneys to understand. In contrast to most examinations that focus on evaluating one person, the typical child custody evaluation involves the examination of a number of persons (e.g., mother, father, child or children, and potential or actual stepparents) and interviews with additional collateral informants. Emotions in cases of contested custody typically run high, further compounding what is an already complicated evaluation process (Otto et al., 2000). The high emotions often affect how parents behave during interviews, how they respond psychological tests, and how they communicate with their children. Parents often attempt to paint an overly positive picture of themselves, a more negative picture of the other parent, and a glowing description of the children's experiences with them (Hynan, 2014).

Given the profound importance of the underlying psycholegal issues (i.e., the best interests of the children and the ability of the parents to meet those interests), the parents, children, and other caretakers must be assessed regarding a variety of behaviors, capacities, and needs. These factors affect not only parent behavior but also the evaluator's ability to accurately assess the family dynamics and assist the court in developing a parenting plan for the families' future. Forensic mental health evaluators can easily underestimate the prevalence and severity of distorting influences on their work without developing the correct safeguards for minimizing distorting biases.

Scientifically Informed Guidelines and Standards for CCEs

"Science" is a central tenet of psychological practice. "In explaining, predicting, and controlling the world around us, science is by far the most powerful intellectual technique known" (Faigman, Kaye, Sakes, & Sanders, 2002, p. 47). Understanding human behavior begins with the development of systematic procedures used for reliable observation and recording. When child custody evaluators attend to the methodological integrity of their data gathering process, the court is able to place greater weight on the scientific foundation of the evaluation process (Ramsey & Kelly, 2004). What is scientific includes both process and fact.

> Science is not an encyclopedic body of knowledge about the universe. Instead, it represents a *process* for proposing and refining theoretical explanations about the world that are subject to further testing and refinement
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> **(American Association for the Advancement of Science and the National Academy of Sciences, 1993)**

Insomuch as science can be viewed as "fact," it is the outcome of scientific process, or an orderly body of knowledge with clearly articulated principles (Feigman et al., 2019). The task of Federal Rule of Evidence 702 may be best understood as regulating the supply of facts to the judge "in a manner that states a preference for science as the preeminent methods for discovering facts" (Faigman et al., 2002, p. 47). One important task of a child custody evaluator is as a gatekeeper of reliable psychological data upon which the court may rely. The reliability that comes from scientifically informed processes is the foundation for both psychological investigation and expert psychological testimony.

Best practice guidelines illustrate how scientific principles can be applied to specific tasks. Reviewers should have intimate knowledge of the relevant guidelines and standards for custody evaluations. These include, but are not limited to, the APA's *Ethical Principles of Psychologists and Code of Conduct* (APA, 2002; 2017), *Guidelines for Child Custody Evaluations in Divorce Proceedings* (APA, 2010), *Standards for Educational and Psychological Testing* (APA, 1985, 1999), and *Record-Keeping Guidelines* (APA, 1993); *The Specialty Guidelines for Forensic Psychology* (American Psychological Association, 2011); and the AFCC's *Model Standards of Practice for Child Custody Evaluation* (AFCC, 2006).

Two states with the most highly developed evaluation statutes are Texas (Texas Family Code 107) and California (California Rule of Court 5.220). In Texas, the legislature has passed a statute defining who can conduct child custody evaluations, what needs to be included in child custody evaluations, and other related requirements in order for the evaluation to be admissible

In California, recent case law decisions have influenced how information obtained during a child custody evaluation is presented. The Sanchez decision (2016) has been interpreted to mean that information collected by an evaluator from collateral informants that provides case-specific information may be inadmissible unless the informants testify at trial. The Sanchez decision has been hailed by many attorneys as placing needed limits on the admissibility of hearsay testimony. For evaluators, Sanchez means that expert opinions that are based, in part or in full, on information obtained from collateral informants may be inadmissible unless there is a pretrial waiver signed by both attorneys allowing evaluators to rely on collateral information or unless the collateral informants testify at trial.

Using Science to Maximize Reliability and Minimize Bias

Experts retained to review the work product of an evaluator can provide the retaining attorney with candid input concerning the strengths and deficiencies of the evaluator's work. A comprehensive review of an evaluation can offer commentary on the methodology employed, the assessment devices utilized, the interpretation of assessment data, and the nexus between information gathered and opinions expressed. In this way, privately retained consulting and testifying experts can help attorneys assure that the most reliable and trustworthy data based upon the professional and scientific knowledge of the child custody profession can be presented in court.

The most common service, and usually the first service, provided by privately 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. A reviewer assesses the strengths and weaknesses of a forensic evaluation and the evaluator's report, then communicates findings back to the retaining attorney. Such reviews often serve as a valuable check on the quality and influence of court's evaluator.

Work product reviews conducted by psychologists in custody and parenting time disputes should be written in a manner that focuses on the reliability and relevance of the information gathered during the evaluation, the manner in which the evaluator integrated current professional and scientific knowledge of the discipline into the body of the report, and the degree to which the expert opinions proffered in the evaluation appear logically or scientifically related to the collected data. A reviewer can examine three broad areas and, within each of these, several specific elements: (1) methodology, (2) formulation of opinions, and (3) communication of findings and opinions to the court.

In examining evaluator's methodology, a reviewer may develop opinions about the court-appointed expert's methodologies. Below are 12 dimensions or factors that may be the focus of a review:

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

2. The techniques employed in interviewing the parents. The reviewer seeks to ascertain whether systematic procedures were employed that would increase the probability that the evaluator will obtain pertinent historical information and current information bearing on functional abilities related to parenting and will not be distracted by information that is not pertinent to the evaluative task.

   Although there is little empirical examination of forensic interviewing of parents engaged in child custody evaluations, the evaluator should gather information sufficient to address the specific questions guiding the evaluation. The specific questions should be identified either in the court order or in correspondence from the attorneys (Gould & Martindale, 2011).

   The reviewer should examine whether the evaluator asked each parent about the allegations posed by the other parent and what additional collateral sources might help support his/her position. The reviewer should also examine whether the evaluator asked each parent to address reasonable alternative explanations (plausible rival hypotheses) and their view of how their proposed solutions serve the best interests of their children.
3. The manner by which information has been obtained from children. The reviewer examines the interview techniques that were employed, to see whether they were tailored to the cognitive development and expressive and receptive language abilities of the child. Additionally, the reviewer considers the reliability and validity of any special techniques employed.

   The reviewer might inquire about any video- or audiotape recordings of the child interviews. Significant research has revealed threats to reliability from notetaking and from attempts to accurately recall who said what during an interview.
4. The methods employed in conducting observational sessions between the two parents and between each parent and the children. In order to be maximally useful, observations should be conducted in some systematic manner, evaluators should know in advance what types of information they wish to gather, and whatever data are gathered should be gathered in a structured manner.

