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Matrimonial Series #1: Use of Various Experts in Supreme & Family Court Actions & Proceedings

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March 4, 2019
Suffolk County Bar Association, New York

MATRIMONIAL MONDAYS
MARCH 4, 2019

Use of Various Experts in Supreme and Family Court Actions and Proceedings

Welcome and Introductions
Hon. Jennifer A. Mendelsohn

Business Appraisal and Valuation:
Nicholas E. Arazoza, Esq.
Harold L. Deiters III, CPA
Matthew K. Mady, Esq.

Expert Testimony:
Jeffrey S. Horn, Esq.

Child Custody Evaluations in Supreme and Family Law Proceedings:
Francine H. Moss, Esq.
Hon. John. J. Leo

Guidelines for Child Custody Evaluations in Family Law Proceedings:
Robert I. Goldman, J.D., Psy.D.

FACULTY:

Nicholas E. Arazoza, Esq. is an associate at Campagna Johnson, P.C. in Hauppauge, New York, where he handles divorce matters, from the simple to the complex, including the valuation and distribution of businesses, and professional practices, contentious custody matters, and the collection and enforcement of spousal and child support. Prior to joining Campagna Johnson, Mr. Arazoza operated his own practice in Rochester, New York.

Mr. Arazoza has experience litigating cases at the trial level and has been lead counsel on a number of highly successful appeals, achieving favorable results for his clients. Notably, arguing before the Appellate Division, Second Department, on the matter of *Cook v. Cook*, 162 A.D.3d 674 (2d Dept. 2016), Mr. Arazoza convinced the Appellate Division to modify the decision of the Suffolk County Supreme Court by shifting custody of both children to his client.

Harold L. Deiters III, CPA/ABV/CFF/CGMA, CFE, MAFF/CVA, Baker Tilly
Harold Deiters is the Partner-in-Charge of the litigation and valuation consulting team in the New York regional offices of Baker Tilly. He has concentrated his practice in business appraisal and forensic accounting and covers valuations for matrimonial settlements, estate tax purposes, gift planning, shareholder disputer, buy/sell agreements, and complex forensic accounting projects.

Mr. Deiters has extensive experience in accounting and auditing both public and privately held companies, including manufacturing, wholesale and retail distribution, professional service organizations and not-for-profit organizations. He has trial experience in the NYS Supreme Court, is accredited in Business Valuation (ABV) and has Certification in Financial Forensics (CFF), is a Chartered Global Management Accountant (CGMA) from the American Institute of CPAs (AICPA). He is a Certified Fraud Examiner (CFE) credentialed from the Association of Certified Fraud Examiners and has the Master Analyst in Financial Forensics (MAFF) and Certified Valuation Analyst (CVA) credentials.

Jeffrey F. Gibralter, CPA/ABV/CFF, CFE
Mr. Gibralter is a Partner in the business valuation and litigation consulting support firm of Klein Liebman & Gresen, LLC. Mr. Gibralter has assisted hundreds of closely-held companies, attorneys, accountants and financial professionals with engagements involving business valuations, forensic accounting, litigation support, and expert witness testimony.

Mr. Gibralter holds a Bachelor of Science degree in Accounting from the State University of New York at Albany. He is a Certified Public Accountant licensed in the State of New York and has also earned the American Institute of Certified Public Accountants' ABV designation (Accredit in Business Valuation) and CFF designation (Certified in Financial Forensics). In addition, Mr. Gibralter is a Certified Fraud Examiner (CFE). He is a member of the American Institute of Certified Public Accountants, New York State Society of Certified Public Accountants, and Association of Certified Fraud Examiners.

Robert I. Goldman, J.D., Psy.D.
Doctor of Psychology (Psy.D.), School-Community Psychology, 2004, Hofstra University, Hempstead, N.Y., Juris Doctor (J.D.), 1992, Touro College Jacob D. Fuchsberg Law Center, Huntington, N.Y., B.A., English/ Psychology, 1989, Union College, Schenectady, N.Y.,

LICENSURE/CERTIFICATIONS

- Admitted in New York State Appellate Division Second Dept. Feb. 1993
- Admitted in Federal Court Eastern District
- New York State Licensed Psychologist: 68-016477

Dr. Goldman currently serves as an Adjunct Professor, Hofstra University School Of Criminology teaching Restorative Justice; Adjunct Professor, Saint Joseph's College, Patchogue, NY and teaches the selected topic of Community Corrections and supervises law student interns for probation in the area of restorative justice at Touro Law School, Central Islip.

Jeffrey S. Horn, Esq.
Jeffrey Horn was admitted into practice in the New York State Bar in February 1981. He is a member of the Suffolk County Bar Association, the Nassau County Bar Association, the Suffolk County Matrimonial Bar Association and is a Past President of the Suffolk County Matrimonial Bar Association. Mr. Horn is appointed as a Referee to hear and report on various matrimonial issues and is appointed as a member of the Suffolk County Calm Project.

Hon. John J. Leo, Supreme Court-County of Suffolk
Hon. John J. Leo was admitted to practice in New York and before the Supreme Court of the United States, the United States District Court of the Southern and Eastern Districts. **Justice of the Supreme Court of the State of New York, County of Suffolk**, Justice Leo served as Town Attorney, Town of Huntington, and prior to Town Attorney, was in private practice. Hon. John J. Leo holds a B.A. in Economics, cum laude from Fordham University, M.B.A. NYU Graduate School of Business in Finance/Accounting and J.D. Fordham University School of Law.

Matthew K. Mady, Esq., Associate, Campagna Johnson, PC
Mr. Mady graduated from Quinnipiac University with a double major in History and Health Science Studies, and then continued his education by attending Hofstra University Maurice A. Dean School of Law, from which he obtained his JD with a Certificate of Study in Child and Family Advocacy. While attending law school, Mr. Mady was chosen to be a member of the Family Court Review, was Editor in Chief of the Sports and Entertainment Law Digest, as well the President of the Sports and Entertainment Law Society. Since graduating, Mr. Mady has focused his legal career solely on the practice of family and divorce law, appearing before the Courts of Suffolk, Nassau and Queens Counties, as well as the Appellate Division of the Second Department.

Francine H. Moss, Esq. has been practicing law in Suffolk County for almost 40 years. Her practice, located in Ronkonkoma, NY focuses on Family and Matrimonial Law issues and approximately 25% of her practice is dedicated to representing children in cases of abuse, neglect, custody and visitation.

Francine received her undergraduate degree from Brooklyn College, cum laude with honors in Sociology. She did two years of graduate work at Pennsylvania State University and then went on to law school, receiving her juris doctor degree from the New York University School of Law. She is qualified to practice law in the State of New York, in the United States District Courts for the Eastern and Southern Districts of New York, as well as the United States Supreme Court.

APPRAISAL REPORT
OF THE FAIR MARKET VALUE OF
IVORY MOLAR'S 50% INTEREST IN
ROOT & MOLAR DDS PC

AS OF JANUARY 11, 2016

Report Summary

Purpose of Valuation	Pending Matrimonial Litigation
Standard of Value	Fair Market Value
Premise of Value	Going Concern
Valuation Dates	Date of Action: January 11, 2016 Date of Marriage: July 4, 1994
Interest Being Valued	Ivory Molar's 50% Interest in Root & Molar DDS PC.
Conclusion	Based on the assumptions and limiting conditions as described in this report, as well as the facts and circumstances as of the valuation date, we conclude that the fair market value of Dr. Ivory Molar's 50% interest in Root & Molar DDC PC, as of January 11, 2016, is **$725,000**.

March 4, 2019

Counsel #1 (Husband)
123 Main Street
Denture, NY 10000

Counsel #2 (Wife)
456 Smith St
Bridge, NY 10001

Re: Ivory Molar v. Brad Cavity
Fair Market Value of Ivory Molar's 50% Interest in Root & Molar DDS PC
As of January 11, 2016

Dear Counselors:

Silly Consultants, LLP ("Silly Consultants") was appointed by the Honorable Judge Awesome in connection with the above-captioned matter as the neutral appraiser. We were retained to prepare a valuation analysis and appraisal report ("the Report") to assist you and your clients, in the determination of the fair market value of Dr. Ivory Molar's ("Dr. Molar") 50% interest in Root & Molar DDS PC ("DDS PC" or the "Practice") and Dr. Molar's income derived from the Practice, including reasonable compensation. The value conclusion is considered as a cash or cash equivalent value. The valuation dates are January 11, 2016 and July 4, 1994 ("Valuation Date(s)"). This valuation and Report are to be used only as of these dates and are not valid as of any other date.

This valuation was performed solely to assist in the determination of the value solely in connection with the above-captioned matter and the resulting estimate of value should not be used for any other purpose or by any other party for any purpose, without our express written consent.

We have performed a valuation engagement and present our Report in conformity with the "Statement of Standards for Valuation Services No. 1" ("SSVS") of the American Institute of Certified Public Accountants. SSVS defines a valuation engagement as "an engagement to estimate value in which a valuation analyst determines an estimate of the value of a subject interest by performing appropriate procedures, as outlined in the AICPA Statement on Standards for Valuation Services, and is free to apply the valuation approaches and methods he or she deems appropriate in the circumstances. The valuation analyst expresses the results of the valuation engagement as a conclusion of value, which may be either a single amount or a range."

Our analysis and report are in conformance with the Uniform Standards of Professional Appraisal Practice ("USPAP") promulgated by the Appraisal Foundation, the ethics and standards of the American Society of Appraisers.

Our analysis and report are also in conformance with various revenue rulings, including Revenue Ruling ("R.R.") 59-60, which outline the approaches, methods and factors to be considered in valuing shares of capital stock in closely held corporations for federal tax purposes. R.R. 65-192 extended the concepts in R.R. 59-60 to income and other tax purposes as well as to business interests of any type.

The standard of value is fair market value ("FMV") defined in R.R. 59-60 as "the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts." R.R. 59-60 also defines the willing buyer and seller as hypothetical as follows: "Court decisions frequently state in addition that the hypothetical buyer and seller are assumed to be able, as well as willing, to trade and to be well informed about the property and concerning the market for such property." Furthermore, fair market value assumes that the price is transacted in cash or cash equivalents. R.R. 59-60, while used in tax valuations, is also used in many non-tax valuations.

The premise of value is going concern.[1] The liquidation premise of value was considered and rejected as not applicable, as the going-concern value results in a higher value for the interest than the liquidation value, whether orderly or fixed.

In our conclusion of value, we considered the following relevant factors, which are specified in R.R. 59-60:

- The history and nature of the business
- The economic outlook of the United States and that of the specific industry in particular

[1] *The International Glossary of Business Valuation Terms defines "Going Concern" as "an ongoing operating business enterprise," and "Going Concern Value" as "the value of a business enterprise that is expected to continue to operate into the future. The intangible elements of going concern value result from factors such as having a trained work force, an operational plant, and the necessary licenses, systems, and procedures in place."*

- The book value of the subject practice's stock and the financial condition of the business
- The earning capacity of the practice
- The dividend-paying capacity of the practice
- Whether or not the firm has goodwill or other intangible value
- Sales of the stock and size of the block of stock to be valued
- The market price of publicly traded stocks or corporations engaged in similar industries or lines of business

Our study included, but was not limited to, the above-mentioned factors.

A. Scope of Work

In accordance with USPAP, we have prepared an appraisal. "The objective of an appraisal is to express an unambiguous opinion as to the value of a business, business ownership interest, or security, which opinion is supported by all procedures that the appraiser deems to be relevant to the valuation." [2] It is based on all relevant information available to the appraiser as of the valuation date; the appraiser conducts appropriate procedures to collect and analyze all information expected to be relevant to the valuation, and the appraiser considers all conceptual approaches deemed to be relevant. [3]

In accordance with the Scope of Work Rule in USPAP we:

1. identify the problem to be solved;
2. determine and perform the scope of work necessary to develop credible assignment results; and
3. disclose the scope of work in the report. [4]

To gain an understanding of the operations of the Practice, we reviewed the Practice's financial information and/or operational data, interviewed Dr. Ivory Molar, Brad Cavity, and Joe Accountant, CPA, the Practice's independent accountant. We also visited the Practice's facility. To understand the environment in which the Practice operates, we researched the status of and trends in the various

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[2] *ASA Business Valuation Standards BVS-1 General Requirements for Developing a Business Valuation.*
[3] *Ibid.*
[4] *USPAP 2014-2015, p. U-13.*

industries that have an impact on it. We also studied economic conditions as of the Valuation Dates and their impact on the Practice and the industry. To understand the Practice's financial condition, we analyzed its financial statements as available.

As discussed in this report, we considered all valuation approaches and methods and applied the most appropriate methods from the income, asset and market approaches to derive an opinion of value of the subject equity interest. Our conclusion of value reflects these findings, our judgment and knowledge of the marketplace, and our expertise in valuation.

Our valuation is set out in the attached report, which contains the following sections:

I. History and Nature of the Practice
II. General Economic and Industry Outlook
III. Book Value and Financial Position
IV. Approaches to Value
V. Income Approach
VI. Market Approach
VII. Agreement Value
VIII. Consideration of Discounts
IX. Conclusion of Value
X. Dr. Molar's Income Stream from the Practice

In performing our work, we were provided with and/or relied upon various sources of information, as contained in **APPENDIX A.**

The procedures employed in valuing the subject interest in DDS PC included such steps as we considered necessary, including (but not limited to):

- An analysis of DDS PC's tax returns
- An analysis of DDS PC's management's expectations for the future and other information supplied by management
- Discussions with Dr. Molar and Brad Cavity
- A site visit to DDS PC's office
- An analysis of the dental industry

- An analysis of the general economic environment as of the valuation date, including investors' equity and debt return expectations
- An analysis of other pertinent facts and data resulting in our conclusion of value

There were no restrictions or limitations in the scope of our work or data available for analysis.

This conclusion is subject to the Statement of Assumptions and Limiting Conditions found in **APPENDIX B** of this report and to the Valuation Analyst's Representation and Certification found in **APPENDIX C** of this report. We have no obligation to update this report or our conclusion of value for information that comes to our attention after the date of this report.

Distribution of this letter and report and associated results, which are to be distributed only in their entirety, is intended and restricted to you, your client, and your client's accountants and attorneys, solely to assist you and your client in the determination of the FMV of the subject interest for the purpose stated above and is valid only as of the Valuation Date(s). This letter and accompanying report are not to be used with, circulated, quoted or otherwise referred to in whole or in part for any other purpose, or to any other party for any purpose, without our express written consent.

The approaches and methodologies used in our work did not comprise an examination or any attest service in accordance with generally accepted auditing standards, the objective of which is an expression of an opinion regarding the fair presentation of financial statements or other financial information, whether historical or prospective, presented in accordance with generally accepted accounting principles. We express no opinion and accept no responsibility for the accuracy and completeness of the financial information (audited, reviewed, compiled, internal, prospective or tax returns), or other data provided to us by others, and we have not verified such information unless specifically stated in this report. We assume that the financial and other information provided to us is accurate and complete, and we have relied upon this information in performing our valuation.

If you have any questions concerning this valuation, please contact us.

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I. HISTORY AND NATURE OF PRACTICE [5]

DDS PC was organized under the corporate laws of New York on December 17, 1992 and was founded by Dr. Ivory Molar and Dr. Anita Root. DDS PC does business under the name Bridge Dental. The Practice was founded less than two years prior to the marriage between Ivory Molar and Brad Cavity. The Practice is governed by its Shareholder Agreement.

Dr. Molar specializes in general dentistry and restorative dentistry. Dr. Root specializes in orthodontics and cosmetic dentistry. Since inception, Drs. Root and Molar each own 50% of the Practice.

DDS PC is a comprehensive dental practice with services from routine check-ups and cleanings to reconstructions. DDS PC's full line of services include:

- Comprehensive Restorative Dentistry
- Cosmetic Dentistry
- Implant Dentistry
- Emergency Dentistry
- Orthodontics
- Porcelain Veneers
- Snoring and Sleep Apnea Therapy
- Teeth Whitening
- TMJ Therapy

DDS PC's hours of operations are Monday, Tuesday, Thursday 9:00 AM to 5:00 PM, Wednesday 11:45 AM to 8:00 PM, Friday 9:00 AM to 1:00 PM, and Saturdays (twice a month) 8:00 AM to 1:00 PM. On average the Practice sees approximately 30 to 40 patients per day.

The Practice accepts private pay and dental insurance. The Practice also offers 18-month interest free financing.

[5] *The text of this section is largely drawn from interviews with management, the Practice's website and other available information. Language has in places been extracted wholly or largely verbatim and/or substantially paraphrased.*

DDS PC has 10 full-time employees and 2 part-time employees including both Drs. Root and Molar, dental hygienists, an office manager, receptionist and dental assistants. Brad Cavity also received a salary from the Practice as a part-time billing manager.

DDS PC's office is located at 2745 Oral Street in Rinse, New York. The office consists of 8 exam rooms, doctor's offices and reception area. The building in which the Practice operates is owned by a related entity owned by 2745 Oral Street Realty, LLC, an entity wholly owned by Dr. Molar.

Shareholders' Agreement

The shareholders of the Practice entered into a Shareholders Agreement dated January 1, 2010 ("Agreement"). We have been advised that there was no agreement in place prior to this Agreement. Pursuant to the Agreement, upon the voluntary withdrawal of a shareholder from the Practice, that shareholder would be free to leave the Practice with 90 days' notice but will be restricted from practicing dentistry within a 5 mile radius for 2 years. There was no discussion in the Agreement regarding any buy-out of a shareholder's interest based on voluntary withdrawal or disability.

However, upon death of a shareholder, the Practice shall purchase the deceased shareholder's interest at a price equal to the face value of life insurance policy on that shareholder's life. The Practice shall maintain a $500,000 life insurance policy on each of its shareholder's lives with the Practice being the beneficiary of the policy. The life insurance proceed received by the Practice would then be used to purchase the deceased shareholder's interest from her estate for the same amount.

II. GENERAL ECONOMIC AND INDUSTRY OUTLOOK

A. Recent and Current Economic Conditions

The financial success of the Practice as of the Valuation Dates was dependent upon conditions within the economy and the financial markets. A prospective investor tempers the use of historical financial statistics on the basis of anticipated general economic conditions. An analysis of these factors as of the Valuation Dates is, therefore, incorporated into this valuation study. In this case, economic information was not available as of the Date of Marriage Valuation Date. In this section, we only provide economic information as of the Date of Action Valuation Date.

Certain items in the following discussion have been extracted from Business Valuation Resources, Economic Outlook Update; a full excerpt is included in **APPENDIX E.**

A summary of major points concerning the nation's economic conditions and the effect on the Practice as of the most recent fiscal quarter ended December 31, 2015, is as follows:

- The Bureau of Economic Analysis (BEA) reported that the nation's economy—as indicated by GDP—grew at an annual rate of 0.7% in the fourth quarter of 2015.

- Consumer spending grew at a rate of 2.2% during the fourth quarter of 2015, a deceleration from the third quarter's pace of 3.0%.

- Business investment, also referred to as "nonresidential fixed investment," fell at a rate of 1.8% in the fourth quarter of 2015. This was the first decline in business investment since the third quarter of 2012.

- Service expenditures grew at a rate of 1.3% in the fourth quarter of 2015, down from the 2.7% rate in the prior quarter. The decrease in spending on household services occurred most notably on housing and utilities. In the year, service expenditures grew at 2.3%, down from 2.8% the previous year.

- After a turbulent third quarter in 2015, the stock market rebounded in the fourth quarter of 2015. The Dow Jones Industrial Average (DOW) rose 7.0% in the fourth quarter. Including dividends, the Dow's total return was 7.7% in the fourth quarter and 0.21% for the year.

- Consensus Economics Inc., publisher of Consensus Forecasts – USA, reports that the consensus of U.S. forecasters in the real GDP will increase at a seasonally adjusted annual rate of 2.5% in the first quarter of 2016 and 2.7% in the second quarter. The forecasters expect GDP to grow 2.5% each year in 2016 through 2018.

B. Industry Overview & Trends[6]

Practices in this industry provide general and cosmetic dentistry services. Approximately 135,000 dentist offices operate in the U.S., generating annual revenue of about $110 billion.

[6] *First Research Industry Report for SIC Code 8021 Dentists*

Industry information was not available as of the Date of Marriage Valuation Date. In this section, we only provide industry information as of the Date of Action Valuation Date.

A summary of key items within the Dental industry and the effect on the Practice are discussed below:

Competitive Landscape

- Demand for dental services is driven largely by population growth, especially among children ages 5 to 19, who may require prophylactic and orthodontic work, and adults over 55, who may need more specialized dental work. Profitability depends on efficient operations. Large practices have advantages in marketing, purchasing, and being able to offer a wider range of services. Small practices can compete successfully by providing superior service or by focusing on an underserved region. The U.S. dental industry is highly fragmented: the 50 largest practices generate about 5% of revenue.

Products, Operations & Technology

- Dentists practicing general dentistry provide amalgam and composite fillings, regular teeth cleanings, cosmetic dentistry, root canals, sealants, and oral surgery. Other services include orthodontics, gum disease treatment, maxillofacial surgery, temporomandibular joint (TMJ) therapy, tobacco cessation and nutrition counseling, crowns and bridges, dentures, and dental implants.

- Nonsurgical interventions (restorative, orthodontic, endodontic, and prosthodontic services) account for about 50% of revenue, followed by routine visits (consultations, preventative care, and diagnostics; 30%) and surgeries (20%).

- About 85% of practices are single-dentist offices. Most dentist's offices include dental hygienists and office staff. A typical office has one dentist and three to five employees (receptionists, chairside assistants, and hygienists). Insurance paperwork, bill collection, scheduling, and restocking supplies are the main concerns of the office staff. Some dental practices join purchasing organizations or franchise groups to simplify procurement and other administrative functions. Typical equipment includes

x-ray machines, chair-mounted systems such as drills, suction devices, and sprayers, and computer imaging systems.

- During routine cleanings or diagnostic exams, cleanings and x-rays are done by dental hygienists with the dentist reviewing the hygienists' work. In some states, hygienists' roles are expanding to include procedures previously reserved for dentists, allowing dentists to conduct complex procedures and consult with patients on their oral health.

Technology

- Rapid technological changes in the last decade have changed dental practices. New dental tools and procedures include ultra-high-speed drills, sand blasting, better analgesics, new filling, bonding, and implant compounds; and computer imaging and laser bleaching systems. Intra-oral TV and t-scan devices are used to educate patients about their teeth and the prescribed treatment. Advances in biological medicine also are leading to improved dental implants.

- Computerized management systems have become the norm in most dentist offices. While dentists were slower than physicians to adopt electronic information systems, dentists now use them for patient scheduling, to refer patients to other specialists, and for insurance billing. The number of Americans with dental insurance plans has risen, increasing the need for insurance-processing capabilities. Some dentists use electronic health records (EHRs), which facilitate data sharing among health professionals and can qualify practitioners for federal incentive funding. However, dental EHR adoption lags behind medical fields due to cost and implementation challenges.

Sales and Marketing

- Americans with dental insurance typically visit the dentist every six months, as most insurance plans cover biannual dental checkups and cleanings.

- Most dentists get new patients primarily through referrals from existing patients and from inclusion on approved company insurance lists. TV, radio, and newspaper advertising are rare, because most people use a dentist located in their immediate

geographic area. Use of online advertising has grown, and direct mailings and billboard advertising are sometimes used. Specialized dentists may get referrals from doctors and hospitals. Dentists generally spend less than 1% of income for marketing.

- Prices for dental procedures vary from around $100 to $200 for a normal checkup and cleaning, $1,000 to $3,000 for a crown, and $500 to $2,000 per tooth for a root canal. Fillings are about $100 to $300, depending upon materials.

Finance and Regulation

- Accounts receivable are low, averaging about 10 days' sales, as even with dental insurance patients pay at the time of each visit. Because of the relatively small charge per visit and lack of catastrophic claims, the issue of cost-containment has been much lower in dentistry than in medicine. About 85% of dentists participate in some form of dental plan, whether that is a discount plan or preferred provider network.

- Because of rapid advances in technology, dentists periodically need to buy expensive diagnostic and treatment equipment. Cash flow can be uneven during the year. Receivables are usually low because most patients pay at the time of service, but expensive procedures, such as orthodontia, may be paid for in installments. The industry is labor-intensive: average annual revenue per employee in the U.S. is about $125,000.

- Insurance penetration is increasing, and about 60% of Americans have some form of dental insurance. About 80% of dental plans are obtained through employer group policies, according to the National Association of Dental Plans, but participation in specialties is limited, frustrating patients over dental insurance company services. When dentists contract for their services to insurance plans, they incur large recordkeeping responsibilities and must accept the reimbursement schedules for the different patient procedures they provide. Many plans require dentists to treat patients based on the least expensive alternative treatment ("LEAT"), which limits options. Medicare doesn't cover most dental procedures.

- Dentists in the U.S. must obtain a bachelor's degree, attend dental school for four years, and pass an exam to become licensed in the state in which they wish to practice. Dentists wanting to practice in a specialty field must attend school for an additional two to four years and complete a residency program. Other than compliance with licensing requirements, state regulation of dentistry is generally light. Most states prohibit non-dentists from owning or operating a practice.

- To prescribe certain drugs, dentists must be registered with the Drug Enforcement Administration (DEA). Offices that participate in Medicare and Medicaid programs are subject to investigation by federal and state authorities and can be impacted by changes in reimbursement rates under the Affordable Care Act (ACA) and other health reform measures. The Health Insurance Portability and Accountability Act (HIPAA) restricts dentists from releasing patient information and imposes standards on electronic record-keeping and communication practices.

Regional Highlights

- The U.S. has about 60 dentists per 100,000 people. The District of Columbia, New Jersey, Massachusetts, Hawaii, and Connecticut have the highest ratios of dentists per population; Mississippi, Arkansas, and New Mexico have the lowest, according to data from the Kaiser Family Foundation's State Health Facts research. Most states have fewer dentists than physicians per 100,000 people.

Industry Opportunities

- Two areas of opportunity for dentists is the rising demand for dental implants and cosmetic dentistry. Growth in the number of elderly Americans, driven in part by the aging of baby boomers, will continue to increase demand for dental implants. Cosmetic dentistry has risen in importance as more than 80% of Dentists offer cosmetic procedures, such as teeth whitening.

Critical Issues

- Reduced Demand for Traditional Services - Americans' teeth are much healthier than 30 years ago, reducing demand for traditional dental services. Because demand is limited by the growth of the U.S. population, about 1% per year, more dentists are looking for new ways to expand revenue, like offering more preventive and cosmetic

care, dental implants, integrated health care, and practices that emphasize "gentle dentistry" to help patients overcome fear.

- Growing Importance of Dental Insurance Providers - About 85% of dentists participate in a preferred provider network. Dentists who contract with dental insurance plans have to accept the fees dictated by the insurer, which are often lower than fees charged to other customers. As more Americans are covered by managed care plans that include dental care, dentists will have less control over fees and will be pushed to contain costs.

C. Effect of Economic and Industry Trends on the Practice

Increase in personal income and consumer spending bodes well for the dentist industry as consumers have an ability to pay for dental services. U.S. personal consumption expenditures at dentist's offices and clinics are forecast to grow at an annual compounded rate of 5% between 2016 and 2020.

III. BOOK VALUE AND FINANCIAL POSITION

In this section, we only provide a financial summary analysis of the Practice for the years 2011 through 2015. We have been advised that no tax returns or book and records exist prior to the date of the parties marriage.

The Practice's historical balance sheets and income statements are attached to this report as **EXHIBITS 1A, 1B, and 1C**. The Practice's fiscal year end is December 31st and the Practice's tax returns are prepared on the cash basis of accounting.

The following discussion is based on the balance sheets and income statements shown on **EXHIBITS 1A, 1B, and 1C**, respectively.

A. Balance Sheet Analysis

Assets

The Practice's current assets stood at $131,406 as of December 31, 2015, and were comprised primarily of cash, employee receivable and prepaid supplies.

Total assets were $301,673 at December 31, 2015 including net fixed assets of $73,215, shareholder loans of $75,539 and an $18,513 receivable from 2745 Oral Street Realty, LLC, a related entity.

Liabilities

Total liabilities as of December 31, 2015 were $131,633, consisting of credit card and line of credit debt payables of $29,586 and $92,631, respectively.

Stockholders' Equity

The book value of stockholders' equity at December 31, 2015 was $170,040.

B. The Earnings Capacity of the Practice

Net Revenues

The Practice's revenues have remained consistent ranging from a low of $2,526,801 in 2013 to a high of $2,614,812. The Practice's 5-year average (2011 – 2015) revenue was $2,600,000 (rounded).

Gross Profit Margin

The Practice's gross profit margin has also remained consistent ranging from a low of 76.5% in 2014 to a high of 78.4% in 2015.

Operating Expenses

Operating expenses as a percentage of revenues each year ranged from 73.7% in 2014 to 77.3% in years 2011 and 2012. The Practice's largest expenses were salaries to the doctors and office staff, employee benefits, insurance, rent and utilities.

Operating expenses in the years analyzed included certain non-recurring and discretionary items, as discussed further below.

Profit Before Taxes

Profit before taxes in the years analyzed have ranged from $47,637 in 2015 to $156,258 in 2012. As a percentage of revenue, profit margins ranged from 1.8% in 2015 to 6.1% in 2012. The Practice's pre-tax operating profit margin is significantly below that of other dental practices whose average pre-tax operating income as a percentage of revenue was 6%.

C. Adjustments to the Balance Sheet

As part of our valuation analysis we have adjusted the Practice's December 31, 2015 balance sheet to include the Practice's after-tax accounts receivables, as of December 31, 2015, adjustment to accumulated depreciation, and to eliminate intangible and non-operating assets.

As of December 31, 2015, the Practice's total pre-tax accounts receivable was $323,339, based on an aging report provided. These receivables are assumed to be 100% collectable. We have adjusted the Practice's December 31, 2015 balance sheet to include the after-tax value (40% tax rate) of these receivables as they would be taxed as income when collected.

In 2013 and 2014 the Practice purchased $19,089 of fixed assets which were fully depreciated in 2013 and 2014. No new assets were purchased in 2015. We have adjusted the Practice's accumulated depreciation as of December 31, 2015 to reflect the asset value using straight-line depreciation.

We have eliminated all intangible assets of the Practice and eliminated the Practice's shareholders' receivable from Drs. Molar and Root of $43,336 and $32,203, respectively. The shareholder loans represent monies each shareholder borrowed from the Practice. These loans receivable are a non-operating asset of the Practice. As we have not included the receivable on the business, there should be no corresponding liability on Dr. Molar's Statement of Net Worth.

In **EXHIBIT 2**, we present the adjusted balance sheet as of December 31, 2015.

D. Determination of Earnings and Cash Flow Capacity

In a valuation analysis, historical income statements are examined as an indication of a practice's earnings capacity. In determining the earnings capacity of the Practice, we looked beyond the past five years shown and considered the outlook for the industry and the Practice.

In **EXHIBIT 3**, we present our normalized income schedule. Since DDS PC does not prepare projections or forecasts for the expected future, we analyzed the Practice's historical financial performance and held discussions with management. Consequently, we were able to determine the normalized income and cash flow to use in the valuation of DDS PC. Based on our analysis and

discussions with the Practice's management, future revenue is expected to approximate the 5-year average revenue between 2011 and 2015.

We also made adjustments for the following factors:

- **Reasonable Compensation**

  In deciding on a normalized profit level, we also considered the compensation paid to Drs. Molar and Root. Given the Practice's profitability and the services provided to the Practice by Drs. Molar and Root, our analyses lead us to conclude a reasonable compensation of $300,000 (or $150,000 each) for both Dr. Molar and Dr. Root. This compensation is in line with the statistical compensation paid to Dentists as of the Valuation Date.

- **Fair Market Rent Expense**

  The Practice has historically paid above market rent to a related entity that owns the building in which it operates. Based on our discussion with Albert Rood, the appraiser who valued the building located at 2745 Oral Street, fair market rent for the space occupied by the Practice is $30 per square foot. The Practice occupies approximately 2,420 square feet. Accordingly, we have added back the historical rent paid and adjusted the Practice's income to reflect an annual rent expense of $72,600 per year.

- **Discretionary Expenses**

  Based on our review of the Practice's expenses and discussions with Dr. Molar, Brad Cavity, and the Practice's accountant, the practice pays certain discretionary expenses on behalf of Dr. Molar, Dr. Root and their spouses. As such, we have added back all non-operating discretionary expenses in the years analyzed including auto, travel and entertainment expenses.

- **Additional Income**

  Based on discussions with and documents provided by Dr. Molar and Brad Cavity, we have included additional income of $40,000 per annum to the Practice's revenue and income.

- **Taxes**

  We applied a 40% tax rate to arrive at after tax earnings.

Accordingly, in the valuation methods to be used in this report, we will use a normalized level of Gross Revenue of $2,600,000 and Normalized Net Profit After Tax of $298,000, as developed in **EXHIBIT 3** in the Valuation Section of our Report which follows.

The Practice's after tax cash flow is the same as its Normalized Profit After Tax of $298,000. Typically, allowances for incremental working capital needs and future capital expense are imputed against normalized profit after tax. Since the Practice is not expected to grow appreciably, there would be no large swings in working capital that would affect cash flow. In addition, the Practice has no need for any significant investment in capital assets in the near future. The Practice's annual depreciation expense is equivalent to its capital expenditures. As such, no additional adjustments were necessary in arriving at the Practice's after-tax cash flow.

IV. APPROACHES TO VALUE

IRS Revenue Ruling 59-60 provides a generally accepted methodology for the valuation of closely held business enterprises, both large and small. Three traditional approaches can be used to value an interest in an operating business such as DDS PC: the Income Approach, the Market Approach and the underlying asset or Cost Approach.

A. Income Approach

The Income Approach determines the value indication of a business, business ownership interest, security, or intangible asset using one or more methods that convert anticipated benefits into a present single amount.

The application of the Income Approach establishes value by methods that discount or capitalize earnings and/or cash flow, by a discount or capitalization rate that reflects market rate of return expectations, market conditions, and the relative risk of the investment. Generally, this can be accomplished by the capitalization of earnings or cash flow method and the discounted cash flow method.

B. Market Approach

The Market Approach calculates the value of a business, business ownership interest, security, or intangible asset by using one or more methods that compare the subject to similar businesses, business ownership interests, securities, or intangible assets that have been sold.

Generally, this can be accomplished by a comparison to publicly traded guideline companies or by an analysis of actual transactions of similar businesses sold. It may also include an analysis of prior transactions in the Practice's stock, if any.

C. Underlying Asset or Cost Approach

The underlying Asset Approach calculates the value of a business, business ownership interest, or security by using one or more methods based on the value of the assets of that business net of liabilities.

This approach can include the value of both tangible and intangible assets. However, this approach is often unnecessary in the valuation of a profitable operating practice as a going-concern as the tangible and intangible assets are automatically included, in aggregate, in the market and income approaches to value.

D. Summary of the Valuation Methods

In our valuation of DDS PC, we considered all three approaches to value. Under the Income Approach, we utilized the capitalization of cash flow method. Under the Market Approach, we prepared an analysis using the private transaction method. We considered but did not utilize the Asset Approach as DDS PC is an operating entity and the value of its cash flows is in excess of its asset value.

In addition, we have also considered the life insurance policy value of each shareholder the Practice maintains, as required under the Agreement.

Our valuation conclusions herein are only as of the Date of Commencement of the Action of the parties' matrimonial litigation. We did not provide any conclusion of value for the Practice as of the date of the parties' marriage as we have been advised that no tax returns or records exist.

V. INCOME APPROACH

The Income Approach estimates the fair market value of the Practice based on the earnings, cash flow, and dividend-paying capacity of the Practice. This approach evaluates the present worth of the future economic benefits that accrue to the investors in a business. These benefits are discounted to present value at a rate of return that is commensurate with the Practice's risk. This present value determines the fair market value of a business.

A. Capitalization of Cash Flow Method

This approach to value is based upon the theory that the value of a Practice depends upon the future economic benefits it produces. Future economic benefits are defined as the likely level of earnings and cash flow that a potential buyer could expect to realize.

The capitalization of cash flow approach involves several steps: first, determining the earnings and cash flow capability of the Practice; second, selecting the rate of return a potential investor would require; and third, determining the fair market value.

EXHIBIT 3 presents the normalized level of earnings and cash flow as described in the financial profile section to be reflective of the Practice's earning capacity.

Cost of Equity

We calculated the cost of equity using the build-up method. The build-up method can be summarized as follows:

$$E(R_i) = R_f + RP_m + RP_s + RP_i + RP_u$$

Where:

$E(R_i)$	=	Expected (market required) rate of return on a security
R_f	=	Rate of return for a risk-free security as of the valuation date
RP_m	=	Equity risk premium for the "market"
RP_s	=	Risk premium for small size
RP_i	=	Industry risk premium (IRP_i), if applicable
RP_u	=	Risk premium for specific company, where "$_u$" stands for unsystematic risk

Certain parameters used in the cost of equity method are discussed below.

- **Risk-free return (R_f).** The rate of return on a risk-free security was found by looking at the yields of United States Treasury securities. Ideally, the duration of the security used as an indication of the risk-free rate should match the horizon of the projected cash flows that are being discounted (which is into perpetuity in the present case). We used a 20-year Treasury rate that was equal to 2.6% as of the Valuation Date.

- **Market equity premium (RP_m).** Investors would expect additional compensation to induce them to invest in an equity instrument that has more risk than a Treasury bond. The risk premium for the market can be calculated by subtracting the mean return for long-term government bonds from the mean return for large-company stocks which was 6.9%[7] as of December 31, 2015.

- **Size premium (RP_s).** The size-risk premium (over the risk premium for the market) can be calculated by subtracting the estimated (i.e., CAPM predicted) return in excess of riskless rate from the realized return in excess of the riskless rate. In the case of the Practice, we applied the size-premium return in excess of CAPM of companies in the 10th decile[8] (5.6%).

- **Firm specific (unsystematic) risk (RP_u).** The risk premium for unsystematic risk attributable to the specific company is designed to account for additional risk factors specific to the Practice. Firm-specific risk factors may include, for example, the following: competition, size, poor access to capital, thin management, lack of diversification, environmental, litigation, distribution, technology and other factors. In the case of the Practice, we determined that an additional risk premium of 6.0% was reasonable. This reflected the reliance on Drs. Root and Molar and the limited geographic location of the Practice.

The cost of equity discount rate implied by the build-up method is 21.1% as shown in **EXHIBIT 4**. To arrive at the Practice's capitalization rate, the discount rate is then reduced by a long-term expected growth rate in cash flows. We have determined a 3.0% growth rate was appropriate for the Practice. Accordingly, the capitalization rate is 18.1%.

Applying the capitalization rate of 18.1% to the Practice's growth adjusted expected cash flow results

[7] *Duff and Phelps, 2016 Valuation Handbook – Guide to Cost of Capital, Duff & Phelps, LLC, Chicago, Illinois.*
[8] *Ibid.*

in an indicated value of equity for the Practice of $1,696,000, as of the Valuation Date, as shown in **EXHIBIT 5.**

VI. MARKET APPROACH

We considered two different methods to determine the value of the equity of the Company: an analysis of guideline public companies ("Guideline Company Method") and an analysis of recent guideline merger and acquisition transactions ("Private Transaction Method"). Under the Guideline Company Method, actively traded public companies operating in the same industry and having similar characteristics provide a reasonable basis for comparison to the subject practice being valued. There are no publically traded practices similar to DDS PC and therefore, we have not utilized the Guideline Company Method. We did however utilize the Private Transaction Method to value DDS PC.

A. Private Transaction Method

Transaction Analysis

It is possible to develop an indication of value of a practice based upon the pricing multiples indicated by merger and acquisition transactions of practices in the same or a similar industry in recent years.

We searched transactions included in *Pratt's Stats* for transactions in SIC code 8021. We have identified 29 comparable transactions occurring between 2010 and 2015 as presented in **EXHIBIT 6.**

Based on our research, dental practices are transacted based on a percentage of a practice's revenue and a multiple of earnings before interest, taxes and depreciation and amortization ("EBITDA"). Based on our review of the transactions, we have utilized a percentage of revenue multiple of 50% and a 3.00 times EBITDA multiple in our valuation of DDS PC.

The transactions analyzed were asset transactions and did not include the value of a practice's cash, receivables, payables (i.e. working capital) and long-term debt. As such these assets and liabilities would need to be included to arrive at the enterprise value of the Practice. Accordingly, we have included the value of Practice's working capital and debt as of December 31, 2015, in arriving at the indicated value of DDS PC's equity as of the Valuation Date.

The indicated value of the Practice under the percentage of revenue method and multiple of EBITDA method is $1,494,000 and $1,647,000, respectively, as presented in **EXHIBIT 7.**

VII. AGREEMENT VALUE

As discussed, upon the death of a shareholder or the Practice, the Practice would purchase the deceased shareholder's interest in the Practice from the deceased estate as the value of the life insurance proceeds received by the Practice. The current life insurance policy in place for Dr. Molar is $500,000.

Although we considered the Agreement value, we did not rely upon it in our conclusion of value of Dr. Molar's interest in the Practice.

VIII. CONSIDERATION OF DISCOUNTS

Before a final conclusion of value is determined, consideration must be given to the application for a discounts for lack of control and for lack of marketability.

Since Dr. Molar is a 50% shareholder in the Practice and has significant control over the Practice's operations and cash flow, a discount for lack of control is not appropriate.

The Practice is not publicly held, and a public or secondary market does not exist for an interest in the Practice. The inability to readily sell an interest in the Practice increases the owner's exposure to changing market conditions and increases the risk of ownership. An equity holding that has no market, but might possibly be salable under certain limited circumstances and at a totally undetermined price, must be discounted from an otherwise comparable equity that is legally saleable to the general public and has an established market.

In a sale of a small business like DDS PC, a company must incur some or all of the costs to prepare for sale including accounting costs, legal costs, and other transaction costs[9]. To account for the illiquid nature of an investment in the Practice, a 10% discount for lack of marketability is appropriate.

[9] *Pratt, Shannon P. Business Valuation Discounts and Premiums, 2nd Ed., New Jersey: John Wiley & Sons, Inc., 2009, pages 205-206*

IX. CONCLUSION OF VALUE

Based on the valuation approaches and methods discussed herein, we have weighted each method equally and conclude that the Fair Market Value of 100% of DDS PC is $1,450,000, as of January 11, 2016, as shown in **EXHIBIT 8**. Accordingly, the Fair Market Value of Dr. Molar's 50% interest in DDS PC is $725,000.

X. DR. MOLAR'S INCOME STREAM FROM THE PRACTICE

The estimated income to Dr. Molar is equal to 50% of the pre-tax normalized cash flow from the Practice available to her plus reasonable compensation imputed to her in our valuation of the Practice. Accordingly, Dr. Molar's pre-tax income from the Practice is $398,000, as detailed in the chart below.

Adjusted Profit Before Tax (Exhibit 3)	$	495,892
Dr. Ivory Molar's 50% Interest	$	247,946
Plus: Reasonable Compensation		150,000
Dr. Ivory Molar's Pre-tax Income	**$**	**397,946**
Rounded	**$**	**398,000**

Attachments:

APPENDICES A - F
EXHIBITS 1-8

APPENDICES AND EXHIBITS

APPENDICES

A	Sources of Information
B	Statement of Assumptions and Limiting Conditions
C	Valuation Analyst's Representation and Certification
D	Curriculum Vitae of Appraiser #1
E	Curriculum Vitae of Appraiser #2
F	Economic Data as of 4Q 2015 – Not Attached

EXHIBITS

1	Root & Molar DDS PC – Trended Tax Returns
2	Root & Molar DDS PC – Adjusted Balance Sheet and Working Capital
3	Root & Molar DDS PC – Normalized Income
4	Root & Molar DDS PC – Capitalization and Discount Rate Build Up Method
5	Root & Molar DDS PC – Capitalization of Expected Cash Flow
6	Root & Molar DDS PC – Market Data Transactions
7	Root & Molar DDS PC – Market Approach
8	Root & Molar DDS PC – Summary of Valuation Calculations

Sources of Information

In performing our work, we were provided with and/or relied upon various sources of information, including but not limited to the following:

- Root & Molar, DDS PC tax returns (Form 1120s) for the years ending December 31, 2011 through 2015.
- Root & Molar, DDS PC Shareholders' Agreement dated January 1, 2010 between Anita Root and Ivory Molar.
- 2745 Oral Street Realty LLC tax returns (Form 1065) for the years ending December 31, 2011 through 2015.
- Brad Cavity and Ivory Molar personal income tax returns (Form 1040) for the years, 1995, 1996 and 2011 through 2015.
- Root & Molar, DDS PC Aging Report as December 31, 2015 and as of June 30, 2016.
- Root & Molar, DDS PC Chase checking account statements for the period January 1, 2011 through August 31, 2016.
- Root & Molar, DDS PC American Express credit card statements for the period January 28, 2011 through July 29, 2016.
- Root & Molar, DDS PC Bank of America credit card year end summaries for 2013 and 2014 and monthly statements for 2015.
- Root & Molar, DDS PC Capital One business credit card statements for the period January 5, 2011 through August 5, 2016.
- Root & Molar, DDS PC QuickBooks file.
- Life insurance policies for both Dr. Molar and Dr. Root.
- Both parties' statements of net worth.
- Review of the Practice's website (www.Bridgedentalonline.com)
- Discussions with Dr. Ivory Molar, Brad Cavity and Joe Accountant, CPA.
- First Research Industry Profile, Dentists (NAICS Code 6212), December 14, 2015.
- www.federalreserve.gov
- 2015 Valuation Handbook, Guide to Cost of Capital by Duff & Phelps.
- Other miscellaneous business information.

Statement of Assumptions and Limiting Conditions

The primary assumptions and limiting conditions pertaining to the value estimate conclusion stated in this summary report ("report") are summarized below. Other assumptions are cited elsewhere in this report.

1. The conclusion of value arrived at herein is valid only for the stated purpose as of the date of the valuation.

2. Financial statements and other related information provided in the course of this engagement, have been accepted without any verification as fully and correctly reflecting the enterprise's business conditions and operating results for the respective periods, except as specifically noted herein.

3. Public information and industry and statistical information have been obtained from sources we believe to be reliable. However, we make no representation as to the accuracy or completeness of such information and have performed no procedures to corroborate the information.

4. We do not provide assurance on the achievability of the results forecasted because events and circumstances frequently do not occur as expected; differences between actual and expected results may be material; and achievement of the forecasted results is dependent on actions, plans, and assumptions of management.

5. The conclusion of value arrived at herein is based on the assumption that the current level of management expertise and effectiveness would continue to be maintained and that the character and integrity of the enterprise through any sale, reorganization, exchange, or diminution of the owners' participation would not be materially or significantly changed.

6. This report and the conclusion of value arrived at herein are for the exclusive use of our client for the sole and specific purposes as noted herein. Any other party may not use them for any other purpose or for any purpose. Furthermore, the report and conclusion of value are not intended by the author and should not be construed by the reader to be investment advice in any manner whatsoever. The conclusion of value represents the considered opinion of Silly Consultants, based on information furnished to them.

7. Neither all nor any part of the contents of this report (especially the conclusion of value, the identity of any valuation specialist(s), or the firm with which such valuation specialists are connected or any reference to any of the professional designations) should be disseminated to the public through advertising media, public relations, news media, sales media, mail, direct transmittal, or any other means of communication, including but not limited to the Securities and Exchange Commission or other governmental agency or regulatory body, without the prior written consent and approval of Silly Consultants.