   The reviewer should examine whether the parent–child observations were structured in a manner to gather information useful in answering the specific questions guiding the evaluation. The reviewer should also explore whether the evaluator was engaged in the parent–child observation, thereby changing the parent–child observation to a parent–child–evaluator observation and/or what steps the evaluator took to minimize involvement in the observational interactions.
5. The extent to which pertinent documents were utilized by the evaluator. Evaluators must take great care not to view certain types of documents as constituting verification of oral reports from litigants. Some documents presented to evaluators are no more than written records of oral reports made earlier to different people.
6. The manner in which the evaluator selected collateral sources of information, obtained information from those sources, and assessed the reliability of the information obtained. Austin and Kirkpatrick (2004), for example, have called attention to the fact that as psychological distance from the custody dispute increases, so, too, does objectivity. School personnel are likely to provide more objective information than neighbors. Evaluators who limit their collateral source inquiries to those who are deemed to be objective are likely to overlook information that, despite its delivery by subjective sources, is nevertheless potentially enlightening.

7. The methods employed by the evaluator to corroborate information that he or she relied upon. Despite overwhelming evidence that psychologists are not particularly impressive as human lie detectors (DePaulo, Charlton, Cooper, Lindsay, & Muhlenbruck, 1997; Ekman & O'Sullivan, 1991; Feeley & Young, 1998; Frank & Feeley, 2003), far too many evaluators trust their clinical intuition to tell who is being forthright and who is being disingenuous. The reviewer should examine which parent assertions were verified through third-party information.
8. The criteria employed in the selection of assessment instruments. Although in some jurisdictions the criteria to be employed in assessing custodial suitability are statutorily defined, in many jurisdictions, evaluators must decide for themselves what constitutes effective parenting and what observable indices can be utilized.
9. The manner in which assessment instruments were administered. Evaluators should administer assessment instruments in accordance with the instructions in the manuals that accompany the instruments and should be responsive to the admonitions that appear in the *Standards for Educational and Psychological Testing* (APA, 1985, 1999).
10. The accuracy of the evaluator's scoring and interpretation of assessment data. Many evaluators have become dependent upon computer-generated interpretive reports, despite the clarity of Ethical Standard 9.09(c), which reminds psychologists that they "retain responsibility for the appropriate application, interpretation, and use of assessment instruments, whether they score and interpret such tests themselves or use automated or other services" (p. 1072). Millon, Davis, and Millon (1997) have called attention to the unfortunate reality that computer-generated interpretive reports have certain "intrinsic difficulties, most notably a lack of substantial empirical data to validate which the computer generates its report leads to a product that is inadequately individualized, or 'canned'" (p. 134).
11. The degree to which the evaluator engaged in activities that protected the integrity of the evaluation process. Model standard 8.1 of the AFCC's *Model Standards of Practice for Child Custody Evaluation* (AFCC, 2006) calls attention to the fact that "[t]he responsible performance of a child custody evaluation requires that evaluators be able to maintain reasonable skepticism, distance, and objectivity." Evaluators are reminded that "their objectivity may be impaired when they currently have, have had, or anticipate having a relationship with those being evaluated, with attorneys for the parties or the children, or with the judges." When forensic psychological activities introduce bias or potential bias or when such activities introduce conflicts of interest, have not been respected, reviewers can call attention to the ways in which evaluator objectivity may have been impaired as a result.
12. The evaluator's compliance with ethical standards, laws, and regulations governing the creation, maintenance, and production of appropriate records. Although it is not the task of a reviewer to pass judgment on the ethical propriety of an evaluator's actions, a knowledgeable reviewer can cite sections of ethics codes and similar documents and explain their pertinence to actions (or failures to act) on the part of the evaluator.

Neal Slobogin, Saks, Faigman, and Geisinger (2019) recently reviewed the use of psychological assessment tools in the courtroom and concluded:

> We find that many of the assessment tools used by psychologists and admitted into legal contexts as scientific evidence actually have poor or unknown scientific foundations. We also find few legal challenges to the admission of this evidence. Attorneys rarely challenge the expert evidence and, when they do, judges tend not to subject psychological assessment evidence to the legal scrutiny required by law.
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> **(Neal et al., 2019, p. 155)**

Neal et al. (2019) reported that there is no relationship between the psychometric qualities of a test and its likelihood of being challenged in court. Their data suggested that some of the weakest tools tend to get a pass from the courts. "Our bottom-line conclusion is that evidentiary challenges to psychological tools are rare and challenges to the most scientifically suspect tools are even rarer or are nonexistent" (p. 154).

The scope of a reviewer's task is limited and should not be confused with the work of a practitioner conducting a second evaluation. If a reviewer identifies deficiencies in an evaluator's work, the reviewer's task is to articulate those deficiencies and explain why they may have had a significant impact on the process of formulating the opinions that have been communicated to the court by the evaluator in his or her advisory report.

There is a disagreement within the field about whether or not the reviewer should attempt to address the identified deficiencies. In the first edition of this book, Martindale and Gould (2008) argued that although it is appropriate that reviewers identify missing information and opine concerning the likely consequences of formulating an opinion without the identified information, they should not attempt to address the identified deficiencies. An alternative model was presented by Austin, Kirkpatrick, and Flens (2011), who argued that reviewers might address deficiencies by gathering and reviewing information that should have been part of the evaluator's investigation. Both arguments, however, support the assertion that the formulation of opinions on the basis of data that are insufficient, skewed, or inappropriately analyzed is a serious error, whether it is made by an evaluator or by a reviewer. For example, reviewers who meet with litigants obtain information that is, by its very nature, insufficient and skewed, and it cannot be appropriately analyzed.

Reviewers cannot second-guess evaluators and cannot opine responsibly on the ultimate issues before the court. Reviewers can call attention to methodological errors, flawed data analyses, and opinions that are not linked to the reported data. They can also point out that sound methodology increases the probability of formulating a supportable opinion and deficient methodology increases the probability of formulating a questionable opinion. No responsible reviewer would deny, however, that in all fields of endeavor, satisfactory solutions to simple and complex problems have been stumbled upon by individuals who were utilizing substandard methods and unproven problem-solving strategies.

Privately Retained Experts

Attorneys responding to the court's increasing reliance upon social science evidence often engage mental health experts. In addition to offering consultation with the attorney about the quality of forensic mental-health evaluations, mental health professionals often provide litigation support for the attorney, educational and emotional support for the client/parent, testimony at trial, or some combination of these activities (Dale & Gould, 2014). 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. Privately retained experts need to understand that integrating their expertise 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. 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, 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. 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.

Ethics for Privately Retained Experts

Like all witnesses, experts take an oath "to tell the truth, the whole truth, and nothing but the truth." 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. 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.

A retained expert has a responsibility to accurately present to the court a fair and balanced explanation of the professional and scientific knowledge of the discipline. Whether a neutral evaluator or a retained expert, once on the stand the expert's responsibility is to accurately represent the field, not the client. The expert witness can advocate for a particular position but also must be prepared to discuss the strengths and weakness of that position and to explain how reasonable alternative hypotheses were considered and why they were rejected.

Just as incompetent evaluators leave damage in their wake, so, too, do incompetent reviewers. In the portion of the psychologists' ethics code that addresses the issue of competence, psychologists are reminded that they should provide services only within the boundaries of their competence, based on their education, training, and supervised experience. When assuming forensic roles, psychologists are or become reasonably familiar with the judicial or administrative rules governing their roles) [Ethical Standard 2.01 (f)], they must "undertake ongoing efforts to develop and maintain their competence" (Ethical Standard 2.03), and their work must be "based upon established scientific and professional knowledge of the discipline" (Ethical Standard 2.04).

Experts who have been retained by one side are often disparagingly referred to as "hired guns." Those who view themselves as dedicated educators often find that they must contend with the hurdle that is created by the negative stereotype. The phrase *ethical review work* is not an oxymoron. Ethical reviewers provide feedback that addresses both the strengths and the deficiencies of the work that has been reviewed. Retaining attorneys then get to decide how, if at all, the expert can be of additional assistance. In preparing their reports, ethical reviewers work independently of the attorneys who have retained them. The reviewers do not collaborate with the attorneys in order to produce a document that will more effectively advance the attorneys' goals.

Good reviewers are perpetual students. They follow developments in the field, as reported in peer-reviewed professional literature, and they draw upon the knowledge base of the field of psychology. They do not simply compare the work under review with their own favorite way of conducting evaluations. Skilled and ethical reviewers are knowledgeable and familiar with applicable research, able to discern the difference between sound methodology and flawed methodology, and able to interpret test data without computer-generated interpretive reports.

Not surprisingly, knowledge and an active mind lead to the formulation of opinions. Inevitably, there will be times when an opinion formulated by a reviewer concerning the methodology employed by an evaluator will turn out to be the opinion that a particular attorney wants a judge to hear. When the ethical reviewer is paid to come to court and explain that opinion to the judge, the reviewer is being paid for time expended and nothing more. The ethical reviewer takes seriously the most basic obligation of an expert witness – the obligation to assist the trier of fact.

Although the evidence is only anecdotal, there is good reason to believe that many of the ethical traps psychologists must avoid are inadvertently dug by the psychologists themselves. In particular, when providers of a service lead those who are utilizing those services to develop unrealistic expectations, the likelihood of ethical dilemmas increases. It is understandable that attorneys retaining reviewers will view them as allies. When testifying reviewers have been enmeshed in a team mentality, they may find themselves tailoring their testimony to meet the perceived needs of the team and neglect their obligation to the court. Prudent reviewers make it abundantly clear in writing that, in their testimony, they will focus on procedure and methodology and will not opine on matters of custodial suitability, professional ethics, standards of care, or law. They also make clear that they are obligated to respond in a forthright manner to all questions posed and that, in doing so, information, opinions, or both may be expressed that may not be helpful to the position of the retaining attorney's client.

Consulting Expert: Litigation Support

Attorneys may choose to retain mental health experts for litigation support rather than providing testimony. The services offered by non-testifying 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 them 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 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 the best interests of child determination. Consultants might also provide in-court support to the legal team.

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. 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. 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. 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, 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. An experienced consultant can 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.

In discussing different review methods, we should not overlook the role of the *case-blind didactic expert* (Martindale, 2006). A case-blind educator provides information concerning some well-researched dynamic and leaves it to the court to decide how (if at all) the dynamic that has been explained is applicable to the issues in dispute. The concept is not a new one; other writers (e.g., Vidmar and Schuller, 1989) have used the term "social framework testimony." Our preference for the term "case-blind didactic testimony" lies in the fact that the words "case-blind" emphasize the importance of diligently maintaining constructive ignorance of the facts of the case.

Often, when framework testimony is offered, the expert is familiar with many (but never all) of the facts of the case. In offering testimony, the expert is at least implying (if not directly opining) that the framework being described is applicable to the facts of the case. The case-blind didactic expert, in contrast, makes clear that he or she knows nothing about the case and has simply been retained to explain some psychological dynamic to the court. In such cases, it is obvious to all that the parties who retain such experts believe that the psychological dynamics being explained are applicable to the case being adjudicated, but the experts do not opine on the issue of applicability and make it clear that they are unable to do so.

There are times when an expert is asked to apply the case-blind didactic testimony to a set of hypothetical situations that are similar or identical to the facts of the case. The expert may apply the didactic testimony to the hypothetical facts of the case. There are times when an attorney might ask the expert to review pleadings and other material presented to the court as well as present the court with didactic testimony. The expert should ask to see all materials presented to the court by both sides in order to avoid being challenged at trial that the expert was selectively provided case information rather than being provided with information representing both sides.

Possible Limitations to Reviewer's Activities

In 2001, a Pennsylvania psychologist functioning as a case reviewer was disciplined by the Commonwealth's Bureau of Professional Affairs for what mental health professionals would describe either as a failure to maintain appropriate role boundaries or as an inappropriate mixing of incompatible forensic psychological activities *(Grossman v. State Board,* No. 3023 C. D. 2001). The state's expert testified that Dr. Grossman had "moved from evaluating existing data to creating his own data" and explained that meeting participants in an evaluation transforms the review process into an evaluative process in which reviewers are formulating their own opinions concerning the issues in dispute. Another concern is that once engaged in creating rather than just reviewing data; there must be sufficient information from independent sources upon which to base an expert opinion. Said differently, evaluation activities require conducting an evaluation. Expert opinions should not be based upon a single source of information. Expert opinions must be based upon data sufficiently robust to allow for consideration of reasonable alternative explanations.

Biases in Child Custody Evaluations

In the child custody arena, experts often serve two primary functions. One function is to assist attorneys behind the scenes as a trial consultant. A second function is to provide testimony to the court. For both functions, experts are considered experts precisely because they have developed special abilities or what the law refers to as specialized knowledge. This specialized knowledge is believed to enable experts to perform at much higher levels than non-experts and novices (Dror, 2011). Expertise is conceptualized as a continuum with different levels of performance abilities rather than a dichotomy, suggesting a range of levels of expertise.

> True expertise requires an individual to have
>
> > well-organized knowledge, use sophisticated and specific mental representations and cognitive processing, apply automatic sequences quickly and efficiently, be able to deal with large amounts of information, make sense out of signals and patterns even when they are obscured by noise, deal with low quality and quantity of data, or with ambiguous information and many other challenging task demands and situation that otherwise paralyze the performance of novices.
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> **(Dror, 2011, p. 179)**

Experts develop special abilities and knowledge acquired over time and with repeated exposure to the tasks they perform. They develop schemas that frame the information into relevant and non-relevant information. They develop strategies to detect relevant information and ignore and filter less relevant information. Experts are driven by knowledge contained within the specific mental representations and schemas they have acquired through repeated experience, continuous learning, and frequent consolidation and reframing. "Armed with these expert tools, they select and focus on the specific signals that are relevant and perform quickly and efficiently even in environments that contain little data or noise" (Dror, 2011, p. 180).