8. Future services regarding the subject matter of this report, including but not limited to testimony or attendance in court, shall not be required of Silly Consultants unless previous arrangements have been made in writing.

9. No change of any item in this report shall be made by anyone other than Silly Consultants, and we shall have no responsibility for any such unauthorized change.

10. Except as noted, we have relied on the representations of the owners, management, and

other third parties concerning the value and useful condition of all equipment, real estate, investments used in the business, and any other assets or liabilities, except as specifically stated to the contrary in this report. We have not attempted to confirm whether or not all assets of the business are free and clear of liens and encumbrances or that the entity has good title to all assets.

11. The approaches and methodologies used in our work did not comprise an examination in accordance with generally accepted auditing standards, the objective of which is an expression of an opinion regarding the fair presentation of financial statements or other financial information, whether historical or prospective, presented in accordance with generally accepted accounting principles. We express no opinion and accept no responsibility for the accuracy and completeness of the financial information or other data provided to us by others. We assume that the financial and other information provided to us is accurate and complete, and we have relied upon this information in performing our valuation.

12. The valuation may not be used in conjunction with any other appraisal or valuation study. The value conclusion stated in this report is based on the program of utilization described in the report, and may not be separated into parts. The appraisal was prepared solely for the purpose, function and party so identified in the report. The report may not be reproduced, in whole or in part, and the findings of the report may not be utilized by a third party for any purpose, without the express written consent of Silly Consultants.

13. Unless otherwise stated in the report, the valuation of the business has not considered or incorporated the potential economic gain or loss resulting from contingent assets, liabilities or events existing as of the valuation date.

14. The working papers for this engagement are being retained in our files and are available for your reference. We would be available to support our valuation conclusion should this be required. Those services would be performed for an additional fee.

15. All facts and data set forth in our report are true and accurate to the best of the Appraiser's knowledge and belief.

16. All recommendations as to fair market value are presented as the Appraiser's conclusion based on the facts and data set forth in this report.

17. We have no responsibility or obligation to update this report for events or circumstances occurring subsequent to the date of this report.

18. In all matters that may be potentially challenged by a Court or other party we do not take responsibility for the degree of reasonableness of contrary positions that others may choose to take, nor for the costs or fees that may be incurred in the defense of our recommendations against challenge(s). We will, however, retain our supporting work papers for your matter(s), and will be available to assist in defending our professional positions taken, at our then current rates, plus direct expenses at actual, and according to our then current Standard Professional Agreement.

19. No third parties are intended to be benefited. An engagement for a different purpose, or under a different standard or basis of value, or for a different date of value, could result in a materially different opinion of value.

20. Silly Consultants retains all exclusive rights to copyrights to the report and to control the issuance of copies by others, and the client has no right of diffusion, reproduction, distribution or sale. The client may reproduce ten copies of the report solely for its internal use. Otherwise, the client may not reproduce the report without the prior written consent of Silly Consultants.

21. Our report will not be used for financing, or included in a private placement or other public documents and may not be relied upon by any third parties.

22. Our report is based on historical and/or prospective financial information provided to us by management and other third parties. This information has not been audited, reviewed or compiled by us, nor has it been subjected to any type of audit, review or compilation procedures by us, nor have we audited, reviewed or compiled the books and records of the subject practice. Had we audited, reviewed or compiled the underlying data, matters may have come to our attention which would have resulted in our using amounts which differ from those provided; accordingly, we take no responsibility for the underlying data presented or relied upon in this report.

23. We express no opinion for matters that require legal or other specialized expertise, investigation, or knowledge beyond that customarily employed by business appraisers.

24. Unless stated otherwise in this report, we express no opinion as to: 1) the tax consequences of any transaction which may result, 2) the effect of the tax consequences of any net value received or to be received as a result of a transaction, and 3) the possible impact on the market value resulting from any need to effect a transaction to pay taxes.

25. We have conducted interviews with the current management of the Practice concerning its past, present, and prospective operating results of the entities.

26. We did make an on-site visit to the Practice's facility.

27. This valuation analysis and report, which are to be distributed only in their entirety, are intended solely for use by you, your client, and your client's accountants and attorneys, solely to assist you and your client in the determination of the fair market value of the subject interests for the previously stated purposes. It should not be used for any other purpose or distributed to third parties for any purpose, in whole or in part, without the express written consent of Silly Consultants.

Valuation Analyst's Representation and Certification

We represent/certify that, to the best of our knowledge and belief:

- The statements of fact contained in this valuation report are true and correct.
- The reported analyses, opinions and conclusions of value are limited only by the reported assumptions and limiting conditions, and are our personal, impartial, independent, unbiased, objective professional analyses, opinions and conclusions.
- We have no present or prospective/contemplated financial or other interest in the business or property that is the subject of this report, and have no personal financial or other interest or bias with respect to the parties involved.
- This engagement was not contingent upon developing or reporting predetermined results.
- Compensation for completing this assignment is fee-based and is not contingent upon the development or reporting of a predetermined value or direction in value that favors the cause of the client, the outcome of the valuation, the amount of the value opinion, the attainment of a stipulated result, or the occurrence of a subsequent event directly related to the intended use of this appraisal.
- The economic and industry data included in the valuation report have been obtained from various printed or electronic reference sources that the valuation analyst believes to be reliable. The valuation analyst has not performed any corroborating procedures to substantiate that data.
- The analysis, opinion, conclusions and this summary report were developed in conformity with the American Institute of Certified Public Accountant's Statement on Standards for Valuation Services No. 1.
- The parties for which the information and use of the valuation report is restricted are identified. The valuation report is not intended to be and should not be used by anyone other than such parties.

- This report and analysis was prepared by Appraiser #1 and reviewed by Appraiser #2. Mr. Appraiser #1 is a Certified Public Accountant licensed in the State of New York and is Accredited in Business Valuation and Certified in Financial Forensics by the American Institute of Certified Public Accountants. Mr. Appraiser #1 is also an Accredited Senior Appraiser by the American Society of Appraisers. Mr. Appraiser #1's Curriculum Vitae is attached as **APPENDIX E.**

- Mr. Appraiser #2 is a Certified Public Accountant licensed in the State of New York and is Accredited in Business Valuation and Certified in Financial Forensics by the American Institute of Certified Public Accountants. Mr. Appraiser #2 is also a Certified Fraud Examiner by the Association of Certified Fraud Examiners and a Master Analyst in Financial Forensics and Certified Valuation Analyst by the National Association of Certified Valuation Analysts. Mr. Appraiser #2' Curriculum Vitae is attached as **APPENDIX E.**

- The American Institute of Certified Public Accountants and the American Society of Appraisers have mandatory recertification programs for its members. Mr. Appraiser #1 and Mr. Appraiser #2 are in compliance with that program.

Appraisers' Certification Signatures

EXHIBIT 1A

IVORY MOLAR & BRAD CAVITY
ROOT & MOLAR DDS PC
BALANCE SHEET
DATE INCORPORATED: DECEMBER 17, 1992
AS OF:
Source: Form 1120S, Cash Basis

12/31/11	12/31/12	12/31/13	12/31/14	12/31/15		12/31/11	12/31/12	12/31/13	12/31/14	12/31/15
					ASSETS					
$ 166,812	$ 240,335	$ 288,568	$ 281,600	$ 116,936	Cash	48.4%	60.3%	65.9%	65.2%	38.8%
-	-	696	696	696	Employee receivable	0.0%	0.0%	0.2%	0.2%	0.2%
17,442	18,316	16,191	12,328	13,772	Prepaid supplies	5.1%	4.6%	4.0%	3.1%	4.6%
184,354	258,651	285,456	274,824	131,408	Total Current Assets	53.5%	64.9%	70.0%	68.5%	43.6%
823,247	828,026	840,660	847,116	853,343	Buildings and other depreciable assets	238.9%	207.8%	206.3%	211.1%	282.9%
(689,700)	(709,713)	(740,049)	(780,301)	(780,128)	Less: Accumulated depreciation	-200.1%	-178.1%	-181.6%	-189.4%	-258.6%
133,547	118,313	100,611	66,815	73,215	Total Fixed Assets, Net	38.7%	29.7%	24.7%	21.6%	24.3%
20,902	20,902	20,902	20,902	20,902	Intangible assets	6.1%	5.2%	5.1%	5.2%	6.9%
(17,902)	(17,902)	(17,902)	(17,902)	(17,902)	Less: Accumulated amortization	-5.2%	-4.5%	-4.4%	-4.5%	-5.9%
-	-	-	7,210	32,203	Shareholder loans receivable - Anita Root	0.0%	0.0%	0.0%	1.8%	10.7%
			10,979	43,336	Shareholder loans receivable - Ivory Molar	0.0%	0.0%	0.0%	2.7%	14.4%
23,742	18,513	18,513	18,513	18,513	Due from 2745 Oral Street	6.9%	4.6%	4.5%	4.6%	6.1%
26,742	21,513	21,513	39,702	97,052	Total Other Assets	7.8%	5.4%	5.3%	9.9%	32.2%
$ 344,643	$ 398,477	$ 407,579	$ 401,341	$ 301,673	Total Assets	100.0%	100.0%	100.0%	100.0%	100.0%
					LIABILITIES AND SHAREHOLDERS' EQUITY					
$ 127,312	$ 27,432	$ 31,182	$ -	$ -	Line of credit	36.9%	6.9%	7.7%	0.0%	0.0%
47,309	57,376	48,040	57,064	29,586	Credit card advances	13.7%	14.4%	11.8%	14.2%	9.8%
-	-	-	6,854	112	Payroll liabilities	0.0%	0.0%	0.0%	1.7%	0.0%
3,720	3,028	4,589	2,337	9,304	Pensions payable	1.1%	0.8%	1.1%	0.6%	3.1%
178,341	87,836	83,811	66,255	39,002	Total Current Liabilities	51.7%	22.0%	20.6%	16.5%	12.9%
11,764	50,250	-	-	-	Loans from shareholders	3.4%	12.6%	0.0%	0.0%	0.0%
18,009	67,604	106,147	112,683	92,631	Line of credit	5.2%	17.0%	26.0%	28.1%	30.7%
29,773	117,854	106,147	112,683	92,631	Total Long-Term Liabilities	8.6%	29.6%	26.0%	28.1%	30.7%
208,114	205,690	189,958	178,938	131,633	Total Liabilities	60.4%	51.6%	46.6%	44.6%	43.6%
5,000	5,000	5,000	5,000	5,000	Capital stock	1.5%	1.3%	1.2%	1.2%	1.7%
438	438	438	438	438	Additional paid in capital	0.1%	0.1%	0.1%	0.1%	0.1%
131,091	187,349	212,183	216,965	164,602	Retained earnings	38.0%	47.0%	52.1%	54.1%	54.6%
136,529	192,787	217,621	222,403	170,040	Total Shareholders' Equity	39.6%	48.4%	53.4%	55.4%	56.4%
$ 344,643	$ 398,477	$ 407,579	$ 401,341	$ 301,673	Total Liabilities & Shareholders' Equity	100.0%	100.0%	100.0%	100.0%	100.0%
					Distributions:					
$ 50,000	$ 50,000	$ 50,000	$ 50,000	$ 50,000	Anita Root					
50,000	50,000	50,000	50,000	50,000	Ivory Molar					
$ 100,000	$ 100,000	$ 100,000	$ 100,000	$ 100,000	Total					

REPORT FOR PRESENTATION PURPOSES ONLY AND DOES NOT REPRESENT A REAL CASE

EXHIBIT 1B

IVORY MOLAR & BRAD CAVITY
ROOT & MOLAR DDS PC
INCOME STATEMENT
FOR THE YEARS ENDED:
Source: Form 1120S, Cash Basis

12/31/11	12/31/12	12/31/13	12/31/14	12/31/15		12/31/11	12/31/12	12/31/13	12/31/14	12/31/15
$ 2,581,782	$ 2,553,488	$ 2,526,801	$ 2,595,338	$ 2,614,812	Net Revenue	100.0%	100.0%	100.0%	100.0%	100.0%
486,749	453,701	452,789	504,367	517,249	Cost of Goods Sold (*)	18.9%	17.8%	17.9%	19.4%	19.8%
2,095,033	2,099,787	2,074,012	2,090,971	2,097,563	Gross Profit	81.1%	82.2%	82.1%	80.6%	80.2%
506,990	481,553	513,102	498,193	557,831	Compensation of officers (**)	19.6%	18.9%	20.3%	19.2%	21.3%
617,078	615,266	606,822	613,137	612,307	Salaries and wages	23.9%	24.1%	24.0%	23.6%	23.4%
24,981	26,917	20,020	18,240	9,966	Repairs and maintenance	1.0%	1.1%	0.8%	0.7%	0.4%
100,372	100,239	100,776	100,285	100,600	Rents	3.9%	3.9%	4.0%	3.9%	3.8%
50,454	50,617	48,718	48,374	50,014	Taxes and licenses	2.0%	2.0%	1.9%	1.9%	1.9%
6,425	6,146	6,839	6,245	8,776	Interest	0.2%	0.2%	0.3%	0.2%	0.3%
21,575	21,013	17,703	13,796	13,600	Depreciation	0.8%	0.8%	0.7%	0.5%	0.5%
74,108	79,593	77,889	80,498	83,839	Advertising	2.9%	3.1%	3.1%	3.1%	3.2%
21,080	21,370	17,964	17,429	20,222	Pension, profit-sharing plans, etc., plans	0.8%	0.8%	0.7%	0.7%	0.8%
188,344	198,799	189,706	203,723	212,096	Employee benefit programs	7.3%	7.7%	7.5%	7.8%	8.1%
352,555	344,016	349,639	356,269	380,675	Other deductions	13.7%	13.5%	13.8%	14.9%	14.6%
1,963,942	1,943,529	1,949,178	1,986,189	2,049,926	Total Deductions	76.1%	76.1%	77.1%	76.5%	78.4%
$ 131,091	$ 156,258	$ 124,834	$ 104,782	$ 47,637	Profit Before Taxes	5.1%	6.1%	4.9%	4.0%	1.8%

					Earnings Before Interest and Taxes (EBIT)					
$ 131,091	$ 156,258	$ 124,834	$ 104,782	$ 47,637	Profit Before Taxes		5.1%	6.1%	4.9%	4.0%
6,425	6,146	6,839	6,245	8,776	Interest Expense		0.2%	0.2%	0.3%	0.2%
137,516	162,404	131,673	111,027	56,413	EBIT		5.3%	6.4%	5.2%	4.3%
21,575	21,013	17,703	13,796	13,600	Depreciation and Amortization		0.8%	0.8%	0.7%	0.5%
$ 159,091	$ 183,417	$ 149,376	$ 124,823	$ 70,013	EBITDA		6.2%	7.2%	5.9%	4.8%
					(*) Cost of Good Sold					
$ 476,126	$ 437,322	$ 438,208	$ 489,679	$ 505,756	Purchases	18.4%	17.1%	17.3%	18.9%	19.3%
10,623	16,379	14,581	14,688	11,493	Outside services	0.4%	0.6%	0.6%	0.6%	0.4%
$ 486,749	$ 453,701	$ 452,789	$ 504,367	$ 517,249	Total	18.9%	17.8%	17.9%	19.4%	19.8%
					(**) Compensation of officers					
$ 300,000	$ 300,000	$ 300,000	$ 300,000	$ 300,000	Anita Root	N/A	N/A	11.9%	11.6%	11.5%
206,990	181,553	213,102	198,193	257,831	Ivory Molar	N/A	N/A	8.4%	7.6%	9.9%
$ 506,990	$ 481,553	$ 513,102	$ 498,193	$ 557,831	Total	N/A	N/A	20.3%	19.2%	21.3%

EXHIBIT 1C

IVORY MOLAR & BRAD CAVITY
ROOT & MOLAR DDS PC
OTHER DEDUCTIONS
DATE INCORPORATED: DECEMBER 17, 1992
FOR THE YEARS ENDED:
Source: Form 1120S, Cash Basis

12/31/11	12/31/12	12/31/13	12/31/14	12/31/15		12/31/11	12/31/12	12/31/13	12/31/14	12/31/15
$ 7,347	$ 9,862	$ 8,097	$ 7,299	$ 5,941	Auto & truck expense	0.3%	0.4%	0.3%	0.3%	0.2%
38,314	39,142	36,333	38,653	38,111	Auto lease	1.5%	1.5%	1.4%	1.5%	1.5%
1,783	774	1,185	647	932	Bank charges	0.1%	0.0%	0.0%	0.0%	0.0%
9,436	9,155	9,655	9,461	9,314	Computer and internet costs	0.4%	0.4%	0.4%	0.4%	0.4%
1,230	3,607	1,107	1,324	2,577	Dues and subscriptions	0.0%	0.1%	0.0%	0.1%	0.1%
57,602	3,414	29,128	43,117	40,801	Insurance	2.2%	0.1%	1.2%	1.7%	1.6%
19,384	20,063	25,919	19,902	19,818	Laundry and cleaning	0.8%	0.8%	1.0%	0.8%	0.8%
10,619	10,715	9,574	10,078	9,012	Legal and professional	0.4%	0.4%	0.4%	0.4%	0.3%
-	30,708	30,999	32,269	33,208	Medical billing fees	0.0%	1.2%	1.2%	1.2%	1.3%
34,347	37,628	36,144	35,654	38,129	Meeting exp and employee meals	1.3%	1.5%	1.4%	1.4%	1.5%
27,735	24,056	23,189	42,875	29,946	Merchant service fees	1.1%	0.9%	0.9%	1.7%	1.1%
83,894	89,713	80,226	86,035	83,621	Office expenses	3.2%	3.5%	3.2%	3.3%	3.2%
-	-	-	1,289	734	Outside services	0.0%	0.0%	0.0%	0.0%	0.0%
219	219	759	927	646	Parking and tolls	0.0%	0.0%	0.0%	0.0%	0.0%
8,029	6,437	3,086	2,984	5,013	Postage	0.3%	0.3%	0.1%	0.1%	0.2%
678	678	547	678	613	Security	0.0%	0.0%	0.0%	0.0%	0.0%
20,084	23,951	20,866	21,837	22,206	Telephone	0.8%	0.9%	0.8%	0.8%	0.8%
6,000	5,713	5,185	5,236	5,615	Training and education	0.2%	0.2%	0.2%	0.2%	0.2%
-	-	8,117	5,861	11,572	Travel	0.0%	0.0%	0.3%	0.2%	0.4%
16,435	13,694	13,515	15,617	18,265	Utilities	0.6%	0.5%	0.5%	0.6%	0.7%
594	433	-	-	-	X-mas	0.0%	0.0%	0.0%	0.0%	0.0%
8,825	14,054	6,008	4,506	4,601	Travel, meals, and entertainment 50%	0.3%	0.6%	0.2%	0.2%	0.2%
$ 352,555	$ 344,016	$ 349,639	$ 386,269	$ 380,675	Total Other Deductions	13.7%	13.6%	13.8%	14.9%	14.6%

EXHIBIT 2

IVORY MOLAR & BRAD CAVITY
ROOT & MOLAR DDS PC
ADJUSTED BALANCE SHEET AND WORKING CAPITAL
VALUATION DATE: JANUARY 11, 2016
Source: Form 1120S, Cash Basis

	AS OF DECEMBER 31, 2015			
	Unadjusted	Adjusted		Working Capital
ASSETS				
Cash	$ 116,938	$ 116,938		$ 116,938
Employee receivable	696	696		696
Accounts receivable, net of tax	-	194,003	(a)	194,003
Prepaid supplies	13,772	13,772		13,772
Total Current Assets	131,406	325,409		325,409
Buildings and other depreciable assets	853,343	853,343		X
Less: Accumulated depreciation	(780,128)	(766,497)	(b)	X
Total Fixed Assets, Net	73,215	86,846		X
Intangible assets	20,902	-	(c)	X
Less: Accumulated amortization	(17,902)	-	(c)	X
Shareholder loans receivable - Anita Root	32,203	-	(d)	X
Shareholder loans receivable - Ivory Molar	43,336	-	(d)	X
Due from 2745 Oral Street	18,513	18,513		X
Total Other Assets	97,052	18,513		X
Total Assets	$ 301,673	$ 430,768		$ 325,409
LIABILITIES AND SHAREHOLDERS' EQUITY				
Credit card advances	$ 29,586	$ 29,586		$ 29,586
Payroll liabilities	112	112		112
Pensions payable	9,304	9,304		9,304
Total Current Liabilities	39,002	39,002		39,002
Line of credit	92,631	92,631		X
Total Long-Term Liabilities	92,631	92,631		X
Total Liabilities	131,633	131,633		39,002
Net Tangible Assets	$ 170,040	$ 299,136		
Working Capital				$ 286,407

Adjustments:
(a) Accounts receivable as of December 31, 2015, net of taxes (40% tax rate).

(b) Adjusted by adding back the Sec. 179 depreciation on recently acquired assets and imputing straight-line depreciation.

Reported Accumulated Depreciation - 12/31/15	$ (780,128)
Add: Sec 179 Dep. On Acquired Assets	19,089
Less: Accumulated Straight Line Depreciation on Assets	(5,458)
Adjusted Accum Depreciation - 12/31/15	$ (766,497)

(c) Adjustment to eliminate intangible assets.

(d) Shareholder loans were eliminated as a non-operating asset. We did not include the value of Dr. Molar's loan as an asset to her in arriving at the fair market value of her interest in the Practice. Therefore, the debt owed to the Practice should not be included as a personal liability on her statement of net worth. Had we included Dr. Molar's non-operating asset, the off-setting liability would need to be included on her statement of net worth.

IVORY MOLAR & BRAD CAVITY
ROOT & MOLAR DDS PC
NORMALIZED INCOME
VALUATION DATE: JANUARY 11, 2016

	FYE 12/31/11	FYE 12/31/12	FYE 12/31/13	FYE 12/31/14	FYE 12/31/15		Normalized
Net Revenue	$ 2,581,782	$ 2,553,488	$ 2,526,801	$ 2,595,338	$ 2,814,812		
Plus: Cash Income	40,000	40,000	40,000	40,000	40,000		
Total Adjusted Revenue	$ 2,621,782	$ 2,593,488	$ 2,566,801	$ 2,635,338	$ 2,854,812	(a)	$ 2,800,000
Profit Before Tax (PBT)	131,091	156,259	124,834	104,782	47,637		
PBT as % of Net Revenue	*5.1%*	*6.1%*	*4.9%*	*4.0%*	*1.8%*		
Adjustments:							
Plus: Compensation of Officers	506,990	481,553	513,102	498,193	557,831		
Plus: Rent Expense	100,372	100,239	100,776	100,285	100,800		
Plus: Cash Income	40,000	40,000	52,192	44,490	43,280		
Plus: Auto Expenses	45,661	49,004	44,430	45,952	44,052		
Plus: Auto Insurance	7,853	5,178	2,058	2,292	-		
Plus: Travel	-	-	8,117	5,861	11,572		
Plus: Meeting Expense	34,347	37,628	36,144	35,654	38,129		
Total Adjustments	735,023	713,602	756,819	732,727	795,464		
Adjusted PBT (Before Reasonable Compensation)	$ 866,114	$ 869,860	$ 881,653	$ 837,509	$ 843,101		$ 868,492
Adjusted PBT (Before Reasonable Compensation) as % of Net Revenue (rounded)	*33.5%*	*34.1%*	*34.9%*	*32.3%*	*32.2%*		*33.4%*
Plus (Minus) Adjustments to PBT:							
Less: Reasonable Compensation							300,000
Less: Fair Market Value of Rent Adjustment							72,600
Adjusted Profit Before Tax (PBT)							495,892
Less Taxes at 40%							198,357
Adjusted Profit After Tax (PAT)							$ 297,535
Rounded							$ 298,000
Adjusted PAT as % of Net Revenue (rounded)							*11.4%*
Adjusted Profit Before Tax (PBT)							$ 495,892
Plus: Interest Expense							8,776
Plus: Depreciation							13,600
Adjusted EBITDA							$ 518,268
Adjusted EBITDA as % of Net Revenue (rounded)							*19.9%*

(a) - Normalized total adjusted revenue calculated as the weighted average of years 2013-2015 with the least weight given to 2013 and the greatest weight to 2015.

IVORY MOLAR & BRAD CAVITY
ROOT & MOLAR DDS PC
CAPITALIZATION AND DISCOUNT RATE
BUILD-UP METHOD
DATE INCORPORATED: DECEMBER 17, 1992
VALUATION DATE: JANUARY 11, 2016

Average Market Return

Long-term Treasury Bond Yield	2.6% (a)
Equity Risk Premium-Stocks over Bonds	6.9% (b)
Size Premium (CRSP Deciles 10-Smallest)	5.6% (b)
Sub-total Cost of Equity	15.1%
Adjustments for:	
Unique Company Factors	6.0% (c)
Net Discount Rate	**21.1%**

(a) - Long-term 20-year U.S. Treasury Coupon Bond Yield as of January 11, 2016 (www.federalreserve.gov).

(b) - Data obtained from the Duff & Phelps, 2016 Valuation Handbook. (Data as of December 31, 2015).

(c) - Company specific factors considered include limited geographic location and reliance on the two owners.

IVORY MOLAR & BRAD CAVITY
ROOT & MOLAR DDS PC
CAPITALIZATION OF EXPECTED CASH FLOW
VALUATION DATE: JANUARY 11, 2016

	Formula $\frac{CF\ (1\ X\ G)}{DR - G}$	
Assumptions		
Growth ("G")	=	3.0%
Discount Rate - **(EXHIBIT 4)**	=	21.1%
Cap Rate	=	18.1%
Cash Flow ("CF") to Equity (*)		$ 298,000
1 + Growth Rate		103.0%
Expected Cash Flow		306,940
Cap Rate		18.1%
Indicated Market Value of Equity		**$ 1,695,801**
Rounded		**$ 1,696,000**

(*) - There is no material difference between the Practice's net income and net cash flow because of the following facts. The Practice was not in need of significant investment of capital assets and it is expected that capital investment and depreciation expense would be similar in the future. Since revenues were not expected grow appreciably in the coming years, it was determined that there would be no large swings in working captial that would affect cash flow.

IVORY MOLAR & GRAD CAVITY
ROOT & MOLAR DDS PC
MARKET DATA TRANSACTIONS
VALUATION DATE: JANUARY 11, 2016
NAICS CODE 621210 SIC CODE 8021
Source: Pratt's Stats - Private Company Merger and Acquisition (M&A) Transaction Database

Asset Transactions

	Net Sales	Gross Profit	GP % of Net Sales	Operating Profit	Operating Profit %	Net Income	Net Income %	EBITDA	EBITDA % of Net Sales	Total Assets	MVIC To Sales	MVIC To EBITDA	MVIC To EBIT	MVIC To Discretionary Earnings
Median	$ 649,470	$ 649,470	100.00%	$ 103,929	14.89%	$ 97,709	14.89%	$ 112,112	3.83%	$ 177,500	0.53	3.42	3.34	1.45
Average	$ 783,991	$ 716,874	94.42%	$ 125,934	13.16%	$ 100,524	12.52%	$ 122,340	10.37%	$ 167,039	0.53	34.44	33.04	1.62
Max	$ 3,356,000	$ 3,356,000	100.00%	$ 356,515	45.45%	$ 356,515	45.45%	$ 356,515	45.45%	$ 271,433	0.92	418.70	418.70	3.68
Min	$ 221,262	$ 161,251	72.88%	$ (63,257)	-28.64%	$ (63,257)	-28.64%	$ (62,501)	-28.25%	$ 65,603	0.30	0.66	0.66	0.64
ROOT & MOLAR DDS PC	$ 2,614,612	$ 2,097,583				$ 47,437		$ 73,013		$ 351,673				

No	Business Description	Sale Date	MVIC Price	Net Sales	Gross Profit	GP % of Net Sales	Operating Profit	Operating Profit %	Net Income	Net Income %	EBITDA	EBITDA % of Net Sales	Total Assets	MVIC To Sales	MVIC To EBITDA	MVIC To EBIT	MVIC To Discretionary Earnings
				Company Information										Multiples			
1	General Dentist	10/1/2015	$390,000	$609,689	$487,102	79.89%	($28,278)	-4.64%	($28,278)	-4.64%		0.00%	$65,603	0.24			
2	Dental Practice	1/1/2015	$192,000	$563,099	$452,329	80.36%	($9,230)	-1.64%	($9,230)	-1.64%	($4,376)	-0.78%	$190,000	0.34			2.07
3	General Dentist	3/30/2014	$295,000	$1,022,182	$904,836	88.53%	$152,133	14.88%	$152,130	14.88%		0.00%		0.29		3.93	
4	Dental Practice (GP)	7/15/2014	$220,000	$421,850	$421,850	100.00%	$103,929	24.64%	$82,929	19.66%		0.00%	$220,000	0.52		2.17	
5	General Dental Practice	4/1/2014	$505,000	$1,177,012	$981,978	83.43%	$35,815	3.04%	$35,815	3.04%		0.00%		0.43		15.15	
6	General Dentistry	3/1/2014	$245,000	$649,470	$649,470	100.00%	$97,709	15.04%	$97,709	15.04%	$112,688	18.85%		0.33	2.23	2.51	1.18
7	General Dental Practice	7/31/2013	$411,000	$592,813	$522,907	88.22%	$110,112	18.57%	$110,112	18.57%	$110,112	18.57%		0.69	3.73	3.73	1.41
8	General Dentistry	7/1/2013	$120,000	$265,168	$265,168	100.00%	$0	0.00%	$0	0.00%	$3,149	1.19%		0.45	38.22		1.67
9	Dental Practice	6/30/2013	$335,000	$618,164	$618,694	100.00%	$153,692	24.79%	$153,692	24.79%	$153,692	24.79%		0.54	2.18	2.18	1.37
10	Dental Practice	6/4/2013	$440,000	$617,937	$617,937	100.00%	$217,939	35.27%	$217,939	35.27%		0.00%		0.71		2.02	
11	General Dentist	5/31/2013	$353,000	$843,654	$701,281	83.10%	$126,777	15.03%	$126,777	15.03%		0.00%		0.46		4.26	
12	General Dentistry	5/1/2013	$320,000	$584,265	$584,265	100.00%	$21,218	3.63%	$21,218	3.63%	$21,218	3.63%		0.55	15.08	15.08	1.15
13	Dental (General Practice)	4/8/2013	$590,000	$666,340	$660,343	100.00%	$281,763	42.28%	$239,244	35.90%	$282,366	42.37%	$271,433	0.89	2.09	2.09	2.02
14	General Dentistry	12/31/2012	$475,000	$787,618	$787,618	100.00%	$164,424	20.88%	$164,424	20.88%	$164,424	20.88%	$190,642	0.6	2.89	2.89	1.87
15	Dental Practice	12/28/2012	$140,000	$378,000	$338,000	89.33%	$38,000	10.13%	$38,000	10.13%	$38,000	10.13%		0.37	3.68	3.68	3.68
16	Dental Practice	12/7/2012	$165,000	$550,000	$550,000	100.00%	$250,000	45.45%	$250,000	45.45%	$250,000	45.45%		0.3	0.66	0.66	0.64
17	General Dentist	11/12/2012	$310,000	$585,116	$585,116	100.00%	$67,173	11.48%	$67,173	11.48%		0.00%		0.53		4.61	
18	General Dentistry Practice	10/31/2012	$439,000	$687,000	$687,000	100.00%	$129,000	18.78%	$129,000	18.78%	$129,000	18.78%		0.64	3.4	3.4	1.86
19	General Dental Practice	8/29/2012	$165,000	$363,513	$331,447	91.04%	($31,088)	-8.62%	($31,088)	-8.62%		0.00%	$165,000	0.45			
20	General Dentistry	7/1/2012	$442,000	$674,823	$674,823	100.00%	$198,750	29.45%	$198,783	29.41%	$198,750	29.45%		0.65	2.21	2.21	2.21
21	General Dentistry Practice	3/26/2012	$220,000	$709,000	$709,000	100.00%	$120,000	16.93%	$120,000	16.93%	$120,000	16.93%		0.31	1.83	1.83	1.09
22	Dental Practice	2/24/2012	$108,000	$221,262	$161,251	72.88%	($63,257)	-28.64%	($63,257)	-28.64%	($62,501)	-28.25%		0.49			
23	General Dentistry	11/15/2011	$927,000	$1,943,700	$1,943,700	100.00%	$2,214	0.11%	$2,214	0.11%	$2,214	0.11%		0.48	418.7	418.7	0.9
24	Dental Practice	10/3/2011	$500,000	$941,481	$772,241	82.03%	$356,515	37.87%	$356,515	37.87%	$356,515	37.87%		0.53	1.4	1.4	1.4
25	General Dentistry	7/8/2011	$1,035,000	$1,459,487	$1,459,487	100.00%	$344,460	23.60%	$344,460	23.60%	$345,760	23.69%		0.71	2.99	3	1.03
26	General Dentistry	3/16/2011	$400,000	$684,000	$684,000	100.00%	$2,100	0.31%	$0	0.00%	$3,200	0.47%		0.58	125	190.48	1.69
27	General Dentistry	5/7/2010	$1,600,000	$3,356,000	$3,356,000	100.00%	$184,000	5.48%	$133,000	3.96%	$282,000	8.40%		0.48	5.67	8.7	1.13
28	General Dentistry	9/15/2010	$288,000	$768,000	$768,000	100.00%	$42,000	5.47%	$0	0.00%	$49,000	6.38%		0.37	5.84	6.61	1.4
29	General Dentistry	4/1/2010	$110,000	$289,000	$289,000	100.00%	$6,000	2.08%	$6,000	2.08%	$6,600	2.28%		0.38	16.67	18.33	1.49

REPORT FOR PRESENTATION PURPOSES ONLY AND DOES NOT REPRESENT A REAL CASE

IVORY MOLAR & BRAD CAVITY
ROOT & MOLAR DDS PC
MARKET APPROACH
VALUATION DATE: JANUARY 11, 2016

Based on Revenue (MVIC/Revenue)*	
Gross Sales	$ 2,600,000
Multiple	0.50
Indicated Market Value of Invested Capital	1,300,000
Plus: Working Capital	286,407
Less: Interest Bearing Debt	(92,631)
Indicated Market Value of Equity	$ 1,493,776
Rounded	$ 1,494,000
Based on EBITDA (MVIC/EBITDA)*	
Normalized EBITDA	$ 518,268
Multiple	3.00
Indicated Market Value of Invested Capital	1,554,805
Plus: Working Capital	286,407
Less: Interest Bearing Debt	(92,631)
Indicated Market Value of Equity	$ 1,647,436
Rounded	$ 1,647,000

*MVIC is the market value of equity plus the market value of interest bearing debt.

EXHIBIT 8

IVORY & BRAD MOLAR
ROOT & MOLAR DDS PC
SUMMARY OF VALUATION CALCULATIONS
VALUATION DATE: JANUARY 11, 2016

	Reference	Indicated Value Before DLOM (*)	DLOM Adjustments @ 10%	Concluded Value
Market Approach				
Private Transaction (MVIC/Revenue)	*Exhibit 7*	$ 1,493,776	$ (149,378)	$ 1,344,399
Private Transaction (MVIC/ EBITDA)	*Exhibit 7*	$ 1,647,436	$ (164,744)	$ 1,482,693
Income Approach				
Capitalized Cash Flow	*Exhibit 5*	$ 1,695,801	$ (169,580)	$ 1,526,221
Conclusion of Fair Market Value - 100% Equity				**$ 1,450,000**
Conclusion of Fair Market Value of a 50% Interest				**$ 725,000**

(*) - DLOM - Discount for Lack of Marketability. The discount for marketability is related to the liquidity of the Practice. The 10% DLOM is related to the costs of selling the Practice and holding time to sell the Practice.

EXHIBIT 8

IVORY MOLAR & BRAD CAVITY
ROOT & MOLAR DDS PC

EXPERT TESTIMONY

1. As a general rule, a witness must testify to facts and not opinions or conclusions drawn from the facts. *People v. Russell*, 165 A.D.2d 327, 567 N.Y.S.2d 548, *affd.*, 79 N.Y.2d 1024.

2. A lay witness is permitted to testify to opinions of color, weight, size, quantity, light and darkness as well as the identity as to race, language, visibility, sounds and the like. *Laubach v. Colley, Townsend v. Brundage*, 4 Hun 264, *Miller v. City of New York*, 104 A.D. 33, 93 N.Y.S. 227, matters involving taste, smell and touch, *People v. Marx*, 128 A.D. 828, 112 N.Y.S. 1011, the state of emotion exhibited by a person. *Blake v. People*, 73 N.Y. 586.

3. A lay person can testify as to the physical condition of a person such as a person's strength, vigor, feebleness, or illness. *Rawls v. American Mutual Life, Ins.*, 27 N.Y. 282. See *Cotilletta v. Tepedino*, 151 Misc.2d 660, 573 N.Y.S.2d 396. Lay persons can also testify as to identity and likeness. *People v. Strolo*, 191 N.Y. 42. The identification of another person's voice. *Wilbur v. Hubbard*, 35 Barb (NY) 303.

4. A pay personal can testify as to whether or not a person appeared to be intoxicated. *People v. Cruz*, 48 N.Y.2d 419, *Renzo v. Topps Friendly Markets*, 136 A.D.2d 952, *People v. Bost*, 133 A.D.2d 930, *Burke v. Tower East Restaurant*, 37 A.D.2d 836.

5. A lay person who has some experience in observing the rate of speed of moving objects may testify to same. *People v. Olsen*, 22 N.Y.2d 230, *People v. Dusing*, 5 N.Y.2d 126, *Salter v. Utica & Black River RR*, 59 N.Y. 631.

6. A lay person may estimate the age of another person based on appearance. *People v. Patterson*, 149 A.D.2d 966.

7. A lay person may testify to the rational or irrational nature of a person's conduct. (But may not testify that a person was of sound or unsound mind. *People v. Hill*, 195 N.Y. 16,

Holcomb v. Holcomb, 95 N.Y. 316.

OPINIONS OF EXPERT WITNESSES

8. *DeLong v. Erie*, 60 N.Y.2d 296-admissibility of expert testimony on a particular point is addressed to the discretion of the trial court . . . the guiding principle is that expert opinion is proper when it would "help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror."

9. *People v. Cronin*, 60 N.Y.2d 430. "It is for the trial court in the first instance to determine when jurors are able to draw conclusions from the evidence based on their day-to-day experience, their common observation and their knowledge, and when they would be *benefitted* by the specialized knowledge of an expert witness."

10. The testimony of an expert must relate to subject matter concerning scientific, technical or other specialized knowledge that is beyond the understanding of the trier of fact. May also dispel misconceptions that the trier of fact may have. *People v. Taylor*, 75 N.Y.2d 277 (1990) *Matter of Nicole V.*, 71 N.Y.2d 112.

11. Where expert testimony is being offered but does not demonstrate how said testimony would clarify an issue involving professional and technical knowledge, said proposed testimony is inadmissible. *GMAC Commercial Credit, LLC., v. Mitchell* B.J. Ltd., 272 A.D.2d 51.

12. The trial court appropriate precluded expert testimony regarding proximate cause because that connection did not require expert testimony but rather an understanding of the facts surrounding the accident. *Matott v. Ward*, 48 N.Y.2d 455.

13. Wife in a matrimonial proceeding was permitted to give general testimony as to her disabilities and medical condition as this affected her ability to work and the Court did not

require expert testimony. *Eattinelli v. Eatinelli*, 174 A.D.2d 503.

FORCING THE TESTIMONY OF AN EXPERT WITNESS

14. Generally, an expert cannot be compelled to testify as to matters of opinion. *People Kraushaar Bros v. Thorpe*, 296 N.Y.223, *Horowitz v. Upjohn, Co.*, 149 A.D.2d 467.

15. A party may be called as an expert witness. McDermott v. Manhattan Eye, Ear & Throat Hospital, 15 N.Y.2d 20 (1964).

EXPERT QUALIFICATIONS

16. An expert should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information testified to or the opinion rendered is reliable. *Mattot v. Ward*, 48 N.Y.2d 455.

17. When a witness is permitted to testify as an expert, the extent of his qualifications then becomes a matter of the weight given to the testimony. *Felt v. Olson*, 51 N.Y.2d 977.

WEIGHT GIVEN TO EXPERT TESTIMONY

18. The trier of fact determines the weight of expert testimony. *Felt v. Olson*, 51 N.Y.2d 977., *Matter of Sylvestri*, 44 N.Y.2d 260, *People v. Wood*, 12 N.Y.2d 69.

19. The trier of fact is not bound to accept the opinion of an expert even if uncontradicted. *Mechanick v. Conradi*, 139 A.D.2d 857, *Halvorsen v. Ford Motor*, 132 A.D.2d 57, *lv den*, 71 N.Y.2d 805. Opinion on ultimate issue.

20. The trial court has the discretion to allow an expert to express an opinion on the ultimate issue the subject to the same standards applicable to expert testimony on any issue. Does the experts opinion assist the trier of fact or does the ultimate issue fall into the range of ordinary trained and intelligence. *People v. Robinson*, 191 A.D.2d 595.

21. Expert testimony regarding the ultimate question the admissibility of same turns on whether given the nature of the subject, the facts cannot be stated or described in such a manner as to enable them to form an accurate judgment from same and no other better evidence than that opinion evidence is attainable. *People v. Cronin*, 60 N.Y.2d 430.

BASIS FOR EXPERT OPINION

22. Opinion evidence must be based on facts in the record or personally known to the witness. The expert cannot render an opinion by assuming material facts that are not supported by the evidence. *Cassano v. Hagstrom*, 5 N.Y.2d 643, *Tarlowe v. Metropolitan Ski Slopes*, 28 N.Y.2d 410.

ESTABLISHING LIABILITY

23. The New York Courts consistently require that an expert rely on tests or procedures generally accepted as reliable by the relevant scientific community. This is the standard that is consistently applied in all New York Courts. *Frye v. US,* 293 F. 1013.

24. The standard is not whether a particular procedure is unanimously endorsed as reliable but whether it is generally accepted as reliable. *People v. Middleton*, 54 N.Y. 42.

FORM OF OPINION

25. An experts opinion is not required to follow any particular form of words but rather the testimony need only show that the opinion is not based upon supposition or speculation. *People v. Brown*, 67 N.Y.2d 555. *Matter of Anthony M*, 63 N.Y.2d 270.

HANDWRITING

26. A lay witness may express an opinion as to the genuineness of a handwriting of another provided that witness shows familiarity with the handwriting in question. *Hammond v.*

Varian, Johnson v. Daverne, 19 Johns (NY) 134, *Gross v. Sormani*, 50 A.D. 531.

27. The admissibility of opinion testimony of handwriting experts is beyond dispute. *Matter of Sylvestri*, 44 N.Y.2d 260.

28. C.P.L.R. Rule 4536 - proof of writing by comparison of handwriting - "comparison of a disputed writing with any writing prove to the satisfaction of the court to be the handwriting of the person claimed to have made the disputed writing shall be permitted."

HEARSAY EVIDENCE

29. An expert may base their opinion in part upon out of Court information supplied by witnesses provided they are subject to cross examination on trial. *People v. Sugden*, 35 N.Y.2d 453.

30. Scientific books are excluded as hearsay and may therefore be relied upon. *People v. Riccardi*, 285 N.Y.21. *People v. Sugden, supra.*

31. Expert doctor may not testify as to opinion based upon x-rays without the same being admitted into evidence. *Hambsch v. New York City Transit Authority*, 63 N.Y.2d 723 (1984)

32. Expert physician may not testify as to his opinion based upon an unknown study that he did not participate in. *Id.*

33. Expert opinion must be based on facts in the record or personally known to the witness. *Id.*

34. In order to qualify as "professional reliability" exception, there must be evidence establishing the reliability of the out of court material. *Id.*

35. "It is well settled that, to be admissible, opinion evidence must be based on one of the following: first, personal knowledge of the facts upon which the opinion rests; second, where

the expert does not have person knowledge of the facts upon which the opinion rests, the opinion may be based upon facts and material in evidence, real or testimonial; third, material not in evidence provided that the out-of-court material is derived from a witness subject to full cross-examination; and fourth, material not in evidence provided the out-of-court material is one of the kind excepted in the profession as a basis in forming an opinion and the out-of-court material is accompanied by evidence establishing its reliability.

It is this fourth basis for positing an opinion, commonly known as the 'professional reliability' basis, which is implicated in this matter, and which has resulted in confusion with respect to the use of secondary evidence in this department (citations omitted)". *Wagman v. Bradshaw*, 292 A.D.2d 84 (2nd Dept, 2002)

COLLATERAL SOURCES

36. It is error to permit an expert to offer an opinion based in part upon interviews with collateral sources and where there is no evidence that the information obtained was the kind accepted in the profession as being reliable. *Murphy v. Woods*, 63 A.D.3d 1526

37. An expert report may be admitted into evidence where it does not rely to a significant extent on hearsay statements but rather where the report set forth conclusions that were primarily based upon first hand interviews with the litigants. Those portions of the report containing inadmissible hearsay should not be considered. *Straus v. Straus*, 136 A.D.3d 419.

38. An expert may render an opinion utilizing out-of-court hearsay provided the declarant testifies at trial. *Flamio v. State*, 132 A.D.2d 594.

39. It is error to allow an expert to render an opinion as to diagnosis based mostly on his review of MRI imaging as opposed to a physical examination of the party. The court found

the MRI was not used to simply confirm the expert's opinion but was used at the basis for the opinion. *Nuzzo v. Castellano*, 254 A.D.2d 265.

40. Expert opinion may not be received in evidence where it is based upon opinions of another physician who treated the plaintiff but was not called as a witness. The expert had no personal knowledge of the facts of the matter and no evidence was produced establishing the reliability of the expert's out-of-court material. *Brown v. County of Albany*, 271 A.D.2d 819.

41. It was error that the Court admitted the defendant's diary of certain events that occurred during the marriage and where the Court appointed forensic relied in part on this inadmissible hearsay in reaching his opinion as to custody. HOWEVER, the error was deemed harmless. *Lieberman v. Lieberman*, 142 A.D.3d 1144 (2nd Dept, 2016)

42. The proponents burden of showing acceptance in the profession can be obtained through the testimony of a qualified expert even where that expert is different than the one who seeks to rely on the out-of-court material. *People v. Goldstein*, 6 N.Y.3d 119 (2005)

43. An economist may rely on a letter from a parties employer describing that parties potential and where the economist testified that such hearsay was the type of document relied upon in the field of economics. *Tassone v. Mid-Valley Oil Co., Inc.*, 5 A.D.3d 931.

44. Testimony of a social worker-psychotherapist opining as to the potential detriment to the children by the father living in a separate first floor apartment of the families two family home is inadmissible where the expert had not interviewed either the husband or the children. *Schmidt v. Schmidt*, 184 A.D.2d 629 (2nd Dept, 1992)

45. Expert who did not examine the party for whom the appointment of a guardian was being sought, could not testify as to that persons incapacity simply based upon the parties'

appearance in the Courtroom. *Matter of Maher*, 207 A.D.2d 133.

46. An expert may not render an opinion by assuming material facts not contained in the record and may not guess or speculate in making said conclusion. *Interstate Cigar Co., v. Dynaire Corp.*, 176 A.D.2d 699 (2nd Dept, 1991)

COURT APPOINTED EXPERT

COURT RULES

47. The Court may appoint a psychiatrist, psychologist, social worker or other appropriate expert to give testimony with respect to custody or visitation and may appoint an accountant, appraiser, actuary, or other appropriate expert to give testimony with respect to equitable distribution or distributive award. 22 N.Y.C.R.R. 202.18.