The efficiency and effectiveness in information processing and problem-solving that comes from development of these mental representations and schema come at a cost. These mental representations and schema serve as cognitive processing gatekeepers, allowing some information into the cognitive processing apparatus and keeping other information out of that cognitive processing. Experts learn to consolidate and integrate complex mental operations into a unified routine and the automatic quality of those operations function at a level that is seldom within awareness, what Dror (2011) calls *automatization*, that is, the manner in which we develop specialized knowledge as experts bring with it a tendency to selectively attend to some information and selectively exclude other information. "The brain changes that occur with expertise reflect optimization of the brain to carry out cognitive information processing needed for specific expert performance" (Dror, 2011, p. 181). These automatic processing functions, needed as they are for optimal performance, introduce different types of potential errors.

Martindale has written extensively on the role played by bias in various phases of the child custody assessment process (Martindale, 2005, 2010; Gould & Martindale, 2007). Among the errors scientifically informed procedures intend to minimize are confirmatory bias, confirmatory distortion, primacy and recency effects, selective attention to data, and other types of bias (Drozd, Olesen, & Saini, 2013; Kahneman, 2011).

In science, "bias" is usually considered a kind of systematic error and has a negative connotation. Cognitive biases can emerge from factors in the specific case, factors related to the specific person doing the analysis, and/or factors related to human nature and human cognitive architecture (Dror, 2020). Bias involves attributing disproportionate weight in favor of or against an idea or thing, or perhaps against an individual, group or belief, usually in a way that is closed minded, prejudicial, and unfair (Wikipedia). A cognitive bias is a systematic pattern of deviation from a norm or reality in judgment where one's subjective evaluation, reasoning, or remembering of information, not objective information, leads to inaccurate judgment, illogical interpretation, or irrationality (Kahneman & Tversky, 1972).

"In the realm of forensic mental health evaluation, bias may be implicit – operating outside of an evaluator's conscious awareness – or explicit and has come to have a negative connotation" (Zappala, Reed, Beltran, Kapf, &Otto, 2018, p. 46). As a result of the fundamental feature of human cognition that makes us unaware of many of our mental processes, the mental contamination that results from implicit bias is difficult to control (Nisbett & Wilson, 1977; Wilson & Brekke, 1994). This often results in blind spot bias. "Bias blind spot" refers to the tendency of individuals to see bias in others as a greater cause for concern than bias in oneself (Zapf, Kukucka, Kassin, & Dror, 2017).

Central to an understanding of the distorting nature of cognitive bias and cognitive heuristics and bias are Kahneman's (2011) differentiation between System 1 and System 2 thinking, and the concept of attribute substitution. In a ground-breaking book on cognitive bias, Kahneman described System 1, or fast, thinking as automatic, effortless, and unconscious. While System 1 thinking characterizes much of our thinking, this style is prone to certain kinds of errors, or biases in specific circumstances, namely use of System 1 thinking sometimes results in easier answers than the ones asked, and there is little understanding of logic and statistics. In contrast, System 2 thinking reflects self-control and works to overcome the impulses of System 1. By comparison, System 2 thinking is conscious, deliberate, effortful, and slow.

Reviewers are looking for signs of System 1 thinking that is not contained by System 2 thinking. Reviewers look for indicators of (1) the degree to which evaluators have explored competing hypotheses and have sought data that would either confirm or disconfirm those hypotheses, (2) the degree to which consideration appears to have been given to data that are not supportive of the opinions expressed, (3) the degree to which pertinent case law and statutes appear to have been considered, and (4) possible examiner bias. Although bias is not directly observable, its role in opinion formation can often be inferred when evaluators apply different standards in examining and commenting on the actions of the two parents; use insulting terminology in describing the non-favored parent; use glowing terminology describing the favored parent; assign minimal importance to possible parenting deficiencies in the favored parent; assign much importance to reported flaws in the non-favored parent; appear to unquestioningly accept the favored parent's perspective; and appear to reflexively reject the non-favored parent's perspective.

Types of Bias

In the child custody field where the forensic evaluation task is viewed as both ambiguous and complex, treatment of bias in the professional literature has focused primarily on data collection.

Attribute substitution reflects a "judgment … when the individual assesses a specified target attribute of a judgment object by substituting a related heuristic attribute that comes more readily to mind" (Kahneman, 2003). When confronted with difficult questions, *attribute substitution* distorts the process and can lead to the individual choosing an easier answer when difficult questions require more effortful judgment (Kahneman, 2003). Availability heuristic is "a judgmental heuristic in which a person evaluates the frequency of classes or the probability of events by availability, i.e., by the ease with which relevant instances come to mind" (Tversky & Kahneman, 1973).

Confirmatory bias refers to the "inclination to seek information that will confirm an initially-generated hypothesis and the disinclination to seek information that will disconfirm that hypothesis" (Martindale, 2005, p. 37).

> The operation of confirmatory bias or confirmatory distortion is most easily demonstrated where there is a discernible pattern of discrepancies between the information that appears in contemporaneously taken notes and the information that appears in the advisory report. … Bias or distortion is also operating when parenting deficiencies in the favored parent are noted in the contemporaneously taken notes but not alluded to in the advisory report.
>
> **(Martindale, 2005, p. 43)**

> Too often, the presentation of a hypothesis by a persuasive litigant can create an expectation on the part of the evaluator (Rosenthal, 1966) that can lead to selective attending as the evaluation progresses and to selective recall as the evaluator begins mentally to assemble the information that will appear in his or her report.
>
> **(Gould & Martindale, 2007, p. 89)**

Other related biases that affect data collection have also been identified.

Affect heuristics reflect that every stimulus evokes an affective evaluation, which is not always conscious and is a candidate for attribute substitution when responses reflect attitudes (Slovic, Finucane, Peters, & MacGregor, 2002).

Anchoring refers to a perceptual and cognitive dynamic in which information that "may not be pertinent and may be false is presented in a manner that gives it salience" (Martindale, 2005).

Confirmatory distortion refers to when there is a conscious effort to find and report information that "is supportive of one's favored hypothesis" (Martindale, 2005). This includes when "overconfidence in the accuracy of one's initial hypothesis leads evaluators to intentionally select the data to be considered and to be reported" (Martindale, 2005, p. 48).

Representativeness heuristic describes "when an event is judged probable to the extent that it represents the essential features of the parent population or generating process" (Tversky & Kahneman, 1973). An example of this would be the "belief in the law of small numbers" in which a sample randomly drawn from a population is viewed as highly representative of the population in all essential characteristics as if they all had the characteristics of the average (Tversky & Kahneman, 1971).

Primacy bias suggests that where conflicting information must be contemplated in order to formulate an opinion, information received earlier in the deliberative process has a greater impact than information received subsequently (Crano, 1977).

Recency bias refers to the tendency to place more attention on more recent information and either ignore or forget more distant information (Plous, 1993).

Retention bias refers to the ways in which retained experts tend to be influenced by the attorney who retained them. Retained experts must reflect on the initial contact with the attorney. Often, a phone call or email will inform the potential retainer expert of the attorney's interest in having a review conducted. Our experience is that during the first contact, attorneys will offer their opinions about the deficiencies in the report, data that should have been gathered, and opinions about the quality of the report. The potential

retained expert needs to inform the attorney not to share opinions about the report's deficiencies until the retained expert has reviewed the report and formulated his/her own opinions.