48. N.Y. Judiciary Law 35(4) This permits the appointment of a mental health professional where custody of a child may be placed in an agency due to mental health impairment of the parent.

CASE LAW

49. The court has the power to appoint an independent appraiser to value marital property. *Zirinsky v. Zirinsky*, 138 A.D.2d 43.

50. Absent an abuse discretion, the matrimonial court has the ability to appoint an independent appraiser to value marital property. *Pryba v. Pryba* 70 A.D.3d 1109.

AMERICAN PSYCHOLOGICAL ASSOCIATION

ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT

Adopted August 21, 2002
Effective June 1, 2003
(With the 2010 Amendments
to Introduction and Applicability
and Standards 1.02 and 1.03,
Effective June 1, 2010)

With the 2016 Amendment
to Standard 3.04
Adopted August 3, 2016
Effective January 1, 2017

ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT

CONTENTS

Effective June 1, 2003 (as amended 2010, 2016). Effective January 1, 2017

INTRODUCTION AND APPLICABILITY

The American Psychological Association's (APA's) Ethical Principles of Psychologists and Code of Conduct (hereinafter referred to as the Ethics Code) consists of an Introduction, a Preamble, five General Principles (A-E), and specific Ethical Standards. The Introduction discusses the intent, organization, procedural considerations, and scope of application of the Ethics Code. The Preamble and General Principles are aspirational goals to guide psychologists toward the highest ideals of psychology. Although the Preamble and General Principles are not themselves enforceable rules, they should be considered by psychologists in arriving at an ethical course of action. The Ethical Standards set forth enforceable rules for conduct as psychologists. Most of the Ethical Standards are written broadly, in order to apply to psychologists in varied roles, although the application of an Ethical Standard may vary depending on the context. The Ethical Standards are not exhaustive. The fact that a given conduct is not specifically addressed by an Ethical Standard does not mean that it is necessarily either ethical or unethical.

This Ethics Code applies only to psychologists' activities that are part of their scientific, educational, or professional roles as psychologists. Areas covered include but are not limited to the clinical, counseling, and school practice of psychology; research; teaching; supervision of trainees; public service; policy development; social intervention; development of assessment instruments; conducting assessments; educational counseling; organizational consulting; forensic activities; program design and evaluation; and administration. This Ethics Code applies to these activities across a variety of contexts, such as in person, postal, telephone, Internet, and other electronic transmissions. These activities shall be distinguished from the purely private conduct of psychologists, which is not within the purview of the Ethics Code.

Membership in the APA commits members and student affiliates to comply with the standards of the APA Ethics Code and to the rules and procedures used to enforce them. Lack of awareness or misunderstanding of an Ethical Standard is not itself a defense to a charge of unethical conduct.

The procedures for filing, investigating, and resolving complaints of unethical conduct are described in the current Rules and Procedures of the APA Ethics Committee. APA may impose sanctions on its members for violations of the standards of the Ethics Code, including termination of APA membership, and may notify other bodies and individuals of its actions. Actions that violate the standards of the Ethics Code may also lead to the imposition of sanctions on psychologists or students whether or not they are APA members by bodies other than APA, including state psychological associations, other professional groups, psychology boards, other state or federal agencies, and payors for health services. In addition, APA may take action against a member after his or her conviction of a felony, expulsion or suspension from an affiliated state psychological association, or suspension or loss of licensure. When the sanction to be imposed by APA is less than expulsion, the 2001 Rules and Procedures do not guarantee an opportunity for an in-person hearing, but generally provide that complaints will be resolved only on the basis of a submitted record.

The Ethics Code is intended to provide guidance for psychologists and standards of professional conduct that can be applied by the APA and by other bodies that choose to adopt them. The Ethics Code is not intended to be a basis of civil liability. Whether a psychologist has violated the Ethics Code standards does not by itself determine whether the psychologist is legally liable in a court action, whether a contract is enforceable, or whether other legal consequences occur.

The American Psychological Association's Council of Representatives adopted this version of the APA Ethics Code during its meeting on August 21, 2002. The Code became effective on June 1, 2003. The Council of Representatives amended this version of the Ethics Code on February 20, 2010, effective June 1, 2010, and on August 3, 2016, effective January 1, 2017. (see p. 16 of this pamphlet). Inquiries concerning the substance or interpretation of the APA Ethics Code should be addressed to the Office of Ethics, American Psychological Association, 750 First St. NE, Washington, DC 20002-4242. This Ethics Code and information regarding the Code can be found on the APA website, http://www.apa.org/ethics. The standards in this Ethics Code will be used to adjudicate complaints brought concerning alleged conduct occurring on or after the effective date. Complaints will be adjudicated on the basis of the version of the Ethics Code that was in effect at the time the conduct occurred.

The APA has previously published its Ethics Code, or amendments thereto, as follows:

American Psychological Association. (1953). *Ethical standards of psychologists.* Washington, DC: Author.

American Psychological Association. (1959). Ethical standards of psychologists. *American Psychologist, 14,* 279-282.

American Psychological Association. (1963). Ethical standards of psychologists. *American Psychologist, 18,* 56-60.

American Psychological Association. (1968). Ethical standards of psychologists. *American Psychologist, 23,* 357-361.

American Psychological Association. (1977, March). Ethical standards of psychologists. *APA Monitor,* 22-23.

American Psychological Association. (1979). *Ethical standards of psychologists.* Washington, DC: Author.

American Psychological Association. (1981). Ethical principles of psychologists. *American Psychologist, 36,* 633-638.

American Psychological Association. (1990). Ethical principles of psychologists (Amended June 2, 1989). *American Psychologist, 45,* 390-395.

American Psychological Association. (1992). Ethical principles of psychologists and code of conduct. *American Psychologist, 47,* 1597-1611.

American Psychological Association. (2002). Ethical principles of psychologists and code of conduct. *American Psychologist, 57,* 1060-1073.

American Psychological Association. (2010). 2010 amendments to the 2002 *"Ethical Principles of Psychologists and Code of Conduct." American Psychologist, 65,* 493.

American Psychological Association. (2016). Revision of ethical standard 3.04 of the *"Ethical Principles of Psychologists and Code of Conduct"* (2002, as amended 2010). *American Psychologist, 71,* 900.

Request copies of the APA's Ethical Principles of Psychologists and Code of Conduct from the APA Order Department, 750 First St. NE, Washington, DC 20002-4242, or phone (202) 336-5510.

The modifiers used in some of the standards of this Ethics Code (*e.g., reasonably, appropriate, potentially*) are included in the standards when they would (1) allow professional judgment on the part of psychologists, (2) eliminate injustice or inequality that would occur without the modifier, (3) ensure applicability across the broad range of activities conducted by psychologists, or (4) guard against a set of rigid rules that might be quickly outdated. As used in this Ethics Code, the term *reasonable* means the prevailing professional judgment of psychologists engaged in similar activities in similar circumstances, given the knowledge the psychologist had or should have had at the time.

In the process of making decisions regarding their professional behavior, psychologists must consider this Ethics Code in addition to applicable laws and psychology board regulations. In applying the Ethics Code to their professional work, psychologists may consider other materials and guidelines that have been adopted or endorsed by scientific and professional psychological organizations and the dictates of their own conscience, as well as consult with others within the field. If this Ethics Code establishes a higher standard of conduct than is required by law, psychologists must meet the higher ethical standard. If psychologists' ethical responsibilities conflict with law, regulations, or other governing legal authority, psychologists make known their commitment to this Ethics Code and take steps to resolve the conflict in a responsible manner in keeping with basic principles of human rights.

PREAMBLE

Psychologists are committed to increasing scientific and professional knowledge of behavior and people's understanding of themselves and others and to the use of such knowledge to improve the condition of individuals, organizations, and society. Psychologists respect and protect civil and human rights and the central importance of freedom of inquiry and expression in research, teaching, and publication. They strive to help the public in developing informed judgments and choices concerning human behavior. In doing so, they perform many roles, such as researcher, educator, diagnostician, therapist, supervisor, consultant, administrator, social interventionist, and expert witness. This Ethics Code provides a common set of principles and standards upon which psychologists build their professional and scientific work.

This Ethics Code is intended to provide specific standards to cover most situations encountered by psychologists. It has as its goals the welfare and protection of the individuals and groups with whom psychologists work and the education of members, students, and the public regarding ethical standards of the discipline.

The development of a dynamic set of ethical standards for psychologists' work-related conduct requires a personal commitment and lifelong effort to act ethically; to encourage ethical behavior by students, supervisees, employees, and colleagues; and to consult with others concerning ethical problems.

GENERAL PRINCIPLES

This section consists of General Principles. General Principles, as opposed to Ethical Standards, are aspirational in nature. Their intent is to guide and inspire psychologists toward the very highest ethical ideals of the profession. General Principles, in contrast to Ethical Standards, do not represent obligations and should not form the basis for imposing sanctions. Relying upon General Principles for either of these reasons distorts both their meaning and purpose.

Principle A: Beneficence and Nonmaleficence

Psychologists strive to benefit those with whom they work and take care to do no harm. In their professional actions, psychologists seek to safeguard the welfare and rights of those with whom they interact professionally and other affected persons, and the welfare of animal subjects of research. When conflicts occur among psychologists' obligations or concerns, they attempt to resolve these conflicts in a responsible fashion that avoids or minimizes harm. Because psychologists' scientific and professional judgments and actions may affect the lives of others, they are alert to and guard against personal, financial, social, organizational, or political factors that might lead to misuse of their influence. 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.

Principle B: Fidelity and Responsibility

Psychologists establish relationships of trust with those with whom they work. They are aware of their professional and scientific responsibilities to society and to the specific communities in which they work. Psychologists uphold professional standards of conduct, clarify their professional roles and obligations, accept appropriate responsibility for their behavior, and seek to manage conflicts of interest that could lead to exploitation or harm. Psychologists consult with, refer to, or cooperate with other professionals and institutions to the extent needed to serve the best interests of those with whom they work. They are concerned about the ethical compliance of their colleagues' scientific and professional conduct. Psychologists strive to contribute a portion of their professional time for little or no compensation or personal advantage.

Principle C: Integrity

Psychologists seek to promote accuracy, honesty, and truthfulness in the science, teaching, and practice of

psychology. In these activities psychologists do not steal, cheat, or engage in fraud, subterfuge, or intentional misrepresentation of fact. Psychologists strive to keep their promises and to avoid unwise or unclear commitments. In situations in which deception may be ethically justifiable to maximize benefits and minimize harm, psychologists have a serious obligation to consider the need for, the possible consequences of, and their responsibility to correct any resulting mistrust or other harmful effects that arise from the use of such techniques.

Principle D: Justice

Psychologists recognize that fairness and justice entitle all persons to access to and benefit from the contributions of psychology and to equal quality in the processes, procedures, and services being conducted by psychologists. Psychologists exercise reasonable judgment and take precautions to ensure that their potential biases, the boundaries of their competence, and the limitations of their expertise do not lead to or condone unjust practices.

Principle E: Respect for People's Rights and Dignity

Psychologists respect the dignity and worth of all people, and the rights of individuals to privacy, confidentiality, and self-determination. Psychologists are aware that special safeguards may be necessary to protect the rights and welfare of persons or communities whose vulnerabilities impair autonomous decision making. Psychologists are aware of and respect cultural, individual, and role differences, including those based on age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, language, and socioeconomic status, and consider these factors when working with members of such groups. Psychologists try to eliminate the effect on their work of biases based on those factors, and they do not knowingly participate in or condone activities of others based upon such prejudices.

ETHICAL STANDARDS

1. Resolving Ethical Issues

1.01 Misuse of Psychologists' Work

If psychologists learn of misuse or misrepresentation of their work, they take reasonable steps to correct or minimize the misuse or misrepresentation.

1.02 Conflicts Between Ethics and Law, Regulations, or Other Governing Legal Authority

If psychologists' ethical responsibilities conflict with law, regulations, or other governing legal authority, psychologists clarify the nature of the conflict, make known their commitment to the Ethics Code, and take reasonable steps to resolve the conflict consistent with the General Principles and Ethical Standards of the Ethics Code. Under no circumstances may this standard be used to justify or defend violating human rights.

1.03 Conflicts Between Ethics and Organizational Demands

If the demands of an organization with which psychologists are affiliated or for whom they are working are in conflict with this Ethics Code, psychologists clarify the nature of the conflict, make known their commitment to the Ethics Code, and take reasonable steps to resolve the conflict consistent with the General Principles and Ethical Standards of the Ethics Code. Under no circumstances may this standard be used to justify or defend violating human rights.

1.04 Informal Resolution of Ethical Violations

When psychologists believe that there may have been an ethical violation by another psychologist, they attempt to resolve the issue by bringing it to the attention of that individual, if an informal resolution appears appropriate and the intervention does not violate any confidentiality rights that may be involved. (See also Standards 1.02, Conflicts Between Ethics and Law, Regulations, or Other Governing Legal Authority, and 1.03, Conflicts Between Ethics and Organizational Demands.)

1.05 Reporting Ethical Violations

If an apparent ethical violation has substantially harmed or is likely to substantially harm a person or organization and is not appropriate for informal resolution under Standard 1.04, Informal Resolution of Ethical Violations, or is not resolved properly in that fashion, psychologists take further action appropriate to the situation. Such action might include referral to state or national committees on professional ethics, to state licensing boards, or to the appropriate institutional authorities. This standard does not apply when an intervention would violate confidentiality rights or when psychologists have been retained to review the work of another psychologist whose professional conduct is in question. (See also Standard 1.02, Conflicts Between Ethics and Law, Regulations, or Other Governing Legal Authority.)

1.06 Cooperating with Ethics Committees

Psychologists cooperate in ethics investigations, proceedings, and resulting requirements of the APA or any affiliated state psychological association to which they belong. In doing so, they address any confidentiality issues. Failure to cooperate is itself an ethics violation. However, making a request for deferment of adjudication of an ethics complaint pending the outcome of litigation does not alone constitute noncooperation.

1.07 Improper Complaints

Psychologists do not file or encourage the filing of ethics complaints that are made with reckless disregard for or willful ignorance of facts that would disprove the allegation.

1.08 Unfair Discrimination Against Complainants and Respondents

Psychologists do not deny persons employment, advancement, admissions to academic or other programs, tenure, or promotion, based solely upon their having made or their being the subject of an ethics complaint. This does not preclude taking action based upon the outcome of such proceedings or considering other appropriate information.

2. Competence

2.01 Boundaries of Competence

(a) Psychologists provide services, teach, and conduct research with populations and in areas only within the boundaries of their competence, based on their education, training, supervised experience, consultation, study, or professional experience.

(b) Where scientific or professional knowledge in the discipline of psychology establishes that an understanding of factors associated with age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, language, or socioeconomic status is essential for effective implementation of their services or research, psychologists have or obtain the training, experience, consultation, or supervision necessary to ensure the competence of their services, or they make appropriate referrals, except as provided in Standard 2.02, Providing Services in Emergencies.

(c) Psychologists planning to provide services, teach, or conduct research involving populations, areas, techniques, or technologies new to them undertake relevant education, training, supervised experience, consultation, or study.

(d) When psychologists are asked to provide services to individuals for whom appropriate mental health services are not available and for which psychologists have not obtained the competence necessary, psychologists with closely related prior training or experience may provide such services in order to ensure that services are not denied if they make a reasonable effort to obtain the competence required by using relevant research, training, consultation, or study.

(e) In those emerging areas in which generally recognized standards for preparatory training do not yet exist, psychologists nevertheless take reasonable steps to ensure the competence of their work and to protect clients/patients, students, supervisees, research participants, organizational clients, and others from harm.

(f) When assuming forensic roles, psychologists are or become reasonably familiar with the judicial or administrative rules governing their roles.

2.02 Providing Services in Emergencies

In emergencies, when psychologists provide services to individuals for whom other mental health services are not available and for which psychologists have not obtained the necessary training, psychologists may provide such services in order to ensure that services are not denied. The services are discontinued as soon as the emergency has ended or appropriate services are available.

2.03 Maintaining Competence

Psychologists undertake ongoing efforts to develop and maintain their competence.

2.04 Bases for Scientific and Professional Judgments

Psychologists' work is based upon established scientific and professional knowledge of the discipline. (See also Standards 2.01e, Boundaries of Competence, and 10.01b, Informed Consent to Therapy.)

2.05 Delegation of Work to Others

Psychologists who delegate work to employees, supervisees, or research or teaching assistants or who use the services of others, such as interpreters, take reasonable steps to (1) avoid delegating such work to persons who have a multiple relationship with those being served that would likely lead to exploitation or loss of objectivity; (2) authorize only those responsibilities that such persons can be expected to perform competently on the basis of their education, training, or experience, either independently or with the level of supervision being provided; and (3) see that such persons perform these services competently. (See also Standards 2.02, Providing Services in Emergencies; 3.05, Multiple Relationships; 4.01, Maintaining Confidentiality; 9.01, Bases for Assessments; 9.02, Use of Assessments; 9.03, Informed Consent in Assessments; and 9.07, Assessment by Unqualified Persons.)

2.06 Personal Problems and Conflicts

(a) Psychologists refrain from initiating an activity when they know or should know that there is a substantial likelihood that their personal problems will prevent them from performing their work-related activities in a competent manner.

(b) When psychologists become aware of personal problems that may interfere with their performing work-related duties adequately, they take appropriate measures, such as obtaining professional consultation or assistance, and determine whether they should limit, suspend, or terminate their work-related duties. (See also Standard 10.10, Terminating Therapy.)

3. Human Relations

3.01 Unfair Discrimination

In their work-related activities, psychologists do not engage in unfair discrimination based on age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, socioeconomic status, or any basis proscribed by law.

3.02 Sexual Harassment

Psychologists do not engage in sexual harassment. Sexual harassment is sexual solicitation, physical advances, or verbal or nonverbal conduct that is sexual in nature, that occurs in connection with the psychologist's activities or roles as a psychologist, and that either (1) is unwelcome, is offensive, or creates a hostile workplace or educational environment, and the psychologist knows or is told this or (2) is sufficiently severe or intense to be abusive to a reasonable person in the context. Sexual harassment can consist of a single intense or severe act or of multiple persistent or pervasive acts. (See also Standard 1.08, Unfair Discrimination Against Complainants and Respondents.)

3.03 Other Harassment

Psychologists do not knowingly engage in behavior that is harassing or demeaning to persons with whom they interact in their work based on factors such as those persons' age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, language, or socioeconomic status.

3.04 Avoiding Harm

(a) Psychologists take reasonable steps to avoid harming their clients/patients, students, supervisees, research participants, organizational clients, and others with whom they work, and to minimize harm where it is foreseeable and unavoidable.

(b) Psychologists do not participate in, facilitate, assist, or otherwise engage in torture, defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person, or in any other cruel, inhuman, or degrading behavior that violates 3.04a.

3.05 Multiple Relationships

(a) A multiple relationship occurs when a psychologist is in a professional role with a person and (1) at the same time is in another role with the same person, (2) at the same time is in a relationship with a person closely associated with or related to the person with whom the psychologist has the professional relationship, or (3) promises to enter into another relationship in the future with the person or a person closely associated with or related to the person.

A psychologist refrains from entering into a multiple relationship if the multiple relationship could reasonably be expected to impair the psychologist's objectivity, competence, or effectiveness in performing his or her functions as a psychologist, or otherwise risks exploitation or harm to the person with whom the professional relationship exists.

Multiple relationships that would not reasonably be expected to cause impairment or risk exploitation or harm are not unethical.

(b) If a psychologist finds that, due to unforeseen factors, a potentially harmful multiple relationship has arisen, the psychologist takes reasonable steps to resolve it with due regard for the best interests of the affected person and maximal compliance with the Ethics Code.

(c) When psychologists are required by law, institutional policy, or extraordinary circumstances to serve in more than one role in judicial or administrative proceedings, at the outset they clarify role expectations and the extent of confidentiality and thereafter as changes occur. (See also Standards 3.04, Avoiding Harm, and 3.07, Third-Party Requests for Services.)

3.06 Conflict of Interest

Psychologists refrain from taking on a professional role when personal, scientific, professional, legal, financial, or other interests or relationships could reasonably be expected to (1) impair their objectivity, competence, or effectiveness in performing their functions as psychologists or (2) expose the person or organization with whom the professional relationship exists to harm or exploitation.

3.07 Third-Party Requests for Services

When psychologists agree to provide services to a person or entity at the request of a third party, psychologists attempt to clarify at the outset of the service the nature of the relationship with all individuals or organizations involved. This clarification includes the role of the psychologist (e.g., therapist, consultant, diagnostician, or expert witness), an identification of who is the client, the probable uses of the services provided or the information obtained, and the fact that there may be limits to confidentiality. (See also Standards 3.05, Multiple relationships, and 4.02, Discussing the Limits of Confidentiality.)

3.08 Exploitative Relationships

Psychologists do not exploit persons over whom they have supervisory, evaluative or other authority such as clients/patients, students, supervisees, research participants, and employees. (See also Standards 3.05, Multiple Relationships; 6.04, Fees and Financial Arrangements; 6.05, Barter with Clients/Patients; 7.07, Sexual Relationships with Students and Supervisees; 10.05, Sexual Intima-

cies with Current Therapy Clients/Patients; 10.06, Sexual Intimacies with Relatives or Significant Others of Current Therapy Clients/Patients; 10.07, Therapy with Former Sexual Partners; and 10.08, Sexual Intimacies with Former Therapy Clients/Patients.)

3.09 Cooperation with Other Professionals

When indicated and professionally appropriate, psychologists cooperate with other professionals in order to serve their clients/patients effectively and appropriately. (See also Standard 4.05, Disclosures.)

3.10 Informed Consent

(a) When psychologists conduct research or provide assessment, therapy, counseling, or consulting services in person or via electronic transmission or other forms of communication, they obtain the informed consent of the individual or individuals using language that is reasonably understandable to that person or persons except when conducting such activities without consent is mandated by law or governmental regulation or as otherwise provided in this Ethics Code. (See also Standards 8.02, Informed Consent to Research; 9.03, Informed Consent in Assessments; and 10.01, Informed Consent to Therapy.)

(b) For persons who are legally incapable of giving informed consent, psychologists nevertheless (1) provide an appropriate explanation, (2) seek the individual's assent, (3) consider such persons' preferences and best interests, and (4) obtain appropriate permission from a legally authorized person, if such substitute consent is permitted or required by law. When consent by a legally authorized person is not permitted or required by law, psychologists take reasonable steps to protect the individual's rights and welfare.

(c) When psychological services are court ordered or otherwise mandated, psychologists inform the individual of the nature of the anticipated services, including whether the services are court ordered or mandated and any limits of confidentiality, before proceeding.

(d) Psychologists appropriately document written or oral consent, permission, and assent. (See also Standards 8.02, Informed Consent to Research; 9.03, Informed Consent in Assessments; and 10.01, Informed Consent to Therapy.)

3.11 Psychological Services Delivered to or Through Organizations

(a) Psychologists delivering services to or through organizations provide information beforehand to clients and when appropriate those directly affected by the services about (1) the nature and objectives of the services, (2) the intended recipients, (3) which of the individuals are clients, (4) the relationship the psychologist will have with each person and the organization, (5) the probable uses of services provided and information obtained, (6) who will have access to the information, and (7) limits of confidentiality. As soon as feasible, they provide information about the results and conclusions of such services to appropriate persons.

(b) If psychologists will be precluded by law or by organizational roles from providing such information to particular individuals or groups, they so inform those individuals or groups at the outset of the service.

3.12 Interruption of Psychological Services

Unless otherwise covered by contract, psychologists make reasonable efforts to plan for facilitating services in the event that psychological services are interrupted by factors such as the psychologist's illness, death, unavailability, relocation, or retirement or by the client's/patient's relocation or financial limitations. (See also Standard 6.02c, Maintenance, Dissemination, and Disposal of Confidential Records of Professional and Scientific Work.)

4. Privacy and Confidentiality

4.01 Maintaining Confidentiality

Psychologists have a primary obligation and take reasonable precautions to protect confidential information obtained through or stored in any medium, recognizing that the extent and limits of confidentiality may be regulated by law or established by institutional rules or professional or scientific relationship. (See also Standard 2.05, Delegation of Work to Others.)

4.02 Discussing the Limits of Confidentiality

(a) Psychologists discuss with persons (including, to the extent feasible, persons who are legally incapable of giving informed consent and their legal representatives) and organizations with whom they establish a scientific or professional relationship (1) the relevant limits of confidentiality and (2) the foreseeable uses of the information generated through their psychological activities. (See also Standard 3.10, Informed Consent.)

(b) Unless it is not feasible or is contraindicated, the discussion of confidentiality occurs at the outset of the relationship and thereafter as new circumstances may warrant.

(c) Psychologists who offer services, products, or information via electronic transmission inform clients/patients of the risks to privacy and limits of confidentiality.

4.03 Recording

Before recording the voices or images of individuals to whom they provide services, psychologists obtain permission from all such persons or their legal representatives. (See also Standards 8.03, Informed Consent for Recording Voices and Images in Research; 8.05, Dispensing with Informed Consent for Research; and 8.07, Deception in Research.)

4.04 Minimizing Intrusions on Privacy

(a) Psychologists include in written and oral reports and consultations, only information germane to the purpose for which the communication is made.

(b) Psychologists discuss confidential information obtained in their work only for appropriate scientific or professional purposes and only with persons clearly concerned with such matters.

4.05 Disclosures

(a) Psychologists may disclose confidential information with the appropriate consent of the organizational client, the individual client/patient, or another legally authorized person on behalf of the client/patient unless prohibited by law.

(b) Psychologists disclose confidential information without the consent of the individual only as mandated by law, or where permitted by law for a valid purpose such as to (1) provide needed professional services; (2) obtain appropriate professional consultations; (3) protect the client/patient, psychologist, or others from harm; or (4) obtain payment for services from a client/patient, in which instance disclosure is limited to the minimum that is necessary to achieve the purpose. (See also Standard 6.04e, Fees and Financial Arrangements.)

4.06 Consultations

When consulting with colleagues, (1) psychologists do not disclose confidential information that reasonably could lead to the identification of a client/patient, research participant, or other person or organization with whom they have a confidential relationship unless they have obtained the prior consent of the person or organization or the disclosure cannot be avoided, and (2) they disclose information only to the extent necessary to achieve the purposes of the consultation. (See also Standard 4.01, Maintaining Confidentiality.)

4.07 Use of Confidential Information for Didactic or Other Purposes

Psychologists do not disclose in their writings, lectures, or other public media, confidential, personally identifiable information concerning their clients/patients, students, research participants, organizational clients, or other recipients of their services that they obtained during the course of their work, unless (1) they take reasonable steps to disguise the person or organization, (2) the person or organization has consented in writing, or (3) there is legal authorization for doing so.

5. Advertising and Other Public Statements

5.01 Avoidance of False or Deceptive Statements

(a) Public statements include but are not limited to paid or unpaid advertising, product endorsements, grant applications, licensing applications, other credentialing applications, brochures, printed matter, directory listings, personal resumes or curricula vitae, or comments for use in media such as print or electronic transmission, statements in legal proceedings, lectures and public oral presentations, and published materials. Psychologists do not knowingly make public statements that are false, deceptive, or fraudulent concerning their research, practice, or other work activities or those of persons or organizations with which they are affiliated.

(b) Psychologists do not make false, deceptive, or fraudulent statements concerning (1) their training, experience, or competence; (2) their academic degrees; (3) their credentials; (4) their institutional or association affiliations; (5) their services; (6) the scientific or clinical basis for, or results or degree of success of, their services; (7) their fees; or (8) their publications or research findings.

(c) Psychologists claim degrees as credentials for their health services only if those degrees (1) were earned from a regionally accredited educational institution or (2) were the basis for psychology licensure by the state in which they practice.

5.02 Statements by Others

(a) Psychologists who engage others to create or place public statements that promote their professional practice, products, or activities retain professional responsibility for such statements.

(b) Psychologists do not compensate employees of press, radio, television, or other communication media in return for publicity in a news item. (See also Standard 1.01, Misuse of Psychologists' Work.)

(c) A paid advertisement relating to psychologists' activities must be identified or clearly recognizable as such.

5.03 Descriptions of Workshops and Non-Degree-Granting Educational Programs

To the degree to which they exercise control, psychologists responsible for announcements, catalogs, brochures, or advertisements describing workshops, seminars, or other non-degree-granting educational programs ensure that they accurately describe the audience for which the program is intended, the educational objectives, the presenters, and the fees involved.

5.04 Media Presentations

When psychologists provide public advice or comment via print, Internet, or other electronic transmission,

they take precautions to ensure that statements (1) are based on their professional knowledge, training, or experience in accord with appropriate psychological literature and practice; (2) are otherwise consistent with this Ethics Code; and (3) do not indicate that a professional relationship has been established with the recipient. (See also Standard 2.04, Bases for Scientific and Professional Judgments.)

5.05 Testimonials

Psychologists do not solicit testimonials from current therapy clients/patients or other persons who because of their particular circumstances are vulnerable to undue influence.

5.06 In-Person Solicitation

Psychologists do not engage, directly or through agents, in uninvited in-person solicitation of business from actual or potential therapy clients/patients or other persons who because of their particular circumstances are vulnerable to undue influence. However, this prohibition does not preclude (1) attempting to implement appropriate collateral contacts for the purpose of benefiting an already engaged therapy client/patient or (2) providing disaster or community outreach services.

6. Record Keeping and Fees

6.01 Documentation of Professional and Scientific Work and Maintenance of Records

Psychologists create, and to the extent the records are under their control, maintain, disseminate, store, retain, and dispose of records and data relating to their professional and scientific work in order to (1) facilitate provision of services later by them or by other professionals, (2) allow for replication of research design and analyses, (3) meet institutional requirements, (4) ensure accuracy of billing and payments, and (5) ensure compliance with law. (See also Standard 4.01, Maintaining Confidentiality.)

6.02 Maintenance, Dissemination, and Disposal of Confidential Records of Professional and Scientific Work

(a) Psychologists maintain confidentiality in creating, storing, accessing, transferring, and disposing of records under their control, whether these are written, automated, or in any other medium. (See also Standards 4.01, Maintaining Confidentiality, and 6.01, Documentation of Professional and Scientific Work and Maintenance of Records.)

(b) If confidential information concerning recipients of psychological services is entered into databases or systems of records available to persons whose access has not been consented to by the recipient, psychologists use coding or other techniques to avoid the inclusion of personal identifiers.

(c) Psychologists make plans in advance to facilitate the appropriate transfer and to protect the confidentiality of records and data in the event of psychologists' withdrawal from positions or practice. (See also Standards 3.12, Interruption of Psychological Services, and 10.09, Interruption of Therapy.)

6.03 Withholding Records for Nonpayment

Psychologists may not withhold records under their control that are requested and needed for a client's/patient's emergency treatment solely because payment has not been received.

6.04 Fees and Financial Arrangements

(a) As early as is feasible in a professional or scientific relationship, psychologists and recipients of psychological services reach an agreement specifying compensation and billing arrangements.

(b) Psychologists' fee practices are consistent with law.

(c) Psychologists do not misrepresent their fees.

(d) If limitations to services can be anticipated because of limitations in financing, this is discussed with the recipient of services as early as is feasible. (See also Standards 10.09, Interruption of Therapy, and 10.10, Terminating Therapy.)

(e) If the recipient of services does not pay for services as agreed, and if psychologists intend to use collection agencies or legal measures to collect the fees, psychologists first inform the person that such measures will be taken and provide that person an opportunity to make prompt payment. (See also Standards 4.05, Disclosures; 6.03, Withholding Records for Nonpayment; and 10.01, Informed Consent to Therapy.)

6.05 Barter with Clients/Patients

Barter is the acceptance of goods, services, or other nonmonetary remuneration from clients/patients in return for psychological services. Psychologists may barter only if (1) it is not clinically contraindicated, and (2) the resulting arrangement is not exploitative. (See also Standards 3.05, Multiple Relationships, and 6.04, Fees and Financial Arrangements.)

6.06 Accuracy in Reports to Payors and Funding Sources

In their reports to payors for services or sources of research funding, psychologists take reasonable steps to ensure the accurate reporting of the nature of the service provided or research conducted, the fees, charges, or payments, and where applicable, the identity of the provider, the findings, and the diagnosis. (See also Standards 4.01, Maintaining Confidentiality; 4.04, Minimizing Intrusions on Privacy; and 4.05, Disclosures.)

6.07 Referrals and Fees

When psychologists pay, receive payment from, or divide fees with another professional, other than in an employer-employee relationship, the payment to each is based on the services provided (clinical, consultative, administrative, or other) and is not based on the referral itself. (See also Standard 3.09, Cooperation with Other Professionals.)

7. Education and Training

7.01 Design of Education and Training Programs

Psychologists responsible for education and training programs take reasonable steps to ensure that the programs are designed to provide the appropriate knowledge and proper experiences, and to meet the requirements for licensure, certification, or other goals for which claims are made by the program. (See also Standard 5.03, Descriptions of Workshops and Non-Degree-Granting Educational Programs.)

7.02 Descriptions of Education and Training Programs

Psychologists responsible for education and training programs take reasonable steps to ensure that there is a current and accurate description of the program content (including participation in required course- or program-related counseling, psychotherapy, experiential groups, consulting projects, or community service), training goals and objectives, stipends and benefits, and requirements that must be met for satisfactory completion of the program. This information must be made readily available to all interested parties.

7.03 Accuracy in Teaching

(a) Psychologists take reasonable steps to ensure that course syllabi are accurate regarding the subject matter to be covered, bases for evaluating progress, and the nature of course experiences. This standard does not preclude an instructor from modifying course content or requirements when the instructor considers it pedagogically necessary or desirable, so long as students are made aware of these modifications in a manner that enables them to fulfill course requirements. (See also Standard 5.01, Avoidance of False or Deceptive Statements.)

(b) When engaged in teaching or training, psychologists present psychological information accurately. (See also Standard 2.03, Maintaining Competence.)

7.04 Student Disclosure of Personal Information

Psychologists do not require students or supervisees to disclose personal information in course- or program-related activities, either orally or in writing, regarding sexual history, history of abuse and neglect, psychological treatment, and relationships with parents, peers, and spouses or significant others except if (1) the program or training facility has clearly identified this requirement in its admissions and program materials or (2) the information is necessary to evaluate or obtain assistance for students whose personal problems could reasonably be judged to be preventing them from performing their training- or professionally related activities in a competent manner or posing a threat to the students or others.

7.05 Mandatory Individual or Group Therapy

(a) When individual or group therapy is a program or course requirement, psychologists responsible for that program allow students in undergraduate and graduate programs the option of selecting such therapy from practitioners unaffiliated with the program. (See also Standard 7.02, Descriptions of Education and Training Programs.)

(b) Faculty who are or are likely to be responsible for evaluating students' academic performance do not themselves provide that therapy. (See also Standard 3.05, Multiple Relationships.)

7.06 Assessing Student and Supervisee Performance

(a) In academic and supervisory relationships, psychologists establish a timely and specific process for providing feedback to students and supervisees. Information regarding the process is provided to the student at the beginning of supervision.

(b) Psychologists evaluate students and supervisees on the basis of their actual performance on relevant and established program requirements.

7.07 Sexual Relationships with Students and Supervisees

Psychologists do not engage in sexual relationships with students or supervisees who are in their department, agency, or training center or over whom psychologists have or are likely to have evaluative authority. (See also Standard 3.05, Multiple Relationships.)

8. Research and Publication

8.01 Institutional Approval

When institutional approval is required, psychologists provide accurate information about their research proposals and obtain approval prior to conducting the research. They conduct the research in accordance with the approved research protocol.

8.02 Informed Consent to Research

(a) When obtaining informed consent as required in Standard 3.10, Informed Consent, psychologists inform participants about (1) the purpose of the research, expect-

ed duration, and procedures; (2) their right to decline to participate and to withdraw from the research once participation has begun; (3) the foreseeable consequences of declining or withdrawing; (4) reasonably foreseeable factors that may be expected to influence their willingness to participate such as potential risks, discomfort, or adverse effects; (5) any prospective research benefits; (6) limits of confidentiality; (7) incentives for participation; and (8) whom to contact for questions about the research and research participants' rights. They provide opportunity for the prospective participants to ask questions and receive answers. (See also Standards 8.03, Informed Consent for Recording Voices and Images in Research; 8.05, Dispensing with Informed Consent for Research; and 8.07, Deception in Research.)

(b) Psychologists conducting intervention research involving the use of experimental treatments clarify to participants at the outset of the research (1) the experimental nature of the treatment; (2) the services that will or will not be available to the control group(s) if appropriate; (3) the means by which assignment to treatment and control groups will be made; (4) available treatment alternatives if an individual does not wish to participate in the research or wishes to withdraw once a study has begun; and (5) compensation for or monetary costs of participating including, if appropriate, whether reimbursement from the participant or a third-party payor will be sought. (See also Standard 8.02a, Informed Consent to Research.)

8.03 Informed Consent for Recording Voices and Images in Research

Psychologists obtain informed consent from research participants prior to recording their voices or images for data collection unless (1) the research consists solely of naturalistic observations in public places, and it is not anticipated that the recording will be used in a manner that could cause personal identification or harm, or (2) the research design includes deception, and consent for the use of the recording is obtained during debriefing. (See also Standard 8.07, Deception in Research.)

8.04 Client/Patient, Student, and Subordinate Research Participants

(a) When psychologists conduct research with clients/patients, students, or subordinates as participants, psychologists take steps to protect the prospective participants from adverse consequences of declining or withdrawing from participation.

(b) When research participation is a course requirement or an opportunity for extra credit, the prospective participant is given the choice of equitable alternative activities.

8.05 Dispensing with Informed Consent for Research

Psychologists may dispense with informed consent only (1) where research would not reasonably be assumed to create distress or harm and involves (a) the study of normal educational practices, curricula, or classroom management methods conducted in educational settings; (b) only anonymous questionnaires, naturalistic observations, or archival research for which disclosure of responses would not place participants at risk of criminal or civil liability or damage their financial standing, employability, or reputation, and confidentiality is protected; or (c) the study of factors related to job or organization effectiveness conducted in organizational settings for which there is no risk to participants' employability, and confidentiality is protected or (2) where otherwise permitted by law or federal or institutional regulations.

8.06 Offering Inducements for Research Participation

(a) Psychologists make reasonable efforts to avoid offering excessive or inappropriate financial or other inducements for research participation when such inducements are likely to coerce participation.

(b) When offering professional services as an inducement for research participation, psychologists clarify the nature of the services, as well as the risks, obligations, and limitations. (See also Standard 6.05, Barter with Clients/Patients.)

8.07 Deception in Research

(a) Psychologists do not conduct a study involving deception unless they have determined that the use of deceptive techniques is justified by the study's significant prospective scientific, educational, or applied value and that effective nondeceptive alternative procedures are not feasible.

(b) Psychologists do not deceive prospective participants about research that is reasonably expected to cause physical pain or severe emotional distress.

(c) Psychologists explain any deception that is an integral feature of the design and conduct of an experiment to participants as early as is feasible, preferably at the conclusion of their participation, but no later than at the conclusion of the data collection, and permit participants to withdraw their data. (See also Standard 8.08, Debriefing.)

8.08 Debriefing

(a) Psychologists provide a prompt opportunity for participants to obtain appropriate information about the nature, results, and conclusions of the research, and they take reasonable steps to correct any misconceptions that participants may have of which the psychologists are aware.

(b) If scientific or humane values justify delaying or withholding this information, psychologists take reasonable measures to reduce the risk of harm.

(c) When psychologists become aware that research procedures have harmed a participant, they take reasonable steps to minimize the harm.

8.09 Humane Care and Use of Animals in Research

(a) Psychologists acquire, care for, use, and dispose of animals in compliance with current federal, state, and local laws and regulations, and with professional standards.

(b) Psychologists trained in research methods and experienced in the care of laboratory animals supervise all procedures involving animals and are responsible for ensuring appropriate consideration of their comfort, health, and humane treatment.

(c) Psychologists ensure that all individuals under their supervision who are using animals have received instruction in research methods and in the care, maintenance, and handling of the species being used, to the extent appropriate to their role. (See also Standard 2.05, Delegation of Work to Others.)

(d) Psychologists make reasonable efforts to minimize the discomfort, infection, illness, and pain of animal subjects.

(e) Psychologists use a procedure subjecting animals to pain, stress, or privation only when an alternative procedure is unavailable and the goal is justified by its prospective scientific, educational, or applied value.

(f) Psychologists perform surgical procedures under appropriate anesthesia and follow techniques to avoid infection and minimize pain during and after surgery.

(g) When it is appropriate that an animal's life be terminated, psychologists proceed rapidly, with an effort to minimize pain and in accordance with accepted procedures.

8.10 Reporting Research Results

(a) Psychologists do not fabricate data. (See also Standard 5.01a, Avoidance of False or Deceptive Statements.)

(b) If psychologists discover significant errors in their published data, they take reasonable steps to correct such errors in a correction, retraction, erratum, or other appropriate publication means.

8.11 Plagiarism

Psychologists do not present portions of another's work or data as their own, even if the other work or data source is cited occasionally.

8.12 Publication Credit

(a) Psychologists take responsibility and credit, including authorship credit, only for work they have actually performed or to which they have substantially contributed. (See also Standard 8.12b, Publication Credit.)

(b) Principal authorship and other publication credits accurately reflect the relative scientific or professional contributions of the individuals involved, regardless of their relative status. Mere possession of an institutional position, such as department chair, does not justify authorship credit. Minor contributions to the research or to the writing for publications are acknowledged appropriately, such as in footnotes or in an introductory statement.

(c) Except under exceptional circumstances, a student is listed as principal author on any multiple-authored article that is substantially based on the student's doctoral dissertation. Faculty advisors discuss publication credit with students as early as feasible and throughout the research and publication process as appropriate. (See also Standard 8.12b, Publication Credit.)

8.13 Duplicate Publication of Data

Psychologists do not publish, as original data, data that have been previously published. This does not preclude republishing data when they are accompanied by proper acknowledgment.

8.14 Sharing Research Data for Verification

(a) After research results are published, psychologists do not withhold the data on which their conclusions are based from other competent professionals who seek to verify the substantive claims through reanalysis and who intend to use such data only for that purpose, provided that the confidentiality of the participants can be protected and unless legal rights concerning proprietary data preclude their release. This does not preclude psychologists from requiring that such individuals or groups be responsible for costs associated with the provision of such information.

(b) Psychologists who request data from other psychologists to verify the substantive claims through reanalysis may use shared data only for the declared purpose. Requesting psychologists obtain prior written agreement for all other uses of the data.

8.15 Reviewers

Psychologists who review material submitted for presentation, publication, grant, or research proposal review respect the confidentiality of and the proprietary rights in such information of those who submitted it.

9. Assessment

9.01 Bases for Assessments

(a) Psychologists base the opinions contained in their recommendations, reports, and diagnostic or evaluative statements, including forensic testimony, on informa-

tion and techniques sufficient to substantiate their findings. (See also Standard 2.04, Bases for Scientific and Professional Judgments.)

(b) Except as noted in 9.01c, psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements or conclusions. When, despite reasonable efforts, such an examination is not practical, psychologists document the efforts they made and the result of those efforts, clarify the probable impact of their limited information on the reliability and validity of their opinions, and appropriately limit the nature and extent of their conclusions or recommendations. (See also Standards 2.01, Boundaries of Competence, and 9.06, Interpreting Assessment Results.)

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

9.02 Use of Assessments

(a) Psychologists administer, adapt, score, interpret, or use assessment techniques, interviews, tests, or instruments in a manner and for purposes that are appropriate in light of the research on or evidence of the usefulness and proper application of the techniques.

(b) Psychologists use assessment instruments whose validity and reliability have been established for use with members of the population tested. When such validity or reliability has not been established, psychologists describe the strengths and limitations of test results and interpretation.

(c) Psychologists use assessment methods that are appropriate to an individual's language preference and competence, unless the use of an alternative language is relevant to the assessment issues.

9.03 Informed Consent in Assessments

(a) Psychologists obtain informed consent for assessments, evaluations, or diagnostic services, as described in Standard 3.10, Informed Consent, except when (1) testing is mandated by law or governmental regulations; (2) informed consent is implied because testing is conducted as a routine educational, institutional, or organizational activity (e.g., when participants voluntarily agree to assessment when applying for a job); or (3) one purpose of the testing is to evaluate decisional capacity. Informed consent includes an explanation of the nature and purpose of the assessment, fees, involvement of third parties, and limits of confidentiality and sufficient opportunity for the client/patient to ask questions and receive answers.

(b) Psychologists inform persons with questionable capacity to consent or for whom testing is mandated by law or governmental regulations about the nature and purpose of the proposed assessment services, using language that is reasonably understandable to the person being assessed.

(c) Psychologists using the services of an interpreter obtain informed consent from the client/patient to use that interpreter, ensure that confidentiality of test results and test security are maintained, and include in their recommendations, reports, and diagnostic or evaluative statements, including forensic testimony, discussion of any limitations on the data obtained. (See also Standards 2.05, Delegation of Work to Others; 4.01, Maintaining Confidentiality; 9.01, Bases for Assessments; 9.06, Interpreting Assessment Results; and 9.07, Assessment by Unqualified Persons.)

9.04 Release of Test Data

(a) The term *test data* refers to raw and scaled scores, client/patient responses to test questions or stimuli, and psychologists' notes and recordings concerning client/patient statements and behavior during an examination. Those portions of test materials that include client/patient responses are included in the definition of *test data*. Pursuant to a client/patient release, psychologists provide test data to the client/patient or other persons identified in the release. Psychologists may refrain from releasing test data to protect a client/patient or others from substantial harm or misuse or misrepresentation of the data or the test, recognizing that in many instances release of confidential information under these circumstances is regulated by law. (See also Standard 9.11, Maintaining Test Security.)

(b) In the absence of a client/patient release, psychologists provide test data only as required by law or court order.

9.05 Test Construction

Psychologists who develop tests and other assessment techniques use appropriate psychometric procedures and current scientific or professional knowledge for test design, standardization, validation, reduction or elimination of bias, and recommendations for use.

9.06 Interpreting Assessment Results

When interpreting assessment results, including automated interpretations, psychologists take into account the purpose of the assessment as well as the various test factors, test-taking abilities, and other characteristics of the person being assessed, such as situational, personal, linguistic, and cultural differences, that might affect psychologists' judgments or reduce the accuracy of their interpretations. They indicate any significant limitations of their interpretations. (See also Standards 2.01b and c, Boundaries of Competence, and 3.01, Unfair Discrimination.)

9.07 Assessment by Unqualified Persons

Psychologists do not promote the use of psychological assessment techniques by unqualified persons, except when such use is conducted for training purposes with appropriate supervision. (See also Standard 2.05, Delegation of Work to Others.)

9.08 Obsolete Tests and Outdated Test Results

(a) Psychologists do not base their assessment or intervention decisions or recommendations on data or test results that are outdated for the current purpose.

(b) Psychologists do not base such decisions or recommendations on tests and measures that are obsolete and not useful for the current purpose.

9.09 Test Scoring and Interpretation Services

(a) Psychologists who offer assessment or scoring services to other professionals accurately describe the purpose, norms, validity, reliability, and applications of the procedures and any special qualifications applicable to their use.