Retained experts who allow the attorney to describe the report's deficiencies prior to the expert reviewing the report and formulating opinions is open to challenge based on bias. One argument is based on confirmatory bias: The reviewer's attention was focused at the outset by the attorney's identification of specific issues of concern. An alternative argument is based on retention or allegiance bias. Research reveals that retained experts tend to side with the attorney who retained them. Taking no steps to minimize information provided during the initial phone call adds to the perception that the retained expert was open to being swayed by the attorney.

Coherence Theory: Biases in Data Interpretation and Integration

"Many legal decision-making errors results from underlying cognitive biases in the way that people think about, interpret, evaluate, and integrate information." (Charman, Douglas, & Mook, 2019, p. 30). "[C]ognitive bias with respect to evidence evaluation occurs when beliefs and contextual information lead to the distortion of the perceived diagnostic value of that evidence." (Charman et al., 2019, p. 39). Biased interpretation of one piece of evidence can bias interpretation of other pieces of information, resulting in a cumulative, compounded impact that has been referred to as the "bias snowball effect" (Dror, 2017), "corroboration inflation" (Kassin, 2012), or an "escalation of errors" (Davis & Leo, 2017).

Coherence Theory and Cognitive Bias in Data Integration

Coherence-based reasoning applies to a conclusion based on the integration of numerous ambiguous, complex, and contradictory inferences. As such, a coherence-based reasoning model is able to provide a theoretical structure for this type of legal decision-making. The underlying idea behind this model as it applies to legal decision-making is that various propositions (pieces of evidence, leads about the suspect, etc.) To be integrated into a final assessment (e.g., a guilty/not guilty verdict) and be represented as a network of nodes that are interconnected via a series of excitatory and inhibitory links that represent positive or negative relationships, respectively, between the notes. When individuals are making a decision regarding that information, a parallel constraint satisfaction mechanism settles the entire network into a state that maximizes coherence among the elements. Importantly, this coherence-based reasoning model envisions the act of settling the network into a cohesive state of a continually evolving, bidirectional process, as evaluations of the various pieces of evidence affect the evaluator's emerging beliefs regarding the guilt of the suspect, and the emerging beliefs affect the evaluations of the various pieces of evidence.

> A coherence – based approach, in contrast, assumes that reasoning is bidirectional, in which evidence leads to an emerging conclusion in the emerging conclusion. Feedback to influence the evaluation of the evidence. Thus, as evidence begins to produce an emerging belief about the suspects guilt, that belief also leads supporting evidence to be perceived as stronger and

> not supporting evidence to be perceived as weaker. Indeed, a series of studies have demonstrated that bidirectional effect.
>
> **(Charman et al., 2019, p. 43)**

"An evaluator's knowledge and/or beliefs created by contextual information can bias the evaluation of a piece of evidence in a belief – consistent manner." (Charman et al., 2019, p. 38). Evaluators "may combine the various pieces of evidence in a biased fashion, even if the diagnostic value of each individual piece of evidence is correctly determined." (Charman et al., 2019, p. 39).

> This is a bias of evidence integration (Charman, 2013). Unlike biases of evidence evaluation, which focus specifically on individual pieces of evidence, biases of evidence integration focus more globally on how the final assessment of the suspect's guilt can be biased when combining multiple pieces of individual evidence. We argue that biases of evidence, integration, like biases of evidence evaluation, or a form of cognitive bias: when combining evidence, people's knowledge and expectations and initial leanings toward guilt, or innocent, can lead them to combine evidence in a belief – consistent manner, resulting in erroneous decisions and overconfidence in these final assessments.
>
> **(Charman et al., 2019, p. 40)**

Methods of Decreasing or Minimizing Bias

Forensic-clinical psychologists are occupationally socialized to believe they can and do practice objectively (Neal & Brodsky, 2014). Trainings in forensic psychology stress that clinicians should "avoid bias" and "be objective" in the abstract but do not always provide practitioners with concrete information about the psychology of decision-making in ways that are likely to reduce various forms of distorting cognitive heuristics and bias (Neal & Brodsky, 2016).

Originally, thinking about one's own biases – introspection – was identified as a primary strategy for bias reduction. But research has demonstrated that introspection is not an effective bias reduction strategy, given the human inability to access higher-order cognitive process (see Nisbett & Wilson, 1977). Pronin and Kubler (2007) argued that this "introspection illusion" – the belief that one can combat bias simply by thinking about one's own biases – results from the nonconscious operation of cognitive biases, which renders their influence hidden from introspection. The research definitively states the opposite – that individuals cannot control their biases through introspection. "Introspection, one of the strategies forensic psychologists rated as most useful for mitigating bias – is not just a poor strategy for bias correction, but may actually exacerbate bias" (Neal & Brodsky, 2016, p. 72).

Despite the research on blind spot bias and the introspection illusion, forensic psychologists persist in the belief that they can control their own biases through introspection. For example, Neal and Brodsky (2016) found the bias of introspection illusion at play in their survey of 351 forensic psychologists regarding strategies used to minimize or combat the impact of bias in forensic evaluation. All of the respondents reported attempting to minimize bias by introspection. Similarly, Zapf et al. (2017) indicated that the majority

of respondents (87%) believed they could minimize bias simply by consciously trying to set aside their biases and expectations. Zapf et al. also reported that the insufficiency of introspection for recognizing one's own bias could be a contributor to the observed bias blind spot in their sample. In a small study of forensic psychologists, Zappala et al. (2018) similarly found bias blind spots where evaluators tended to rate themselves as less biased than their peers and colleagues on measures of illusory correlation bias, hindsight bias, fundamental attribution bias, and confirmatory bias. Efforts to educate this sample about the ineffectiveness of introspection as a debiasing technique failed to increase the participants' awareness of bias.

> One of the most serious challenges to evaluators relates not to decisions concerning methodology or to selection of assessment instruments, but to guarding against various sources of bias. Because bias in any form is internal, and because most of the biases affecting evaluators are likely to operate unconsciously, there is no way to gather meaningful data concern the types of bias evaluators have struggled with.
>
> **(Gould & Martindale, 2007, p. 88)**

"In fact, critically examining conclusions (e.g., considering alternative hypotheses) was the highest-rated strategy in the quantitative survey with a mean rating that nearly topped the chart and had a narrow standard deviation" (Neal & Brodsky, 2016, p. 72).

> A few suggestions exist for how forensic clinicians might consider the impact of bias, such as actively generating alternative conclusions, identifying and using relevant base rates, minimizing the role of memory, and identifying and weighing the most valid sources of data.
>
> **(Arkes, 1981; Arkes, Faust, Guilmette, & Hart, 1988; Borum, Otto, & Golding, 1993) (Neal & Brodsky, 2016, p. 59)**

"Similarly, checklists can improve outcomes if they require the clinician to consider relevant information systematically" (Ely, Graber, & Croskerry, 2011; Gawande, 2009; Haynes et al., 2009). Other forcing strategies, such as consider-the-opposite or considering-an-alternative may be useful for reducing the effects of heuristics and biases by increasing the consideration of other potential hypotheses (Galinsky & Moskowitz, 2000; Lord, Lepper, & Preston, 1984; Mumma & Wilson, 1995; Neal & Brodsky, 2016, p. 60).