(b) Psychologists select scoring and interpretation services (including automated services) on the basis of evidence of the validity of the program and procedures as well as on other appropriate considerations. (See also Standard 2.01b and c, Boundaries of Competence.)

(c) Psychologists 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.

9.10 Explaining Assessment Results

Regardless of whether the scoring and interpretation are done by psychologists, by employees or assistants, or by automated or other outside services, psychologists take reasonable steps to ensure that explanations of results are given to the individual or designated representative unless the nature of the relationship precludes provision of an explanation of results (such as in some organizational consulting, preemployment or security screenings, and forensic evaluations), and this fact has been clearly explained to the person being assessed in advance.

9.11 Maintaining Test Security

The term *test materials* refers to manuals, instruments, protocols, and test questions or stimuli and does not include *test data* as defined in Standard 9.04, Release of Test Data. Psychologists make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques consistent with law and contractual obligations, and in a manner that permits adherence to this Ethics Code.

10. Therapy

10.01 Informed Consent to Therapy

(a) When obtaining informed consent to therapy as required in Standard 3.10, Informed Consent, psychologists inform clients/patients as early as is feasible in the therapeutic relationship about the nature and anticipated course of therapy, fees, involvement of third parties, and limits of confidentiality and provide sufficient opportunity for the client/patient to ask questions and receive answers. (See also Standards 4.02, Discussing the Limits of Confidentiality, and 6.04, Fees and Financial Arrangements.)

(b) When obtaining informed consent for treatment for which generally recognized techniques and procedures have not been established, psychologists inform their clients/patients of the developing nature of the treatment, the potential risks involved, alternative treatments that may be available, and the voluntary nature of their participation. (See also Standards 2.01e, Boundaries of Competence, and 3.10, Informed Consent.)

(c) When the therapist is a trainee and the legal responsibility for the treatment provided resides with the supervisor, the client/patient, as part of the informed consent procedure, is informed that the therapist is in training and is being supervised and is given the name of the supervisor.

10.02 Therapy Involving Couples or Families

(a) When psychologists agree to provide services to several persons who have a relationship (such as spouses, significant others, or parents and children), they take reasonable steps to clarify at the outset (1) which of the individuals are clients/patients and (2) the relationship the psychologist will have with each person. This clarification includes the psychologist's role and the probable uses of the services provided or the information obtained. (See also Standard 4.02, Discussing the Limits of Confidentiality.)

(b) If it becomes apparent that psychologists may be called on to perform potentially conflicting roles (such as family therapist and then witness for one party in divorce proceedings), psychologists take reasonable steps to clarify and modify, or withdraw from, roles appropriately. (See also Standard 3.05c, Multiple Relationships.)

10.03 Group Therapy

When psychologists provide services to several persons in a group setting, they describe at the outset the roles and responsibilities of all parties and the limits of confidentiality.

10.04 Providing Therapy to Those Served by Others

In deciding whether to offer or provide services to those already receiving mental health services elsewhere, psychologists carefully consider the treatment issues and the potential client's/patient's welfare. Psychologists discuss these issues with the client/patient or another legally authorized person on behalf of the client/patient in order to minimize the risk of confusion and conflict, consult with the other service providers when appropriate, and proceed with caution and sensitivity to the therapeutic issues.

10.05 Sexual Intimacies with Current Therapy Clients/Patients

Psychologists do not engage in sexual intimacies with current therapy clients/patients.

10.06 Sexual Intimacies with Relatives or Significant Others of Current Therapy Clients/Patients

Psychologists do not engage in sexual intimacies with individuals they know to be close relatives, guardians, or significant others of current clients/patients. Psychologists do not terminate therapy to circumvent this standard.

10.07 Therapy with Former Sexual Partners

Psychologists do not accept as therapy clients/patients persons with whom they have engaged in sexual intimacies.

10.08 Sexual Intimacies with Former Therapy Clients/Patients

(a) Psychologists do not engage in sexual intimacies with former clients/patients for at least two years after cessation or termination of therapy.

(b) Psychologists do not engage in sexual intimacies with former clients/patients even after a two-year interval except in the most unusual circumstances. Psychologists who engage in such activity after the two years following cessation or termination of therapy and of having no sexual contact with the former client/patient bear the burden of demonstrating that there has been no exploitation, in light of all relevant factors, including (1) the amount of time that has passed since therapy terminated; (2) the nature, duration, and intensity of the therapy; (3) the circumstances of termination; (4) the client's/patient's personal history; (5) the client's/patient's current mental status; (6) the likelihood of adverse impact on the client/patient; and (7) any statements or actions made by the therapist during the course of therapy suggesting or inviting the possibility of a posttermination sexual or romantic relationship with the client/patient. (See also Standard 3.05, Multiple Relationships.)

10.09 Interruption of Therapy

When entering into employment or contractual relationships, psychologists make reasonable efforts to provide for orderly and appropriate resolution of responsibility for client/patient care in the event that the employment or contractual relationship ends, with paramount consideration given to the welfare of the client/patient. (See also Standard 3.12, Interruption of Psychological Services.)

10.10 Terminating Therapy

(a) Psychologists terminate therapy when it becomes reasonably clear that the client/patient no longer needs the service, is not likely to benefit, or is being harmed by continued service.

(b) Psychologists may terminate therapy when threatened or otherwise endangered by the client/patient or another person with whom the client/patient has a relationship.

(c) Except where precluded by the actions of clients/patients or third-party payors, prior to termination psychologists provide pretermination counseling and suggest alternative service providers as appropriate.

AMENDMENTS TO THE 2002 "ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT" IN 2010 AND 2016

2010 Amendments

Introduction and Applicability

If psychologists' ethical responsibilities conflict with law, regulations, or other governing legal authority, psychologists make known their commitment to this Ethics Code and take steps to resolve the conflict in a responsible manner. ~~If the conflict is unresolvable via such means, psychologists may adhere to the requirements of the law, regulations, or other governing authority~~ in keeping with basic principles of human rights.

1.02 Conflicts Between Ethics and Law, Regulations, or Other Governing Legal Authority

If psychologists' ethical responsibilities conflict with law, regulations, or other governing legal authority, psychologists clarify the nature of the conflict, make known their commitment to the Ethics Code, and take reasonable steps to resolve the conflict consistent with the General Principles and Ethical Standards of the Ethics Code. ~~If the conflict is unresolvable via such means, psychologists may adhere to the requirements of the law, regulations, or other governing legal authority.~~ Under no circumstances may this standard be used to justify or defend violating human rights.

1.03 Conflicts Between Ethics and Organizational Demands

If the demands of an organization with which psychologists are affiliated or for whom they are working are in conflict with this Ethics Code, psychologists clarify the nature of the conflict, make known their commitment to the Ethics Code, and ~~to the extent feasible, resolve the conflict in a way that permits adherence to the Ethics Code.~~ take reasonable steps to resolve the conflict consistent with the General Principles and Ethical Standards of the Ethics Code. Under no circumstances may this standard be used to justify or defend violating human rights.

2016 Amendment

3.04 Avoiding Harm

(a) Psychologists take reasonable steps to avoid harming their clients/patients, students, supervisees, research participants, organizational clients, and others with whom they work, and to minimize harm where it is foreseeable and unavoidable.

(b) Psychologists do not participate in, facilitate, assist, or otherwise engage in torture, defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person, or in any other cruel, inhuman, or degrading behavior that violates 3.04a.

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THE MENTAL HEALTH EXPERT/FORENSIC

by

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Cost-benefit analysis of traditional court evaluation by a mental health professional: A consumer focused discussion of methodology and data gathering:

by Peter J. Favaro, Ph.D.
Executive Director SmartParenting and The Center for Improved Human Relationships

Scheduled Presentation: October 30, 2015

When the court is given the task of determining who is the more appropriate custodial parent you can expect to experience a number of things including additional litigation expenses. But are those expenses worth it?

Asking this question is like asking a person who commutes by car to work if they need a car to do that, because after all when certain things are a necessity, do we really have much choice? We don't have a choice as to whether we need a vehicle, but we certainly have choices as to how much we need to spend on that vehicle and if what we are concerned bout is the goal of getting to work, we shouldn't have to pay a king's ransom for that.

It Starts with the Kids So It's Got to Be Worth It, Right?

Kids are the most important part of parent's lives and if kids are worth anything, they are worth fighting for, right? Maybe not -- at least not in an adversarial system and maybe not in terms of dollars and cents, especially considering that parents are in such a state of blind rage when fighting for their kids they will spend tens of thousands of dollars to get 50 percent of the time when they are offered 45 percent.

Most of what happens during a high conflict custody struggle is competitive in nature, and while many attorneys promote collaboration, being in court stimulates adversarial interaction, because when people are angry, worried and afraid they drive their interaction forward through mutual insult. When people insult one another they escalate their conflict. One thing I have learned over my last 30 years and 6000 cases of experience working with matrimonial litigants is that communication breaks down so horribly that people give insult without intending to, and receive it where none was intended. This is what most people do when they are constantly placed on the defensive. Get arrested and thrown out of your house a few times, or get pushed around by your spouse, or get called horrible names in front of your kids, and chances are you will adopt an overly sensitive, defensive if not outright hostile attitude.

If only participating in a process geared toward the best interests of your children, performed by a mental health professional, brought some civility and practical problem solving into the process that would have have value--but for the most part,

It doesn't. One reason why is because people tend to get better at the things they practice and what people practice when they engage in a custody battle is telling a one sided story full of lies, exaggerations and revisionist history.

Practice Makes Perfect (A More Perfectly Told Story Anyway)

A perfectly told story is not necessarily an accurately told story. The story of how badly one is treated in a marriage is told to your lawyer, massaged and memorialized in motions (often more than once), and shared with therapists, friends and family, all of whom might have something to add or emphasize when it comes time for the next re-telling. When you meet your mental health evaluator it will be told again (with lots of assistance, editing and spin doctoring from the attorney who wouldn't be doing his or her job if they didn't help), often through written presentations as well as oral re-telling. Mental health evaluators usually ask people to report lots of historical information, the collection of which can take a lot of time and a lot of sessions (which requires lots of money). When a mental health evaluator listens to your history there are a lot of different starting points. Some evaluators go back to the beginning of your childhood recollections to hear the story of how you grew up. I don't see the point of doing this in the time consuming venue of face to face interviews in a forensic evaluation. In a clinical setting, it might have some utility, because the clinician has all the time in the world to gather information and test hypotheses, and therapy clients are supposed to be willing to explore the relationship between the past and present with some degree of honesty, open mindedness and self disclosure. However, your childhood experiences do not predict what kind of parent you are in all cases, and because court evaluations are time limited, and because the ultimate goal is so important, these variables form a very slippery foundation upon which to make a decision or recommendation about custody.

For instance, there are two things we don't understand about how people grow up. First we don't understand how a perfectly normal person grows up under the care of very pathological parents. Second, we don't understand how a very pathological person grows up under the care of very normal parents. In addition, people do rehabilitate themselves from difficult childhoods. How one gets from childhood to adulthood does have some relevance when history is limited to things like substance abuse history, criminal history, and history of violence, but that information can be collected very efficiently with a written few questions with follow ups. So when a person who has a terrible childhood with terrible parenting, grows up, rehabilitates and proudly tells the story of their psychological reincarnation to an evaluator, is that enough to be important in a custody case? It might be important, or it might be a story that has a lot left out of it, or it might bot have made any difference in the first instance. We are not slaves to our pasts, and we are not completely uninfluenced by it. The extent to which it matters cannot be ferreted out in face to face interviews that are part of a process where people strive to present themselves in the most favorable light.

Perhaps the process can be advanced by the administration of psychological tests like the MMPI which about 65 to 70 percent of all custody evaluators use. However, many of the evaluators who I am hired to critique use scoring software that doesn't necessarily reflect a level of competence that equals that of a well trained professional who reviews his or her own test protocols. So the tests that are a common part of methodology of forensic work are machine scored, speculative, not the evaluators work product, have poor chains of custody and if you look even with one eye open, the sentences in the expert's report that seem to be their own are not. They are copied and pasted from the very loose work product of the software scoring service.

OK, interviews might be imperfect, historical reviews of a persons life histories might be imperfect, psychological tests might be imperfect, but when you put them together, along with interviews of the children, observations of the parents interacting with the children, home visits, etc. doesn't that make the process a little better because of the value we get from using multiple measures. Of course, it makes it a little better, but is the final work product worth the cost that experts are charging to evaluate custody matters for the court. Do you know that there are evaluators who are charging 50, 60, 70 thousand dollars and up for evaluations, and does it matter to the system that this is what is happening. Apparently not, because a lot of evaluators in jurisdictions where this is the going rate take upward of a year to complete because even at these prices evaluators are inundated with work.

Let's Do Some Quick Math:

At $600 an hour with four hours for each parent devoted to the collection of family history that's $4800 of effort just gathering the information. Let's give the evaluator another 1.5 hours to blend this information into a report and we are at $5700 for information that can be spun into speculative and potentially irrelevant conclusion formation. Here's an example (not quoted from a real report):

"Mr. Smith's difficult relationship with his dominating and controlling father, as told through his anecdotal exploration of his childhood, caused him to respond angrily to any attempt by Mrs. Smith to make even the most inconsequential family decisions. It is likely that when Mr. Smith's frustrations became unbearable he lashed out, possibly aggressively at Mrs. Smith."

As a trained professional I can see the value of exploring this as a talking point for life change, but in the context of custody evaluation, I cannot overemphasize how this kind of unscientific speculation can destroy lives, persuade a judge to rule on faulty information, and cost a fortune.

The kind of storytelling that goes on with respect to the historical aspects of the pre-marital and marital relationship are also topics of attention of the court evaluator. If we add another 10 to 13 hours of information gathering we can also

add another $9600 for that and say another four hours into the report -- that's another twelve thousand added to the total cost. Now we are at $18,000. just for story telling.

Are Stories Told Truthfully, And If They Aren't How Much Are They Worth?

The truth of historical accounts (anecdotes) should be relevant if an evaluator is going to take an inference about it (and charge money for it). However, as I have written elsewhere, the truth is a difficult construct to evaluate using the psychological tools at our disposal. So, when people tell an evaluator (a well rehearsed and practiced story) how do we know if it's accurate and truthful? Well, that depends on the type of story, how the story is remembered and interpreted, and whether the evaluator is known to be a good tester of the truth.

First, let's talk about the difference between "the truth" and "a perception." A lot of what evaluators deal with are the litigants perceptions about themselves, and their perceptions of others. When a person tells an evaluator, "I was the primary caregiver of the children," or "I was the decision maker" are perceptions because it is impossible to know the precise contributions people make to family decision making on a day to day level. The "primary caregiver" perception is also in part predicated on the belief that whichever parents spends more of the time with the children is "primary." However, even if you use "data" to try to support that claim, such as one parent works full time out of the home, and the other stays at home, that does not reflect the "quality" of the caregiving. It is possible that a parent who spends much less time with the children to have a higher quality relationship with the children. It is also possible that a toxic parent who spends more time with the children is an undesirable caregiver

Second, let's talk about "the truth" as it pertains to validating facts of the case. For instance, one parent tells a story (or multiple stories) of aggression or violence in the home. Each party comes prepared with their anecdotal information -- rehearsed, sometimes memorized, carefully constructed, often very persuasive. While the content of the anecdote is important to bring to a judges attention in the context of report writing, should evaluators "help" judges determine the validity of the account? Do evaluators possess the ability to evaluate factual data and provide an opinion that helps the judge?

The answer to this question is maybe, maybe not. There are several studies which examine the abilities of various professions with respect to their abilities to tell the truth from a lie. Two in particular are interesting to me because they specifically test psychologists. In a 1991 study (Eckman and O'Sullivan) the ability for psychologists to tell the truth from a lie was about equal to flipping a coin. In a 1999 study (Eckman, Sullivan and Frank) percentages improved when psychologists took an interest in deception, and took special training in the detection of deception. Well, in that case the odds improved and the data showed that psychologists interested in deception did better. They were able to detect

truthfulness an average of about 67 percent of the time. Sounds pretty good, right? Unfortunately, if you are about research you also have to care about standard deviation, which is a measure of variability around the mean (average). In this study the standard deviation was 13. Which means that psychologists interested in deception ranged in their accuracy from 54 percent to a whopping 78 percent of the time. If you are a judge, which expert would you want on the stand, but more importantly how do you get the better one? This leads us to the related issue of "base rate" which means the rate at which each individual psychologist is proficient in evaluating the truth. If you are going to use, even in part, a psychologist to help evaluate the truth don't you want to know how accurate that individual psychologist is? That would require some type of evaluation of the psychologist to see how his lie detection is "calibrated." Then you would have to compare this calibration to the specific type of information that was being evaluated in the original study, and then you would have to draw some comparison between the type of lie detection used to "calibrate" the psychologist and each individual question at hand.

As with many aspects of empirical social science, the construct under study is often more interesting "in the lab" than it is in real life or by extension, the court room. Plus, if we are trying to bring things back to the question of cost effectiveness, does it make sense to load up on interview data designed to assess truthfulness with base rates of effectiveness are mostly unknown?

So are Psychologists and Other Mental Health Evaluators of No Value in Helping Determine Custody?

Well that depends on your perception of value, which is what we have been talking about. My opinion is that long forays into revisionistic histories that are of little value in the forensic setting or opportunistic declarations of the superiority of their custodial fitness are of inferior value. Same goes for 100 plus page reports that translate into fees of forty, fifty or even sixty thousand dollars.

Experts can help judges by:

Directly observing parenting behavior in natural settings
Focusing on the present conflict and assessing what contributes to it and what might alleviate it
Reporting on the mental health, criminal and drug histories as they are disclosed in professionally reliable collateral records
Examining attitudes of the parent and how those attitudes influence the co-parenting relationship as well as the ability of each parent to support a loving relationship with the other
Providing observations as to the behavioral strengths and weaknesses shown to the evaluator directly during the evaluation

There are many techniques which can make data collection and understanding of the children's best interest, time and cost efficient. For instance, if marital history is

considered worthwhile data, simply create a form or list of questions that direct the party to report on specific aspects of the marital history. While there are exceptions related to language competency and native intelligence by and large most people who I use such forms with reply very adequately, and when they don't the reasons why are often significant and helpful data, and can always be clarified using traditional interviewing. A strong advantage of written historical reporting is that there is a record of what was asked and what was answered, whereas to obtain historical interviews by listening and writing is subject to error.

Take me for instance, when people are telling me boring stories about their lives, which they think are completely relevant to why they should have custody, my mind often starts to wander. When it does, I often think about how much nicer my time would pass, it I were having a cup of coffee with my wife (who runs my office) then I start thinking about things like how much I love her meatballs and lasagna and then I realize that twenty minutes have passed by and I haven't taken a single note except if I hear something outrageous like litigant A, in an act of revenge, shaved litigant B's cat and it upset everyone in the house.

Critics might say that anyone who doesn't conduct face to face interviews loses opportunity to observe behavior, but there are multiple opportunities to observe behavior as evaluation data collection is multifaceted. I find that after three or four hours of interviewing, behavior stabilizes and becomes quite repetitive. Dozens of hours of interviewing are great for my office bottom line, but of limited utility to the methodology.

So, I have come up with a hybrid process for collecting information. I took the time to content analyze 1000 cases that have been through my office. In doing so I identified typical scenarios that parents in custody evaluations tend to focus on. Out of these areas of concern and scenarios I developed a structured questionnaire to see if various practical factors (like whether visitation schedules are kept, or when and how parents participate in important decisions in their children's lives) and various attitudes exist (like each parent's appreciation of the role the other parent plays in their lives). The parties and I discuss the questions, and while I computer code the data for later analysis, I follow up and add information as I would in a traditional interview. I find this to be the best of both worlds, and it takes me about four hours to collect what I might need fifteen or twenty hours of time to collect in a non structured face to face interview. When all of the hours are tallied I can provide a better, more efficient, more economical package of information for less that $10,000.00.

The Future Looks Brighter

Collection and analysis of data is becoming more and more efficient every day. Artificially intelligent questionnaires can collect information, produce metrics related to a comparison of responses, make inferences about what type of data indicates conflict and potential for settlement and much more. As we learn more

about how to collect and examine data we can finally do the things that need to be done to find better predictors of custodial fitness in more empirically sound ways.

###

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Eckman, P., and O'Sullivan, M. (1991) Who Can Catch a Liar? American Psychologist, 46

A Few Can Catch a Liar, Paul Ekman, Maureen O'Sullivan and Mark Frank, Psychological Science, May, 1999.

SmartParenting
The Family Center

Peter J. Favaro, Ph.D.
Fellow, ACFEI
Child and Adolescent Psychologist
Executive Director

Description of Services
For A
Court Ordered Forensic Evaluation

1 Interviews with the parents, individually and conjointly, as needed/appropriate
2 Collateral contacts/interviews as needed. This may include but is not limited to, other children, other family members living with either parent, any other people residing with either parent or significant other, therapists, treating doctors, hospitals and CPS/ACS
3 Review of additional written materials
4 Administration and scoring of psychological tests
5 Parent-children in-office or in-home observations, as needed and as appropriate
6 Interviews with the children, as age appropriate
7 Written reports to the Court

Testimony at trial may be required and if so, the date will be scheduled by attorneys or the Court with this office as necessary.

I HAVE READ AND UNDERSTAND THE ABOVE

SIGNATURE _____
DATE_____

Rev10/14

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SmartParenting
The Family Center

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Child and Adolescent Psychologist
Executive Director

INFORMED CONSENT TO PARTICIPATE IN A CUSTODY EVALUATION WITH DR. PETER FAVARO AND/OR SMARTPARENTING

Introduction: Before beginning your custody evaluation, it is important that you understand the process. Please review the information below with your attorney. When we first meet, we will discuss the evaluation process described here and you can ask any questions you have and sign that you have read and understood this document. Also please review the fee arrangements and other issues, in addition to what is described below. These arrangements are communicated to you through the office manager.

My curriculum vitae describes my education, professional experience, and membership in professional organizations. You may have a copy of this on request. Simply ask the office manger to provide it at any one of your appointments.

I am performing your evaluation as an independent clinical psychologist licensed in the State of New York. I do not work for the New York State Unified Court System. I am an outside provider of services.

Scheduling: My office will probably schedule appointment(s) with you in advance of our first meeting. This is done in order to try to complete the evaluation in a given time frame. Please understand how important it is for you to make timely appointments. The Court expects the completion of your evaluation within thirty to sixty days. I am under the same time constraints as you are. For this reason, I will send information about noncompliance and slow scheduling directly to the Court and that might influence your case negatively.

It is very important that you try to make yourself and your children available for appointments as early as possible and avoid cancellations, because rescheduling might cause a serious delay. There may be other reasons for a delay in producing the report including the need for more extensive investigation, unanticipated personal or occupational interruptions in the parties' or the evaluator's schedules, or previously planned absences (such as summer vacations).

Overview of Evaluation Process: Please understand that my role as an evaluator is

different from a psychotherapist. I am the court's neutral expert. My role is to investigate and assess psychological issues, using a number of different methods in accordance with court guidelines. I gather information and provide the results, along with my opinion and recommendations, to the judge in your case, to the attorneys, and to you. People involved in custody evaluations often experience stress and there may be ongoing problems involving children. I will not be able to provide you with therapy or advice or intervene in personal crises or conflicts during the evaluation. If there is a life threatening emergency during the evaluation, you should call the local police or 911. I could have a conference call with your attorneys to discuss whether you may want to see a therapist during the evaluation but I require the Court's permission for that. A

A custody evaluation involves getting information from a variety of sources over a specified period of time. There is a tension between being thorough versus containing costs and time. I will talk to you about the process along the way, but I will make final decisions about procedures. Hopefully, your evaluation will have enough information from different sources that it can be used to make a decision about your children and your family can move forward.

Confidentiality: Since an evaluation is not psychotherapy, there is no psychotherapist client privilege and the rules for protecting your confidentiality in healthcare and mental healthcare settings do not apply. The report and file in this case are "sealed court documents" only to be used in this litigation. This means that I will not provide the report to anyone except the Court and the Court provides it to attorneys of record. No one else should have access to the report or to the file except by court order. Children should not see the report. In order to protect your confidentiality, I advise you to leave the report in your attorney's office. It has confidential information about both parties and the children, and you should not show it to others.

I may discuss the case with professional colleagues, without revealing identifying information, in order to promote careful and neutral analysis of results and appropriate recommendations. I also sometimes give case examples without identifying information when training other professionals. I will not reveal identifying information about this case to others except for the collaterals contacted as named in the report, the office staff who assist me with procedures and preparation of the report, consultants on the case as named in the report and, in some cases where I am required to make suspected child abuse reports or reports regarding danger to self or others, to child protective service or law enforcement officials. I may recommend in the report that psychotherapists review the report to understand goals of treatment and then return it to attorneys in order to protect your confidentiality.

In most cases, I include children's statements in my report. When I meet with children, I inform them that I will be helping their mother and father make plans for how they are going to take care of them and how much time they will spend with each parent and that I need to find out how children think and feel to make a good plan. I tell them I write a report that the parents will read. If children tell me they are worried about parents knowing what they say, if a parent is worried that a child is pressured, or if I believe a child

appears unusually distressed, I will talk to the parents about signing a Waiver of Access to Children's Statements. If both parents sign the waiver, the children's statements are included as an attachment that only the judge and attorneys read.

Written Materials: Please complete the requested questionnaires inventories and documents which request historical information, and gather the materials requested in the questionnaires and documents. Some of the written materials are take home, others you must do in the office.

Any written materials (called ancillary materials) you or your attorney provide me, and your questionnaire, should also be provided to the other party's attorney if that is what has been ordered by the Court. It is YOUR responsibility to check the Order Appointing A Forensic Evaluator and comply with the Court's directives. Usually I do not accept written materials submitted more than six weeks after the first appointment for the evaluation. In order to contain costs, I read most ancillary material in detail once at the end of the evaluation while preparing for report of results. If there are particular documents you wish me to be aware of while I am conducting interviews, please bring this to my attention during one of our meetings.

Please provide me with the following materials: your children's most recent school report cards, the court orders for custody, restraining orders or Orders of Protection,(if any). If there has been involvement by Department of Children and Family Services (DCFS), ACS, CPS or any organization whose aim it is to investigate claims of abuse or neglect or police departments, or if there have been any criminal hearings, or any psychiatric hospitalizations, please arrange with your attorney to obtain those records and provide them to me. Also please provide me with copies of any prior decisions of the Court.

If you wish to provide me with emails, audio or video tapes you must supply a summary of what is in the documents or recordings, why you are submitting them, and what you hope to show by offering them to me. I do not evaluate materials for the truth of their contents. I merely advise the Court if the tapes are consistent with what you assert them to show.

Appointments: Your appointments will likely include but are not limited to, the following (with the proviso that because of the fact that not every evaluation examines exactly the same issues, not all of these procedures might be done in every case):

Orientation to procedures with both parties. All office procedures are contained in a separate document, but it is important to re-iterate that you MAY NOT bring children to appointments that are YOUR INDIVIDUAL APPOINTMENTS

Initial individual interviews with each party regarding their requests to the court, issues and concerns.

Separate interaction sessions with each party and the children. DO NOT schedule your

appointment with the child on a parenting day/time that is not yours. Individual interview/assessment of each child.

These are the usual follow-up appointments:

Each party has at least one more individual interview. If more are scheduled, I attempt to equalize time with each party or give each party the opportunity for equal time. If you wish to communicate more information after a session, give me information about events that happen during the time of the evaluation, or bring up issues that you believe require further sessions, please write or fax me. Do not leave lengthy phone messages, as all communication must be in written form for the file.

Each party might be asked to come (on different days) with all members of his or her household including children at issue, step-parents, step-siblings or half-siblings, and other people who live in the home.

Children might be interviewed/assessed individually after each parent's interaction sessions.

Conjoint interviews with both parties together (or in some cases a conference call with both parties). There are usually no conjoint interviews when there is an Order of Protection. If one or both of you object to sitting in the same room, please let Dr. Favaro know and this appointment will be waived.

Psychological Testing: Each party will be asked to do some psychological testing, including the Minnesota Multiphasic Personality Inventory-2 (MMPI-2). Psychological testing data is compared my interview with parties in regard to psychological issues parties may bring up about each other. In addition, psychological testing gives information about a person's likely interpersonal behavior and the way they think, which pertains to parenting.

Other Paperwork: It might require several appointments to complete other paperwork required for the evaluation.

Third Parties: I will do telephone interviews with third-party "collaterals," people who have information about the family. You might be provided a form to organize contact information for collaterals, but I may add collaterals during the evaluation. You are free to suggest who I might interview as a collateral. Sometimes I take that suggestion and sometimes I do not, based on my judgement about how relevant the information they could provide is to your case. I usually interview or get written information from children's teachers, and, if applicable, day-care providers, and psychotherapists, family therapists, marital therapists, child protection case workers, pediatricians and other medical specialists. Other collaterals depend on issues in the case. I will discuss collaterals with you, but the final determination will depend on trying to get needed information from neutral collaterals or the most balanced list of collaterals as possible. I cannot guarantee that you will be informed in advance about collaterals that will be

interviewed. If there are people you strongly feel should have input in the evaluation, you may want to provide a letter from them (considered ancillary material), as I cannot guarantee everyone you request will be interviewed. Please be aware that some people may not make themselves available for interview or there may be logistical problems that prevent the interview.

If you are remarried, or have a significant other who spends significant time with the children, I prefer to have an individual appointment with that person, and I must see them in interaction with the child. I may do phone appointments with significant others who spend little time around the children. If there are issues raised in the evaluation concerning another person's interaction with the children, I will ask that person to consent to be evaluated along with the parties in the case. Otherwise that person is treated as a collateral.

Home Visits and Other Issues: Other procedures may be used in the evaluation. Home visits may be done, depending on the issues in the case and either party's desire that one be done. If a home visit is scheduled, please ask about what will be expected of you. I may use consultants for other procedures or to provide needed information on issues in the evaluation.

Reporting Results: I write a full written report and do not meet with the parties and attorneys. The report is submitted to the Court usually in advance of a specific court date.

Fees: After the Court Order for services has been issued and we have received your initial retainer both parties will be scheduled for their the initial appointment. As the evaluation progresses, we will request further deposits, as necessary. As the report is being finalized, we will give you a final estimate of the total bill. We will release the report after the final bill has been paid. Refunds, as applicable, are made 30 days after requested and as a result of written settlement or direction by the Court. See your billing statement for specific details on fees.

After the Report: I will not communicate separately with you or your attorney after the report has been issued so that I preserve my role as the court's neutral expert witness. If you have complaints about the evaluation, you have the right to go to the Court and present your position to the judge. Your attorney can subpoena the file and have another expert review the report and the file. You can bring me to deposition or to the hearing in the case (please see stipulation for fee arrangements). Email Contact: Dr. Favaro will permit email submission of materials or important information to the email address: pf@drfavaro.com. This email is NOT TO BE USED to forward me complaints about the other parent, ask me for advice or serve as a "tattle forum" for email communications between the parties. If you are unclear as to what you can provide by email, send an email and ASK FIRST.

Use of Ancillary Personnel: Dr. Favaro employs licensed social workers who sometimes do intake interviews, home visits and other information gathering. This is reviewed by

Dr. Favaro and the opinions generated from this data are solely his own.

Use of Recordings: Any or all of your interactions in Dr. Favaro's office might be audio and/or videotaped and kept as part of the file, unless otherwise directed by the Court. When you sign this document you provide your consent for this.

Civility: You are not permitted to be rude, aggressive, hostile or disrespectful to anyone in this office, or to one another, either in person, in writing, or when leaving messages electronically. If you are hostile, rude or disrupted in the office you will be asked to leave. If you are threatening or aggressive, the police will be called. If you arrive intoxicated or appear under the influence you will be asked to call someone to take you home. The staff will call the police to assess you if you are intoxicated and plan on driving after you leave.

Dr. Favaro understands that this is likely to be a difficult time for you, most likely stressful and frustrating. There is always some leeway afforded to individuals who are going through a rough time. However, be advised that if you are directing hostility toward Dr. Favaro or the office staff, it will become part of the behavior that is assessed pursuant to the evaluation. If you need a few minutes to calm down, or take a walk outside just ask.

I have read and understand this description of the custody evaluation procedures.

_____ _____

_____

Print Name Date Signature

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RECOMMENDED ADDITIONAL READINGS

Referenced by

David Coron, Ph.D.
Licensed Psychologist
Child/Adolescent/Family Practice
Farmington

Additional readings referred to in presentation:

Child Custody Evaluation Practices: A 20-Year Follow-Up, Marc J. Ackerman and Tracy Brey Pritzl, Family Court Review, Vol. 49 No. 3, July 2011 618–628.

Irreconcilable conflict between therapeutic and forensic roles. By Greenberg, Stuart A.; Shuman, Daniel W. Professional Psychology: Research and Practice, Vol 28(1), Feb 1997, 50-57.

Essentials of a Forensic Child Custody Evaluation

By Alan M. Jaffe and Diana Mandeleew

Before an expert can begin to conduct a good custody evaluation, he or she must have a full understanding of the various types of divorce, including the effects of divorce on children of different ages, both in the short- and long-term. The expert must also demonstrate a good legal knowledge of the types of custody and visitation arrangements that can be recommended. Although the evaluator should definitely have some experience in the treatment of children and adolescents, it is most important that the evaluator have advanced skills in the assessment of child and adolescent personality, mental illness, family dynamics, and parenting skills required to provide a healthy environment for growth and development of children. A competent evaluator also will be familiar with the legal aspects of custody procedure and understand the various legal definitions of custody as reflected in state law.

When conducting a custody evaluation, the procedure should be equitable and offer fair treatment to all parties by administering the same procedures with each party. Specifically, it is important to use interviewing, psychological testing, home visits, the utilization of collateral informants, observation of parents with children, and the amount of time children spend in a consistent way with all parties.

Who Should Be Included?

A thorough custody evaluation should include not only parents but also any other adults directly responsible for the daily care of children, such as stepparents, grandparents, and either parent's significant other. Any other party living in the custodial or visiting home also should be seen, such as step- or half-siblings. It is generally a good practice for daycare providers as well as medical professionals, psychotherapists, and school personnel to be included. However, it is not always in the best interests of the children to include these collaterals for various reasons.

A good evaluation and a seasoned evaluator may elect not to include specific collaterals at certain times. If consulting with any of these individuals is not ultimately in the best interests of the children and/or would cause a negative result in the day-to-day life of the children, then a competent evaluation need not include them.

For example, (1) the daycare provider who is concerned that what is said may interfere with his or her ability to continue working with the children due to the inadvertent alienation of a parent or an inability to communicate with either parent going forward; (2) the psychotherapist who risks upsetting the course of treatment by taking a position that would either risk confidentiality with his patient or risk the unfavored parent's discontinuing therapy; or (3) school personnel who are concerned that close scrutiny will result in a modification of the curriculum or approach to the student, resulting from the fear of repercussions from either parent. Assuming the use of collateral informants

will not interfere with the best interests of the children, a good evaluation will include them.

Life History

A thorough evaluation should include a good life history. Although there has been a good deal of discussion among judges about the relevance of early historical information, it is important to include as much early history as possible. A good evaluation should demonstrate the expert's deep understanding and working knowledge of each parent's individual psychology and philosophy of child rearing. To truly understand who a parent is and how he/she "arrived" at where the parent is today, a competent evaluator should demonstrate that he or she understands the events that led up to the current crisis. (Those who were political science majors instead of psychology majors would agree. Understanding national and world politics today is impossible without the context of history.) Evaluations differ in the amount of history provided, but a good evaluation should provide a significant amount of relevant history.

The evaluation should include evidence of document review. It is not necessary for the evaluation to summarize all pleadings and the court-related matter, but it should include reference to relevant medical records, school records, encounters with the police, and other issues that affect the well-being and placement of children.

There is some debate about the pros and cons of psychological testing. But a good evaluation includes at least some psychological testing. Experience has shown that testing is not only appropriate and relevant when used correctly, but also essential to a comprehensive evaluation. The tests permit a comparison of each party's performance with the performance of the general population.

Psychological Testing

Some psychological tests and scales specifically measure the test-taker's approach to the test, that is, whether the tests or scales exaggerate or minimize the test-taker's problems or symptoms. This is especially valuable in a custody situation where there is much at stake and the parties have an interest in appearing problem-free. The fact is that some people do better in interview situations than others. Even though the evaluator makes use of trained clinical interview skills, without the testing, the evaluator is relying entirely on what he or she is being told.

Evaluators are not mind readers. Even with the limitations inherent in psychological testing, it is more information for the courts, and it is based on scientific research. A good evaluation includes psychological testing widely used in custody situations and can demonstrate for the courts, if necessary, how the tests are relevant.

There is a multitude of psychometric measures from which a psychologist can choose. Typically, widely used tests with established validity and reliability measures, as well as those supported by a substantial research body, are better choices. When examining psychometric measures, it is important to look at the content as well as statistical

parameters, including validity and reliability. Validity is the degree to which a test measures what it was designed to measure, and reliability is the degree to which the results of a test remain consistent over repeated administrations under identical conditions.

In child custody evaluations, most psychometric measures tend to fall within the following categories: cognitive functioning tests, objective personality tests, projective personality tests, and parenting assessment tests. A comprehensive evaluation will contain a battery of tests from numerous categories. Some of the more common tests used in child custody evaluations follow.

In child custody evaluations, the purpose of cognitive functioning tests given to parents is to determine whether their intellectual skills are adequate to meet parenting demands. Since these tests often are time consuming and not high predictors of custody placement, they are often omitted in evaluations of high-functioning parents. When cognitive tests are administered, it is important to keep in mind that they measure only aptitude or achievement of an individual and might not fully correspond to the multifaceted intelligence of an individual.

The Wechsler Adult Intelligence Scale—Third Edition (WAIS-III) is a comprehensive measure of intelligence composed of verbal and nonverbal tasks (Wechsler, 1997). Examinee's scores are compared with norms of his or her peer group and are calculated into a standard score with a mean of 100 and a standard deviation of 15. In addition to the Full Scale Intelligence Quotient (FSIQ) score, Verbal and Performance IQ scores are generated. Scores are further broken down into the Verbal Comprehension Index (VCI), the Working Memory Index (WMI), the Perceptual Organization Index (POI), and the Processing Speed Index (PSI). The WAIS-III can be administered to examinees over 16 years of age.

To assess a child's cognitive abilities, the Wechsler Intelligence Scale for Children-IV (WISC-IV) can be administered (Wechsler, 2003a; Wechsler, 2003b). Similar to the WAIS-III, this test is composed of a number of verbal and nonverbal tasks. The Full Scale IQ score (FSIQ) can be broken down into four indices: Verbal Comprehension (VCI), Working Memory (WMI), Perceptual Reasoning (PRI), and Processing Speed (PSI). A child might be administered an intelligence measure when it is suspected that he or she has a much lower intelligence than average and, as such, requires additional parental support.

Assessing Academic Achievement

The Wide Range Achievement Test (WRAT-IV) is a measure of academic achievement and includes Reading, Comprehension, Spelling, and Mathematics subtests (Wilkinson & Robertson, 2006). This test can be administered to children, adolescents, and adults and has strong validity and reliability coefficients. The resulting scores compare the examinee with a normative sample of peers, and the results can be expressed either in grade level or age level.

For individuals who have a limited English-speaking ability or whose verbal or fine-motor skills might undermine their true cognitive functioning, a nonverbal measure of cognitive ability can be administered. An example of such a test is General Ability Measure for Adults (GAMA), which yields an IQ score (Naglieri & Bardos, 1997). It consists of 66 pictorial puzzles that require the examinee to indicate which of the six possible answers is correct. GAMA takes only 25 minutes to administer, compared with the much lengthier Wechsler Scales, which can take hours to complete. An obvious drawback of a nonverbal test is that it does not assess verbal expressive abilities.

Objective Personality Tests

Objective measures assess personality and socio-emotional functioning, including broadband comprehensive measures (such as MMPI-II, MCMI-III, and PAI) and narrowband measures (such as the Beck Depression Inventory-II). Typically these tests are designed to screen for clinical symptoms and personality disorders, consistent with the criteria in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR).

The Minnesota Multiphasic Personality Inventory (MMPI-II) is an objective inventory of adult personality designed to provide information on critical clinical variables (i.e., depression, social introversion, hypochondriasis, schizophrenia, etc.) (Hathaway & McKinley, 1989). It contains nine Validity Scales, five Superlative Self-Presentation Subscales, 10 Clinical Scales, 31 Clinical Subscales (Harris-Lingoes and Social Introversion Subscales), nine Restructured Clinical (RC) Scales, 15 Content Scales, 27 Content Component Scales, and 20 Supplementary Scales.

The MMPI-II is based on a large normative sample of thousands of individuals from various communities in the United States. This test incorporates recent trends in mental health diagnosis and includes many common mental health disorders. It is one of the most widely used psychometric measures and, although there are some concerns regarding its validity in testing nonpsychiatric individuals, it has well-established validity and reliability (Friedman, Lewak, Nichols, & Webb, 2001). The drawback to administering the MMPI-II is that it contains 567 true or false items, which can be lengthy to administer.

The Millon Clinical Multiaxial Inventory-III (MCMI-III) is a personality measure for adults, which is composed of 175 true or false questions (Millon, Davis, & Millon, 1997). This instrument can be completed in approximately 30 minutes and can provide numerous subscales for interpretation. It is more sensitive to Axis 2 psychopathology.

The Personality Assessment Inventory (PAI) is an objective inventory of adult personality, which contains 344 items (Morey, 1991). It was designed to provide information on critical clinical variables (i.e., depression, anxiety, schizophrenia, antisocial tendencies, alcohol and drug problems). It contains four validity scales, 11 clinical scales, five treatment scales (including possible areas of interventions, such as suicide or anger), and two interpersonal scales (whether the examinee tends to be domineering or supportive in his or her interactions). It is based on a large database and includes many common mental-health disorders.

The Beck Depression Inventory–Second Edition (BDI-II) is a 21-item self-report instrument that assesses the existence and severity of depressive symptoms, including cognitive, affective, and physiological factors over the past two weeks (Beck, Steer, & Brown, 1996). The time period and the areas of functioning reflect the DSM-IV-TR criteria for depression. The measure's construct validity has been established, and research indicates that this measure can be used to differentiate between depressed and nondepressed patients. However, this test has a high face validity, which means that its purpose easily can be determined from reading the items. As such, the examinee can respond so as to appear to be either more or less pathological than he or she truly is.

Projective Personality Tests

The Rorschach Inkblot Test is a projective measure of emotional functioning and personality characteristics (Rorschach, 1942). The test contains ten inkblots: some are achromatic, and some are multicolored. The individual is first asked what he or she sees in each of the cards, what makes it look like that, and where the image is located. Some evaluators look at the content and common themes of the Rorschach responses. Alternatively, the Exner Scoring System can be used for scoring and interpretation (Exner, 2002). Although some clinicians still incorporate this test, it generally has been abandoned because the concepts employed in the interpretation are too abstract for the courtroom.

The Thematic Apperception Test (TAT) is a projective measure that requires the examinee to tell stories about a series of pictures (Murray, 1971). For each picture, the individual is asked to tell a story with a beginning (what led to the event), a middle (what is happening now), and an end (what will be the outcome). The examinee is asked what the character(s) might be thinking or feeling. It generally is believed that characters in the stories represent projected aspects of the self. The evaluator looks for common themes among the stories.

The Sentence Completion Series–Adult Form (Brown & Unger, 1998) consists of sentence stems on a variety of topics, which the individual is asked to complete. It is designed to gauge areas of concern and distress. The responses can be analyzed based on themes; conflicts; conflict resolution styles, wishes, and fears; and the presented world view.

Projective drawings also are part of the projective personality tests. For example, in the House–Tree–Person Technique, the examinee is asked to draw a house, a tree, and a person on paper (Buck, 1970). In the Kinetic Family Drawing Technique, the examinee is asked to draw his or her family performing some activity (Burns & Kaufman, 1972). There are different ways to interpret projective drawings (i.e., Ogdon, 1998). For example, some evaluators view the drawing of a person (part of the House–Tree–Person Technique) to be indicative of how the individual views him- or herself, including ideas about gender roles. The evaluator looks at the details of the drawings, the placement of the drawing on the page, as well as the verbal description provided by the examinee.

Parenting Assessment Tests

The Bricklin Perceptual Scales (BPS) is a measure that was designed for child custody evaluations (Bricklin, 1984). A child over the age of six is asked 32 questions about both parents (64 questions in total). The four parenting areas gauged by this measure include Supportiveness, Competence, Follow-up Consistency, and Possession of Admirable Personality Traits. A limitation of this test is that it uses a child's report, which can change over time and might be a function of the child's current mood or parental influence. Limited research has made this an instrument beneficial for information gathering, rather than relying on the classifications.

The Ackerman–Schoendorf Scales for Parent Evaluation of Custody (ASPECT) also was designed specifically for child custody evaluations (Ackerman & Schoendorf, 1992). This measure includes a parental questionnaire and incorporates the results of a variety of other tests (i.e., MMPI-II, parents' and child's IQ scores, TAT, projective drawings, etc.). In addition to the global Parental Custody Index, Observational, Social, and Cognitive–Emotional Scales can be used to compare the parenting effectiveness of both parents.

Psychologists choose from a variety of psychometric tests for a child custody evaluation. General trends change over time. For example, in 1986, the three most common psychometric measures administered to adults in custody evaluations were MMPI-II, Rorschach, and TAT (Keilin & Bloom, 1986). A similar study in 2001, found 92 percent of evaluators had reported administering MMPI-II, and relied much less on objective personality and cognitive tests than did evaluators 15 years previously (Quinnell & Bow, 2001). Today, children are being tested less frequently than before, and when they are, evaluators tend to administer projective rather than objective measures (Quinnell & Bow, 2001).

Since both parents in a child custody evaluation often are motivated to present themselves in the best possible light, the results of the psychometric measures must be considered carefully and compared with other information obtained during the evaluation. Similarly, psychometric measures that contain validity scales, such as the MMPI-II, can be useful in determining the degree of consistency between the examinee's report and their true functioning.

Language Preferences

When assessing a bilingual client, it is important to ask which is his or her preferred language. The client may feel more comfortable conversing in a native tongue. When an examiner fluent in the examinee's native tongue is unavailable, the services of a translator may be sought. Family members, and especially minors, should not be used for translations of "sensitive and confidential conversations" between the assessor and the examinee (Raso, 2006, p. 56).

Keep in mind that cultural factors may influence the examinee's performance on psychometric measures, particularly those that assess verbal expression and culture-bound knowledge. In such circumstances, the psychological report must contain a disclaimer to explain this limitation.

When making recommendations about custody matters, each parent, guardian, stepparent or any adult who physically lives or could potentially live with the children should be clinically evaluated. These are the people who will have the most influence on the children. A report should show that clinical interviews have been given to anyone in a position of parental responsibility and that they have been carefully examined. Although there is no magic number of clinical interviews each parental figure should have, a good report demonstrates that an adequate number has been given.

A good evaluation should include observations of the children with their parents and other live-in significant others. Some evaluators conduct these observations at the parent's home, while most are conducted in the evaluator's office. The observation sessions allow the evaluator to see children relating to and interacting with their parents at a moment in time. It is at the discretion of the evaluator as to whether these observation sessions are open-ended, task structured, or a combination of both. These observation sessions are important, will bolster the credibility of the final report, and will demonstrate to the court that the evaluator has spent time in the same room with the parents and children who are the subject of recommendations for the future.

Interviewing Children

The custody evaluation should include individual clinical interviews with the children as long as such interviews do not create undue stress for a given child. The evaluation should include how the child spends time in general with each parent, what he or she likes and dislikes about each parent, the kinds of activities parent and child engage in together, and how discipline is administered. The evaluator should demonstrate competence at eliciting information from children without having to be too direct about controversial issues. It is not the responsibility of the evaluator to extract a statement of preference from a child unless it is clear that the child is old enough and free from all of the other psychological and emotional consequences that could occur.

Psychological testing of children is not necessary unless there are questions raised that require deeper exploration of the child's mental health. By the time the custody evaluation is underway, this generally has been accomplished by a school or outside agency. However, a good evaluation provides enough information about the children's behavior through clinical interviews with parents or by having parents fill out checklists or inventories regarding their children.

A home visit usually is at the discretion of the evaluator. Because the home visit is an additional expense to one or both parties, it should not be conducted if both parties stipulate that the other's living situation is adequate. But where allegations have been made that a home environment is substandard or undesirable for any reason, a home visit should be included.

Sidebar: Summary and Recommendations

Ultimately a good report should provide a summary section and a list of conclusions and recommendations. The report should emphasize to the judge how conclusions and

recommendations were reached, based on the facts gathered throughout the evaluation. The evaluator should be free to express his or her opinion as an expert, but also should expect to demonstrate the foundation for the opinions. In the best reports, little or no additional explanation is required, because the conclusions follow naturally from the foregoing information. However, the evaluator should explain how he or she processed and interpreted the information to reach the final recommendations. Every expert has a particular style of writing a report, and there is room for differences in style and written expression. A good evaluation should be written so that a layperson can readily understand information in it. When it is necessary for a report to contain theoretical information, it is important to explain in layman's terms what the expert is attempting to communicate.

All things considered, a good report walks the fine line of taking into account that the court requires a demonstration that all relevant information has been obtained and a showing that appropriate and logical conclusions have been reached.

This should be accomplished without burdening the court with every word said during each clinical interview and every other encounter. The court appreciates thorough work, but expects the expert to distill the information into a manageable form.

In the end, after the hard work of testing, interviewing, and evaluating has been completed and objectives reached, the best experts keep in mind as they draft the final report that someone else will be reading it.

Alan M. Jaffe, Psy.D., is on the faculty of Northwestern University Feinberg School of Medicine in Chicago. He has authored book chapters and articles and has published internationally in the area of psychological testing, substance abuse, and compulsive disorders. He is a Fellow of the American College of Forensic Examiners. Diana Mandeleew, M.A., has extensive experience conducting psychological assessments, including forensic, personal injury, and custody evaluations. She is completing her doctorate at the Adler School of Professional Psychology.

Critiquing a Colleague's Forensic Advisory Report: A Suggested Protocol for Application to Child Custody Evaluations

Jonathan W. Gould
H. D. Kirkpatrick
William G. Austin
David A. Martindale

ABSTRACT. The purpose of this article is to provide a protocol within which to frame a critique or critical review of a colleague's custody evaluation. While we think that the structure and logic of the following pro-

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William G. Austin, PhD, is a practicing clinical and forensic psychologist in Northwest Colorado. He is the author of numerous articles on forensic methodology for conducting child custody evaluations that are research based with practical applications.

David A. Martindale, PhD, ABPP, is a diplomate in forensic psychology, and author of *Cross-examining mental health experts in child custody litigation* (2001). He now is in private practice in New Jersey as a forensic psychological consultant to attorneys and psychologists. His work is concentrated in the areas of child custody, professional ethics, and malpractice.

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tocol may be applied to other forensic evaluations, our focus here is on the specific forensic specialty area of child custody and parenting access evaluations (CCEs).

KEYWORDS. Child custody, review work product, critique work product, second opinion

INTRODUCTION

Increasingly, mental health professionals (MHPs) are entering the practice of forensic psychology (Gould, 1998). Among the many reasons for this movement, we believe three are primary. The first is that many MHPs perceive the specialty area of forensic practice as an exciting alternative to basic clinical practice. The second reason is that the Supreme Court's decisions in *Daubert v. Merrill Dow Pharmaceuticals* (1993) and in subsequent cases have stimulated a proliferation of experts, including experts in mental health, offering services to American courts. The third reason is that the constraints of managed care have not yet affected forensic practice, allowing forensic practitioners to maintain a pricing structure controlled primarily by marketplace factors.

We define "forensic arena" as the legal context for which the MHP prepares her/his work. This paper will focus on a suggested protocol for offering a review or critique of child custody (and visitation) evaluations. It is the critique itself as a specific type of forensic report that we will address. Little has been written on how to approach a forensic work product review of a child custody evaluation (Calloway, 1997; Metropolitan Denver Interdisciplinary Committee [MDIC], 1997; Stahl, 1996).

The task of providing a critique of another MHP's work within the general forensic area is a frequently occurring forensic activity (Gould, 2001). Forensic mental health professionals (FMHPs) are often retained to provide consultation to attorneys within civil and criminal contexts. A criminal defense attorney whose client is accused of child sexual abuse might retain a FMHP under an *ex parte* appointment order (see *Ake v. Oklahoma,* 1985) to provide pre-trial consultation and to review materials obtained through the discovery process. Part of this review might be an analysis of the strengths and weaknesses of a colleague's particular work in the case (e.g., use and interpretation of psychological test data). In a civil complaint, a plaintiff's attorney in a case involving an emotional distress tort action might retain a FMHP to critique the report generated by an independent medical or psychological evaluator retained by the defense.

Within the field of psychology, the role of critiquing another psychologist's child custody evaluation is identified as an appropriate role by the American Psychological Association (APA). Greenberg and Shuman (1997) observed that many mental health professionals step into the forensic arena with a poor understanding of the differences between clinical and forensic roles and responsibilities. While we believe there is not a bright line between these two specialties and, in fact, a competent FMHP builds his/her forensic skills on a solid clinical base, many clinicians enter the forensic arena poorly prepared and professionally naive about what is required and what level of competence is expected. The APA (Otto & Heilbrun, 2002) has recently declared forensic psychology as a specialty area, and, as such, the practice of forensic psychology requires specialized skills, training, and knowledge.

The scientific robustness and reliability of child custody evaluations (CCEs) have been strongly debated for over 25 years, with some scholars arguing against their usefulness (Ellsworth & Levy, 1969; Krauss & Sales, 2000; Melton, Petrila, Poythress, & Slobogin, 1997; Okpaku, 1976) and other scholars arguing for their usefulness (Ackerman & Kane, 1998; Galatzer-Levy & Krauss, 1999; Gould, 1998). American courts have continued to use experts for the small percentage of custody cases that do not settle, and some states have endorsed their use by statute.[1]

The use of work product reviews is a mechanism by means of which MHPs can police themselves. It is a mechanism for holding forensic practitioners to at least minimal standards of competence (Weissman, 1991) by scrutinizing the quality of their forensic evaluation. A review informs the court on the reliability and relevance of the expert testimony because, as some sources indicate, courts often are not very knowledgeable about underlying research (Kelly & Lamb, 2000) or are poorly equipped to recognize problems in evaluations (Stahl, 1996) and the use of science (Gould & Lehrmann, 2002; Shuman, 2002). A competent review allows the court to be a more sophisticated consumer of a forensic mental health evaluation (Heilbrun, 2001).

The custody evaluation process captures a particular moment in a family's history. The best that evaluators can do is offer opinions about how the family is functioning at that particular moment in time. The critique of a colleague's advisory report takes place at a different moment in time and the methodology used by the original evaluator may provide useful information about the family, even if the methodology has been legitimately criticized by a reviewer. In addition, we recognize that different evaluators may collect different data and different evaluators may assign different weight to data.

We draw a distinction between a "critique" or "review" and a "second opinion." The term "second opinion" has been borrowed from the field of medicine with unfortunate consequences: It is misleading. In the medical context, second opinions are ordinarily offered only following a *second full examination* of the patient. Only in rare circumstances are second opinions formulated on the basis of a file review. In the custody arena, the first evaluation offers rec-

ommendations concerning a parenting plan based upon a sufficiently adequate set of data about all members of the family. We should carefully avoid using the term "second opinion" unless we are describing a second evaluation of equal, greater, or different scope than the first evaluation, in which the second examiner obtains a sufficiently adequate set of data from which to offer a recommendation about a parenting plan. Such a second opinion can only be responsibly offered if the second practitioner has conducted an evaluation that is at least as comprehensive as the initial evaluation or if the second practitioner has conducted an evaluation that focuses attention on a particular aspect of a specific issue that was contested from the first evaluation.

We believe that all that can be expected from a review of an advisory report is commentary on the strengths and deficiencies of the evaluator's methods and a commentary on the manner in which opinions appear to have been supported by the data gathered. A critique enlightens the court concerning what information should have been included in the report and what information was missing. We also wish to emphasize that the term "critique," as we use it, suggests a review of the type that will identify both strengths and deficiencies in the advisory report under review.

Within the past decade, it has become standard practice within most professions offering custody evaluations to American courts that the evaluator must be either court-appointed or agreed upon by the litigants by means of a consent agreement. In some states, such as Colorado, all custody evaluations are court ordered by statute.[2] While the American trial court has the prerogative to give whatever weight it deems appropriate to a custody evaluation, and might perhaps be swayed by the arguments put forth in a critical opinion of the evaluation submitted by one side or the other, the professional offering the critique or review of the original custody evaluation should not allow anyone, including the court, to assume that the critique has the same breadth and scope as a custody evaluation and the FMHP should not opine concerning alternative parenting plans. That is, the reviewer should not offer an opinion about custodial placement.

As a general rule, MHPs have much to learn from our legal colleagues about the capacity to accept critical feedback about our forensic work. It is not uncommon for attorneys, zealously advocating for their clients, to challenge each other and offer stinging and sometimes harsh criticisms of their colleagues' opinions and competence. Such criticism is often seen in written correspondence and heard in open court. Appellate reviews can provide strong rebukes of a lower court's reasoning and decision-making. By and large, attorneys and judges have learned not to take such criticisms personally and to see these criticisms as an integral part of the legal process.

We believe that MHPs who offer their services within the forensic arena must anticipate that their advisory reports may be reviewed from two different perspectives. A MHP may examine a forensic evaluation from a variety of perspectives that include review of the evaluator's current methods, procedures,

research, and psychological reasoning (Gould & Bell, 2000). An attorney or a judge may critique an evaluation from a legal perspective that examines its admissibility, weight, and substance (Gould & Lehrmann, 2002).

A custody evaluator should understand that her/his advisory report–the work product describing the evaluation and the foundation data upon which conclusions and recommendations were based–stands a good chance of receiving close scrutiny because an attorney will likely move that the advisory report be introduced into evidence. It is for these reasons that the Committee on Ethical Guidelines for Forensic Psychologists (1991) recommended that psychologists practicing forensic psychology prepare their advisory report in a manner that anticipates "that the detail and quality of [their] documentation will be subject to reasonable judicial scrutiny; this standard is higher than the normative standard for general clinical practice" (p. 661). Our public role as experts to the court places upon forensic practitioners a "special responsibility for fairness and accuracy" (p. 664). It is because of these responsibilities that we believe FMHPs must become inured to criticisms of their advisory report.

Unfortunately, sometimes even with the most thorough evaluation report available to assist in settlement negotiations, settlement does not occur. Usually, one of the litigants is unhappy with the evaluator's recommendations and remains poised to have his/her day in court. The adversarial process allows litigants to challenge experts, even court-appointed experts. Thus, a custody evaluator must understand that it is quite likely that the advisory report, with its "assumptions and methodology," may be critically reviewed by a colleague acting in a consulting role to one of the attorneys for one of the litigants.

Expert versus Consultant

As used here, the term "consultant" refers to a specific forensic mental health role and is different from the role of "expert." The expert and consultant roles fall on a continuum and although the "expert typically serves to some minimal extent as a consultant," there are nonetheless significant differences between the roles (Hess, 1998, p. 111).

Weissman and DeBow (2003) state that "on the respective ends of the continuum are the 'expert' whose commitment is to finding and expressing the truth, versus the 'consultant,' whose commitment is to assisting attorneys in their preparation of cases for litigation and helping attorneys understand psychological evidence. The two roles can be oppositional to one another" (p. 38). As one of the authors has previously written,

> Occasionally, a forensic examiner will be asked to consult with an attorney without seeing the litigant (s). Such consultation may take the form of a literature review and synthesis, discussion of psychological principles applied to the attorney's legal strategy, review of the psychological components of a legal brief, psychological analysis of the litigant's

> claims, review of the litigant's file, and discussion with other professional forensic specialists and synthesis of their opinions for the attorney's use. Experts are also asked to review a colleague's report and prepare cross-examination questions for the attorney . . . When the forensic specialist is hired as a consultant, it is important that the attorney hires the expert directly. In this way, all work conducted for the attorney is covered under the attorney work-product privilege. (Gould, 1998, pp. 188-189)

From a legal perspective, the forensic mental health consultant is an *agent* of the attorney and is anchored to the attorney-client privilege. According to Epstein (2001), when an attorney retains an expert, there are two primary factors for extending the protection of the privilege. "One is where the other professional communicating with the attorney's client has an independently recognized confidentiality privilege, such as a physician in some states" (Epstein, 2001, p. 151). The other is where the communication with the other professional (such as a forensic psychologist) "is deemed necessary to assist the attorney to understand better the facts and give a legal opinion to the client. The principle that extends the privilege to certain categories of experts, defined as agents of the attorney for the purpose of rendering legal advice, is often referred to as the *Kovel doctrine*, after the case that set forth the concept of derivative privilege attaching to experts necessary for the rendering of legal advice" (p. 152).[3]

Epstein (2001) adds that the retained expert is more likely to be "cloaked with the derivative privilege" (p. 153) if the expert is retained by the attorney rather than by the client, if the purpose of the expert is to assist the attorney in digesting privileged information, and if the information is collected from the client, is confidential in nature, and is digested by the expert for transmission to the attorney. Additionally, and this seems most on point about an expert being retained to critique a custody evaluation, "if the expert was retained to assist the lawyer in understanding data that is either actually or technically in another language so that the attorney can render legal advice, the information exchanged will be protected" (p. 154).[4]

The purpose of this article is to provide a protocol within which to frame a critique or critical review of a colleague's custody evaluation. While we think that the structure and logic of the following protocol may be applied to other forensic advisory reports, our focus here is on the specific forensic specialty area of child custody and parenting access evaluations (CCEs). We hope this article will be considered by other professionals as a jumping off point for future articles addressing this complex area and that our work will stimulate comment and debate about how to review and critique a colleague's child custody advisory report.

Much has been written in the forensic literature about encouraging the use of a standard evaluation protocol (Grisso, 1986). Standard protocols increase

the reliability (accuracy) of the data across time and across interviewees (Rogers, 1995) and are encouraged for use in CCEs (Gould, 1998; Schutz, Dixon, Lindenberger, & Ruther, 1989). We propose that critiques of CCEs would be more useful if a standard evaluation protocol were to be used to review and organize the data and to place the interpretation of the data within a conceptual framework that is anchored to the relevant behavioral science literature. A standard information gathering protocol should be flexible enough to consider unique or ideographic sources of data but also needs to be structured enough to provide a cogent uniformity to the data gathering process.

A review of a CCE should provide the retaining attorney and the court with the scientific basis of concern, if any, about the evaluator's advisory report. Reviews should be written in a manner that encourages the use of the science of our profession. A critique should be focused on the employed forensic methods and procedures, including the evaluator's demonstrated awareness of appropriate child custody standards, guidelines, parameters, principles, and research. The critique should also reflect applicable and relevant law and local rules of evidence. The review should offer a fair and objective examination of the foundation for the evaluation and its subsequent recommendations.

What then are the elements of a critical opinion protocol of a colleague's CCE? We have identified six major elements: (a) A critique should be *factually* and *ethically grounded*; (b) It should offer *clear, cogent, and current knowledge of the relevant behavioral science literature*; (c) It should contain a *discussion of alternative, rival hypotheses*; (d) It should be *objective and bias-free*; (e) The critique should *offer a discussion of its own limitations* as well as the limitations of the reviewed evaluation; and (f) Its tone should be *forceful, open, and honest*.

Factually and Ethically Grounded

A FMHP who is retained to provide a critical analysis of a colleague's CCE must familiarize himself/herself with the fact pattern of the case. In addition to a critical reading of the evaluation report, the reviewer should ask to see all custody-relevant documents, including the pleadings and the appointment order or consent agreement that describes the terms by which the evaluator was appointed and the evaluator's Statement of Understanding and other documents each party was asked to sign prior to beginning the evaluation. A review of any depositions, particularly if the evaluator has been deposed, may prove fruitful. The reviewer should examine the information listed in the evaluator's written report, including all written, audio taped, and video taped materials and notes. Reviewers should not limit their examination of the file to those items identified by the evaluator as having played a role in the formulation of his/her opinion. Particularly if the retaining attorney alleges that information provided to the evaluator appears not to have been utilized, that information should be examined with care.

The actions that will best protect the due process rights of the litigant whose attorney has requested a review and the actions that will conform to the admonitions of our Ethics Code will not always coincide. As Calloway (1997) states, "Courtesy and wisdom obviously dictate that we first inform the court-appointed or consent-ordered psychologist whose work we are requested to review. By speaking with our colleague, we may discover facts about the conflictual situation and encourage collaboration, to help us prevent the misuse of our services" (p. 10).

While this appears to be good advice, deciding whether to contact the evaluator and, if so, when to do so, requires careful ethical and legal consideration. When a FMHP is retained by an attorney to critique a custody evaluation, the reviewer is in a *consulting role* to the attorney (and not to the litigant/parent whom the attorney represents). The fact that the attorney retains the FMHP places the FMHP in a professional relationship with the attorney, who may not want either the court-appointed expert or opposing counsel and his/her client in this adversarial system to know about the existence and services of the retained expert. The attorney may only want consultation about the evaluator's written report. It should be assumed that the reviewer's critical analysis and feedback to the attorney are privileged and confidential, by virtue of the fact that they are received as the attorney's *work product*. Ordinarily, a report to the retaining attorney is disclosed only if the retaining attorney decides that it will be advantageous to his or her case or elects to call the reviewer as a witness.

Some might argue that psychologists should not accept assignments the demands of which will require that they protect from disclosure the product of their forensic services. As stated above, within the many roles FMHPs offer to the legal profession, confidential and privileged consultations are quite common and are sometimes court-ordered (see *Ake v. Oklahoma*, 1985). Psychologists who believe that good review methodology requires that there be contact with an evaluator whose work is being reviewed should decline assignments in which they will be asked to honor an attorney's work-product privilege. An alternative for psychologists who hold this view is to state in their written retainer agreements that they will accept a case assignment only if retaining attorneys agree to allow them to contact the colleague who performed the custody evaluation. This approach allows an attorney to decline to retain a psychologist who expects this kind of collegial openness or to agree to the conditions of collegial contact during the review process.

Another alternative is for the potential reviewer to offer a two-stage consultation. Stage one would involve conducting a preliminary review that would include only the methods and underlying assumptions of the evaluation, consistent with the APA's child custody guidelines (APA, 1994) and the professional practice guidelines guiding forensic psychologists (Committee on Ethical Guidelines for Forensic Psychologists, 1991). The retained reviewer would also provide consultation about the quality of the report, but would pro-

vide no written report and no testimony. In stage two of the review process, if the reviewer finds that s/he needs to speak with the court-appointed expert about aspects of the reviewed evaluation, the retaining attorney may agree to this step. When an attorney provides such permission to the reviewing expert, the act of consulting with the court-appointed expert would pull the privilege mantle off the consulting reviewer. The reviewer's work product and other materials would then be subject to rules of discovery. The FMHP providing critiques must understand that s/he cannot contact another mental health professional, the court, or opposing counsel without prior, written authorization from the retaining attorney. No matter what steps the reviewing expert and the retaining attorney chose to take, all steps must be clearly described in a written retainer agreement between the reviewing expert and the retaining attorney. When changes to the original retainer agreement are made, any and all changes need to be memorialized in writing and signed by both parties. There also are times when an attorney can obtain the entire file of the court-appointed evaluator for review by another FMHP without disclosing that a forensic consultant has been hired.

What happens in a case where the reviewer is retained, agrees to provide confidential consultation, and then discovers upon review of the evaluation what appears to be unprofessional, questionable, or possibly unethical conduct on the part of the custody evaluator? The FMHP who is practicing (including the provision of a critical review of a colleague's advisory report) within the custody arena must recognize that such a situation sets up, at a minimum, a tension among three competing and, one might argue, equally important factors: (a) a litigant's constitutional rights to due process, including the right to discovery and the counsel of record's right to have privileged and confidential expert consultation; (b) the reviewer's and the evaluator's professional ethics and governing code(s) of conduct; and (c) the best interests of the child that is the polar star for the court's determination of custody dispositions. These three factors together create a complex set of issues that must be carefully considered by the reviewer, and, we would argue, one factor cannot be ignored because of influences of the other two. Often, a FMHP seeks ethical advice about such issues by consulting with trusted colleagues. It is important to recognize that such consultation, whether it is peer consultation or paid professional consultation, may first have to be approved by the retaining attorney. Without such written authorization, the FMHP may breech the confidential relationship existing under the work-product privilege.

Though offering to review the advisory report of a colleague is ethically appropriate, FMHPs who provide review services should be familiar with the ethical standards and professional practice guidelines that are applicable to this particular activity. Ethical standards are drawn from the APA's *Ethical Principles of Psychologists and Code of Conduct* (APA, 1992, 2002). Guidelines governing forensic practice are drawn from the *Specialty Guidelines for Forensic Psychologists* (Committee on Ethical Guidelines for Forensic Psy-

chologists, 1991). Guidelines governing forensic practice in the specialty area of child custody evaluations are drawn from the *Guidelines for Child Custody Evaluations in Divorce Proceedings* (APA, 1994) and from documents distributed by various state associations (e.g., North Carolina Psychological Association, 1994). Guidance concerning ethical issues and appropriate methodology can also be obtained from our professional literature, current textbooks, and current continuing education workshop presentations.

In addition to the ethics codes and practice guidelines published by specific professional groups, general practice guidelines and specific practice standards have been promulgated by groups whose members come from a variety of professions. Guidelines that should inform child custody evaluators and FMHPs offering critiques include those available through the Association of Family and Conciliation Courts (AFCC; 1995), the American Academy of Child and Adolescent Psychiatry (AACAP; 1997), the American Professional Society on the Abuse of Children (APSAC; 1990, 1995a, 1995b).

Prior to accepting the task of reviewing a colleague's work, it is incumbent upon the FMHP to objectively examine his/her competency to perform the task. Regardless of one's training and skills, when a FMHP is related to or involved in a social or professional relationship with one or more of the evaluees, s/he should decline to serve as a reviewer of the evaluation.

Admonitions that psychologists practice within their areas of competence (Ethical Principle A: Competence; APA, 1992, 2002) and conduct evaluations only involving matters that are within their established competencies (Guideline III.A: Committee on Ethical Guidelines for Forensic Psychologists, 1991) also apply to reviewers. For example, if a CCE contains an assessment of allegations of child sexual abuse and the reviewer is not experienced in this area, s/he should either seek a consultation by a MHP who is trained in this area and who can assist in the advisory report review or decline the assignment.

The documents that set forth the various standards, guidelines, and practice parameters applicable to work in the child custody field are an essential component of the growing body of knowledge that should inform not only the custody evaluator, but also any mental health professional conducting a critical review of a CCE. Heilbrun (2001) has proposed a list of principles for FMHPs that are useful in reviewing CCEs. With Heilbrun's principles in mind, a reviewer should determine whether or not (a) the evaluator's role and the purpose of the evaluation have been defined; (b) the evaluator has used a data gathering model that is consistent with current literature and current professional practice; (c) collateral sources have been utilized and historical information has been obtained; (d) scientific reasoning and data interpretation have been used to establish connections between characteristics or conditions assessed and the pertinent functional abilities; (e) the information provided will assist the court in adjudicating a fact in the case and/or the ultimate issue; (f) the limits of data interpretation have been articulated; and (g) empirical support has been provided for opinions expressed. These guidelines, princi-

ples, and standards comprise the working framework both for conducting evaluations and reviewing the advisory report. We are of the opinion that any psychologist who substantially practices outside of the standards, guidelines, and parameters that have been identified in the child custody literature must be prepared to offer to the court a logical and coherent rationale for his/her chosen course of practice.

Weissman (1991) made an attempt twelve years ago to delineate a standard of care for CCEs with the starting presumption: "There are certain minimal professional and ethical standards that all mental health professions should comply with when contemplating any involvement in a child custody dispute" (p.470). Weissman first described the standard with thirteen negative examples of how *not* to conduct a CCE (see Table 1), and then described principles that *should* guide the evaluator and his/her evaluation (see Table 2).

Forensic MHPs who conduct CCEs are expected to be knowledgeable about and are expected to follow in a general way guidelines proposed by professional organizations for conducting these types of evaluations (AACAP, 1997; AAFC, 1995; APA, 1994; Committee on the Ethical Guidelines for Forensic Psychologists, 1991). These guidelines describe ethical principles, professional practice standards, parameters, guidelines, and forensic methodological rules for the competent design and execution of a CCE. Although some of these general guidelines, standards, and rules may be described as aspirational in nature, they represent the current state of the art regarding competent and ethical professional practice in CCE and they provide a general framework for how the evaluation should be conducted. One of the authors (Kirkpatrick, 2004) argues that the child custody field has developed to the point that a set of "standards" in fact exists.

The FMHP should also obtain guidance from practice books that describe expected forensic methodology and the research basis for the evaluation of families who are undergoing an evaluation regarding issues of custody and parenting time (Ackerman, 2001; Ackerman & Kane, 1998; Galatzer-Levy & Kraus, 1999; Gould, 1998; Schutz et al., 1989; Skafte, 1985; Stahl, 1994, 1999).

Demonstrate Relevant Knowledge

Expert testimony and advisory reports are expected to be based on scientific research and methods. Practitioners who conduct CCEs are expected to be knowledgeable about relevant substantive scientific research concerning the effects of divorce, child development, and special problems that often surface in child custody disputes such as domestic violence, child abuse, sexual abuse, and child alienation. The relevant professional literature consists of basic research on children and families and evaluation approaches to specialized topics that describe specific forensic methodology, involving topics ranging from child sexual abuse to how to approach parenting time when one parent wants

TABLE 1. Thirteen Examples of How Not to Conduct a CCE (Weissman, 1991, p. 470).

1. "accepting referrals without requisite forensic training and specialized knowledge and competencies in child developmental psychology, personality, psychopathology, and psychological assessment;
2. accepting referrals without a reasonable degree of understanding of the legal standards in custody determinations or the pertinent psychological literature;
3. accepting referrals in cases where personal attitudes, ideologies, or agendas bias the examiner's evaluation of the parties in terms of their gender, ethnicity, or lifestyle, or in terms of selection of methods, interpretation of findings or formulation of opinions;
4. accepting referrals where prior, current, or prospective relationships potentially produce conflicts of interest;
5. entering into dual relationships with parties by serving other contaminating roles such as counselor-therapist, mediator, and/or evaluator;
6. accepting referrals without formally clarifying the nature and scope of the intended evaluations;
7. failing to provide meaningful information to the parties as to the purposes, objectives, and intended uses of the evaluation and its work product;
8. failing to protect confidential communications and privileged information when required by law;
9. failing to construct an assessment methodology that is fair, impartial, and comprehensive as to the issues in question;
10. evaluating only one party in a child custody action, and making recommendations as to the child(ren)'s custody based on this limited information;
11. failing to conduct an independent and autonomous evaluation, relying instead upon second- and third-hand information that may be factually unreliable and biased;
12. failing to document all data which form the basis for evidence or services provided; and
13. failing to represent fairly and accurately findings, interpretations of data, and the factual bases for opinions" [citations omitted].

to relocate with the child. In combination with the general practice guidelines, this literature creates a standard of practice framework for the practitioner once it can be determined what forensic questions need to be addressed for the court. Appendix A provides a representative, but not exhaustive, review of the professional literature that guides practitioners on a variety of issues.

In addition to knowledge in the research content areas and forensic methodology, the FMHP needs to be familiar with relevant state laws because statutes and case law help identify general factors that need to be considered in competently conducted CCEs. Further, some jurisdictions (e.g., California) have published local rules pertaining to CCEs. The term "local rules" refers to rules that are adopted by a presiding judge, by a chief judge, or by all of the judges in a jurisdiction that govern practices, procedures, and policies in the courts of that district. The authority for establishing local rules varies from state to state. For example, a jurisdiction might have local rules pertaining to the appoint-

TABLE 2. Principles to Guide a Child Custody Evaluator (Weissman, 1991)

The evaluator should:
1. Understand the referral questions and make sure the evaluator has "the requisite clinical and forensic knowledge and skill to evaluate" (p. 471);
2. Create a record that can be reviewed by others;
3. Avoid ex parte communications in order to minimize any perception of bias;
4. Directly assess all parties in the dispute and review collateral sources of information for verification of issues and gather data in a standardized and parallel format;
5. Use standardized methods of data collection as much as possible. Be mindful of standards of admissibility of evidence and maximize structure in the evaluation so as to increase reliability;
6. Acknowledge the limits of long-term predictions concerning the child and family due to situational variables associated with the stress of divorce and litigation;
7. Assist the court by formulating parenting plans that will take into account a multitude of relevant variables.

ment of a parent coordinator in a domestic matter, even though there is no statutory basis for the appointment.

While anchored to the relevant behavioral science literature pertaining to child custody, a FMHP might consider the following questions as a set of checkpoints to the thought process as a CCE is being reviewed (Table 3), in reviewing the evaluator's use of interviews of the litigants (Table 4), in reviewing the evaluator's use of psychological tests (Table 5), in reviewing the evaluator's behavioral observations with each child (Table 6), in reviewing the evaluator's use of collateral records and collateral interviews (Table 7), and in reviewing the evaluator's apparent skill, knowledge, and actual advisory report (Table 8).

Discuss Rival, Alternative Hypotheses

An important concept guiding professional activity is that FMHPs, as educators to the court, should include in their reports reasonable alternative hypotheses, thereby enabling the court to critically examine the data. The consideration of plausible, alternative hypotheses suggests that even a critical opinion may include not only a reasonable second perspective but also other plausible explanations. As described below, educating the court about the importance of using a multi-hypothetical model may be as valuable as providing a criticism about the specific report.

Whether we are conducting an evaluation or offering critical opinion testimony, our role is to provide the court with a full range of scientific information, not just the scientific information that fits our argument. Our opinions

TABLE 3. Questions to Consider in Reviewing a CCE

1. Did the evaluator clearly define the main problems or issues to be resolved?
2. Did the evaluator clearly identify the legal questions relevant to the behavioral data to be collected?
3. Did the evaluator identify the factors to be measured?
4. Did the evaluator articulate testable hypotheses for the evaluation?
5. Did the evaluator consider rival and/or plausible alternative hypotheses?
6. Have the criteria defining the best interests of the child been clearly outlined?
7. Did the evaluator identify developmental outcomes and the data upon which the specific predictions are based?

TABLE 4. Questions to Consider in Reviewing the Interviews of Litigants

1. Did the evaluator explain how credibility of interview data was assessed?
2. Did the evaluator obtain interview data from each parent about the specific areas of functioning that are the focus of the court's concern?

need to be crafted around the specific data points from which our conclusions were drawn *and such reasoning needs to be communicated to the court*. That is, we need to inform the court of the data used in forming our opinions. When providing alternative opinions, we need to inform the court of our use of different data points or alternative interpretations of the same data. When offering opinion testimony, we not only explain alternative hypotheses but also describe these alternatives fairly and accurately. We then can explain to the court why the strengths and weaknesses of the rival hypotheses are less convincing in this particular circumstance than the point of view we are presenting as more useful.[5]

Objective and Bias-Free

Forensic psychologists who act consistently within the bounds of the Specialty Guidelines (Committee on Ethical Guidelines for Forensic Psychologists, 1991) maintain an objective and impartial attitude *no matter who retains them*. They present their "services and the products of their services . . . in a forthright and responsible manner" (Committee on Ethical Guidelines for Forensic Psychologists, 1991, p. 658). No matter who the client is, the responsibility of the forensic psychologist is to "provide services in a manner consistent with the highest standards of their profession" (p. 657). Note that the Guidelines clearly state that our behavior is to conform to the *highest* standards.

TABLE 5. Questions to Consider in Reviewing the Use of Psychological Tests

1. Was the psychological testing administered in a competent manner in accordance with ethical standards and professional practice guidelines?
2. Were tests administered as outlined in the test manuals?
3. Did the evaluator explain how test response style/bias was interpreted?
4. Did the evaluator seek external support from collateral sources to confirm response style interpretations?
5. Did the evaluator obtain objective test data from each parent about the specific areas of functioning that are the focus of the Court's concern?
6. Was the choice of each objective test clearly related to the psycho-legal questions that are the focus of the evaluation?
7. If not, what rationale is offered for the instruments selected?
8. Was the relationship between choice of objective tests and the psycho-legal questions clearly explained to the trier of fact?
9. Did each objective test possess the characteristics of a test that are suggested when using psychological tests in a forensic context? If not, why not?
10. Did the evaluator explain the basis for the selection of each test administered and how its results would be used?
11. Did the evaluator clearly identify the hypotheses drawn from the objective test data?
12. Did the evaluator compare discrete sources of data drawn from the objective test data and compare them to information obtained from collateral sources?
13. Did the evaluator discuss how information from objective test data was analyzed for the degree of convergent validity in the data?

This is an awesome responsibility and one that must be taken very seriously. Our essential role is "as expert to the court . . . to assist the trier of fact to understand the evidence or to determine a fact in issue" (Committee on Ethical Guidelines for Forensic Psychologists, 1991, p. 665). Forensic psychologists who follow the Guidelines do not take sides. Their obligation is to seek facts and interpret such facts from a psychological perspective. Of course, our presentation of facts and their interpretation to a court must also conform to relevant state statutes or to the Federal Rules of Evidence guiding scientific evidence testimony.

> [F]orensic psychologists have an obligation to all parties to a legal proceeding to present their findings, conclusions, evidence or other professional products in a fair manner. This principle does not preclude forceful representation of the data and reasoning upon which a conclusion or professional product is based. It does, however, preclude an attempt, whether active or passive, to engage in partisan distortion or misrepresentation. Forensic psychologists do not, by either commission or omission, participate in a misrepresentation of their evidence, nor do they participate in partisan attempts to avoid, deny, or subvert the presentation of evidence

contrary to their own position. (Committee on Ethical Guidelines for Forensic Psychologists, 1991, p. 664)

Discussion of the Critique's Own Limitations

A critical review of a CCE must include caveats and statements about the limitations of the review. A written critique should include a statement that the critical review is neither a custody evaluation nor a second opinion. The written critique should emphasize the manner in which the reviewer became involved in the case, the questions and issues raised to the reviewer by the retaining attorney, the database analyzed by the reviewer, and the inherent and relevant limitations of the database. The limited scope of a critical review must be clearly articulated to everyone. For example, the reviewer may wish to include a statement that no parties were directly evaluated during the critique.

Critique Presented in a Forceful, Open, Honest Tone

We can discuss our opinions in a forceful, open, and honest manner. We can provide cogent reasoning to support our beliefs that one explanation fits the data better than another. However, we should never intentionally exclude or misrepresent the meaning of a rival hypothesis or the cogency of its logic. We can attempt to convince the trier of fact of our conviction, but we should never

TABLE 6. Questions to Consider in Reviewing Behavioral Observations

1. Did the evaluator explain how credibility of self-report data was assessed?
2. Did the evaluator obtain self-report data from each parent about specific areas of functioning that are the foci of the Court's concern?
3. Was the choice of each self-report measure clearly related to the psycho-legal questions that are the focus of the evaluation?
4. If not, was the relationship between choice of self-report measure and the psycho-legal questions clearly explained to the trier of fact?
5. Did each self-report measure possess the characteristics of a test that are suggested when using psychological tests in a forensic context? If not, why not?
6. Did the evaluator explain the basis for the selection of each test administered and how its results would be used?
7. Did the evaluator clearly identify the hypotheses drawn from the self-report measures?
8. Did the evaluator compare discrete sources of data drawn from the self-report measures and compare them to information obtained from collateral sources?
9. Did the evaluator discuss how information from self-report measures was analyzed for the degree of convergent validity in the data?

TABLE 7. Questions to Consider in Reviewing Collateral Records and Interviews

1. Did each parent provide a list of collateral interview sources knowledgeable about each parent's relationship with the minor child?
2. Were the collateral interview sources interviewed in a consistent manner, using a common set of questions to form the basis of the interview focus from which the evaluator could compare responses across information sources?
3. Were the questions asked of the collateral interviewees focused on specific questions of concern in this specific evaluation and were more general questions about parenting skills as well? If not, why not?
4. If yes, what hypotheses were generated based upon the collateral information?
5. Did the evaluator examine similarities and differences across interviewee data (convergent validity)?
6. How did the evaluator assess the credibility of collateral interviewees?
7. Did the evaluator obtain names of other people to interview from the collateral sources? Were these people interviewed?
8. Were the choices of collateral interview sources representative of people involved in the child's life across a wide range of activities contrasted with limiting interviews to family and friends?
9. If not, were the limitations of the obtained collateral data discussed?

attempt to deceive, withhold, distort, or ignore reasonable, cogent alternative arguments.

SUMMARY

In this article, we propose a framework for conducting work product reviews or work product critiques of a colleague's child custody evaluations. Though battles between experts frequently do little to bring light to the situation, the best interests of children are ill served when flawed reports go unchallenged and when they become the basis upon which the trier of fact rests his or her judicial decision. Where an expert's opinions have not been formulated through the utilization of appropriate procedures and are not supported by reliable data, exposing these deficiencies is essential (Martindale, 2001, p. 504). We perform an important educative function when we assist judges in their endeavors to more effectively evaluate proffered expert testimony (Heilbrun, 2001; Martindale, 2001).

The advisory report review is one tool that can make courts more informed consumers of forensic mental health evaluations. The same "special responsibility for fairness and accuracy" (Committee on Ethical Guidelines for Forensic Psychologists, 1991, p. 664) demanded of evaluators is expected of those who review evaluations. When one side requests that a full second evaluation

TABLE 8. Questions to Consider in Reviewing the Skill and Knowledge of the Evaluator

1. Does the interpretation reasonably fit the data described in the report?
2. Does the evaluator clearly address the psycho-legal questions that are relevant to the legal issues before the court?
3. Did the evaluator address the limitations of the data?
4. Did the evaluator address inconsistencies of the data?
5. Did the evaluator discuss the degree to which data from different methods provide a convergent (reliable) view of each parent's parenting competencies?
6. Were relevant research findings introduced to facilitate explanation and prediction?
7. If not, why is the scientific basis of the forensic findings not presented to the Court?
8. Can the court reasonably conclude that the evaluator was impartial and objective in the substance of the written report and in the substance of oral testimony (including depositions)?
9. Based on the data reviewed (with their stated limitations) does the evaluator appear to have been impartial and scientific in approach and demeanor, or does s/he appear to have functioned as an advocate?

be performed, the decision to be made by the court is complex. Second evaluations add to the expenses both for the family and for the court system, delay the process of resolving the conflict between the parents, and place additional stress on the parents and on the children. In some jurisdictions, second evaluations are strongly discouraged. For example, New Jersey's Board of Psychological Examiners have distributed guidelines in which it is suggested that formulating an opinion with respect to an earlier evaluation might best be done by means of a file review rather than subjecting the family members to an additional evaluation (N.J. Board of Psychological Examiners, 1993).

We propose that when second evaluations are requested, courts may want to utilize expert consultation in the form of an advisory report review to determine if there is basis for a full second evaluation. If the evaluation passes a forensic quality control analysis by the consultant, then the case can move forward toward a resolution of the issues.

When providing a critical opinion, the criticism needs to be focused on the "assumptions and methodology" used in the evaluation process, including the professional advisory report and/or qualifications of the expert. Criticism should also include some analysis of the evaluator's apparent knowledge, skills, and training in forensic mental health practice, including the evaluator's awareness of applicable laws, rules, and procedures in family law. Critical review should be limited to evaluations of methodology, interpretation of data, forensic acumen, and alternative conclusions drawn from such interpretations. They should never be personal attacks upon the examiner.

NOTES

1. For example, Colo. Rev. Stat. § 14-10-127 (2001).
2. Colo. Rev. Stat. § 14-10-127 (2001).
3. *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961).
4. ECDC *Envtl. V. New York Marine & Gen. Ins. Co.*, 1998 U.S. Dist. LEXIS 8808 at *22-23 (S.D.N.Y June 4, 1998).
5. We believe that the recent *Daubert* ruling provides a strong rationale for experts being able to articulate the basis for their opinions. The *Daubert* case was returned to the 9th Circuit Court and, again, the scientific evidence proffered by the plaintiffs was rejected by the Court (*Daubert v. Merrell Dow Pharmaceuticals, Inc. (on remand)*, 43 F.3d. 1311 [9th Cir. 1995]). Judge Alex Kozinski, writing for the Court, declared that "[s]omething doesn't become scientific knowledge just because it's uttered by a scientist . . ." (at 1315-16). The Court's task, Kozinski wrote, "is to analyze not what the experts say, but what basis they have for saying it" (at 1316). It is worthy of note that this was not the first time that a respected jurist emphasized the importance of experts articulating the bases for their opinions. In 1967, David Bazelon, in his opinion in *Washington v. United States*, 390 F.2d. 444, declared that the court was "deeply troubled by the persistent use of labels and by the paucity of meaningful information" presented by experts (at 447). He added that in the case at bar, the experts had provided "only the conclusions without any explanation of . . . what facts . . . [were] uncovered, and why these facts led to the conclusions" (at 447).

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SUBMITTED: August 26, 2003
REVISED: November 4, 2003
REVISED: December 1, 2003
ACCEPTED: December 7, 2003

APPENDIX A
Suggested Resources by Topic

1. Abduction of Children by Parents: Johnston & Girdner (2001)
2. Attachment Theory and Research: Ainsworth (1979); Bowlby (1969); Cassidy & Shaver (1999); Main (1996)
3. Child Adjustment and Custodial Arrangements: Amato (2001); Bauserman (2002); Hetherington, Bridges, & Insabella (1998); Maccoby & Mnookin (1992)
4. CCE Approaches, General Methods and Procedures: Gould (1998, 1999b); Gould & Bell (2000); Gould & Lehrmann (2002); Gould & Stahl (2000), Galatzer-Levy & Kraus (1999); Kirkpatrick (in press); Schutz et al. (1989); Stahl (1994, 1999); Weissman (1991)
5. Child Maltreatment Evaluations: Kuehnle, Coulter, & Firestone (2000)
6. Child Development Research: Gould & Stahl (2001); Kelly & Lamb (2000); Lamb (2002); Lamb & Kelly (2001); Solomon & Biringen (2001); Whiteside (1998)
7. Child Resiliency and Mastery: Masten & Coatsworth (1998)
8. Child Sexual Abuse Evaluations and Testimony: Ceci & Hembrooke (1998); Friedrich (2002); Kuehnle (1996)
9. Child Sexual Abuse Interviewing and Suggestibility: Ceci & Bruck (1995); Ceci & Hembrooke (1998); Lyon (1999); Poole & Lamb (1998)
10. Collateral Sources in CCEs: Austin (2002); Austin & Kirkpatrick (in press); Heilbrun (2001); Heilbrun, Warren, & Picarello (2003)
11. Cultural Differences: American Psychological Association (1990)
12. Custody Arrangements: Bauserman (2002); Fabricius & Hall (2000); Lamb (2002); Lamb, Sternberg, & Thompson (1997); Maccoby & Mnookin (1992)
13. Divorce Effects Research: Amato & Keith (1991); Amato & Sobolewski (2001); Emery (1999); Hetherington, Bridges, & Insabella (1998); Hetherington & Kelly, (2002); Wallerstein & Kelly (1980)
14. Domestic and Partner Violence: Austin (2000c, 2001); Bancroft & Silverman (2002); Graham-Bermann & Edleson (2001); Holden, Geffner, & Jouriles (1998); Jaffe & Geffner (1998); Jaffe, Lemon, & Poisson (2003); Johnston & Campbell (1993); Mullender, Hague, Imam, Kelly, Malos, & Regan (2002)
15. Expert Testimony Issues: Ewing (2003); Goldstein (2003); Krauss & Sales (1999); Shuman (1997); Shuman & Sales (1998, 1999)
16. Family Systems and Divorce: Ahrons (1994); Amato (2000, 2001)
17. Fatherhood Research: Braver & O' Connell (1998); Lamb (1997; 2000); Rohner & Venezio (2001)
18. Forensic Evaluations, Generally: Heilbrun (2001); Melton et al. (1997)
19. Forensic Role Issues: Greenberg & Gould (2001); Greenberg & Shuman (1997)
20. Gender Issues in Custody: Cuthbert, Slote, Driggers, Mesh, Bancroft, & Silverman (2002); Warshak (1996)
21. High Conflict Families: Baris, Coates, Duvall, Garrity, Johnson, & LaCrosse (2001); Garrity & Baris (1994); Johnston & Campbell (1988); Johnston & Roseby (1997); Lamb (2002); Warshak (2001)
22. Interview and Observational Techniques: Hynan (1998); Poole & Lamb (1998)
23. Overnight Parenting Time: Biringen, Greve, Howard, Leith et al. (2002); Kelly & Lamb (2000); Warshak (2000a)

APPENDIX A (continued)

24. Nonresidential Parenting: Amato & Gilbreth (1999); Depner & Bray (1993); Lamb (1997; 2000)
25. Parental Alienation/Rejection: Bruch (2001); Clawar & Rivlin (1991); Gardner (2001); Kelly & Johnston (2001); Lee & Olesen (2001); Stoltz & Ney (2002); Sullivan & Kelly (2001); Warshak (2001)
26. Parenting Time: Kelly & Lamb (2000); Lamb (2002); Lamb & Kelly (2001)
27. Psychological Maltreatment of Children: Binggeli, Hart, & Brassard (2001); Briere, Berliner, Bulkley, Jenny, & Reid (2001); Faller (1999)
28. Psychological Testing in CCEs, Generally: Heilbrun (1995); Heinze & Grisso (1996); Medoff (2003); Otto, Edens, & Barcus (2000); Roseby (1995); Shuman (2002)
29. Psychological Testing with the MMPI-2: Bagby, Nicholson, Buis, Radovanovic, & Fidler (1999); Bathurst, Gottfried, & Gottfried (1997)
30. Psychological Testing with Other Personality Inventories: McCann, Flens, Campagna, Collman, Lazarro, & Conner (2001)
31. Psychological Testing with the Rorschach: Garb, Wood, Nezworski, Grove, & Stejskal (2001); Rosenthal, Hiller, Bornstein, Berry, & Brunell-Neuleib (2001); Weiner (2001)
32. Relocation Cases: Austin (2000a, 2000b); Braver, Ellman, & Fabricius (*in press*); Kelly & Lamb (2000); Wallerstein & Tanke (1996); Warshak (2000b)
33. Sexual Orientation and Issues in Custody and Parenting Time: Stacey & Biblarz (2001)
34. Standards of Evidence and Admissibility: Krauss & Sales (1999); Shuman & Sales (1999)
35. Third Party and Grandparent Parenting Time: Lassiter, Deater-Deckard, Dunn, & Davies (2002)

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Unreported Disposition

45 Misc.3d 1212(A), 3 N.Y.S.3d 285 (Table), 2014 WL 5471648 (N.Y.Sup.), 2014 N.Y. Slip Op. 51547(U)

J.F.D. v J.D.