But biases can also result in useful attitudes and behavior. For example, when testing a hypothesis, a preference (or bias) for questions that objectively gather data on the hypothesis, a confirmatory strategy, can be a manifestation of a skill so long as it accomplishes its purpose without leading or contaminating the answer or as long as it discriminates between alternative or competing hypotheses. Hypothesis-testing requires a focused rational approach. A proper confirmatory diagnostic strategy can be very useful in discriminating between one hypothesis and an alternative hypothesis.

> As is the case with all biases, neither now nor in the future is there likely to be a convenient and efficient method by which evaluators can prevent confirmatory bias from distorting their judgment. The best answer lies in heeding the guidance contained in the American Psychological Association's *Guidelines for Child Custody Evaluations in Divorce Proceedings*

> (American Psychological Association, 1994), to employ "multiple methods of data gathering" (p. 679) and to be skeptical concerning information from one source that is not congruent with information from other sources.
>
> **(Martindale, 2005, p. 48)**

> Evaluators whose neutrality has not been contaminated by bias "describe the strengths and limitations of test results and interpretations," even if their profession is not psychology (American Psychological Association, 2002, p. 1071). Similarly, when factors come into play that might affect their "judgments or reduce the accuracy of their interpretations … [t]hey indicate any significant limitations of their interpretations" (p. 1072). It is difficult to imagine a situation in which there would not be limitations worthy of mention. When no statement of limitations appears, it is prudent to explore the possibility that the evaluator is endeavoring to persuade rather than to educate.
>
> **(Martindale, 2005, p 43–44)**

> [W]e suggest that the evaluator thoroughly review the pleadings and create a set of interview questions to be utilized with each parent during their individual interviews. In this way, each parent's perspectives, concerns, and allegations are processed as the evaluator formulates hypotheses and constructs the cognitive framework within which subsequently gathered information will be placed.
>
> **(Gould & Martindale, 2007, p. 90)**

> The evaluator creates active hypotheses, that is, proposed explanations as a starting point for further investigation that will be tested by the facts that are gathered; then those hypotheses organized into decision trees. The decision trees give the evaluator a picture of the many possible explanations for the issues that are present in the family. They allow the evaluator to hold in his or her mind all possible explanations for each particular issue that is present in the family. It allows the evaluator to zoom in on one issue – alone – and/or in interaction with other issues.
>
> The purpose of the evaluation decision tree is to bring forward every potential explanation of parenting and parent-child relationship strengths and weaknesses and to develop every tenable hypothesis respecting the history and causes of the issues that are presently facing the given family. A decision tree is a way of systematizing the evidence, a way to organize different pieces of information – to keep track of all and to avoid getting caught up in some while losing sight of others.
>
> **(Drozd & Oleson, 2004)**

In a survey of forensic practitioners, Neal and Brodsky, (2016), reported bias awareness. This group rated as "useful" or "very useful" the following strategies for minimizing bias:

Awareness of bias falls on a continuum:

1. From automatic denial of bias to believing bias is inevitable
2. Awareness of bias in others is higher than awareness of personal bias
3. Efforts to compensate for colleagues' bias

Specific biases identified

1. Evoked cognitive and emotional reactions
2. Preexisting personal, moral, and political values

3. The influence of interested others
4. The economic effect

Embracing professional pride

5. Developing a sense of pride in one's professional identity

Formal and informal education

6. Receiving explicit didactic training about objectivity
7. Exposure to the importance of objectivity through reading professional literature
8. Observing others who manage their personal biases successfully
9. Taking personal responsibility to continue learning after completing formal training and education

Relying on data

10. Investigating all relevant data before forming an opinion
11. Taking time to think about the evaluation information rather than immediately writing the report
12. Critically examining conclusions (e.g., considering alternative hypotheses)
13. Being an active consumer of scientific information
14. Basing conclusions and opinions on sound data
15. Examining patterns of personal decision-making (e.g., agreement with referral party preferences)

Restricting the scope of opinions

16. Restricting conclusions and opinions to scientific information
17. Clarifying the referral question and limiting the scope of inquiry and report to the referral

Using procedural and structural supports

18. Using structured evaluation methods
19. Taking careful notes during an evaluation
20. Consulting with colleagues about issues of potential bias

Resisting adversarial allegiance

21. Resisting allegiance efforts
22. Avoiding advocacy

Introspecting to recognize bias

23. Fostering a continuing commitment to objectivity
24. Continuous introspection about potential biases

"Controlling" bias

25. Intentionally controlling existing bias
26. Attending to wording choice in reports to edit out value-laden language
27. Accepting referrals only for cases in which bias is unlikely

Disengaging emotionally from cases

28. Limiting empathy and rapport in forensic cases
29. Disengaging emotionally from cases

This study identified two strategies that were considered as between "not certain" and "useful." These two strategies were: (1) disengaging emotionally from cases and (2) accepting referrals only for cases in which bias is unlikely. One last, and the lowest-rated, strategy: limiting empathy and rapport in forensic cases, was the only strategy where the average ratings were generally "not certain" to "useless."

Expert Reports and Testimony

Testifying Expert: Scope of Testimony and Credibility Management

It must be stressed at the outset that reviewers often do not testify. After having conducted a review, the reviewer may often function as an unidentified consultant to the retaining attorney. Ordinarily, in order for reviewers to assist attorneys who have retained them as consultants or to assist triers of fact if the reviewers ultimately offer testimony, reviewers must be familiar with the contents of evaluators' files. In most review work, though a reviewer's preliminary impressions may appropriately be formulated based upon a reading of the report submitted by the evaluator, going forward necessitates having access to the file. Appointment orders, pleadings, evaluators' statements of understanding, contemporaneously taken notes, documents reviewed, and test data are all important.

In our review work, we ask to review the report without asking to review the file. There are times when after reading the report, it is relatively clear that the report is adequate, methodology is appropriate, and conclusions drawn from the data seem reasonable. In such situations, it might be appropriate to explain to the retaining attorney that the report appears satisfactory. It is not uncommon in our practice for the reviewer's work to stop after reviewing the report and indicating that the report appears adequate.

Discussion may follow in which the retaining attorney explains how relevant information in the file was excluded from the report and that without file review, it would be unlikely for the reviewer to recognize potential flaws in the custody evaluation. Other times, the attorney might indicate that the evaluator has appropriately identified the relevant information from the file and discussed these data in the report. Decisions are then made about whether it is cost-effective for the reviewer to spend time analyzing the evaluator's file.

In some situations, full file reviews are not necessary. Triers of fact can often benefit from educational testimony offered by forensic psychologists whose expertise in methodology enables them to offer useful commentary on the evaluative methodology described by experts in their reports. In such situations, reviewers focus their attention on the information provided by the evaluators in their reports and the reviewers formulate their opinions based upon the evaluators' own information. Reviewers need to be mindful, however, that a frequent challenge on cross-examination points out the reviewer's lack of knowledge of the underlying data upon which the evaluator's report is based.