Supreme Court, Nassau County October 17, 2014 45 Misc.3d 1212(A) 3 N.Y.S.3d 285 (Table) 2014 WL 5471648 2014 N.Y. Slip Op. 51547(U) [Unpublished Opinion]

This opinion is uncorrected and will not be published in the printed Official Reports.

*1 J.F.D., Plaintiff,

v.

J.D., Defendant.

XXXXXXX

Supreme Court, Nassau County

Decided on October 17, 2014

CITE TITLE AS: J.F.D. v J.D.

ABSTRACT

Parent, Child and Family

Custody

Disclosure—Forensic evaluator's raw data, recordings, notes, tests, test results, and all material relied upon and created during evaluation are discoverable by both parties and by attorney for children.

J.F.D. v J.D., 2014 NY Slip Op 51547(U). Parent, Child and Family—Custody—Disclosure—Forensic evaluator's raw data, recordings, notes, tests, test results, and all material relied upon and created during evaluation are discoverable by both parties and by attorney for children. (Sup Ct, Nassau County, Oct. 17, 2014, Goodstein, J.)

OPINION OF THE COURT

Jeffrey A. Goodstein, J.

The following papers were read on this motion:

Order to Show Cause, Affirmation and Affidavit in Support, andExhibits	1
Affirmation and Affidavit in Opposition	2
Reply Affirmation	3
Affirmation of Attorney for the Children	4

PROCEDURAL BACKGROUND

The Plaintiff ("Husband") brings this application seeking an order: a) directing Husband's former counsel, XX, Esq., to release the entire file maintained by his firm on Husband's behalf, as concerns the above-captioned matter, to Husband's current counsel, and b) directing the Court appointed forensic evaluator, XX, Ph.D., (the "Forensic Evaluator") to release her entire file in connection with her forensic evaluation, and the report issued further thereto, of the parties and their children to XX, M D , as a forensic expert retained on behalf of the Husband in connection with the above-captioned matter. The Defendant ("Wife") takes *2 no position as to branch "a)" but opposes Husband's request for the release of the Forensic Evaluator's entire file. The Attorney for the Children, Patricia M. Latzman, Esq., supports the Husband's request for the release of the Forensic Evaluator's entire file.

DISCUSSION

This matter is currently scheduled for trial regarding custody and finances on XXXXXX. The Husband submitted a Consent to Change Attorney form from his former counsel, XX, of XX & XX, (the "Firm"), to his present counsel, dated May 22, 2014. Since said date the Firm has refused to release the file and has a retaining lien until the outstanding balance of its fee is

paid. Husband argues that the file in the Firm's possession contains numerous original records, as well as copies of all motions, correspondence, and anything that has occurred in the last year of this litigation. Husband argues that without the complete file, he will be prejudiced as his attorneys will not be able to properly prepare for, and represent him appropriately at, the upcoming trial. As is a matter of course in many matrimonial actions, Husband disputes many of the fees owed to the Firm. Husband makes various allegations against the Firm's representation of him and alleges that since it was discharged for cause, the Firm has no right to a retaining lien on Husband's file.

One of the allegations is that XX provided a copy of the Forensic Report to his client, in direct contravention of the Stipulation for Release and Use of Forensic Reports and Order signed by XX himself and So-Ordered by the undersigned, which at the execution of same, was the rule in this Part regarding the release of forensic reports. [1]

Even in situations in which a retaining lien has been validly asserted, which Husband argues is not the case here, courts have still directed files to be turned over. When a litigant has shown an unrefuted or uncontroverted showing of exigent circumstances, the court will relegate the outgoing attorney to a charging lien on the proceeds of the action pursuant to Judiciary Law §475. (*see Katsaros v. Katsaros*, 152 AD2d 539 [2d Dept 1989]; *Pileggi v. Pileggi*, 512 NYS2d 142 [2d Dept 1987]). Here, as this matter is scheduled for trial to commence in approximately 1 month, and the seriousness of the custody issues, this Court deems it appropriate that Husband be provided his entire file immediately. Accordingly, it is hereby ORDERED that the Firm turn over their entire file with regard to this matter to the Husband within 10 days of service of this Decision and Order. Failure to do so as directed herein may be considered contempt of court and may expose the Firm to the possibility of the imposition of sanctions. It is further

ORDERED, that Husband and/or his counsel shall serve his former counsel, XX & XX, by overnight mail, return receipt requested.

FORENSIC FILE

In this case, the undersigned appointed the Forensic Evaluator to conduct a forensic examination regarding the parties and their children. The report provided by the Forensic Evaluator, (the "Forensic Report") was distributed to counsel for the parties as well as the Attorney for the Children pursuant to the Stipulation for Release and Use of Forensic Reports and Order in which this Court allowed the attorneys to receive the Forensic Report and discuss it with the parties, but not distribute the Forensic Report to the parties. Apparently, here, Husband's prior counsel provided him a copy of the report in direct violation of this Court's directives and rules. To rectify same, this Court permitted, by Order dated September 19, 2014, the Wife to review the Forensic Report in the presence of counsel, at counsel's office with an attorney present in the room with her, with the restriction that no notes or pictures be taken and no copies made. The circumstances surrounding this Forensic Report, as well as the instant motion for the release of the Forensic Evaluator's entire file has required this Court to conduct a close examination of the issue of discovery during custody litigation regarding forensic reports and the raw data, notes, and overall entire file maintained by forensic evaluators which are compiled during the course of the evaluation process.

The determination whether to direct a social or psychological evaluation in custody and visitation matters is within the sound discretion of the court. (*In the Matter of Elaine Sassower-Berlin v. Stephen Berlin*, 31 AD3d 771 [2d Dept 2006], citing *Kesseler v. Kesseler*, 10 NY2d 445 [1962]; *Matter of Farnham v. Farnham*, 252 AD2d 848 [3d Dept 1998]). Here, this Court made the determination that due to the custody and visitation issues, a forensic report was needed to assist the Court in its determination.

The best interest of the children is of paramount concern and consideration to the court in all custody determinations. (DRL §§ 70, 240(1), *Friederwitzer v. Friederwitzer*, 55 NY2d 89 [1982]; *Eschbach v. Eschbach*, 56 NY2d 167 [1982]). Before making a custody determination, the court should exercise every means possible to ensure it has all relevant information. (*see* CPLR 3101; *Burgel v. Burgel*, 141 AD2d 215 [2d Dept 1988]; *Ochs v. Ochs*, 193 Misc 2d 502 [Sup. Ct., Westchester County 2002]; *S.C. v. H.B.*, 9 Misc 3d 1110 (A) [Fam. Ct., Rockland County 2005])

As this Court pointed out in *J.C. v. A.C.*, decided on April 7, 2014 and published in the New York Law Journal on May 5, 2014, the forensic reports and the evaluation process as a whole in child custody matters are valuable tools which assist the trial courts in reaching a

determination of the best interests of the children. It is well settled law that "the recommendations of court-appointed experts are but one factor to be considered and are entitled to some weight (*see Baker v. Baker*, 66 AD3d 722 [2d Dept 2009]). Such opinions, however, are not determinative and must not be permitted to usurp the judgment of the trial judge." (*see Baker, supra*; *Matter of Nikolic v. Ingrassia*, 47 AD3d 819 [2d Dept 2008], *In the Matter of Sherry Pitt v. Scott Reid*, 111 AD3d 948 [2d Dept 2013]). In *J.C. v. A.C.*, (supra) this Court pointed out that the New York State Matrimonial Commission's Report to the Chief Judge of the State of New York dated February 2006, recommended a number *3 of elements which should be adhered to by forensic evaluators when conducting custody evaluations, and therein, this Court opined that those elements have become common, accepted standards expected to be performed during a forensic evaluation. Based upon the forensic report in *J.C. v. A.C.* and the standards not being met, this Court found that based upon the deviation from the accepted standards for forensic evaluations rendered the report and its recommendations completely invalid requiring the Court to appoint a new forensic evaluator and striking the report previously admitted into evidence during the trial.

Disclosure of the notes made and the data prepared by experts is routinely permitted in areas of the law. (*see e.g. People v. Almonor*, 93 NY2d 571 [1999]). Each counsel cited *Ochs* and argued that it supports their claim. In fact, even a recently published decision, *R.L. v. L.T.*, decided by Justice Susan M. Capeci (Supreme Court, Westchester County), published on October 3, 2014 in the New York Law Journal provides the reader with an analysis of the *Ochs* case and the standard which has routinely been followed by fellow Supreme Court and Family Court judges with regard to whether or not a Court should permit disclosure of the forensic evaluator's raw data including but not limited to notes, recordings, test data and testing materials. Justice Capeci recites the following:

Discovery is typically limited in custody cases because the potential for abuse is "so great" (*Garvin v. Garvin*, 162 AD2d 497 [2d Dept 1990]; *see also Lohmiller v. Lohmiller*, 118 AD2d 760 [2d Dept 1986]; *A.L. v. C.K.*, 21 Misc 3d 933 (Sup. Ct. Kings County 2008, Sunshine, J.]). Consistent with this limitation, New York courts have generally not allowed pretrial discovery of the notes, raw data and tests results of the forensic evaluator, absent special circumstances (*CP v. AP*, 32 Misc 3d 1210(A) [Sup. Ct, New York County 2011]; *Ochs v. Ochs*, 193 Misc 2d 502 [Sup. Ct., Westchester County 2002, Spolzino, J.]). Such "Special circumstances" would include a showing of bias on the part of the evaluator, or a deficiency in the report (*Ochs, supra*)."

In conducting its research with regard to this decision, the Court reviewed Bill A8342-2013 ("the Bill") proposed by Helene E. Weinstein, chair of the Assembly Standing Committee on the Judiciary. The Bill purports to amend Domestic Relations Law §§ 70 and 240, as they relate to court ordered forensic evaluations and reports in child custody and visitation proceedings. The justification for the Bill is set forth, in pertinent parts, as follows:

The limitations on access to the reports raise serious due process concerns including the inability of parents to adequately and effectively challenge the quality and trustworthiness of forensic reports that play a critical and often decisive role in shaping a court's decision about parental access to their children Thorough analysis of the reports including any defects therein requires a lot of time and even expert resources Since the parents are most familiar with the facts of their lives, they are best positioned to identify factual errors in the forensic reports Without the ability to thoroughly examine the report and challenge its contents, a litigant's right to a fair trial is severely *4 hampered. A parent's interest in the care, custody and management of his or her child/ren is one of the oldest and most fundamental liberty interests recognized by law. This right has also been recognized by the United State Supreme Court in its decision in Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054 (2000). In light of the interest at stake, it is important to afford parents and litigants in child custody and visitation cases due process protections and evidentiary safeguards However, under the proposal, at each step, the court has the ability to make a protective order limiting or conditioning access to the forensic report or the evaluator's file This proposal balances important due process rights against any countervailing concerns relating to a harmful impact on the child/ren subject to the litigation that may result from unfettered access to forensic reports and underlying data in child custody and visitation cases.

The Bill itself, proposes to make the following specific modifications, in pertinent parts:

Any report or evaluation prepared by the court ordered evaluator, to be known as a forensic report' for the purposes of this subdivision, shall be confidential and kept under seal except that, all parties, their attorneys and the attorney for the child shall have a right to receive a copy of any such forensic report upon receipt of such a report by the court, subject to the

provisions of section three thousand one hundred three of the civil practice law and rules. Provided, however, in no event shall a party or his or her counsel be prevented from access to or review of a forensic report in advance of and during trial to enable competent representation and trial preparation upon application by counsel or a party the court shall permit a copy of the forensic report and a copy of the court ordered evaluator's files as provided for under paragraph two of this subdivision to be provided to any person retained to assist counsel or any party.

Pursuant to a demand made under rule three thousand one hundred twenty of the civil practice law and rules, the court ordered evaluator shall provide to a party, his or her attorney or the attorney for the child the entire file related to the proceeding including but not limited to, all underlying notes, test data, raw test materials, underlying materials provided to or relied upon by the court ordered evaluator and any records, photographs or other evidence for inspection and photocopying. There shall be a rebuttable presumption that the court ordered evaluator's file related to his or her appointment, including all the aforementioned materials, is discoverable subject to the provisions of section three thousand one hundred three of the civil practice law and rules

A failure to comply with a court order conditioning a limiting access to a forensic report shall be contempt of court and may be punishable as such. The court shall notify the parties and counsel on the record that a failure to comply with the court order shall be contempt of court which may include punishment of a fine or imprisonment or both

It is beyond dispute that full disclosure of all relevant and material information has proven to be the surest method of sharpening the issue for trial and thereby presenting the trier of fact the best information available in the most efficient manner. The notes and raw data of a court appointed neutral forensic psychologist are certainly relevant and material to the issue of custody. It cannot be denied that providing such disclosure will be of assistance in preparing for trial, particularly to the party seeking to challenge the psychologist's conclusions. (*Ochs*, *supra*).

Ms. Latzman, the Attorney for the Children, argues that in order for the Court to be certain that the forensic report is unbiased and based upon good science rather than the prejudice of the evaluator, it is necessary to be provided with all supporting documents. She further argues that for the Court to properly consider the evaluation, it must determine whether tests were administered and whether those tests are adequate on scientific grounds, whether claims made by the evaluator have any basis in science, the empirical data relied on by the forensic in making her recommendations, and whether the interviews support her conclusions. "Without reviewing the raw data, it is impossible for the Court to make determinations regarding the appropriateness of the recommendations and without cross examination based upon this information, the Court will never have all the necessary information to make a proper determination."[2]

The Husband points out that he is simply seeking to have the raw data and notes released for his personal expert to review same to be able to prepare for cross examination. Husband is not requesting that the information be released to either party.

Wife argues that since the "potential for abuse in matrimonial and custody cases is great, the court has broad discretionary power to limit disclosure " (*Worysz v. Ratel III*, 101 AD3d 893 [2d Dept 2012]). In *Worysz*, the husband sought to compel disclosure of the mother's personal psychiatric records for the five (5) years leading up to the custody litigation. The Wife also cites to the case of *McDonald v. McDonald*, 196 AD2d 7 (2d Dept. 1994) where the husband sought disclosure of the wife's in vitro fertilization records in the context of a custody litigation. Neither of the appellate division cases relied upon by the Wife are analogous to the instant matter.

This Court disagrees with the standard established in *Ochs* which has, for the most part, been followed by the subsequent cases as set forth above. As times continue to change, so too must certain standards in the law. Specifically, this Court does not believe that "special circumstances" need to be present to direct the release of the raw data, notes and test results, or any other material which creates the forensic evaluator's entire file. This Court fails to understand how a party can show bias on the part of the evaluator or a deficiency in the report without the careful review of the raw data and notes of the forensic *5 evaluator. Otherwise, the litigator is limited to cross examination of the forensic evaluator and a forensic report without knowing which questions to ask and without being able to properly establish to the Court, the trier of fact in matrimonial cases, any deficiencies in the report or bias on the part of the evaluator. The Court is tasked with applying a certain amount of

weight to the conclusions in a forensic report, and it is the parties' job to bring any deficiencies in the report to the Court's attention and same cannot be properly completed, or attempted, without the raw data and notes available during trial preparation.

This Court fully agrees with the explanation of the summary of the Weinstein Bill. Specifically, this Court believes that there should be a rebuttable presumption of pre trial discovery of the forensic report and the evaluator's entire file, including raw data, notes, tests, test results and any other materials utilized and same should be provided in every case, unless a specific motion is made to restrain the release of those materials based upon a showing of substantial prejudice. This Court believes that the weight to be given to a forensic report must be measured, not only by the conclusions rendered, but by the process taken to reach those conclusions. Custody determinations are the most important and most difficult determinations which the Court is required to make, and restricting a proper cross examination by not allowing the raw data to be distributed could be detrimental to the best interests of the child and this Court's ultimate decision.

A party must be provided the opportunity to bring to the Court's attention, through extensive and proper cross examination, any issues with regard to the forensic report so the Court's determination is not only based on an edited version of the forensic evaluator's conclusions. This Court is keenly aware of the alleged effect this may have on forensic evaluators' concerns about lengthy cross examination into their thought process and how they reached their conclusion, but the utmost important task is for the Court to be provided with the most reliable data to make such decisions when it comes to custody. The same discovery issues and cross examinations occur for a forensic accountant, and the value of a business, or a party's enhanced earning capacity, means little when compared to a judge having to decide what he/she believes is in the best interests of a child, when that child's parents cannot come to that determination amongst themselves.

In addition, this Court likens the discovery of the raw data to the "Rosario" rule regarding pre-trial statements of witnesses in criminal cases. Prince-Richardson on Evidence, as edited by Professor Richard Farrell, Eleventh Edition, 1995, §6-413 states, in pertinent part, as follows:

Rosario imposes a clear obligation that "if the prosecution possesses or has the power to produce a statement of its prospective witness which relates to the substance of that witness' testimony, defense counsel must, in fairness, be given a copy because ordinarily counsel would have no knowledge of it and no other means of obtaining it.' *People v. Jones*, 70 NY2d 547. See also *People v. Haupt*, 71 NY2d 929. Incident to this obligation is the requirement of preserving statements in the possession *6 or control of the prosecution, including any preliminary notes made by police officers who later file formal reports based on those notes.

It is this Court's view that a forensic evaluator's raw data material clearly relates to the substance of that witness' testimony, which both counsel would be unaware of unless the raw data material is provided in advance of trial. Likewise, a police officer's preliminary notes, i.e., memo book entries, are discoverable in criminal cases and official, more formal, police reports are based upon those entries. The same is true for the raw data material gathered and utilized by a forensic evaluator, as their preliminary notes and test data are transformed into their forensic report. Further, as a litigant standing trial facing criminal charges is entitled to due process to protect his/her liberty interests, so too is a parent, as expressed in the Weinstein Bill, whose interest in the custody of his or her children is "one of the oldest and most fundamental liberty interests recognized by law" which is entitled to "appropriate due process protections and evidentiary safeguards."

Accordingly, it is this Court's belief that the forensic evaluator's raw data, recordings, notes, tests, test results, and all material relied upon and created during the evaluation process are discoverable by both parties and by the Attorney for the Children. Likewise, this Court, while coming to this decision, shall, from this day forward, allow the parties themselves to read the report, as well as the raw material. However, the parties shall not be provided a copy of the report or the raw materials, but will be allowed to review the report and raw materials in their attorney's office with an attorney present. They will be permitted to take notes, but will be precluded from taking photos and/or copies of the report and/or the raw data. This Court's orders appointing forensic evaluators for custody purposes will address the evaluator's responsibility to maintain and provide copies of all the raw data materials to the Court, which in turn, will provide same to counsel as set forth above with the signing of a Stipulation for Release and Use of Forensic Reports and Order as outlined above. Only in doing this can a party truly assist their counsel in preparing for an effective cross-examination.

Specifically for this case, the Husband's request for the raw material prepared and utilized by the Forensic Evaluator to be provided is GRANTED in that the Forensic Evaluator shall, within 10 days of the date of this Decision and Order provide this Court with 4 copies of her raw data and material. Once received by the Court, the Court shall notify counsel, who shall execute a confidentiality agreement, to be So-Ordered by the Court, allowing them to take a copy of the material, show it to the litigants, (only in counsel's office), allow the litigant to take notes, but not take any pictures or copies of any kind of the material, so they can assist with trial preparation.

Likewise, it is hereby ORDERED that Husband may provide a copy of the Forensic Evaluator's notes and raw material to his privately retained expert. However, said expert must execute a confidentiality agreement *7 likened to the one executed by counsel for the parties, which must be filed with the Court prior to the release of the report and/or the Forensic Evaluator's raw data.

Any other requested relief not specifically addressed herein is DENIED.

This is the Decision and Order of this Court.

Dated. October 17, 2014

Mineola, New York

ENTER:

_____

HON. JEFFREY A. GOODSTEIN,

A.J.S.C

FOOTNOTES

Footnotes

1 This Court's rules regarding parties' accessibility to forensic reports will be addressed in further detail below.

2 Affirmation of Attorney for the Children.

End of Document

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50 Misc.3d 892

Supreme Court, Westchester County, New York.

K.C. v. J.C.

Supreme Court, Westchester County, New York. December 10, 2015 50 Misc.3d 892 25 N.Y.S.3d 798 2015 N.Y. Slip Op. 25421 (Approx. 15 pages)

K.C., Plaintiff,

v.

J.C., Defendant.

Dec. 10, 2015.

Synopsis

Background: In consolidated matrimonial, custody, and visitation proceedings, plaintiff wife moved for release to her counsel and retained expert entire file of court-appointed forensic evaluator, and defendant husband moved for interim expert and counsel fees.

Holdings: The Supreme Court, Westchester County, Paul I. Marx, J., held that:
1 rebuttable presumption of pre-trial discovery of entire forensic file applies;
2 forensic evaluator's entire file was subject to discovery;
3 expert's affidavit was required to support motion for interim expert fees; and
4 reduction of requested interim counsel fees was warranted.

Plaintiff's motion granted; defendant's granted in part and denied in part.

West Headnotes (15)

Change View

1 **Child Custody** Discovery
Child Custody Presumptions
A rebuttable presumption of pre-trial discovery of the forensic report and the forensic evaluator's entire file, including raw data, notes, tests, test results, and any other materials utilized, applies in every child custody and visitation case, unless a specific motion is made to restrain the release of those materials based upon a showing of substantial prejudice.

2 **Child Custody** Weight and Sufficiency
Trial court must have access to good science and the most reliable data in making the critical determination of custody and visitation.

3 **Child Custody** Reports and recommendations
Child Custody Discovery
Full disclosure of all relevant and material information underlying a forensic report is the surest method of sharpening the child custody and visitation issue for trial and thereby presenting the trier of fact the best information available in the most efficient manner.

4 **Child Custody** Reports and recommendations
Child Custody Discovery
In custody and visitation proceedings, giving counsel and the parties' access to the notes and raw data underlying a forensic report is the surest means of uncovering any bias on the part of the evaluator and any deficiencies or errors in the report, particularly where such bias or deficiencies or errors may not be evident from the conclusions expressed in the report.

SELECTED TOPICS

Divorce

Alimony, Allowances, and Disposition of Property
Award of Attorney Fees

Child Custody
Child's Preference of Custodian
Question of Custody of the Children of Divorced Parents

Proceedings

Reserved Question of Child Custody

Secondary Sources

P230 ORDER OF BENEFIT DETERMINATION RULE 2: CHILD COVERED UNDER MORE THAN ONE PLAN

Coordination of Benefits Handbook ¶230

...The second order-of-benefit-determination (OBD) rule deals with children covered under more than one plan, who are always covered as a dependent under each of their parents' plans. Originally, the rule...

P270 QUALIFIED DOMESTIC RELATIONS ORDERS

The 401(k) Hdbk. ¶270

...A primary goal of the Employee Retirement Income Security Act of 1974 (ERISA) is to increase the security of retirement plans so that, when an employee retires, the benefits promised may be delivered...

P220 OTHER TYPES OF RESTRICTED PERSONAL DATA

Employer's Guide to HIPAA Privacy Requirements ¶220

...Many states have adopted laws that protect health information related to certain medical conditions, such as mental illness, communicable diseases, cancer, and HIV/AIDS. In addition, some federal laws...

See More Secondary Sources

Briefs

Brief of the Domestic Violence Project Inc./Safe House (Michigan); the Pennsylvania Coalition Against Domestic Violence, Inc.; the Florida Coalition Against Domestic Violence, the Iowa Coalition Against Domestic Violence, and the Missouri Coalition Against Domestic Violence as Amici Curiae in Support of Respondent.

1999 WL 1186737

Supreme Court of the United States
Dec. 13, 1999

...FN*Counsel of Record for Amici Curiae [Additional Counsel Listed Inside] Amici are comprised of various non-profit state organizations and coalitions dedicated to addressing the legal and societal probl...

Brief for Petitioner

1950 WL 78460
Cornelia HARRIS, petitioner, v.
COMMISSIONER OF INTERNAL REVENUE.
Supreme Court of the United States
Sep. 09, 1950

5 Child Custody ⇐ Reports and recommendations
Child Custody ⇐ Discovery
Neutral court-appointed forensic evaluator's entire file, including his underlying notes, test results, and raw data used to prepare his report, were subject to discovery in order to determine children's best interests in custody and visitation proceedings and to allow parties to identify and address any factual errors; parties' relationship to each other or to their two children was unlikely to be further damaged by disclosure of raw data underlying evaluator's report to any greater extent than observations and conclusions made in report itself, and any damage to those already fraught relationships was dwarfed by substantial benefit to trial court in obtaining full understanding of report and evaluator's process in reaching his conclusions.

6 Child Custody ⇐ Reports and recommendations
Child Custody ⇐ Discovery
Child custody determinations should not be made based upon a black box; rather, all of the information underlying a neutral forensic evaluator's report, which is unquestionably relevant and material, must be provided to the parties' counsel, who must be fully equipped to cross-examine the evaluator and establish for the trial court, as trier of fact, the credibility and reliability of the opinions and conclusions expressed by the evaluator.

7 Child Custody ⇐ Reports and recommendations
Trial court is not required to base its child custody determination solely on the neutral forensic evaluator's report, which must never usurp the court's judgment; however, the report is a significant factor to be considered by the court, along with all of the evidence and any testimony from other experts that may be presented by the parties.

8 Divorce ⇐ Authority and discretion of court
The decision to award expert witness fees in a matrimonial action is within the sound discretion of the trial court.

9 Divorce ⇐ Particular services
Awards of expert witness fees should not be made routinely in a matrimonial action; instead, there should be a detailed showing of the services to be rendered and the estimated time involved.

10 Divorce ⇐ Affidavit, summary or itemization
The request for expert witness fees in a matrimonial action must be supported by an affidavit from the expert; absent affidavits from the expert witnesses at issue, the trial court lacks a sufficient basis to grant a motion for the award of such fees.

11 Divorce ⇐ Affidavit, summary or itemization
In matrimonial action, husband's request for award of interim expert fees in amount of $12,500 was required to be supported by expert's affidavit setting forth services to be rendered and estimated time involved, rather than affidavit of husband attesting to purpose for retaining expert and services he would perform, since husband had no personal knowledge of expert's services or amount of time he needed to perform those services.

12 Divorce ⇐ Authority and discretion of court
Divorce ⇐ Temporary and pendente lite awards
In a matrimonial action, trial court may award interim counsel fees to the non-monied spouse, in its discretion, based upon the equities and circumstances of the case. McKinney's DRL § 237(a).

Divorce ⇐ Financial condition and resources in general

...The opinion of the Court of Appeals (R. 24, 28) is reported in 178 F. 2d 861, 864. The opinion of the Tax Court (R. 3, 9) is reported in 10 T. C. 741, 748. The judgment of the Court of Appeals was ente...

BRIEF FOR RESPONDENTS

1999 WL 1146868
In Matter of Visitation of Natalie Anne Troxel, Isabelle Rose Troxel; Jenifer Troxel, Gary Troxel v. Tommie Granville; Tommie Granville Wynn
Supreme Court of the United States
Dec. 13, 1999

...The court may order visitation rights for a person other than a parent when visitation may serve the best interest of the child whether or not there has been any change of circumstances. A person other...

See More Briefs

Trial Court Documents

USA, v. MAALI, et al.

2005 WL 6073854
USA, v. MAALI, et al.
United States District Court, M.D. Florida
Sep. 08, 2005

...The defendant was found guilty on Counts 54, 56, 57, 58, 59-71 of the Third Superseding Indictment. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses. The de...

In re Red Mountain Machinery Co.

2011 WL 4053792
In re RED MOUNTAIN MACHINERY COMPANY, EIN: 86-0551713, Debtor
United States Bankruptcy Court, D. Arizona.
Sep. 06, 2011

...IT IS HEREBY ADJUDGED and DECREED this is SO ORDERED. The party obtaining this order is responsible for noticing it pursuant to Local Rule 9022-1. <<signature>> RANDOLPH J HAINES U.S. Bankruptcy Judge...

U.S. v. Bedenfield

2017 WL 8813001
UNITED STATES OF AMERICA, v. Rodney BEDENFIELD.
United States District Court, N.D. Illinois.
Feb. 27, 2017

...Date of Original Judgment: (Or Date of Last Amended Judgment) Reason for Amendment: Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2)) Reduction of Sentence for Changed Circumstances (F...

See More Trial Court Documents

13 Divorce ⇨ Temporary and pendente lite awards
An award of interim fees is generally warranted in a matrimonial action where there is a significant disparity in the financial circumstances of the parties; an award of interim counsel fees ensures that the non-monied spouse will be able to litigate the action and do so on equal footing with the monied spouse. McKinney's DRL § 237(a).

14 Divorce ⇨ Grounds and Considerations for Award or Amount in General
Divorce ⇨ Temporary and pendente lite awards
In determining the amount of an interim award of counsel fees in a matrimonial action, the trial court need not undertake the kind of detailed inquiry needed to make a final award of fees at the conclusion of the case; thus, the court need not consider the relative merit of the parties' positions, the nature and extent of services rendered, or other factors relevant to a final award. McKinney's DRL § 237(a).

15 Divorce ⇨ Grounds and Considerations for Award or Amount in General
Divorce ⇨ Temporary and pendente lite awards
Husband's requested $50,000 award of interim attorney fees, as non-monied spouse in matrimonial action, would be reduced to award of only $25,000, where husband was required to have "some skin in the game," and he had other income sources including wherewithal to increase his income. McKinney's DRL § 237(a).

Attorneys and Law Firms

***800** McCarthy Fingar LLP, White Plains (Dolores Gebhardt of counsel), for plaintiff.

Guttridge & Cambareri, P.C., White Plains (Jo-Ann Cambareri and John C. Guttridge of counsel), for defendant.

Stephen K. Metz, White Plains, Attorney for the Children.

Opinion

PAUL I. MARX, J.

***893** It is ORDERED that the motions are disposed as follows.

BACKGROUND
The parties were married on July 26, 2003. There are two children of the marriage: O. C., born ——, 2004, and M. C., born ——, 2007. The parties and children reside in the marital residence in Cross River, N.Y. Defendant occupies a separate apartment within the marital residence. ***801** The parties agreed to joint legal custody and shared residential custody on a temporary basis, in order to resolve their competing Family Offense petitions and to dissolve their cross Orders of Protection. Order to Show Cause, Interim So–Ordered Stipulation (Hon. Michelle I. Schauer, J.F.C.), Exhibit A.

On September 15, 2014, Plaintiff filed the instant action for dissolution of the parties' marriage based upon irretrievable breakdown of the relationship, pursuant to Domestic Relations Law ("DRL") § 170(7). On October 21, 2015, Defendant filed a Verified Answer and Counterclaim for divorce on the same grounds.

Plaintiff is approximately 45 years old. She is the Chief Executive Officer of K.R., Inc. in Connecticut. Her gross income in 2014, as reflected on her W–2, was $563,098.55. She holds a Master in Business Administration, earned prior to the marriage.

***894** Defendant is approximately 44 years old. He is a Consultant/Account Manager for an Insurance Company. His total gross income in 2014, as reflected on his W–2 forms, was $86,785.48.[1]

On January 12, 2015, the parties and counsel appeared for a conference before Court Attorney Referee Laurie Sullivan. Referee Sullivan recommended consolidation of the parties' custody and visitation proceeding in the Family Court with the instant action. The Referee also recommended that the Attorney for the Children appointed in Family Court be

appointed to represent the children in this Court and that a psychologist be appointed to conduct a forensic evaluation of the parties and their children.

The Court ordered consolidation of the custody and visitation proceeding then pending in Family Court with the instant matrimonial action. Consolidation Order dated January 12, 2015. By Order dated January 13, 2015, the Court appointed Marc S. Mednick, Ph. D., DABPS to conduct a forensic evaluation. By Order of the same date, the Court appointed Stephen Kmetz, Esq. as privately paid Attorney for the Children.

On September 9, 2015, the parties and counsel appeared for a conference before Referee Sullivan. In accordance with the Westchester Supreme Court Matrimonial Part Operational Rules,[2] Plaintiff requested authorization to move for the release of the forensic evaluator's entire file. Referee Sullivan issued Rule E authorization to Plaintiff. On the same date, *895 Referee Sullivan issued separate Rule E authorization to Defendant to move for expert and interim counsel fees.

**802 DISCUSSION

Release of Forensic Evaluator's File

Plaintiff moves for the release to her counsel and retained expert of the entire contents of the Court-appointed forensic evaluator's file, including the notes, test results and raw data used to prepare his report. Plaintiff asserts that the law concerning the release of a forensic evaluator's underlying notes and data is evolving, with the trend moving toward release of such information being "mandatory." She notes that there are no Appellate Division decisions on the issue and argues in favor of abandoning the overly restrictive "special circumstances" standard which generally has been applied by trial courts in the Second Department. Plaintiff contends that even if the Court applied the "special circumstances" standard, disclosure of the underlying notes and data is warranted because of the numerous deficiencies in Dr. Mednick's report. Plaintiff claims that Dr. Mednick's report is "weak, poorly organized ... and ... fails to make definitive conclusions or recommendations." Affirmation of Dolores Gebhardt, Esq. at ¶ 7. Plaintiff argues further that the conclusions and recommendations made in the report "are unexplained and seemingly unsupported by data."[3] *Id.* She identifies at least ten specific deficiencies, among them that the report indicates bias against her client by severely criticizing aspects of her personality without examining whether the characteristics he criticizes have any impact on her parenting skills. Plaintiff contends that access to Dr. Mednick's notes and data will assist the parties with settlement and allow their counsel to better prepare for trial if no settlement is reached.

Defendant objects to the release of Dr. Mednick's file, contending that "Plaintiff has not demonstrated any special circumstances that warrant its release. Defendant claims that "Plaintiff has not demonstrated a single reason much less any special circumstances' to warrant the release of the file ...". Affirmation of Jo–Ann Cambareri, Esq. in Opposition at ¶ 2. Defendant points out certain contradictions in Plaintiff's position. For example, Defendant asserts that Plaintiff's counsel states in *896 her affirmation both that Dr. Mednick is biased against her client and that he has "labeled both parties in unflattering ways." Defendant contends that if Plaintiff's characterization of Dr. Mednick's labeling is true, it tends to indicate a lack of any bias on the part of the forensic evaluator. Defendant contends further that if the report shows any bias, the bias is against him. Defendant references Dr. Mednick's statements in the report about his alcoholism, suicide attempt, possible neurological problems and possible lack of appropriate boundaries with the parties' 11 year-old daughter. Defendant argues that Plaintiff can adequately pursue the deficiencies she identified in the report upon cross-examination of Dr. Mednick at trial. Defendant advocates withholding the underlying data, because he believes its release will exacerbate the parties' difficulties co-parenting their child and only prolong the litigation. *Id.* at ¶ 3–4.

The reported decisions governing the release of a forensic evaluator's file are exclusively trial court decisions. The Appellate Division has yet to examine this particular issue. The case law in this area began with *Feuerman v. Feuerman*, 112 Misc 2d 961, 447 N.Y.S.2d 838 [Sup Ct., Nassau County 1982], which held that the underlying information was not relevant and its disclosure was not material or necessary for the party's private psychiatrist **803 to make an individual evaluation and recommendation. Further, the court determined that the test results and other data was not material, necessary or proper for the "purpose of having [a] private psychiatrist determine whether [the evaluator] had sufficient objective justification for their conclusions and recommendations', for that is the function of the trial court based upon all of the evidence and testimony taken at the trial." *Id.* at 965, 447 N.Y.S.2d 838. Moreover, the court determined that the party's psychiatrist could conduct

similar tests to those performed by the evaluator and present their "own findings and evaluations to the court at the time of trial." *Id.* The court opined that a trial subpoena to the evaluator directing that any notes, test results and other supporting data be brought to trial would suffice.

Decades later, *Feuerman* was followed by *Ochs v. Ochs*, 193 Misc.2d 502, 749 N.Y.S.2d 650 [Sup Ct., Westchester County 2002], which noted the court's concern in *Feuerman* that making the test results and notes available before trial might undermine the effectiveness of the evaluation. The court in *Ochs* also noted the sensitivity of custody determinations and some of the limitations *897 that courts have placed upon discovery in this area. *Id.* at 507–508, 749 N.Y.S.2d 650 (noting with citations to authority that depositions are generally not allowed on custody issues; bills of particulars are not allowed to be demanded; limits on access to a party's medical records; strict control of additional psychological testing; and the restrictions on access to forensic reports). The court held that the party seeking disclosure of the forensic evaluator's file must show something more than mere displeasure with the forensic report; disclosure "should be granted only upon a showing, on the basis of the report itself or through extrinsic evidence, of special circumstances, such as a deficiency in the report, a potential bias or other cause." *Id.* at 510, 749 N.Y.S.2d 650. Notably, the court stated that discretion must be exercised "in each case so as to balance the benefit to be achieved by permitting such disclosure against the detriment it causes." *Id.*

Ochs has been followed by trial courts in the First and Second Departments. In *CP v. AP*, 32 Misc.3d 1210(A), 2011 WL 2651798 [Sup.Ct., New York County 2011], the court followed *Ochs* closely, finding no special circumstances to warrant pre-trial disclosure of the underlying basis of the court-appointed neutral forensic evaluator's report. The circumstances alleged by the wife, who sought release of the forensic evaluator's file, were that it was needed for trial preparation and because the forensic evaluator would be available on only one of the two dates set for trial. In support of her request, the wife offered the 2006 report of the New York State Matrimonial Commission, recommending that the forensic evaluator's report be subject to all available discovery devices for probing the basis for the report. The court noted that the Commission's report recognized that its recommendation for full disclosure of the forensic's file did not conform to existing case law on that issue. The court denied access to the file in advance of trial. Indeed, the court may have gone even one step further by applying the pre-trial standard to access at trial when it held that the evaluator's notes and test results could be produced at trial only if there was a sufficient showing of bias or other reason that called into question the reliability of the report. *Id.* at *4.

The court in *R.L. v. L.T.*, 3406–12, NYLJ 1202672096267 [Sup.Ct., Westchester County 2014], was similarly unpersuaded by the father's request in that case for access to the forensic evaluator's entire file. In addition to claiming that the entire file was needed to prepare for cross- **804 examination at trial, *898 the father contended that the forensic evaluator did not use accepted psychological testing methods and reached her conclusions without a proper basis. The court denied access, relying upon the specific finding in *Ochs* that such access could have a deleterious effect on the parties' relationship. The court also concurred with *Ochs* ' assessment of the evaluator's underlying notes, finding little value in the " unfiltered, immediate impressions of the psychologist, jotted down in haste." *Id.* at *4 (quoting *Ochs, supra*, at 509, 749 N.Y.S.2d 650). The court held that the father did not identify "any particular bias on the part of the evaluator" and his contention about the testing methodology merely threatened to turn the trial into a long and costly critique of the methodology utilized by the evaluator. Accordingly, the court found no special circumstances to justify the father's access to the file.

In *S.C. v. H.B.*, 9 Misc.3d 1110(A), 2005 WL 2276666 [Family Ct., Rockland County 2005], the court also followed *Ochs*. The court took an interesting approach based upon the peculiar facts of that case and ordered only partial disclosure of the evaluator's file. The court began its analysis by stating that "[c]ross-examination of the expert and rebuttal testimony that is based on a full critique of the evaluation and careful analysis of the facts, which form the basis for his conclusions, would aid the court in evaluating the scientific validity of said conclusions, and would be greatly facilitated by thorough pre-trial disclosure." *Id.* at *1 (citing *Ochs* and Timothy M. Tippins, Custody Evaluations, Part 4: Full Disclosure Critical, N.Y.L.J., January 15, 2004, 3 (col. 1)). Rather than apply *Ochs* wholesale, the court considered the types of information contained in the evaluator's file and found that certain records in the file did not implicate the concerns expressed in *Ochs*. Specifically, the court ordered disclosure of the parties' Department of Mental Health Forensic Unit Questionnaires and the records of the respondent's admission to Good Samaritan Hospital Frawley Unit and

psychiatric treatment, which had been provided to the forensic evaluator, the petitioner's privately retained psychiatrist and his attorney. Such information did not pose any danger of revealing the forensic evaluator's thoughts and perceptions and any physician-patient privilege that applied to the documents had been waived by respondent actively contesting custody and making the information available to the evaluator. However, *899 consistent with *Ochs*, the court declined to order disclosure of the forensic evaluator's notes and memoranda.

The weight of authority on this issue adheres to the special circumstances standard set forth in *Ochs*. However, another view has emerged from the trial court in Nassau County from which *Feuerman* hails. The court in ***J.F.D. v. J.D.*, 45 Misc 3d 1212(A), 2014 WL 5471648 [Sup.Ct., Nassau County 2014]**, adopted the recommendation of Bill A8342–2013,[4] which proposed amending Domestic Relations Law §§ 70 and 240 to allow disclosure, pursuant to a demand made under CPLR § 3120, of a forensic evaluator's entire file, including raw data, notes, tests and test results. The court did not lightly deviate from the special circumstances standard established by *Ochs* and followed by other trial courts. However, the court determined **805 that changing times signaled a need for a different standard in the law related to this issue. Following a thorough analysis of the case law, the proposed legislation and the views of the New York State Matrimonial Commission expressed in its Report to the Chief Judge of the State of New York dated February 2006, the court held that a "rebuttable presumption" standard allowing full disclosure of the forensic evaluator's entire file was warranted. The court relied upon the recommendation in the proposed Bill and the general acceptance in the field of the standards for forensic evaluators' reports set forth in the Matrimonial Commission's Report. In addition, the court noted the routine permission granted by courts in other areas of the law for access to the notes and data prepared by experts. *Id.* at *3 (citing *e.g.*, *People v. Almonor*, 93 N.Y.2d 571, 693 N.Y.S.2d 861, 715 N.E.2d 1054 [1999]). The court also gave weight to the due process concerns of parents regarding the utmost important issue of the custody of their children. *Id.* at *6.[5] Finally, the court considered its critical need for the most reliable information to render an appropriate and just determination of custody that is in the best *900 interests of the child. *Id.* at *5 ("Custody determinations are the most important and most difficult determinations which the Court is required to make, and restricting a proper cross examination by not allowing the raw data to be distributed could be detrimental to the best interests of the child and this Court's ultimate decision.").

1 2 3 4 This Court is persuaded by the court's rationale in *J.F.D. v. J.D.*, *supra*, for applying "a rebuttable presumption of pre-trial discovery of the forensic report and the evaluator's entire file, including raw data, notes, tests, test results and any other materials utilized ... in every case, unless a specific motion is made to restrain the release of those materials based upon a showing of substantial prejudice." *Id.* at *5. It is beyond cavil that this Court must have access to good science and the most reliable data in making the critical determination of custody and visitation. Further, "[i]t is beyond dispute that full disclosure of all relevant and material information has proven to be the surest method of sharpening the issue for trial and thereby presenting the trier of fact the best information available in the most efficient manner." *Id.* at *4. Giving counsel and the parties' access to the underlying notes and raw data is undoubtedly the surest means of uncovering any bias on the part of the evaluator and any deficiencies or errors in the report, particularly where such bias or deficiencies or errors may not be evident from the conclusions expressed in the report.

5 Running throughout the decision in *Ochs* and forming the basis for the "special circumstances" standard established in that case, is a concern that subjecting the neutral forensic evaluator's report to the usual devices of the adversarial process will prove harmful to the parties' relationship with their children and defeat the beneficial result the report is meant to achieve. *Ochs*, *supra*, at 506–509, 749 N.Y.S.2d 650. This Court is hard pressed to find that the parties' relationship to each other or to their child in this or any custody proceeding is likely to be further damaged by disclosing the raw data which **806 underlies the forensic evaluator's report to any greater extent than the observations and conclusions made in the report itself. The degree to which any damage may occur to these already fraught *901 relationships is dwarfed by the substantial benefit to the Court in obtaining a full understanding of the forensic report and the process used by the evaluator to reach its conclusions, so that the Court may determine the best interests of the children.

6 There is no reasonable justification to withhold such critical information from counsel and the parties. Without full disclosure, any factual errors that may form the basis for the forensic evaluator's opinions and conclusions will never come to light. By allowing full

disclosure, the parties, who are in the best position to identify any factual errors, will have the opportunity to find and address such errors with their counsel and/or a privately retained expert. Custody determinations should not be made based upon a black box. All of the underlying information, which is unquestionably relevant and material, must be provided to counsel, who must be fully equipped to cross-examine the forensic evaluator and establish for the Court, as trier of fact, the credibility and reliability of the opinions and conclusions expressed by the neutral forensic evaluator.

The Court also disagrees with the court's conclusion in *Ochs* that full disclosure will "[turn] the litigation into a lengthy and expensive critique of the [forensic evaluator's] methodology, rather than a test of the conclusions themselves." *Id.* at 509, 749 N.Y.S.2d 650. On the contrary, the conclusions expressed in the report cannot be fully tested and proven to be sound without full disclosure of the underlying raw data and materials that led the forensic evaluator to arrive at those conclusions. In addition, deferring full disclosure to the time of trial is more likely to generate a request for delay so that an individual expert can be engaged to render an opinion once the underlying data has been obtained by counsel. Such delay is antithetical to the requirement set forth in the rules of the court and the Matrimonial Part Rules that trials in matrimonial actions, and custody trials in particular, be conducted day to day until concluded. Uniform Civil Rules for the Supreme Court and the County Court, 22 NYCRR § 202.16(*l*); Westchester Supreme Court Matrimonial Part Operational Rules, Rule G(2).[6]

Data, by its nature, is capable of multiple interpretations, or, perhaps, error, mathematical or otherwise. Thus, it is important *902 for all parties to have the same data to evaluate. The alternative would be to require the parties to submit to multiple examinations by evaluators on all sides, the approach favored by *Feuerman*. Not only would this be duplicative, time wasting and expensive, it may lead to different data being evaluated by the psychologists for the competing sides. Thus, this Court believes that full disclosure is preferable, even at the expense of the fantasy espoused by *Ochs* that non disclosure will aid in healing the rifts between the parties and enhance their ability to co-parent. Simply put, the full light of truth cannot be shined on the custody issue without all parties having full and advance access to relevant data with which they can devise strategy and evaluate their positions.

7 An unguided cross-examination (akin to an examination before trial being conducted during the trial) is more likely **807 to lengthen the proceedings while counsel seeks to divine the basis for the conclusions in the report. How can the Court rely on a report that is essentially a black box into which the only light that may be shone comes from a searching rather than a piercing cross-examination? It cannot. While the forensic evaluator is selected by the Court, if the forensic report is never thoroughly tested, the Court proceeds on blind faith and its own divinations. The paramount importance of custody determinations and their sensitivity require a more informed inquiry. Clearly, if the opinions of the neutral evaluator cannot survive the scrutiny provided by a fully informed cross-examination, then the Court should not rely on such flawed opinions.[7]

Accordingly, this Court agrees with and adopts the rebuttable presumption standard in favor of full disclosure of the neutral forensic evaluator's entire file.[8] Adequate protection is afforded *903 in the unusual case by the ability of a party or the expert to seek a protective order from the Court.[9]

The Court further agrees that the neutral forensic evaluator's file shall be made available to the parties and counsel in the same manner in which they are provided access to the forensic report. Therefore, the forensic evaluator shall provide the Court with a copy of the entire contents of his file in this case and copies for all counsel, within 10 days of this Decision and Order. Upon the Court's receipt of a copy of the file, it will notify all counsel, who shall execute a confidentiality affidavit, allowing them to obtain a copy of the file, show it to their clients (only in counsel's office), allow the client to take notes, but not pictures or copies of any kind, for purposes of assisting with trial preparation. Counsel may provide a copy of the file to an expert privately retained by them to review and assess the forensic evaluator's report, who shall execute a confidentiality affidavit similar to the one executed by counsel, prior to receipt of the forensic evaluator's file. Counsel shall file his/her confidentiality affidavit with the Court prior to the release of the file. Counsel shall file the expert's confidentiality affidavit with the Court prior to releasing the file to the expert.