When there appear to be flaws in the report or it appears some data have been disregarded or neglected, a full file review is performed. Reviewers should not limit their examination of the file to those items identified by evaluators as having played a role in the formulation of their opinions. Particularly when retaining attorneys assert that information provided to the evaluator appears not to have been utilized, that information should be examined with care. It may be as important to review information *excluded* from the report that is in the evaluator's file as it is to review the information that is *included* in the evaluator's report and file.

Reports are most useful when they address the issues of methodology, formulation of opinions, and the communication of findings and opinions to the court. Reviewers should describe the manner in which they were retained, the nature of their assigned task, and the items examined in formulating their opinions. In discussing the limitations inherent in the review process, reviewers should make it clear that they have had no significant contact

with the litigants or with others involved in the evaluative process (aside from attorneys). Reviewers are educators to the attorneys who retain them and, if they testify, to the judges who hear their testimony. For this reason, reviews should contain citations to current peer-reviewed published literature and should provide clear explanations of any criticisms registered (Gould & Martindale, 2008).

There is no consensus in the child custody literature about how best to present information in a written review of another colleague's child custody report. We have structured our written reviews to follow the logical steps taken by attorneys in a *Daubert* challenge.

As a reviewer approaches writing a report, it is important to keep in mind that courts, especially courts operating in *Daubert* and *Daubert*-like jurisdictions, recognize the value of the scientific process as the basis of data gathering, data analysis, and opinion development.

> A "key question" is whether the theory or technique can be (and has been) tested. … Scientific methodology … is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry.
>
> **(Daubert at 594)**

The first step in writing a review is establishing the basis for the review. We discuss the psychological ethics, professional practice guidelines, peer-reviewed literature, and workshops that support the role of a psychologist reviewing the work of a colleague.

A next step is to address the statutory, regulatory, or standard of care criteria that might exist in the state in which the court order was issued. In several states, a fundamental assumption in assessing the reliability of expert opinion testimony is whether the expert complied with a particular mandated statutory, regulatory, or standard of care. Mandated compliance with statutory, regulatory, or standard of practice criteria is a necessary but not sufficient component of an examination of reliability for expert testimony. Some courts have found that expert opinions that did not consider regulatory performance standards are unreliable and therefore inadmissible. Other courts have determined that, for expert testimony to be viewed as reliable, it must be predicated on "proper legal concepts" governing standard of care.

A third step is to discuss the evaluator's qualifications. The reviewer might look at the evaluator's resume and request that the retaining attorney obtain from the evaluator a list of continuing education courses taken in the past five years with particular attention to CE courses related to child custody assessment. If the evaluation's focus was on an area requiring specialized knowledge such as relocation, resist-refusal dynamics, or transgender concerns, does the evaluator's background suggest specialized knowledge in those areas relevant to conducting this particular evaluation? Although the reviewer should be careful not to be perceived as venturing into judicial decision-making about whether the evaluator is qualified to testify in this trial about these particular issues, a critical review of an evaluator's credentials, education, and training can help answer the question: "Does the witness have enough expertise to be in a better position than the trier of fact to have an opinion on the subject?" [McGrady at 889].

A fourth step of a written review is the examination of each of the data gathering procedures employed in the evaluation. A review of parent interviews, child interviews, and

collateral interview data should focus attention on whether the evaluator gathered sufficient relevant information to answer questions guiding the custody evaluation. If there are no questions identified by the court or the attorneys to guide the evaluator's investigation, it might be important to comment about how the lack of specific questions to guide the evaluation makes it difficult for the reviewer to know – and likely difficult for the court to determine – what the evaluator considered relevant and whether sufficient relevant data were collected during the evaluation.

When there are no specific questions to guide the evaluation, we believe there are three options to address. These options are not mutually exclusive. One option is to discuss the state's best interest criteria that are most often defined in statute or case law. The primary question to be answered is whether the evaluator has gathered sufficient information from multiple sources to address each of the best interest factors.

The second option is to discuss the state's statutes that control conducting child custody evaluations. Some states have statutory requirements defining how to conduct evaluations, what factors must be assessed, how to present the information in reports, and other requirements. The primary questions to be answered are whether the evaluator has gathered sufficient information from multiple sources to address each of the child custody factors and whether the evaluator has conducted the evaluation in a manner consistent with the statutory requirements. For example, in the State of Texas, one required question is whether the evaluator took steps to verify from independent sources statements made by the parties during their interviews.

The third option is to discuss the factors to be assessed in a child custody evaluation as recommended in professional practice guidelines such as those promulgated by the American Psychological Association (2010) and the Association of Family and Conciliation Courts (2007). The primary question to be answered is whether the evaluator has gathered sufficient information from multiple sources to address each of the recommended child custody factors.

A fifth step of a review is the evaluator's selection, administration, scoring, and interpretation of psychological tests. Survey research revealed many colleagues continue to use assessment tools with weak or nonexistent psychometric integrity.

> The forensic use of psychological tests needs, not only research support on the specific application but also clarity in demonstrating the best interest of the child or children. In other words, forensic custody testing needs to have the type of research support of risk assessment now commonly part of police investigations and court proceedings.
>
> **(Posthuma, 2016, p. 67)**

The most recent survey data suggest child custody evaluators are more mindful of administering psychological tests perceived to be capable of surviving a Daubert challenge (Ackerman, Bow, & Mathy, 2020).

When examining how psychological tests were used in courtrooms across the country, Neal et al. (2019) reported that nearly all of the assessment tools used by psychologists and offered as expert evidence in legal settings have been subjected to empirical testing (90%). However, only about 67% were identified as generally accepted in the field and only about 40% have generally favorable reviews of their psychometric and technical properties in authorities such as the Mental Measurements Yearbook. Furthermore, Neal et al. (2019)

reported that legal challenges to the admission of psychological test results are infrequent. They found legal challenges to the assessment evidence for any reason occurred in only 5.1% of cases in their sample, with a little more than half of these challenges focused on the validity of the test. When challenges were raised, they succeeded only about a third of the time. Challenges to the most scientifically suspect tools were found to be almost nonexistent. Neal et al. reported that there is no relationship between the psychometric qualities of a test and its likelihood of being challenged in court. Their data suggested that some of the weakest tools tend to get a pass from the courts. "Our bottom-line conclusion is that evidentiary challenges to psychological tools are rare and challenges to the most scientifically suspect tools are even rarer or are nonexistent" (Neal et al., 2019, p. 154).

Another important finding in the Neal et al. study was the lack of context-validation studies of the psychological tests being used by psychologists in forensic cases. This refers to the practice of using psychological tests for purposes other than how they were intended to be used. A test developed for one purpose may not be appropriate to be used for a different purpose or in another context. Data need to be available demonstrating the test's reliability and validity when used with the population under scrutiny. That is, are there data to support an evidence-informed understanding of the meaning of test results with a particular population? The Minnesota Multiphasic Personality Measure, 2nd Edition (MMPI-2), Minnesota Multiphasic Personality Inventory 2nd Edition-Restructured Form (MMPI-2-RF), Personality Assessment Inventory (PAI), Millon Clinical Multiaxial Inventory, 3rd Edition (MCMI-III), and Parenting Stress Index, 4th Edition (PSI-4) have normative data describing male and female custody litigants' performance. Similar data should be available for each of the measures employed by the evaluator.