Interim Expert Fees

Defendant moves for an award of interim expert fees in the amount of $12,500 to be paid by certified check to him from Plaintiff, without prejudice to further application for such fees at

the custody trial. Defendant contends that Plaintiff is the monied spouse and that he is unable to afford to retain an expert to review the forensic evaluator's report. Defendant seeks to be put on a level playing field with Plaintiff, who has already retained her own forensic evaluator.

Plaintiff concedes that she is the monied spouse, but claims she cannot afford to pay Defendant's expert fees. Despite her considerable salary, Plaintiff asserts that she has "a total of $2,014.23 in the bank." Affidavit of K.C. in Opposition at ¶ 8. She claims that her salary is subsumed by the ***808** family's living expenses. Her net worth statement shows that she is paying $11,508 per month towards the mortgage, homeowner's association fees, real estate taxes and a home equity loan. She claims that the family's expenses total almost $24,000 per month and Defendant contributes only $2,000 per month, although she acknowledges ***904** that the allocation was agreed to by her. Pursuant to the parties' So –Ordered Pendente Lite Stipulation, dated November 20, 2014, Plaintiff agreed to continue paying the majority of the families' expenses *pendente lite*, while Defendant pays $2,000 per month and the monthly premiums on his life insurance policies. Plaintiff claims that the parties are "house poor." She asserts that she is funding the litigation with loans from her father. She supports this assertion with copies of promissory notes. She suggests that Defendant has similar funding sources. She proposes that he borrow money from his own parents, who are alleged to be millionaires, or take loans against his 401(k). In addition, she contends that Defendant works part-time ("less than 40 hours per week") and can increase his income by working more hours.

8 9 10 The decision to award expert witness fees in a matrimonial action is within the sound discretion of the trial court. *Avello v. Avello*, 72 A.D.3d 850, 852, 899 N.Y.S.2d 337 [2nd Dept.2010]. Awards of expert witness fees should not be made routinely. *Id.* Instead, there should be "a detailed showing of the services to be rendered and the estimated time involved." *Id.* (citing *O'Donnell v. O'Donnell*, 2 A.D.3d 604, 604, 769 N.Y.S.2d 282 [2nd Dept.2003]; *Ahern v. Ahern*, 94 A.D.2d 53, 56, 463 N.Y.S.2d 238 [2nd Dept.1983]). The request for expert witness fees must be supported by an affidavit from the expert. "Absent affidavits from the expert witnesses at issue, the Supreme Court lacks a sufficient basis to grant a motion for the award of such fees." *Avello, supra*, at 852, 899 N.Y.S.2d 337 (citing *O'Donnell, supra*, at 604, 769 N.Y.S.2d 282 and *Corrao v. Corrao*, 209 A.D.2d 573, 574, 619 N.Y.S.2d 647 [2nd Dept.1994]).

11 Defendant provided a copy of his expert's *curriculum vitae*, Order to Show Cause for Expert and Interim Counsel Fees, Vita of Peter Joseph Favaro, Ph. D., Exhibit I, and retainer agreement, Reply Affidavit, Exhibit N. Conspicuously absent from Defendant's submissions is any affidavit from the expert setting forth "the services to be rendered and the estimated time involved", as required. *Avello, supra*, at 852, 899 N.Y.S.2d 337. Although Defendant attests in his own affidavit to the purpose for retaining Dr. Favaro as an expert and the services he will perform, Defendant has no personal knowledge of these services or the amount of time it will take to perform them. Defendant must provide an affidavit from the expert.

Accordingly, the Court denies the branch of Defendant's motion requesting expert fees. However, expert fees may be necessary in order that Defendant may utilize Dr. Favaro to review the raw data and other materials upon which Dr. Mednick ***905** based his expert report. Therefore, Defendant may renew his application within 30 days hereof, upon proper papers making the required detailed showing of the work his expert will be perform and the expert's estimate as to the amount of time it will take him to perform his work.

Interim Counsel Fees

Defendant moves for interim counsel fees in the amount of $50,000 in order for counsel to prepare for and conduct the custody trial. Defendant contends that Plaintiff is the monied spouse. Plaintiff concedes that she is the monied spouse.

12 13 The Court may award interim counsel fees, in its discretion, pursuant to DRL Section 237, based upon the equities ***809** and circumstances of the case. *Isaacs v. Isaacs*, 71 A.D.3d 951, 897 N.Y.S.2d 225 [2nd Dept.2010]; *Morrissey v. Morrissey*, 259 A.D.2d 472, 473, 686 N.Y.S.2d 71 [2nd Dept.1999]. DRL Section 237(a) provides that "[t]here shall be [a] rebuttable presumption that counsel fees shall be awarded to the less monied spouse." An award of interim fees is "generally warranted where there is a significant disparity in the financial circumstances of the parties." *Prichep v. Prichep*, 52 A.D.3d 61, 65, 858 N.Y.S.2d 667 [2nd Dept.2008] (citations omitted). "An award of interim counsel fees ensures that the nonmonied spouse will be able to litigate the action, and do so on equal footing with the monied spouse." *Id.*

14 In determining the amount of an interim award of counsel fees, the Court need not undertake the kind of detailed inquiry needed to make a final award of fees at the conclusion of the case. *Prichep, supra*, at 65, 858 N.Y.S.2d 667. Thus, the Court need not consider the relative merit of the parties' positions, the nature and extent of services rendered, or other factors relevant to a final award. *Id.* at 65, 858 N.Y.S.2d 667.

15 Defendant is clearly the non monied spouse. As such, Defendant is entitled to an award of interim counsel fees to litigate the action on an equal footing with Plaintiff. Nonetheless, the Court agrees that Defendant must have "some skin in the game" and that he has other income sources, including the wherewithal to increase his income. Defendant may well be justified in choosing to litigate custody where he seeks greater access to his children than Plaintiff is willing to allow. Indeed, the parties' positions are so far apart that they have been unable to close the yawning chasm between them on this issue. The forensic report does not fully support Defendant's position. Nor does the report fully support Plaintiff's position. It is in the **906* best interest of the children and the parties themselves to find the middle ground. The Court urges them to do so. [10]

Accordingly, the Court awards Defendant counsel fees in the sum of $25,000. Plaintiff is directed to pay that amount directly to Defendant's counsel within 60 days of the date of this Decision and Order.

All Citations

50 Misc.3d 892, 25 N.Y.S.3d 798, 2015 N.Y. Slip Op. 25421

Footnotes

1 Defendant states in his affidavit in support of his motion for fees that his gross pay in 2014 was $88,685. He references the three W–2's issued to him from MetLife, which provide the following amounts: $76,663.18, $8,762.30 and $1,360. The total of these amounts is $86,785.48.

2 The Operational Rules of the Westchester County Supreme Court Matrimonial Part require that

> "[f]or pre-note of issue cases, except in the event of an emergency that requires immediate relief from a Matrimonial Part Justice, no motions are to be made without the movant first requesting a pre-motion conference and without the holding of a pre-motion conference, unless the motion seeks to vacate or modify a recommended order." Westchester Supreme Court Matrimonial Part Operational Rules E(1).
>
> "If the motion is made following a pre-motion conference, the Rule E Motion Compliance Sheet shall be signed by the court attorney-referee and shall set forth the relief that may be requested in the motion(s) and the motion briefing schedule. The movant may not seek any other relief other than that authorized by the court attorney-referee at the pre-motion conference and specified in the Rule E Motion Compliance Sheet." *Id.* at E(6).

3 The Court does not agree with Plaintiff's counsel's characterizations of Dr. Mednick's report, but given the Court's decision, counsel's assertions are irrelevant.

4 Bill A8342–2013 was proposed by Helene E. Weinstein, chair of the Assembly Standing Committee on the Judiciary, to amend DRL §§ 70 and 240 to allow disclosure of the evaluations and reports of court ordered forensic evaluators in child custody and visitation proceedings, including the entirety of the evaluator's file containing notes, test data, raw test materials and any other materials relied upon by the evaluator in creating the final report submitted to the court.

5 The court even analogized to the "Rosario" rule in criminal cases, which requires the prosecution to disclose exculpatory information, such as pre-trial statements of witnesses, to the defense. *J.F.D. v. J.D., supra*, at *6 (referencing *People v. Rosario*, 9 N.Y.2d 286, 213 N.Y.S.2d 448, 173 N.E.2d 881 [1961]). The court also noted that preliminary notes made by police officers prior to preparing their formal report are discoverable in criminal cases. *Id.*

6 22 NYCRR § 202.16(/) provides, in relevant part, that "[h]earings or trials pertaining to temporary or permanent custody or visitation shall proceed from day to day to conclusion...."; Matrimonial Part Rule G(2) provides that "[a]ll matrimonial trials and hearings shall proceed day-to-day until conclusion."

7 The Court is well aware that it is not required to base its custody determination solely on the neutral forensic evaluator's report, which must never usurp the Court's judgment. The report is, however, a significant factor to be considered by the Court, along with all of the evidence and any testimony from other experts that may be presented by the parties. *J.F.D. v. J.D., supra*, at *2 (citations omitted).

8 In the event a competing report is obtained, all raw materials created by that evaluator should be shared in like manner.

9 Any objection by a party or the neutral forensic evaluator in any given case should be made on motion, brought by Order to Show Cause, pursuant to CPLR § 3103.

10 The Court is hopeful that Plaintiff's contention that access to the forensic evaluator's entire file will enable the parties to reach a settlement of custody bears out.

End of Document

Disagreed With by K.C. v. J.C., N.Y.Sup., December 10, 2015

View New York Official Reports version

Ochs v. Ochs 193 Misc.2d 502
Supreme Court, Westchester County, New York 749 N.Y.S.2d 650 2002 N.Y. Slip Op. 22691 (Approx. 7 pages)

Mitchell OCHS, Plaintiff,
v.
Stacey OCHS, Defendant.

July 9, 2002.

Synopsis

Husband filed action against wife for divorce. Wife filed request for an order directing disclosure of notes and raw testing data compiled by court-appointed neutral forensic psychologist who evaluated parties' children to aid in determination of child custody. The Supreme Court, Westchester County, Spolzino, J., held that wife was not entitled to disclosure of notes and raw testing data compiled by court-appointed neutral forensic psychologist.

Motion denied.

West Headnotes (1)

Change View

1 Child Custody Mental Examinations
Wife was not entitled to disclosure of notes and raw testing data compiled by court-appointed neutral forensic psychologist who evaluated parties' children to aid in determination of child custody; pre-trial disclosure of notes and raw data of court-appointed neutral forensic psychologist was likely to make custody litigation lengthier and more expensive without providing any concomitant benefit sufficient to justify its costs.

10 Cases that cite this headnote

Attorneys and Law Firms

***650 *502** Mark S. Helwell, Esq., Now York, attorney for plaintiff.

Barry Abbott, Esq., Hall, Dickler, Kent, Goldstein & Wood, LLP, Naomi R. Duker, Esq., Law Guardian, White Plains, Allison Bell, Psy.D., Katonah, attorneys for defendant.

Opinion

***503** SPOLZINO, J

Is a litigant in a contested custody proceeding entitled to pre-trial disclosure of the notes and raw testing data compiled by the court-appointed neutral forensic psychologist? For the reasons that follow, the court concludes that, in the absence of special circumstances not present here, the answer is no. The defendant's request for an order directing such disclosure is, therefore, denied.

This is an action for divorce and ancillary relief in which the most significant issue is custody of the parties' two children, Jonathan, age 12, and Julie, age 9. After the parties advised the court that they could not reach an agreement with respect to custody, the court appointed a law guardian to represent the children and a neutral forensic psychologist [1] to prepare an evaluation of the respective parental fitness of the parties. The psychologist ***651**

SELECTED TOPICS

Matters of Child Custody and Visitation are Court's Primary Concern

Secondary Sources

§ 21:58. Denial of visitation

12 N.Y.Prac., New York Law of Domestic Relations § 21:58

...Before a court will deny a parent access to his or her child, the parent seeking to deny a child's access to the other parent has the burden of showing that visitation is inimical to the child's welfar...

§ 16:45. Visitation rights

3 NY Fam Ct Law & Prac § 16:45

...A parent has a right of access to his or her child, even when custody is awarded to another. Even if divorced, a parent should be afforded that right unless exceptional circumstances and the best inter...

§ 118A:124. Generally; best interests of child

19B Carmody-Wait 2d § 118A:124

...Whether visitation should be granted lies solely in the discretion of the court and must, in the final analysis, be determined in the light of what is required in the best interest of the child. The ex...

See More Secondary Sources

Briefs

Petition for a Writ of Certiorari

1999 WL 33611372
In the Matter of the Visitation of Natalie Anne TROXEL and Isabelle Rose Troxel, Minors, Jenifer and Gary Troxel, Petitioners, v. Tommie Granville, Respondent.
Supreme Court of the United States
July 06, 1999

...Jenifer and Gary Troxel (the Troxels) petition for a Writ of Certiorari to review the judgment of the Supreme Court of the State of Washington in this case. The December 24, 1998 Opinion of the Supreme...

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS AMICI CURIAE IN SUPP ORT OF PETITIONERS

1999 WL 1034462
In re Visitation of Natalie Ann Troxel, Isabelle Rose Troxel, Minors, Jenifer Troxel, Gary Troxel v. Tommie Granville; National Conference of State Legislatures
Supreme Court of the United States
Nov. 12, 1999

...FN* Counsel of Record for theAmici Curiae Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. Amici have a compelling inte...

Petition for Writ of Certiorari

interviewed and conducted psychological testing of the parties and the children and then rendered a report in which she recommended that custody be awarded to the plaintiff.

In a pre-trial conference shortly after the report was released, the attorney for the defendant requested informally that he be provided with copies of the psychologist's notes and the raw data resulting from the psychological testing she had conducted. His purpose was to submit the data for review by the defendant's psychological expert in order to develop a basis for cross-examining the court-appointed psychologist and rebutting her recommendation. Without addressing the issue of entitlement to such disclosure, the court directed the defendant's counsel to ask the law guardian to communicate this request to the court-appointed psychologist. When the psychologist objected, in a verbal communication to the court, the court advised counsel of her objections and directed them to submit their arguments as to whether disclosure of the notes and raw data should be compelled.

Before addressing the merits of this dispute, it is necessary to dispose of the defendant's claim that the court-appointed **504* forensic psychologist has no standing to contest the disclosure of her raw data and notes. The right to seek a protective order from disclosure is not limited to parties (*see*, CPLR 3103); non-parties are regularly permitted to contest the discovery demands that are made upon them (*see, e.g., Snow v. Snow*, 209 A.D.2d 399, 618 N.Y.S.2d 442 [2d Dept. 1994]). There is nothing in these authorities to indicate that the right to seek such relief is waived by accepting a court appointment. Indeed, the limited authority that there appears to be with respect to the somewhat unique role of the court-appointed expert supports the proposition that a court-appointed forensic psychologist does have the right to seek the intervention of the court, at least with respect to the enforcement of her entitlement to a fee (*see, Matter of Custody of Rebecca B.*, 227 A.D.2d 315, 642 N.Y.S.2d 685 [1st Dept. 1996]; *Sciacca v. Sciacca*, 173 Misc.2d 758, 663 N.Y.S.2d 808 [Sup. Ct. (Suffolk Co.) 1997]). The right of the court-appointed neutral expert to seek protection from disclosure of his or her notes and raw data should be no less. In any event, standing to raise objections to the requested disclosure here does not depend solely on the rights of the forensic psychologist, since the attorney for the plaintiff has also objected. There is no question that he has standing to do so.

Turning to the merits, it is beyond dispute that full disclosure of all relevant and material information has proven to be the surest method of sharpening the issues for trial and thereby presenting to the trier of fact the best information available in the most efficient manner; it is the rule in this state (*see*, CPLR 3101[a]; *Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 288 N.Y.S.2d 449, 235 N.E.2d 430 [1968]). The notes and raw data of a court-appointed neutral forensic psychologist are certainly relevant and material to the issue of custody, particularly where the conclusions drawn from that data are the central evidence before the court. It cannot be denied that providing such disclosure will be of assistance in preparing for trial, particularly to the party seeking to challenge the psychologist's conclusions. In fact, similar disclosure of the data prepared and notes made by experts is routinely permitted in other areas of the law (*see, Kern v. Ingersoll–Rand Co.*, 168 F.R.D. 633, 38 Fed.R.Serv.3d 919 [N.D. Ind.1996][tort litigation]; *People v. Almonor*, 93 N.Y.2d 571, 693 N.Y.S.2d 861, 715 N.E.2d 1054 [1999] [criminal prosecution]; ***652 Town of Pleasant Valley v. N.Y. State Bd. of Real Property Services*, 253 A.D.2d 8, 685 N.Y.S.2d 74 [2d Dept. 1999][real property tax litigation]). Nevertheless, there are factors unique to the role of the court-appointed neutral forensic psychologist in a disputed custody matter that caution against unquestioning application here of the general rule of full disclosure.

**505* The appointment of a neutral expert is now a well-established part of custody litigation (*see, Stern v. Stern*, 225 A.D.2d 540, 541, 639 N.Y.S.2d 80 [2d Dept. 1996]; *Garvin v. Garvin*, 162 A.D.2d 497, 556 N.Y.S.2d 699 [2d Dept. 1990]). Originally founded on the court's inherent power, with the use of their reports at trial dependent upon the consent of the parties (*see, Kesseler v. Kesseler*, 10 N.Y.2d 445, 225 N.Y.S.2d 1, 180 N.E.2d 402 [1962]; *Zirinsky v. Zirinsky*, 138 A.D.2d 43, 529 N.Y.S.2d 298 [1st Dept. 1988]; *Waldman v. Waldman*, 95 A.D.2d 827, 463 N.Y.S.2d 868 [2d Dept. 1983]), the practice of appointing independent experts is now sanctioned by the rules of the court (*see*, 22 NYCRR §§ 202.16 (g), 202.18), which provide for the use of such reports, without consent, as the equivalent of the expert's direct testimony, subject only to each party's right to cross-examine (*see, Chrisaldos v. Chrisaldos*, 170 A.D.2d 428, 565 N.Y.S.2d 536 [2d Dept. 1991]; Family Court Act § 251). The value of the essential role played by the court-appointed neutral forensic psychologist in custody litigation is now so well recognized that such an appointment is essentially required in any custody litigation where there are serious questions of parental fitness (*see, Vernon Mc. v. Brenda N.*, 198 A.D.2d 823, 825, 602 N.Y.S.2d 58 [2d Dept.

1993], *Koppenhoefer v. Koppenhoefer*, 159 A.D.2d 113, 558 N.Y.S.2d 596 [2d Dept. 1990]; *Giraldo v. Giraldo*, 85 A.D.2d 164, 171, 447 N.Y.S.2d 466 [1st Dept. 1982]).

Thus, the court-appointed neutral forensic psychologist is not like the expert retained by litigants to testify in other types of matters. The report of such an expert is not introduced at trial for the purpose of advocating the position advanced by either party; rather, the report is intended to provide the court with an unbiased professional opinion on the often difficult psycho-social issues that are before the court in a custody dispute. While this does not mean that the court is required to, or even should, base its determination solely on the psychologist's opinion (*see, Edgerly v. Moore*, 232 A.D.2d 214, 215, 647 N.Y.S.2d 773 [1st Dept. 1996]; *Chait v. Chait*, 215 A.D.2d 238, 239, 638 N.Y.S.2d 426 [1st Dept. 1995]; *Alanna M. v. Duncan M.*, 204 A.D.2d 409, 410, 611 N.Y.S.2d 886 [2d Dept. 1994]), the neutrality of the expert and the high regard that the court must have in order to appoint a particular forensic psychologist, makes his or her report a highly significant factor for the court to consider in the context of all of the evidence presented in the case, including any expert testimony presented by the parties (*see, Young v. Young*, 212 A.D.2d 114, 125, 628 N.Y.S.2d 957 [2d Dept. 1995]; *Linda R. v. Richard E.*, 162 A.D.2d 46, 56, 561 N.Y.S.2d 29 [2d Dept. 1990]; *Harvey v. Share*, 119 A.D.2d 823, 824, 501 N.Y.S.2d 448 [2d Dept. 1986]).

Despite the importance of this role, however, the court-appointed neutral forensic psychologist is not Caesar's wife. Our jurisprudence has long concluded that the adversarial process **506* is the best means for reaching the truth insofar as it is humanly possible to do so (*see, Lanzano v. City of New York*, 71 N.Y.2d 208, 524 N.Y.S.2d 420, 519 N.E.2d 331 [1988]). Unless that process is to be abandoned in these matters (*see, Rosenblitt v. Rosenblitt*, 107 A.D.2d 292, 299–300, 486 N.Y.S.2d 741 [2d Dept. 1985] [Lazer, J., dissenting]), the conclusions of the court-appointed neutral forensic psychologist, like those of any other expert witness, are subject to question, ***653* through the process of cross-examination and rebuttal (*see, Murtari v. Murtari*, 249 A.D.2d 960, 673 N.Y.S.2d 278 [4th Dept. 1998]). Since the normal grist for cross-examination is provided by the facts on which an expert's conclusions are based, as reflected in the notes and raw data he or she has collected (*see*, Juvelier, Child Custody: *Reconciling the Disclosure Rules in Custody and Visitation Cases*, New York Family Law Monthly, vol. 3, no. 4 [February 2002] p. 4), it is difficult not to conclude that the adversarial process would achieve its best result where such information is provided to counsel in advance of trial. In fact, the framers of the Uniform Marriage and Divorce Act have apparently reached this conclusion in permitting such disclosure (Uniform Marriage and Divorce Act § 405, 9 Uniform Laws Ann. p. 603 [1970]). While this authority is not without weight, the relevant precedents in this jurisdiction require that the court exercise caution in reaching the same conclusion.

As the Court of Appeals has recognized, at issue in custody litigation are some of the most important, and the most difficult, questions that can be decided in our legal system (*see, Matter of Lincoln v. Lincoln*, 24 N.Y.2d 270 [1969]), affecting the intimate relationship between parents and children. When the court makes a custody determination, it sits as the successor to the chancellor, exercising the authority of the state as *parens patriae* (*see, Finlay v. Finlay*, 240 N.Y. 429, 433–434, 148 N.E. 624 [1925]). For that reason, the court has broad discretion to do what it determines to be right (*see, Fanelli v. Fanelli*, 215 A.D.2d 718, 627 N.Y.S.2d 425 [2d Dept. 1995]) in the "best interests of the children" (*see, Friedenwitzer v. Friedenwitzer*, 55 N.Y.2d 89, 447 N.Y.S.2d 893, 432 N.E.2d 765 [1982]; *Eschbach v. Eschbach*, 56 N.Y.2d 167, 451 N.Y.S.2d 658, 436 N.E.2d 1260 [1982]).

If the process of custody litigation is to be successful, the court's concern for the "best interests of the children" must apply not only with respect to the result, but in the means used to reach that result, as well. Custody cases are difficult, at best, not merely because the correct result is often elusive, but also because the adversarial process that is most conducive to reaching the truth is often detrimental to the relationships it is intended to protect. Thus, while it is true that the court should exercise every means possible to ensure that it has all **507* relevant information before making a custody determination (*see, DeBlasio v. DeBlasio*, 187 A.D.2d 551, 590 N.Y.S.2d 227 [2d Dept. 1992]; *Burgel v. Burgel*, 141 A.D.2d 215, 216, 533 N.Y.S.2d 735 [2d Dept. 1988]), the court must also be cognizant of the great burden that such litigation places on the parties and the children. The process should not be permitted to defeat, through an excess of zeal in discovering every last ounce of relevant information, the beneficial effects that are intended to be achieved in the result.

It is, of course, within the discretion of the court to limit disclosure (*see*, CPLR 3103; *Hirschfeld v. Hirschfeld*, 114 A.D.2d 1006, 495 N.Y.S.2d 445 [2d Dept. 1985], affd. 69 N.Y.2d 842, 514 N.Y.S.2d 704, 507 N.E.2d 297 [1987]). Because of the importance of the

issues, the breadth of the court's discretion with respect to discovery in custody cases is substantial, commensurate with its discretion in determining the substantive issue (*see, Wegman v. Wegman*, 37 N.Y.2d 940, 380 N.Y.S.2d 649, 343 N.E.2d 288 [1975]; *Annexstein v. Annexstein*, 202 A.D.2d 1060, 609 N.Y.S.2d 131 [1st Dept. 1994]; *Garvin v. Garvin*, 162 A.D.2d 497, 499, 556 N.Y.S.2d 699 [2d Dept. 1990]; *Lohmiller v. Lohmiller*, 118 A.D.2d 760, 500 N.Y.S.2d 151 [2d Dept. 1986]). "The procedures of the custody proceeding must, therefore, be molded to serve its primary purpose, and limited ***654** modifications of the traditional requirements of the adversary system must be made, if necessary." (*Matter of Lincoln v. Lincoln*, 24 N.Y.2d 270, 272, 299 N.Y.S.2d 842, 247 N.E.2d 659 [1969]). Put simply, if the procedures sought to be employed in litigating custody are not likely to improve the result sufficiently to justify their financial and emotional cost, the means must be discarded, or, at least, limited.

Recognizing these concerns, the New York courts and, particularly, the Appellate Division, Second Department, have regularly restricted discovery in custody cases in ways that reduce the burden on the litigants and the children without compromising the integrity of the adversarial process. Depositions with respect to issues related to custody are generally not permitted (*see, Garvin v. Garvin*, 162 A.D.2d 497, 556 N.Y.S.2d 699 [2d Dept. 1990]; *Hunter v. Hunter*, 10 A.D.2d 291, 198 N.Y.S.2d 1008 [1st Dept. 1960]; *P v. P*, 93 Misc.2d 704, 403 N.Y.S.2d 680 [Sup. Ct. (N.Y. County) 1978]; *but see, Westrom v. Westrom*, 130 Misc.2d 265, 266, 495 N.Y.S.2d 628 [Sup. Ct. (Chautauqua County) 1985]), and bills of particulars may not be demanded (*see, Ginsberg v. Ginsberg*, 104 A.D.2d 482, 479 N.Y.S.2d 233 [2d Dept. 1984]). Access to forensic reports is routinely limited, although copies are provided to counsel and the parties are entitled to review them, the reports may not be copied (*see, Morrissey v. Morrissey*, 225 A.D.2d 779, 639 N.Y.S.2d 953 [2d Dept. 1996]; *Matter of Scuderi–Forzano v. Forzano*, 213 A.D.2d 652, 624 N.Y.S.2d 942 [2d Dept 1995]). Requests for the production of a party's medical records have been denied (*see, *508 McDonald v. McDonald*, 196 A.D.2d 7, 608 N.Y.S.2d 477 [2d Dept. 1994]; *Anne D v. Raymond D*, 139 Misc.2d 718, 528 N.Y.S.2d 775 [Sup. Ct. (Nassau County) 1988]; *Doe v. Roe*, 139 Misc.2d 209, 526 N.Y.S.2d 718 [Sup. Ct. (N.Y. County) 1988]), even though any privilege has been waived (*see, Baecher v. Baecher*, 58 A.D.2d 821, 396 N.Y.S.2d 447 [2d Dept. 1977])[2]. Leave to conduct additional psychological testing has regularly been denied (*see, Garvin v. Garvin*, 162 A.D.2d 497, 556 N.Y.S.2d 699 [2d Dept. 1990]; *Matter of Quinn v. Genovese*, 158 A.D.2d 602, 551 N.Y.S.2d 844 [2d Dept. 1990]; *Forrest v. Forrest*, 131 A.D.2d 425, 516 N.Y.S.2d 79 [2d Dept. 1987]; *Lohmiller v. Lohmiller*, 118 A.D.2d 760, 500 N.Y.S.2d 151 [2d Dept. 1986]; *Rosenblitt v. Rosenblitt*, 107 A.D.2d 292, 486 N.Y.S.2d 741 [2d Dept. 1985]), except where a deficiency in the initial examination, a potential bias, or other cause has been demonstrated (*see, Bricker v. Powers*, 196 A.D.2d 698, 601 N.Y.S.2d 616 [1st Dept. 1993]; *Sardella v. Sardella*, 125 A.D.2d 384, 509 N.Y.S.2d 109 [2d Dept. 1986]). The general rule that can be divined from these cases is that before such discovery is allowed, a showing is required of some specific need for disclosure beyond the materiality of the information sought and its general utility in litigating the issues.

The same policy should apply to a request for disclosure of the raw data and notes of the court-appointed neutral forensic psychologist. Like the discovery that has routinely been denied, inspection of the raw data and notes, and their use on cross-examination, may add to the relevant information before the court, but at a significant cost. Notes and raw data contain the unfiltered, immediate impressions of the psychologist, jotted down in haste and ***655** without the benefit of reflection. While the litigator sees in this the advantage of investigating the thought process of the evaluator, the disclosure of such material is potentially damaging, in very real ways, to the litigants and their relationships. Critically, unlike the release of data in other litigation, the parties here will continue to have a relationship after the instant litigation is concluded. In fact, it is that relationship that is the subject of the litigation. Like the examinations before trial at issue in *P v. P* (93 Misc.2d at 704, 403 N.Y.S.2d 680) and *Hunter v. Hunter* (10 A.D.2d at 294, 198 N.Y.S.2d 1008), disclosure of raw data and notes may make the future relationship of the parties more difficult. Even recognizing the importance of cross-examination as a means for finding the truth, the future relationship of the parties should not be put at risk simply to develop more points for cross-examination.

***509** This is particularly true when one recognizes that it is not the immediate impressions of the psychologist that are ultimately at issue in the litigation, but the opinions he or she has reached about the parties and their relationships with their children. These opinions are formulated not simply by replicating the notes and test data, but by evaluating all of the information and impressions gathered in the course of the investigation in light of the

expert's professional training and experience. Thus, while reviewing the raw data and notes may shed some light on the psychologists thought process, it does not ultimately reach the central issue of the validity of the psychologist's conclusions (*see, Feuerman v. Feuerman* (112 Misc.2d 961, 965, 447 N.Y.S.2d 838 [Sup. Ct. Nassau Co.] 1982). Instead, what it does is give the cross-examiner the opportunity to discredit the psychologist's testimony on the basis of perceived inconsistencies between the notes and the conclusions, thereby turning the litigation into a lengthy and expensive critique of the psychologist's methodology, rather than a test of the conclusions themselves. The limited value of such cross-examination does not justify the financial or emotional cost to the parties and, particularly, the children.

Finally, as Justice McCaffrey noted in *Feuerman*, 112 Misc.2d at 965, 447 N.Y.S.2d 838, making the raw data and notes available prior to trial may have the unintended consequence of undermining the effectiveness of the neutral evaluations themselves. Psychologists who know that their data and notes are likely to be scrutinized may, understandably, be less willing to commit to paper the impressions they form in the course of their interviews with the parties—impressions that may not individually have a strong basis in evidence, but which may, after reflection, be a significant element of the mosaic that is reflected in the report. It is the validity of the report, and, consequently, the soundness of the court's determination, that will suffer in such circumstances, to the ultimate detriment of the children. If the substantial benefit of such reports is to be maintained, this result must be avoided.

In light of all this, it is apparent to the court that pre-trial disclosure of the notes and raw data of the court-appointed neutral forensic psychologist is likely to make custody litigation lengthier and more expensive without providing any concomitant benefit sufficient to justify its costs. While it would always be better to have more information, if there were no human or financial cost from obtaining it, that is not the case here. This is not to say that there are no circumstances in **510* which such disclosure is warranted. The court is obligated to exercise its discretion in each case so as to balance the benefit to be achieved by permitting such disclosure against the detriment it causes. As with the additional ***656* evaluations at issue in *Rosenblitt*, 107 A.D.2d at 295–296, 486 N.Y.S.2d 741, a showing of bias or other reason to doubt the credibility of the report, other than mere displeasure with its result, would cause the balance to weigh in favor of disclosure. Thus, such requests should be evaluated in the same manner as requests for additional psychological examinations, and should be granted only upon a showing, on the basis of the report itself or through extrinsic evidence, of special circumstances, such as a deficiency in the report, a potential bias or other cause.

Here, the defendant has made no such showing. There is simply nothing on the face of the report or in the facts that have been related with respect to its development that would justify inquiry into its foundations. The defendant's motion for an order directing the court-appointed neutral forensic psychologist to disclose her notes and the raw data of the psychological testing she has conducted is therefore denied. The court-appointed neutral forensic psychologist is directed, however, to produce her notes at the time of her testimony, in the event that sufficient cause is established at that time for the review of those notes by the defendant's counsel.

The foregoing constitutes the decision and order of this court.[3]

All Citations

193 Misc.2d 502, 749 N.Y.S.2d 650, 2002 N.Y. Slip Op. 22691

Footnotes

1 Psychiatrists, as well as psychologists, are regularly appointed as neutral forensic evaluators in custody cases. For ease of terminology, and because in this case the court-appointed neutral expert is a psychologist, the court will use that term to refer to the expert here. The general principles discussed are equally applicable to court-appointed neutral forensic psychiatrists.

2 Apparently there no ethical restriction on such disclosure, as long as the disclosure is made to another qualified professional (*see*, Nouryan and Weisel, Essays on Creative problem Solving, *When Ethics Collide: Psychologists, Attorneys and Disclosure*, 36 Cal. W.L.Rev. 125 [1999]).

3 The court has considered the following documents in reaching this decision: (1) the letter from Barry Abbott, Esq., to Naomi R. Duker, Esq., dated June 5, 2002; (2) the letter from Naomi R. Duker, Esq., to the court, dated June 10,

2002; (3) the letter from Barry Abbott, Esq., to the court, dated June 11, 2002; (4) the letter from Mark S. Helweil, Esq., to the court, dated June 11, 2002; (5) the letter from Mark S. Helweil, Esq., to the court, dated June 18, 2002; (6) the letter from the court to counsel, dated June 19, 2002; (7) the letter brief submitted by Mark S. Helweil, Esq., dated June 24, 2002; (8) the letter brief submitted by Barry Abbott, Esq., dated June 25, 2002; (9) the letter brief submitted by Naomi R. Duker, Esq., dated June 25, 2002; and the letter from Barry Abbott, Esq., to the court, dated June 28, 2002.

End of Document

Guidelines for Child Custody Evaluations in Family Law Proceedings

American Psychological Association

Introduction

Family law proceedings encompass a broad range of issues, including custody, maintenance, support, valuation, visitation, relocation, and termination of parental rights. The following guidelines address what are commonly termed *child custody* evaluations, involving disputes over decision making, caretaking, and access in the wake of marital or other relationship dissolution. The goal of these guidelines is to promote proficiency in the conduct of these particular evaluations. This narrowed focus means that evaluations occurring in other contexts (e.g., child protection matters) are not covered by these guidelines. In addition, the guidelines acknowledge a clear distinction between the forensic evaluations described in this document and the advice and support that psychologists provide to families, children, and adults in the normal course of psychotherapy and counseling.

Although some states have begun to favor such terms as *parenting plan, parenting time,* or *parental rights and responsibilities* over the term *custody* (American Law Institute, 2000, pp. 131–132), the substantial majority of legal authorities and scientific treatises still refer to *custody* when addressing the resolution of decision-making, caretaking, and access disputes. In order to avoid confusion and to ensure that these guidelines are utilized as widely as possible, these guidelines apply the term *custody* to these issues generically, unless otherwise specified. It is no longer the default assumption that child custody proceedings will produce the classic paradigm of sole custodian versus visiting parent. Many states recognize some form of joint or shared custody that affirms the decision-making and caretaking status of more than one adult. The legal system also recognizes that the disputes in question are not exclusively marital and therefore may not involve divorce per se. Some parents may never have been married and perhaps may never even have lived together. In addition, child custody disputes may arise after years of successful co-parenting when one parent seeks to relocate for work-related or other reasons. These guidelines apply the term *parents* generically when referring to persons who seek legal recognition as sole or shared custodians.

Parents may have numerous resources at their disposal, including psychotherapy, counseling, consultation, mediation, and other forms of conflict resolution. When parents agree to a child custody arrangement on their own—as they do in the overwhelming majority (90%) of cases (Melton, Petrila, Poythress, & Slobogin, 2007)—there may be no dispute for the court to decide. However, if parties are unable to reach such an agreement, the court must intervene in order to allocate decision making, caretaking, and access, typically applying a "best interests of the child" standard in determining this restructuring of rights and responsibilities (Artis, 2004; Elrod, 2006; Kelly, 1997).

Psychologists render a valuable service when they provide competent and impartial opinions with direct relevance to the "psychological best interests" of the child (Miller, 2002). The specific nature of psychologists' involvement and the potential for misuse of their influence have been the subject of ongoing debate (Grisso, 1990, 2005; Krauss & Sales, 1999, 2000; Melton et al., 2007). The acceptance and thus the overall utility of psychologists' child custody evaluations are augmented by demonstrably competent forensic practice and by consistent adherence to codified ethical standards.

These guidelines are informed by the American Psychological Association's (APA's) "Ethical Principles of Psychologists and Code of Conduct" (hereinafter referred to as the Ethics Code; APA, 2002). The term *guidelines* refers to statements that suggest or recommend specific professional behavior, endeavors, or conduct for psychol-

This revision of the 1994 "Guidelines for Child Custody Evaluations in Divorce Proceedings" (American Psychological Association, 1994) was completed by the Committee on Professional Practice and Standards (COPPS) and approved as APA policy by the APA Council of Representatives on February 21, 2009. Members of COPPS during the development of this document were Lisa Drago Piechowski (chair, 2009), Eric Y. Drogin (chair, 2007–2008), Mary A. Connell (chair, 2006), Nabil El-Ghoroury (Board of Professional Affairs [BPA] liaison, 2007–2008), Michele Galietta, Terry S. W. Gock, Larry C. James (BPA liaison, 2004–2006), Robert Kinscherff, Stephen J. Lally, Gary D. Lovejoy, Mary Ann McCabe, Bonnie J. Spring, and Carolyn M. West. COPPS is grateful for the support and guidance of the BPA and particularly to BPA Chairs Cynthia A. Sturm (2009), Jaquelyn Liss Resnick (2008), Jennifer F. Kelly (2007), and Kristin Hancock (2006). COPPS also acknowledges the consultation of APA Practice Directorate staff Shirley A. Higuchi and Alan Nessman. COPPS extends its appreciation to the APA Practice Directorate staff who facilitated both the work of COPPS and the revision efforts: Lynn F. Bufka, Mary G. Hardiman, Omar Rehman, Geoffrey M. Reed, Laura Kay-Roth, Ernestine Penniman, and Ayobodun Bello.

Expiration: These guidelines are scheduled to expire 10 years from February 21, 2009 (the date of their adoption by the APA Council of Representatives). After this date, users are encouraged to contact the APA Practice Directorate to determine whether this document remains in effect.

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ogists. Guidelines differ from *standards* in that standards are mandatory and may be accompanied by an enforcement mechanism. Guidelines are aspirational in intent. They are intended to facilitate the continued systematic development of the profession and to help facilitate a high level of practice by psychologists. Guidelines are not intended to be mandatory or exhaustive and may not be applicable to every professional situation. They are not definitive, and they are not intended to take precedence over the judgment of psychologists.

I. Orienting Guidelines: Purpose of the Child Custody Evaluation

1. The purpose of the evaluation is to assist in determining the psychological best interests of the child.

Rationale. The extensive clinical training of psychologists equips them to investigate a substantial array of conditions, statuses, and capacities. When conducting child custody evaluations, psychologists are expected to focus on factors that pertain specifically to the psychological best interests of the child, because the court will draw upon these considerations in order to reach its own conclusions and render a decision.

Application. Psychologists strive to identify the psychological best interests of the child. To this end, they are encouraged to weigh and incorporate such overlapping factors as family dynamics and interactions; cultural and environmental variables; relevant challenges and aptitudes for all examined parties; and the child's educational, physical, and psychological needs.

2. The child's welfare is paramount.

Rationale. Psychologists seek to maintain an appropriate degree of respect for and understanding of parents' practical and personal concerns; however, psychologists are mindful that such considerations are ultimately secondary to the welfare of the child.

Application. Parents and other parties are likely to advance their concerns in a forceful and contentious manner. A primary focus on the child's needs is enhanced by identifying and stating appropriate boundaries and priorities at the outset of the evaluation. Psychologists may wish to reflect upon their own attitudes and functioning at various points during the course of the evaluation to ensure that they are continuing to maintain an optimal focus on the child's welfare.

3. The evaluation focuses upon parenting attributes, the child's psychological needs, and the resulting fit.

Rationale. From the court's perspective, the most valuable contributions of psychologists are those that reflect a clinically astute and scientifically sound approach to legally relevant issues. Issues that are central to the court's ultimate decision-making obligations include parenting attributes, the child's psychological needs, and the resulting fit. The training of psychologists provides them with unique skills and qualifications to address these issues.

Application. Psychologists attempt to provide the court with information specifically germane to its role in apportioning decision making, caretaking, and access. The most useful and influential evaluations focus upon skills, deficits, values, and tendencies relevant to parenting attributes and a child's psychological needs. Comparatively little weight is afforded to evaluations that offer a general personality assessment without attempting to place results in the appropriate context. Useful contextual considerations may include the availability and use of effective treatment, the augmentation of parenting attributes through the efforts of supplemental caregivers, and other factors that could affect the potential impact of a clinical condition upon parenting.

II. General Guidelines: Preparing for the Custody Evaluation

4. Psychologists strive to gain and maintain specialized competence.

Rationale. Laws change, existing methods are refined, and new techniques are identified. In child custody evaluations, general competence in the clinical assessment of children, adults, and families is necessary but is insufficient in and of itself. The court will expect psychologists to demonstrate a level of expertise that reflects contextual insight and forensic integration as well as testing and interview skills.

Application. Psychologists continuously strive to augment their existing skills and abilities, consistent with a career-long dedication to professional development. Although psychologists take care to acquire sufficient knowledge, skill, experience, training, and education prior to conducting a child custody evaluation, this acquisition is never complete. An evolving and up-to-date understanding of child and family development, child and family psychopathology, the impact of relationship dissolution on children, and the specialized child custody literature is critical to sustaining competent practice in this area. Psychologists also strive to remain familiar with applicable legal and regulatory standards, including laws governing child custody adjudication in the relevant state or other jurisdiction. Should complex issues arise that are outside psychologists' scope of expertise, they seek to obtain the consultation and supervision necessary to address such concerns.

5. Psychologists strive to function as impartial evaluators.

Rationale. Family law cases involve complex and emotionally charged disputes over highly personal matters, and the parties are often deeply invested in a specific outcome. The volatility of this situation is often exacerbated by a growing realization that there may be no resolution that will completely satisfy every person involved. In this contentious atmosphere, it is crucial that evaluators remain as free as possible of unwarranted bias or partiality.

Application. Psychologists are encouraged to monitor their own values, perceptions, and reactions actively and to seek peer consultation in the face of a potential loss of impartiality. Vigilant maintenance of professional boundaries and adherence to standard assessment procedures, throughout the evaluation process, will place psychologists in the best position to identify variations that may signal impaired neutrality.

6. Psychologists strive to engage in culturally informed, nondiscriminatory evaluation practices.

Rationale. Professional standards and guidelines articulate the need for psychologists to remain aware of their own biases, and those of others, regarding age, gender, gender identity, race, ethnicity, national origin, religion, sexual orientation, disability, language, culture, and socioeconomic status. Biases and an attendant lack of culturally competent insight are likely to interfere with data collection and interpretation and thus with the development of valid opinions and recommendations.

Application. Psychologists strive to recognize their own biases and, if these cannot be overcome, will presumably conclude that they must withdraw from the evaluation. When an examinee possesses a cultural, racial, or other background with which psychologists are unfamiliar, psychologists prepare for and conduct the evaluation with the appropriate degree of informed peer consultation and focal literature review. If psychologists find their unfamiliarity to be insurmountable, the court will appreciate being informed of this fact sooner rather than later.

7. Psychologists strive to avoid conflicts of interest and multiple relationships in conducting evaluations.

Rationale. The inherent complexity, potential for harm, and adversarial context of child custody evaluations make the avoidance of conflicts of interest particularly important. The presence of such conflicts will undermine the court's confidence in psychologists' opinions and recommendations and in some jurisdictions may result in professional board discipline and legal liability.

Application. Psychologists refrain from taking on a professional role, such as that of a child custody evaluator, when personal, scientific, professional, legal, financial, or other interests or relationships could reasonably be expected to result in (a) impaired impartiality, competence, or effectiveness or (b) exposure of the person or organization with whom the professional relationship exists to harm or exploitation (Ethics Code, Standard 3.06). Subject to the same analysis are multiple relationships, which occur when psychologists in a professional role with a person are simultaneously in another role with that person, when psychologists are in a relationship with another individual closely associated with or related to that person, or when psychologists promise to enter into another future relationship with that person or with another individual closely associated with or related to that person (Ethics Code, Standard 3.05). Psychologists conducting a child custody evaluation with their current or prior psychotherapy clients and psychologists conducting psychotherapy with their current or prior child custody examinees are both examples of multiple relationships. Psychologists' ethical obligations regarding conflicts of interest and multiple relationships provide an explainable and understandable basis for declining court appointments and private referrals.

III. Procedural Guidelines: Conducting the Child Custody Evaluation

8. Psychologists strive to establish the scope of the evaluation in a timely fashion, consistent with the nature of the referral question.

Rationale. The scope of a child custody evaluation will vary according to the needs of a particular case and the specific issues psychologists are asked to address. Referral questions may vary in the degree to which they specify the desired parameters of the evaluation. Failure to ensure in a timely fashion that an evaluation is appropriately designed impairs the utility and acceptance of the resulting opinions and recommendations.

Application. Before agreeing to conduct a child custody evaluation, psychologists seek when necessary to clarify the referral question and to determine whether they are potentially able to provide opinions or recommendations. It may be helpful to have psychologists' understanding of the scope of the evaluation confirmed in a court order or by stipulation of all parties and their legal representatives.

9. Psychologists strive to obtain appropriately informed consent.

Rationale. Obtaining appropriately informed consent honors the legal rights and personal dignity of examinees and other individuals. This process allows persons to determine not only whether they will participate in a child custody evaluation but also whether they will make various disclosures during the course of an examination or other request for information.

Application. When performing child custody evaluations, psychologists attempt to obtain informed consent using language that is reasonably understandable to the examinee. If the examinee is legally incapable of providing informed consent, psychologists provide an appropriate explanation, seek the examinee's assent, consider the preferences and best interests of the examinee, and obtain appropriate permission from a legally authorized person (Ethics Code, Standards 3.10 and 9.03). Psychologists are encouraged to disclose the potential uses of the data obtained and to inform parties that consent enables disclosure of the evaluation's findings in the context of the forthcoming litigation and in any related proceedings deemed necessary by the court. Psychologists may find it helpful to extend a similar approach to persons who provide collateral information (e.g., relatives, teachers, friends, and employers) even when applicable laws do not require informed consent per se.