It is critical to look at the nature and quality of the psychological test data. It is dangerous to assume that the use of reliable data gathering techniques will yield relevant information. Reliable data gathering techniques such as psychological tests may yield inaccurate or incomplete information. The use of psychological tests in forensic assessment remains somewhat controversial (Rappaport et al., 2018). The evaluator's ability to explain to the court the relevance of each test selected for use in the assessment might be a useful area to explore.

Recall the 1971 US Supreme Court decision in *Griggs et al. v. Duke Power Company*, a matter only remotely related to custody evaluations but with important implications for evaluators and their choice of tests. The *Griggs* case focused on industrial tests used for the purpose of guiding decisions regarding employment, placement, or promotion. The *Griggs* court declared that our assessment "devices and mechanisms" must be demonstrably reasonable measures of job performance (p. 436) and held that "what Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." (p. 436). The italicized words are critical: Individuals who employ psychological tests must "measure" and describe only those aspects of the person that relate directly to the job for which the person is being evaluated (Gould & Martindale, 2011).

The lesson that custody evaluators can take from the *Griggs* decision is that our attempts to assess the characteristics that bear directly upon parenting are more likely to meet with success if we conceptualize parenting as a job and focus our attention on those attributes, behaviors, attitudes, and skills that are reliably related to the demands of the job. Examining an attribute in the absence of evidence of its connection to parenting effectiveness leaves an evaluator open to criticism on several fronts (Gould & Martindale, 2011). The application of *Griggs* to review an evaluator's selection of tests pertains to relevance.

Some evaluators select assessment techniques that measure behaviors that are not relevant to parenting.

No doubt forensic evaluators need to be aware of the various types of malingering and deception that litigants might bring to bear on psychological testing. Not all tests of malingering, however, are used for all situations. Some specific peer-reviewed literature addresses measures of malingering and deception commonly used in child custody evaluations (Gould, Flens, & Rappaport, 2018). Research findings over more than 60 years demonstrate little validity to the idea that a person can make reliable judgments of another person's credibility even in face-to-face interviews. "The evidence from many experimental studies is remarkably consistent: the majority of laypersons and professionals have little or no ability to discriminate between true and false statements about past events made by either children adults" (Herman & Freitas, 2010, p. 135). Said differently, research clearly documents the inability of psychologists to identify deception in face-to-face interpersonal interactions any more effectively than deception can be reliably identified by others (DePaulo et al., 1997; Ekman & O'Sullivan, 1991; Feely & Young, 1998; Frank & Feeley, 2003).

Examining how the psychological test was scored is another area of potentially useful inquiry. Most tests used in forensic assessment have standardized administration and scoring. Scoring is most often done through a computer program with known reliability. Knowing the scoring program used to score the test might yield valuable areas for examination. Some evaluators use nonstandard means to score a test. Exploring the scientific basis for using a nonstandard scoring procedure might be a fruitful avenue for a reviewer to examine.

Over the past 15 years, the professional and scientific literature addressing the use of psychological tests in child custody evaluations has warned against reliance upon computer-generated reports. With the exception of the more recent MMPI-2-RF, none of the computer-generated reports identify the empirical basis for the interpretive statements. None of the programs provide information to the evaluator regarding which score, or which set of scores, is associated with specific statements found in the computer-generated reports. Similarly, none of the programs provide information to the evaluator regarding the value of the score or scores upon which the interpretive statements are based, yet evaluators' use of this generalized information often goes unchallenged in court.

The biggest obstacle to the admissibility of interpretive statements drawn from computer-generated reports is the lack of information about their reliability and validity. None of the programs used to produce computer-generated reports have been subject to peer review. The algorithms used in producing the interpretive statements are proprietary and have yet to be empirically examined in peer-reviewed publications. Simply stated, evaluators who rely on interpretive statements drawn from a computer-generated report are basing their expert opinions on a methodology (the algorithms used in the computer program) of unknown reliability applied to test data by a person or persons unknown to the evaluator and unknown to the court. Those who have written about concerns using computer-generated reports question the reliance on interpretive statements drawn from the computer-generated reports and opine that such interpretations should be considered inadmissible hearsay evidence (Gould et al., 2009; Rappaport et al., 2018).

A sixth step is to examine the file for whether the evaluator considered plausible alternative hypotheses as described in professional practice guidelines (APA, 2011) and in case law addressing admissibility of expert testimony (*Merrell Dow Pharm., Inc. v. Havner*, 1997). Some courts have viewed the failure to consider plausible alternative hypotheses

and/or causes turning expert opinion into little more than speculation (*E.I. Dupont de Nemours & Co. v. Robinson*, 1995). Other courts, such as North Carolina, have cited similar language and asked the trial court to determine whether the expert has adequately accounted for obvious alternative explanations (*McGrady*, 2016).

A seventh step is the examination of whether the evaluator's opinions are reasonably tied to data. A connection must be established between the underlying data and facts relied upon in reaching the conclusion, on the one hand, and the evaluator's opinion(s) on the other. If the underlying information that forms the basis of opinion testimony is unreliable, or if the underlying data are insufficient, the reviewer should raise concerns about the lack of foundation for the evaluator's opinion.

An eighth step is whether the evaluator has gathered sufficient and relevant information from independent sources to base an opinion. An evaluator who forms an opinion without all the relevant data may form a questionable conclusion. In that circumstance, the evaluator's testimony may be unreliable and excluded from admission into evidence. The reviewer's analysis can identify places where the evaluator's opinions are based upon insufficient information or incomplete information. The reviewer's focus is not to determine the truth or falsity of the evaluator's opinion, but whether the evaluator's is relying on a complete set of data as the basis for the expert opinions.

Opinions without substances are not helpful to the court. Or, as the Texas Court ruled in *Havner* (1997): "An expert who supplies nothing but a bottom-line supplies nothing of value to the judicial process." Citing *Daubert*, "Expert testimony that is not grounded in methods and procedures acknowledged by scientists in the particular field of study amount to no more than subjective belief or unsupported speculation" (Daubert, pp. 589–90). When an expert brings to court little more than his credentials and a subjective opinion, he or she offers no evidence that would support a judgment (Havner, 1997). The idea is that if an opinion is fundamentally unsupported, then it offers no expert assistance to the court.

The final area of review pertaining to forensic psychological methods is record review. The reviewer should examine the records provided to the evaluator for review regardless of whether or not the evaluator chose to read the material. The assumption is that a review is permitted to review any and all material provided to the evaluator for review, not whether the evaluator did, in fact, review the material.

Credibility Judgments

We end this chapter by addressing an issue that we often observe that arises in the reviewer's expert witness testimony. We observe many evaluators offering judgments about the credibility of a parent drawn from interview data or the credibility of information drawn from child interviews or collateral interviews. Judgments of credibility are the province of the court, not the expert witness. Evaluators and reviewers focus on the consistency or reliability of information across independent data sources.

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