10. Psychologists strive to employ multiple methods of data gathering.

Rationale. Multiple methods of data gathering enhance the reliability and validity of psychologists' eventual conclusions, opinions, and recommendations. Unique as well as overlapping aspects of various measures contribute to a fuller picture of each examinee's abilities, challenges, and preferences.

Application. Psychologists strive to employ optimally diverse and accurate methods for addressing the questions raised in a specific child custody evaluation. Direct methods of data gathering typically include such components as psychological testing, clinical interview, and behavioral observation. Psychologists may also have access to documentation from a variety of sources (e.g., schools, health care providers, child care providers, agencies, and other institutions) and frequently make contact with members of the extended family, friends and acquaintances, and other collateral sources when the resulting information is likely to be relevant. Psychologists may seek corroboration of information gathered from third parties and are encouraged to document the bases of their eventual conclusions.

11. Psychologists strive to interpret assessment data in a manner consistent with the context of the evaluation.

Rationale. The context in which child custody evaluations occur may affect the perceptions and behavior of persons from whom data are collected, thus altering both psychological test responses and interview results. Unreliable data result in decreased validity, a circumstance that enhances the potential for erroneous conclusions, poorly founded opinions, and misleading recommendations.

Application. Psychologists are encouraged to consider and also to document the ways in which involvement in a child custody dispute may impact the behavior of persons from whom data are collected. For example, psychologists may choose to acknowledge, when reporting personality test results, how research on validity scale interpretation demonstrates that child custody litigants often display increased elevations on such scales.

12. Psychologists strive to complement the evaluation with the appropriate combination of examinations.

Rationale. Psychologists provide an opinion of an individual's psychological characteristics only after they have conducted an examination of the individual adequate to support their statements and conclusions (Ethics Code, Standard 9.01(b)). The only exception to this rule occurs in those particular instances of record review, consultation, or supervision (as opposed, in each case, to evaluations) in which an individual examination is not warranted or necessary for the psychologist's opinion (Ethics Code, Standard 9.01(c)). The court typically expects psychologists to examine both parents as well as the child.

Application. Psychologists may draw upon the court's resources to encourage relevant parties to participate in the child custody evaluation process. If a desired examination cannot be arranged, psychologists document their reasonable efforts and the result of those efforts and then clarify the probable impact of this limited information on the reliability and validity of their overall opinions, limiting their forensic conclusions and any recommendations appropriately (Ethics Code, Standard 9.01(c)). While the court eventually will have no choice but to make a decision regarding persons who are unable or unwilling to be examined, psychologists have no corresponding obligation. Psychologists do have an ethical requirement to base their opinions on information and techniques sufficient to substantiate their findings (Ethics Code, Standard 9.01(a)) and may wish to emphasize this point for the court's benefit if pressed to provide opinions or recommendations without having examined the individual in question. When psychologists are not conducting child custody evaluations per se, it may be acceptable to evaluate only one parent, or only the child, or only another professional's assessment methodology, as long as psychologists refrain from comparing the parents or offering opinions or recommendations about the apportionment of decision making, caretaking, or access. Nonexamining psychologists also may share with the court their general expertise on issues relevant to child custody (e.g., child development, family dynamics) as long as they refrain from relating their conclusions to specific parties in the case at hand.

13. Psychologists strive to base their recommendations, if any, upon the psychological best interests of the child.

Rationale. Not every child custody evaluation will result in recommendations. Psychologists may conclude that this is an inappropriate role for a forensic evaluator or that available data are insufficient for this purpose. If a recommendation is provided, the court will expect it to be supportable on the basis of the evaluations conducted.

Application. If psychologists choose to make child custody recommendations, these are derived from sound psychological data and address the psychological best interests of the child. When making recommendations, psychologists seek to avoid relying upon personal biases or unsupported beliefs. Recommendations are based upon articulated assumptions, interpretations, and inferences that are consistent with established professional and scientific standards. Although the profession has not reached consensus about whether psychologists should make recommendations to the court about the final child custody determination (i.e., "ultimate opinion" testimony), psychologists seek to remain aware of the arguments on both sides of this issue (Bala, 2005; Erard, 2006; Grisso, 2003; Heilbrun, 2001; Tippins & Wittman, 2005) and are able to articulate the logic of their positions on this issue.

14. Psychologists create and maintain professional records in accordance with ethical and legal obligations.

Rationale. Legal and ethical standards describe requirements for the appropriate development, maintenance, and disposal of professional records. The court expects psychologists providing child custody evaluations to preserve the data that inform their conclusions. This enables other professionals to analyze, understand, and provide appropriate support for (or challenges to) psychologists' forensic opinions.

Application. Psychologists maintain records obtained or developed in the course of child custody evaluations with appropriate sensitivity to applicable legal mandates, the "Record Keeping Guidelines" (APA, 2007), and other relevant sources of professional guidance. Test and interview data are documented with an eye toward their eventual review by other qualified professionals.

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A Critical Assessment of Child Custody Evaluations

Limited Science and a Flawed System

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SUMMARY—*Most parents who live apart negotiate custody arrangements on their own or with the help of lawyers, mediators, or other professionals. However, psychologists and other mental health professionals increasingly have become involved in evaluating children and families in custody disputes, because of the large number of separated, divorced, and never-married parents and the substantial conflict that often accompanies the breakup of a family. Theoretically, the law guides and controls child custody evaluations, but the prevailing custody standard (the "best interests of the child" test) is a vague rule that directs judges to make decisions unique to individual cases according to what will be in children's future (and undefined) best interests. Furthermore, state statutes typically offer only vague guidelines as to how judges (and evaluators) are to assess parents and the merits of their cases, and how they should ultimately decide what custody arrangements will be in a child's best interests. In this vacuum, custody evaluators typically administer to parents and children an array of tests and assess them through less formal means including interviews and observation. Sadly, we find that (a) tests specifically developed to assess questions relevant to custody are completely inadequate on scientific grounds; (b) the claims of some anointed experts about their favorite constructs (e.g., "parent alienation syndrome") are equally hollow when subjected to scientific scrutiny; (c) evaluators should question the use even of well-established psychological measures (e.g., measures of intelligence, personality, psychopathology, and academic achievement) because of their often limited relevance to the questions before the court; and (d) little empirical data exist regarding other important and controversial issues (e.g., whether evaluators should solicit children's wishes about custody; whether infants and toddlers are harmed or helped by overnight visits), suggesting a need for further scientific investigation.*

We see the system for resolving custody disputes as deeply flawed, for reasons that go beyond the problem of limited science. The coupling of the vague "best interests of the child" test with the American adversary system of justice puts judges in the position of trying to perform an impossible task, and it exacerbates parental conflict and problems in parenting and coparenting, which psychological science clearly shows to be key factors predicting children's psychological difficulties in response to their parents' separation and divorce.

Our analysis of the flawed system, together with our desire to sharply limit custody disputes and custody evaluations, leads us to propose three reforms. First, we urge continued efforts to encourage parents to reach custody agreements on their own—in divorce mediation, through collaborative law, in good-faith attorney negotiations, in therapy, and in other forums. Some such efforts have been demonstrated to improve parent–parent and parent–child relationships long after divorce, and they embrace the philosophical position that, in the absence of abuse or neglect, parents themselves should determine their children's best interests after separation, just as they do in marriage. Second, we urge state legislatures to move toward adopting more clear and determinative custody rules, a step that would greatly clarify the terms of the marriage contract, limit the need for custody evaluations, and sharply narrow the scope of the evaluation process. We find particular merit in the proposed "approximation rule" (recently embraced by the American Law Institute), in which postdivorce parenting arrangements would approximate parenting involvement in marriage. Third and finally, we recommend that custody evaluators follow the law and only offer opinions for which there is an adequate scientific basis. Related to this, we urge professional bodies to enact more specific standards of practice on this and related issues.

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INTRODUCTION

Child custody disputes can entail any number of emotionally wrenching circumstances. The prototypical case involves married parents who separate and, in the heat of divorce, cannot reach an agreement about where and how their children should live. In other cases, a marital or cohabiting relationship dissolves before a child is born and parents must negotiate custody without the benefit of a shared history of parenting. Custody disputes also can surface years after a break-up, for example when a parent relocates, an adolescent wants to change living arrangements, or parents have problems with a difficult child.

Child custody disputes also are not limited to conflicts between biological parents. Grandparents may dispute custody of their grandchildren with their own children, birth parents may contest custody in the context of adoption, or same-sex couples may dispute custody with each other or a biological parent. Finally, infidelity and genetic testing, as well as technological and social innovations in conception and childbearing, can create nightmarish scenarios in which biological and social parents can end up disputing custody (Schwartz, 2003). Our focus here is on child custody disputes between parting parents, whether married or not, but many of the same issues and concerns apply across these different circumstances.

Our initial mission for this monograph was simply to critique the psychological science underpinning child custody evaluations. We make such a critique in the section titled "The (Limited) Science of Custody Evaluations." However, the subject of child custody disputes is complicated by many emotional, practical, and legal issues that are of interest and relevance to psychologists. We therefore have broadened the scope of the report to consider these more general issues, particularly developments in child custody law, alternative dispute resolution, ethics, and societal values about family life. Of course, psychological science is our primary focus, and one of the strongest findings of basic research in this area is that children fare better in separation and divorce if parental conflict is minimal or at least contained and if children maintain a good relationship with at least one, and preferably both, of their parents (Emery, 1982, 1999b, 2004). In other words, the process of family dissolution and the nature of continuing family relationships are more important to children's mental health than is the structure of any particular custody arrangement.

This finding, together with our analysis of the context of custody disputes, leads us to call for three sets of reforms. First, we encourage continued efforts to promote the private settlement of child custody disputes through education, good-faith negotiation, and alternative dispute resolution. Private settlement of custody disputes can reduce conflict; it can encourage more cooperative, ongoing relationships between coparents; and it can facilitate positive relationships between children and both of their parents. Second, we support efforts to make child custody law more clear and determinative, in order to substantially reduce the number of custody disputes. Third, in disputes that remain contested, we would limit mental health expert testimony only to opinions clearly supported by psychological science, a circumstance that unfortunately does not characterize some of today's practice. This final point is not so much a call for a reform as a recommendation that expert witnesses in custody evaluations conform to existing standards for expert testimony.

The Deer-Doe Case

We invite the reader to begin to consider the many emotional, legal, empirical, and value conflicts involved in child custody disputes with a hypothetical case. We revisit this case at points throughout the monograph to illustrate and anchor our discussion.

> Jane and John Deer-Doe, both 39 years old, have two children: Isabella, a 10-year-old girl in the fourth grade, and Carlos, a 3-year-old boy who attends preschool but spends most of the day at home with his mother. Jane continued to work full time as a certified public accountant after Isabella was born, but, with John's reluctant agreement, she quit work after Carlos's birth. John, a moderately successful computer engineer and self-described highly involved father, says that he had expected Jane to return to work after a year or two at home with the children.
>
> Jane and John agreed that they had longstanding conflicts about parenting, finances, and sexuality. John tried repeatedly to get Jane to address their unhappiness by seeing a marriage therapist. Jane was open to therapy but also accepting of an imperfect marriage. Jane's acceptance ended, however, when she learned of John's
> 2-year-long affair with a coworker. She immediately contacted an attorney, and shortly thereafter, John left the house at her request.
>
> In their subsequent negotiations, Jane indicated her desire for a divorce, and John agreed. He hoped to remarry soon and wanted the children with him half of the time. Jane countered that John should have the children no more than every other weekend, consistent with his "minimal" involvement during their marriage, and she further insisted that their children have no contact with his "friend."
>
> In the 3 months after her parents' separated, Isabella refused to see her father except on a couple of occasions. She continued to do well in school but was extremely angry with her father for "cheating on my mother." Carlos asked for his father repeatedly in the days and weeks after the separation but did so less after seeing his father only sporadically during this time. His preschool teachers complained that Carlos had become very aggressive in school and had begun to wet and soil himself again.

How can psychological scientists help families like the Deer-Does? As we will review in this monograph, there is good research to help us better understand children, divorce, and custody conflicts, and there is some reasonably strong evidence on some successful interventions. Unfortunately, very little research has been conducted directly on legal issues in the custody context, including child custody evaluations.

DEMOGRAPHICS OF FAMILY STRUCTURE, CUSTODY DISPUTES, AND CUSTODY ARRANGEMENTS

The structure of American families changed dramatically in the latter part of the 20th century. As indicated in Figure 1, divorce rates trended upward in the United States throughout the 1900s and, following a rapid rise in the late 1960s, peaked in 1981 before turning downward (Bramlett & Mosher, 2002).

Other key elements of the demographic story include an average risk of divorce of somewhat less than 50%, higher divorce rates for African Americans, lower rates for Asian Americans, and the declining risk for divorce as a function of years in marriage (Bramlett & Mosher, 2001; see Fig. 2). About 60% of divorces involve children (Clarke, 1995), and about half take place in the first 7 years of marriage (see Fig. 2), so that children are likely to be young when marriages end and custody is disputed (Furstenberg, Peterson, Nord, & Zill, 1983). As we discuss later, special concerns arise about custody for infants, toddlers, and, to a lesser extent, preschoolers.

Unmarried Parents

Over 40% of children born to married parents are expected to experience the divorce of their parents (Bumpass, 1984; U.S. Bureau of the Census, 1992), and the qualification "born to married parents" is an important one. In 2002, 34% of all children in the United States were born outside of marriage (Martin et al., 2003). In fact, the apparent decline in divorce since 1981 may be attributable to at-risk individuals and couples self-selecting out of legal marriage and childbearing. Rapid increases in nonmarital childbirth did not stabilize until about 1990, and cohabitation (which is more difficult to track) apparently is continuing to increase in frequency.

The best estimates suggest that about half of children born outside of marriage actually are born to unmarried but cohabiting parents (Sigle-Rushton & McLanahan, 2002), and cohabiting unions are more likely to dissolve than legal marriages are. Forty-nine percent of cohabiting relationships end within 5 years, whereas 20% of first marriages dissolve within 5 years (Bramlett & Mosher, 2002). Although we know of no data regarding how many disrupted cohabitations involve parents and their biological children, the disruption of relationships between unmarried parents clearly is an important and growing area for research on child custody disputes.

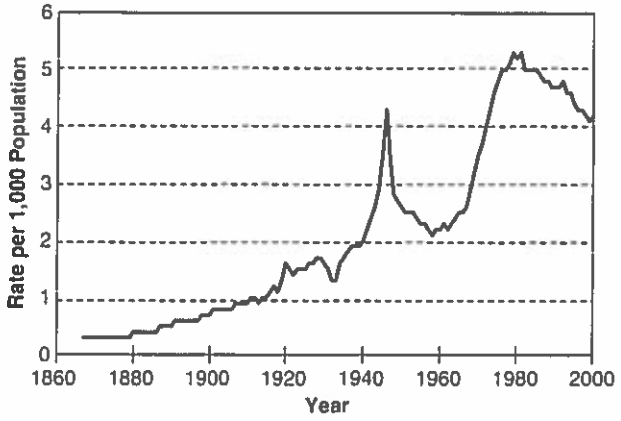

Fig. 1. Annual U.S. divorce rates from 1867 to 2000 (based on Bramlett & Mosher, 2002, and Emery, 1999b).

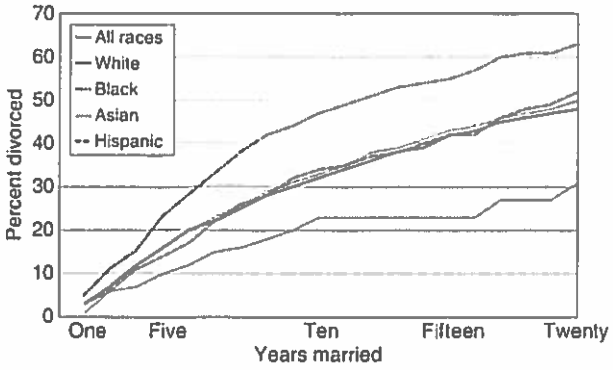

Fig. 2. Risk of divorce over the first 20 years of marriage, by ethnicity (based on Bramlett & Mosher, 2001).

Child Custody Disputes

There is no good national data on how many custody disputes arise when divorcing, cohabiting, or unmarried parents part or on how many such disputes erupt years after the break-up (which may be a more common circumstance). What is clear is that courts are overwhelmed by the huge number of families separating, divorcing, and disputing custody. In 1995, domestic-relations disputes, which include but are not limited to child custody litigation, accounted for one quarter of all legal filings, making this the largest category of court action (Ostrom & Kauder, 1996). Other evidence indicates that custody disputes form the largest percentage of domestic-relations cases (Schepard, 2004).

Child Custody Decisions

The best evidence on how child custody is decided in the context of divorce comes from Maccoby and Mnookin's (1992) study of 1,124 families with children in which the parents filed for divorce in two California counties in the middle 1980s. As illustrated in Figure 3, most of these cases were settled outside of court, as over three quarters of custody arrangements were negotiated either by the parents themselves or through their lawyers. Since 1981, California law has mandated that mediation be attempted before a custody hearing can be held before a judge; an additional 11% of the cases were settled in mediation, while 5% of the cases went the next step up in the hierarchy of legal conflict—a custody evaluation—before reaching a settlement. Only 4% of cases went to

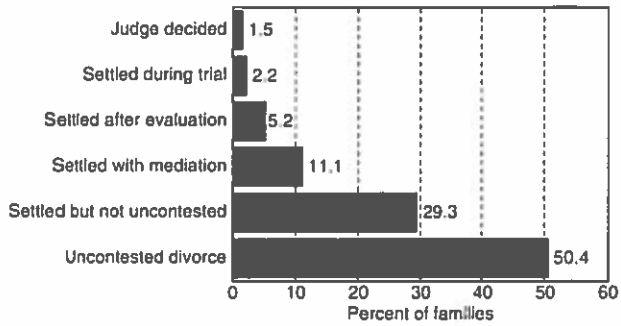

Fig. 3. Percent of 1,124 families in two California counties settling divorce custody using various methods, during the mid-1980s (based on Maccoby & Mnookin, 1992, p. 137).

trial, and most of these were settled during the trial process. A judge decided less than 2% of the cases (Maccoby & Mnookin, 1992).

The generality of these findings is limited by the two-county sampling, as well as by rapidly changing laws and societal expectations. Still, the data highlight several patterns observed across the United States and much of the industrialized world (Emery, 1999b; Pryor & Rodgers, 2001). First, many parents experience at least a mild degree of conflict surrounding child custody, and conflict is substantial in a significant subset of cases. Combining legal indicators and self-reported conflict measures, Maccoby and Mnookin (1992) estimated that 51% of divorces involved negligible conflict over issues related to custody, while 24% had mild conflict, 10% substantial conflict, and 15% intense conflict. Second, as is the case with other litigation, most custody disputes are decided outside of the courtroom. Third, alternative dispute resolution methods such as mediation increasingly are used, often successfully, in an attempt to settle disputed cases. Fourth, mental health professionals often are involved in child custody conflicts as mediators, custody evaluators, or therapists (although the last role is not reflected in these data).

The importance of each of these patterns is multiplied by high rates of separation and divorce, custody disputes between cohabiting and never-married parents, and the potential for conflict throughout the duration of the children's childhood. This means that (a) even if they represent a minority of cases, large numbers of children are exposed to substantial or intense parental and legal conflict in the midst of their parents' separation; (b) judges face the prospect of spending a great deal of their time hearing custody cases; (c) alternative dispute resolution and custody evaluations have become important parts of the process; and (d) mental health professionals are becoming increasingly involved in the child custody arena in a variety of ways.

Child Custody Arrangements Following Separation and Divorce

Although laws, definitions, and terms vary from state to state, most of the key aspects of child custody arrangements are captured by the following concepts:

- *Legal custody* refers to parental authority or decision making. In cases of *sole legal custody*, one parent has the right to make major decisions about the children's lives, especially schooling, elective medical care, and religious training. When *joint legal custody* is in effect, both parents share these major decisions, while each parent makes day-to-day decisions autonomously when the children are with her or him. In some cases, the court will assign more specific decision making over day-to-day matters to one or both parents.
- *Physical custody* refers to the time children actually spend with their parents. In cases of *primary physical custody*, the children spend the majority of their time with one parent and generally "visit" (a term many find pejorative) with the "nonresidential parent" on some agreed-to schedule (e.g., one evening during the week and every other weekend). In cases of *joint physical custody*, children spend close to equal amounts of time with both parents. Although there is no uniform definition of joint physical custody, many consider it to be a minimum of an average of two overnights per week (Maccoby & Mnookin, 1992). This definition is consistent with child-support laws in 28 states that lower support obligations for joint physical custody arrangements and often define joint physical custody at about 100 overnights per year (Elrod & Spector, 2004).
- *Split custody* refers to circumstances in which each parent has sole physical custody of at least one child—that is, when siblings are split up between their parents.

Single Mothers and Single Fathers

The United States Census Bureau generally does not track joint physical custody, but instead lists children as living with two married parents, a single mother, a single father, or in some other arrangement. In 2002, of all children living with a single parent, just over 82% lived with a single mother while approximately 18% lived with a single father (Fields, 2003). This percentage of children living with a single father represents an increase over the historical level of about 10% (Meyer & Garasky, 1993). Interpretation of these census data, however, is clouded by several factors including (a) remarriage, as children who live with remarried parents are counted as living in a two-parent household; (b) cohabitation, as many "single" parents live with a partner, including 11% of single mothers and 33% of single fathers in 2002 (Fields, 2003); and (c) reason for single-parent status, as the category includes separated, divorced, never-married, and widowed parents. Another limitation is that joint physical (or legal) custody is not routinely documented.

Joint Custody

Joint custody (a term that confounds legal and physical custody) has been a much-discussed and much-debated coparenting arrangement since the 1980s (Folberg, 1991). Later, we discuss evidence about the well-being of children living in joint custody. Our present task is to estimate its prevalence.

We know of three national estimates of the frequency of joint custody (Child Trends, 2002; Clarke, 1995; Donnelly & Finkelhor, 1993), the best coming from special supplemental 1998 United States Census data (and also 1994 and 1996 data that provide essentially the same results). In this analysis, 65% of mothers had sole physical and legal custody, 10% had sole physical and joint legal custody, 11% of fathers had sole physical custody (with either joint or sole legal custody), 9% of parents had joint physical and legal custody, and 5% had split custody or some other arrangement (Child Trends, 2002). Thus, about 75% of children not living with both parents lived primarily with their mothers, approximately 10% lived primarily with their fathers, about 10% lived in joint physical custody, and another 5% lived either in split custody or in some other arrangement. Although some people argue that joint physical custody is becoming far more common, no trends for increased prevalence between 1994 and 1998 were found in the census data (Child Trends, 2002).

Historical Trend Evidence and Joint Custody

Historical data from Wisconsin demonstrate the importance of distinguishing legal custody and physical custody, and also make us suspect that joint legal custody is becoming considerably more common than suggested by the census estimates. A review of 9,500 Wisconsin divorce settlements between 1980 and 1992 revealed that sole physical custody to fathers remained stable during these years while sole physical custody to mothers declined (see Fig. 4). Joint physical custody rose from 2% to 14% of the Wisconsin cases, while joint legal custody increased from 18% to 81% (Melli, Brown, & Cancian, 1997). Our experience leads us to believe that this dramatic increase in joint legal custody and more modest increase in joint physical custody have also occurred in many other states. Estimates from 1990 data gathered by the National Center for Health Statistics (Clarke, 1995) also support this suggestion, as different states reported widely varying rates of joint custody (legal and physical custody were not distinguished)—for example, 4% percent in Nebraska compared with 44% in geographically and politically similar Kansas.

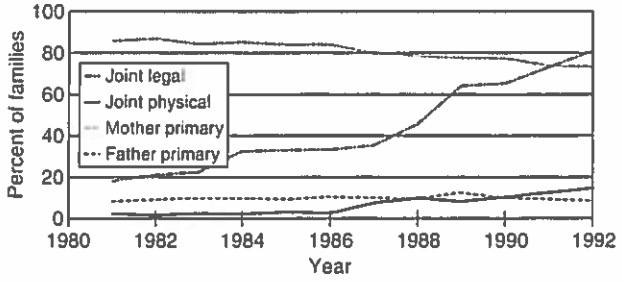

Fig. 4. Percentage of custody arrangements in Wisconsin divorces from 1980 to 1992 (data were collected across calendar years; thus 1982 refers to 1981–82, etc.; based on Melli, Brown, & Cancian, 1997).

Changes in Custody Arrangements

Custody arrangements change over time, and legal agreements often do not correspond to de facto residence. The best evidence on these points also comes from Maccoby and Mnookin's (1992) longitudinal study. For 783 cases where complete data were obtained during the 3-year study, initial legal agreements designated the following custody arrangements in the two California counties: 66% sole mother custody, 9% sole father custody, 21% joint physical custody, and 4% split custody. Shortly after the divorce decree was filed, however, only 52% of the cases with designated joint physical custody actually had a *de facto* joint physical custody. Among the 48% of the joint physical cases in which the living situation was not consistent with the legal agreement, most involved sole mother physical custody. Of cases with designated mother custody, 87% followed that arrangement in practice, as did 82% of father custody agreements, but only 35% of split-custody agreements actually conformed to that arrangement.

Three years later, only 45% of legally designated joint physical custody cases actually conformed to that arrangement, compared to 85% of cases with designated mother custody, 71% of cases of father custody, and 34% of split custody awards (Maccoby & Mnookin, 1992). The absolute percentages of the four types of custody arrangements 3 years after the divorce decree were similar to the initial arrangements, but the longitudinal analysis demonstrated that many families shifted out of their original custody arrangements and into new ones.

CUSTODY LAW AND CHILD CUSTODY EVALUATIONS IN PRACTICE

Later, we consider broad conceptual issues related to child custody law and custody evaluations. We begin, however, with a brief overview of the current legal landscape and a minimal critique.

The "Best Interests of the Child" Standard

Each state legislature in the United States controls its own child custody law, and laws can vary considerably from state to state. Still, every state law indicates that custody decisions are to be made according to "best interests of the child" standard, the principle that judicial determinations should be based on each child's unique future best interests (Elrod & Spector, 2004). Many mental health professionals applaud this "best interests of the child" standard as being responsive to individual children and families. We differ. Individualized decision making is appealing on the surface, but we are deeply concerned that a standard vague enough to be interpreted differently for each family that comes before the court (a) encourages parents to enter into custody disputes (thereby increasing parental conflict), because the outcome of a court hearing is difficult to

predict; and (b) allows for bias to intrude in the exercise of judicial discretion.

For reasons we do not fully understand, the law apparently has interpreted children's best interests to be primarily their best psychological interests (as opposed to other possibilities such as their economic, educational, or medical interests). This is evident in the various factors deemed relevant to children's best interests listed in most state laws, which typically are rooted in the Uniform Marriage and Divorce Act (1979), which lists the following:

- The wishes of the children's parent or parents as to their custody
- The wishes of the children regarding their custodian
- The interaction and interrelationship of the children and their parent or parents, their siblings, and any other person who may significantly affect the children's best interests
- The children's adjustment to their home, school, and community
- The mental and physical health of all individuals involved

Because child custody laws differ from state to state, some factors designed to be considered by judges are idiosyncratic to one or only a handful of states. South Carolina, for example, takes into account the religious beliefs and commitment of the parents, while Alabama, Florida, Michigan, North Dakota, and Utah consider parents' "moral character" to be relevant to children's best interests. One of the goals of a child custody evaluation—the overriding goal, according to some—is to assess the child and parents relative to these state-specified best-interest factors.

A Psychological Evaluation for the Deer-Doe Family

After several months of separation and still no custody agreement, Jane's attorney suggested a child custody evaluation as a next step in their negotiations, and, eager for some outside help, John agreed. Several weeks later, a psychologist, Dr. David Hagan, who was mutually agreed upon by both parties, was appointed by the court to assess Jane, John, his girlfriend, and their children.

Over the course of 6 weeks, Dr. Hagan conducted a comprehensive evaluation consisting of interviews and psychological testing with both parents; tests included the Minnesota Multiphasic Personality Inventory-2 (MMPI-2), the Rorschach Inkblot Technique, and the Wechsler Abbreviated Scale of Intelligence. Both children were interviewed, observed interacting with each other, and observed interacting with each parent at Dr. Hagan's office and at the respective parental homes. Dr. Hagan also administered a number of psychological tests to the children including the Achenbach Child Behavior Checklist (with parents and teachers as informants), the Roberts Apperception Test, the Bricklin Perceptual Scales, and the Wechsler Intelligence Scale for Children-IV. In addition, Dr. Hagan obtained collateral information by interviewing the children's teachers and grandparents, reviewing school and medical records, and reading all litigation-related documents. Finally, Dr. Hagan evaluated John's girlfriend by way of extensive interviewing and administration of the psychological tests mentioned earlier.

Dr. Hagan's bill for $7,400 reflected that he spent 37 hours conducting the evaluation, reviewing records, and writing a 35-page report summarizing his observations, findings, and opinions. (We discuss the report later.)

Practices Reported by Custody Evaluators

Given their frequency, high cost, and social and personal importance, we might expect to find a large body of research on custody evaluations and their scientific underpinnings. However, only a few studies of custody evaluations have been completed. One thing these studies show is that, in real life, many evaluators use the instruments employed by our fictional Dr. Hagan. Another thing research shows is that most of these measures are deeply flawed when used in the custody context.

With the exception of one study (Bow & Quinnell, 2002) all research examining child custody evaluation practices has been based on the self-report of examiners. Although these data provide some helpful information, we must keep in mind that professionals' reports of their behavior may not accurately depict their actual practices (Greenberg, Otto, & Long, 2003).

Keilin and Bloom (1986) described the practices reported by 82 custody evaluators (78% psychologists) who responded to an anonymous survey. Respondents devoted an average of 19 hours to each evaluation and almost always reported interviewing each parent and the children. Most used psychological tests with adults (76%) and children (74%); most observed parent–child interactions (69%); half said they observed interactions between the two parents; and about one third reported visiting the children's homes or schools. Approximately one half interviewed third parties (e.g., friends and relatives) in an attempt to gain a better understanding of the children and their parents.

No one particular psychological test was used by a majority of the respondents when assessing children. Intelligence tests were used most frequently, with almost half of the evaluators using them in the majority of their cases. The next most frequently used instruments with children were the Thematic Apperception Test or the Children's Apperception Test (39%), followed by miscellaneous projective drawings, the Rorschach Inkblot Technique, and the Bender-Gestalt Visual Motor Test. In assessments of parents, the MMPI was the most commonly used assessment technique (70%), followed by the Rorschach Inkblot Technique (42%), and the Thematic Apperception Test (38%).

Keilin and Bloom (1986) also asked the evaluators to rank order 21 different factors with respect to their importance when considering custody. In descending order of significance, the ten most important were (1) the stated preferences of a 15-year-old (or older) child, (2) parental attempts at alienation (i.e., attempting to turn a child against the other parent), (3) the nature and quality of the child's emotional relationship with each parent, (4) the emotional or psychological stability of each

parent, (5) each parent's parenting skills, (6) each parent's openness towards the child's contact with the other parent, (7) the parents' preseparation caretaking and parenting roles, (8) the parents' expressed anger and bitterness regarding the divorce, (9) the parents' sexual orientation, and (10) the stated preferences of a 5-year-old child.

Ten years later, Ackerman and Ackerman (1997) surveyed 800 doctoral-level psychologists who conducted child custody evaluations and obtained usable responses from 201 (25%). Respondents spent 21 hours per evaluation—similar to the earlier survey—but these respondents reported devoting more time to reviewing collateral materials and report writing. Intelligence tests and projective measures continued to be the instruments most frequently employed with children, and the MMPI/MMPI-2 remained the most frequently used assessment instrument for parents, followed by the Rorschach Inkblot Technique.

Many custody evaluators also reported using assessment instruments with children that were developed specifically for use in custody contexts (Ackerman & Ackerman, 1997). Over one third used the Bricklin Perceptual Scales (Bricklin, 1990a) while 16% used the Perception of Relationships Test (Bricklin, 1989). Fewer respondents (11%) used the Ackerman-Schoendorf Scales for Parent Evaluation of Custody (Ackerman & Schoendorf, 1992), the one custody-assessment measure designed for entire families and adults. Fewer than 10% used other custody-assessment measures, specifically, the Parent Awareness of Skills Survey (Bricklin, 1990b) and the Custody Quotient (Gordon & Peek, 1989). Other investigators (e.g., Bow & Quinnell, 2001; Gourley & Stolberg, 2000) have reported findings regarding test usage by custody evaluators similar to those detailed by Keilin and Bloom (1986) and Ackerman and Ackerman.

Like Keilin and Bloom (1986) before them, Ackerman and Ackerman (1997) also asked custody evaluators to rate the importance of various factors to issues of child custody. According to the custody evaluators, the ten most important, in descending order of significance, were (1) the substance abuse status of each parent, (2) the parents' parenting skills, (3) parental attempts at alienation, (4) the nature and quality of the child's emotional relationship with each parent, (5) the emotional or psychological stability of each parent, (6) each parent's openness toward the child's contact with the other parent, (7) the parents' history of compliance with the court during the separation, (8) the parents' preseparation caretaking and parenting roles, (9) the stated preferences of a 15-year-old or older child, and (10) the parents' expressed anger and bitterness regarding the divorce.

THE (LIMITED) SCIENCE OF CUSTODY EVALUATIONS

State statutes regarding children's best interests help us understand at least some of the practices of custody evaluators. We could (and later do) question, for example, whether (or when) a parent's mental health or the wishes of a child should be a central focus in child custody cases. Still, evaluators who assess such factors are following explicit legal guidelines. More difficult to explain and more problematic, however, are other aspects of evaluation practices including the widespread use of well-established measures with no clear relevance to the custody context (e.g., measures of intelligence), attempts to measure constructs created to apply to child custody decision making (e.g., "parent alienation syndrome"), efforts to identify "parent of choice" (e.g., the Bricklin Perceptual Scales), and the use of measures that a significant number of psychologists view with skepticism (e.g., the Rorschach Inkblot Technique).

We are dubious about many child custody evaluation practices, because of the absence of solid psychological science and of clear criteria to be predicted by psychological science. We also hold two much more fundamental questions about child custody evaluations: Why has society and the law placed such importance on a prediction about *psychological* factors in determining custody? And if the goal is to minimize children's psychological risk, might there be better roles for psychologists to play—both as practitioners and as scientists—in custody disputes? For now, however, we focus on the lack of scientific evidence to support many of the instruments and practices of mental health professionals who serve as custody evaluators.

Heilbrun, Rogers, and Otto (2002) described a three-category typology of assessment techniques used in forensic contexts, including custody evaluations. *Clinical assessment instruments* are those developed to assess psychological constructs, typically for intervention purposes (e.g., measures of intelligence, psychopathology, academic achievement). *Forensically relevant instruments* assess constructs that are psychological in nature but may be of particular relevance in forensic contexts (e.g., measures of response style, risk for criminal offending). Finally, *forensic assessment instruments* are specifically designed to assess psycho-legal constructs. Here we review evidence in regard to the third and first categories of assessment techniques. We do not consider forensically relevant instruments because none have been used widely by custody evaluators, although that may change (Posthuma, 2003). We also raise concerns about "parent alienation syndrome" and other constructs that have been created for, and asserted to have scientific standing in, the context of custody evaluations.

Forensic Assessment Instruments: No Scientific Support

In the past 15 years, psychologists have developed a number of forensic assessment instruments purporting to assess children's best interests in custody disputes (see Grisso, 2003). Our bottom-line evaluation of these measures is a harsh one: These measures assess ill-defined constructs, and they do so poorly, leaving no scientific justification for their use in child custody evaluations.

The most widely used forensic assessment instrument (Ackerman & Ackerman, 1997) is the Bricklin Perceptual Scales

(BPS), described as a projective measure of parents' competence, supportiveness, follow-up consistency, and possession of admirable traits (Bricklin, 1990a). Using a stylus and rating card, children rate each parent on 32 different activities considered to be relevant to these four capacities. The parent who receives the greater number of positive ratings is identified as the "Parent of Choice." Bricklin asserts that the nonverbal nature of the task (using a stylus rather than a verbal response) allows for the assessment of the child's "unconscious preferences," which are less likely to be subject to distortion due to social desirability or parental persuasion. However, the BPS has been criticized on numerous grounds: There is no support for claims that it assesses children's unconscious preferences or that responses are not subject to external influence; the developer permits variation from standard test administration; the measure samples a relatively narrow range of parenting domains; the developer has not provided basic norms and psychometric properties of the measure; and data regarding concurrent and predictive validity are either absent or unconvincing (Heinze & Grisso, 1996; Melton, 1995; Melton, Petrila, Poythress, & Slobogin, 1997; Otto & Edens, 2003; Otto, Edens, & Barcus, 2000; Shaffer, 1992).

Another measure used fairly frequently is the Perception of Relationships Test (PORT; Bricklin, 1989), a projective drawing that is described as measuring the "whole organism or gut-level responses a child has toward a parent [that] are much more reflective of what the child's actual interactions or experiences with that parent have been" (Bricklin, 1993, p. 1). Seven drawing tasks completed by the child are scored to identify the "Primary Caretaking Parent." Like the BPS, the PORT has been widely criticized. Objections include the incomplete and confusing manual, unclear administration and scoring guidelines, minimal reliability data, missing norms, and lack of validity data (Carlson, 1995; Conger, 1995; Heinze & Grisso, 1996; Melton et al., 1997; Otto & Edens, 2003; Otto et al., 2000).

Bricklin (1990b) describes another measure, the Parent Awareness Skills Survey (PASS), as a "clinical tool designed to illuminate the strengths and weaknesses in awareness skills a parent accesses in reaction to typical child care situations" (p. 4). The PASS consists of 18 childcare scenarios selected to represent caretaking of children of various ages. The parent's responses are followed up with questioning by the examiner as needed, and scoring is based on guidelines in the test manual. The PASS also has been criticized for basic shortcomings: the absence of norms, reliability and validity data, and clear scoring guidelines (Otto & Edens, 2003; Otto et al., 2000). Of particular concern is the developer's suggestion that "the evaluator, by virtue of appropriate training in psychology and/or child development, can apply his or her own standards in assigning the suggested scores. The PASS allows for wide latitude in scoring since its main purpose is to discover the relative (rather than absolute) strengths and weaknesses any individual or compared set of respondents manifest" (Bricklin, 1990b, p. 11).

The Parent Perception of Child Profile (PPCP; Bricklin & Elliott, 1991) is described as a measure of parents' understanding of a child's development and needs across eight areas: interpersonal relations, daily routine, health history, developmental history, school history, fears, personal hygiene, and communication style. Because parents who more accurately assess their child are assumed to be better parents, the PPCP requires the examiner to assess the accuracy of each parent's report, using vaguely defined criteria that include the examiner's and third-party informants' opinions. According to the manual, data need not be gathered in all eight categories, and the examiner can decide which issues are most critical for a particular child and parent. The PPCP has been criticized for its incomplete manual, lack of scoring directions, and absence of reliability and validity data (Otto et al., 2000; Otto & Edens, 2003).

Another instrument used by evaluators with some frequency, the Ackerman-Schoendorf Scales for Parent Evaluation of Custody (ASPECT), is purported to be "a clinical tool designed to aid mental health professionals in making child custody recommendations" (Ackerman & Schoendorf, 1992, p. 1). The ASPECT is not a test, but an assessment approach that aggregates data from the parent (an open-ended "Parenting Questionnaire," the MMPI-2, the Rorschach Inkblot Technique, and an intelligence test) and from the child (the Rorschach Inkblot Technique, an intelligence test, an academic achievement test, and a projective story). Measures were selected based on the developers' review of the literature, and test scores are used to calculate a "Parental Custody Index" (PCI) for each parent. The PCI is considered to indicate parenting effectiveness, and judgments about the parents are based on their relative PCI values. With rare exceptions (e.g., Brodzinsky, 1993), reviews of the ASPECT have been uniformly negative. Criticisms include the absence of a clear relationship between many of the measures and behavior relevant to custody; the failure to assess factors clearly deemed relevant to custody decisions; and an absence of important data regarding basic psychometric properties, including predictive validity (Arditti, 1995; Heinze & Grisso, 1996; Melton, 1995; Melton et al., 1997; Otto & Edens, 2003; Otto et al., 2000; Wellman, 1994).

In summary, all measures that purport to assess constructs directly relevant to child custody determinations suffer from significant limitations. In fact, no study examining the properties of these measures has ever been published in a peer-reviewed journal—an essential criterion for science and, in theory, for the courts. In our view, the absence of scientific support should preclude the use of any of these forensic assessment instruments for any purpose other than research. We even have doubts about the value of research using these measures, because it is hard to conceive of any psychological test that could measure all the factors that might be relevant to child custody (Shuman, 2002) or that might assess the best custody arrangements for children when the criteria for fulfilling children's best interests are so poorly defined (Emery, 1999b).

Clinical Assessment Instruments: Some Cautions in the Custody Context

Heilbrun et al. (2002) describe measures of intelligence, personality, psychopathology, and academic achievement as clinical assessment instruments. In contrast to forensic assessment instruments, we believe use of many of these measures is warranted in forensic assessment contexts to the degree that they offer reliable and valid assessments of relevant constructs identified in the law. We do, however, wonder about the routine use of measures such as IQ tests, which can add to the time and expense of a custody evaluation without holding a clear relevance to the issue before the court.

A greater concern is the validity of clinical assessment instruments in the custody context, as a number of considerations suggest the need for caution. For one thing, as in other forensic contexts, examinees may be less than candid in their responses, including on psychological tests. Tests that do not include measures of response style are particularly vulnerable to dissimulation, while tests with embedded measures of response style are not necessarily impervious to false reporting.

Whether the constructs assessed by the instrument are, broadly conceived, "states" or "traits" is another important issue. Assessments of characteristics that commonly change over time (e.g., parental depression) provide a weak basis for an evaluator to make claims about how a parent functioned in the past or will function in the future. Because families are evaluated during a period of high stress, moreover, evaluators also must be cautious about drawing inferences about functioning at some later, hopefully less stressful, point in time. Given the very nature of custody disputes and the context in which most custody evaluations occur, it is particularly important that the evaluator not assume that instruments assessing more enduring styles will not change in response to situational factors. The Standards for Educational and Psychological Testing (American Educational Research Association, American Psychological Association, & National Council on Measurement in Education, 1999) direct that "a test taker's score should not be accepted as a reflection of lack of ability with respect to the characteristic being tested for without consideration of alternate explanations for the test taker's inability to perform on that test at that time" (p. 43). The upheaval of divorce constitutes a reasonable "alternative explanation" that should certainly be considered when interpreting a test score.

We do not want to throw out the baby with the bathwater. There may be a role for clinical assessment instruments in some custody evaluation contexts. More specifically, to the degree that there is a psychological construct that is relevant to the issues at the heart of a custody matter and there are valid psychological measures of that construct available, use of such measures can be of some value. Examples of relevant things that may need to be determined in a custody case might include whether a child has a learning disorder that needs special attention, whether a mother suffers from depression that affects her ability to meet her children's emotional needs, or whether a father has a substance-abuse disorder that results in him placing the children in at-risk situations when in his care.

Projective Measures

Our concerns about clinical assessment instruments apply to highly structured, well-validated, and well accepted measures of intelligence, academic achievement, and psychopathology. These issues present the greatest concerns, however, for unstructured, projective measures, given questions that have been raised about even basic psychometric properties of such tests, including their reliability and validity. There is a considerable difference of opinion and ongoing, active debate regarding the general utility of projective measures such as the Rorschach Inkblot Technique (compare Wood, Nezworski, & Stejskal, 1997; Wood, Nezworski, Lilienfeld, & Garb, 2003 and Weiner, 1996; Meyer, 1997, 2001), Draw a Person, and Human Figure Drawings. The very existence of this debate, in combination with some of the specific criticisms and potential dangers in the custody context, lead us to suggest that such measures not be used in child custody evaluation contexts, or any other evaluation contexts for that matter.

We do not have the space, expertise, or the inclination to review the broad and polarized literature on projective tests in this monograph. Thus we only point to the extensive and serious controversy, and note this: Questions about the value of projectives or any other assessment technique need to be debated and answered by psychological scientists outside of the courtroom. It is naive to expect judges to make informed judgments about the psychometric adequacy of projective measures in the context of a custody hearing. We also are concerned about the potential for evaluators to assert that projective measures have scientific authority while the underlying empirical, legal, and values questions remain unanswered, precisely because the "test" is mysterious to lay observers and therefore potentially misleading or difficult to challenge. A nonexpert might feel competent challenging the relevance or the validity of a relatively straightforward measure like an IQ test or an MMPI-2. Yet, despite more significant concerns about its psychometric properties, results of a Rorschach may be more difficult to challenge precisely because of its more obscure source of material and scoring (Shuman, 2002).

Clinical Interviews

The clinical interview is another assessment technique that requires considerable caution when used as a measurement technique in custody evaluations. Interviewers may yield inferences that are reliable or unreliable, valid or invalid, but there are no structured interviews with well-established psychometric properties specifically developed for use in the child custody context, and survey data regarding psychologists' custody evaluation practices indicate that use of any structured interview approach is virtually unheard of (Ackerman & Ackerman, 1997; Keilin & Bloom, 1986). Thus, differences between

interviewers may result from variance in the family's responses or from the contrasting structure, content, or interpretation of the interview. We urge psychological scientists to work to develop structured interviews for the custody context. In the meantime, we expect custody evaluators to continue to interview families. Although we are dubious about the psychometrics of unstructured interviews, we find some comfort in the fact that, unlike projective measures, interviews are more straightforward and understandable and hopefully are not presented as providing data as scientific-sounding as that of a test.

Direct Observation

Direct observation of parent–child interactions is another complex and generally unstandardized assessment strategy. Threats to validity include reactivity, unreliable coding systems, unrepresentative samples of behavior, and problematic data compilation and analysis. As with interviews, we urge the development of standardized observation measures for use in the custody context, and urge evaluators to describe their observations clearly and to identify the inferences they draw from observational assessments.

Combining Assessment Results and Drawing Inferences

This last point raises a broader and very important issue. All clinical assessment instruments assess constructs that, at most, are only indirectly relevant to custody; thus their use in custody evaluations typically requires inferences to be made. Once a parent's depression or a child's academic abilities are assessed, for example, the examiner may draw some inference regarding how that factor is relevant to the best interests of a child. The question is: How is the examiner to draw conclusions from a single measure or, even more importantly, combine data from several sources to form a conclusion about the best interests of the child? For example, how does an evaluator weigh the results of a hypothetically accurate (impossible in practice) evaluation where all data indicate that the mother is an effective disciplinarian but not terribly warm and that the father is warmly supportive but not good at setting limits? Thus, our concerns with clinical assessment instruments are not only how to measure relevant constructs reliably and validly in a difficult context, but also how to synthesize multiple measurements in a manner relevant to the ultimate issue of a custody determination. Perhaps ideally, the law would provide a formula for making such decisions, but the factors to be considered in the law are rarely even ranked relative to one another.

Controversial Topics Requiring Further Investigation

Surveys of practicing custody evaluators indicate that, in addition to using clinical assessment instruments and dubious forensic assessment instruments, they also frequently assess certain quite controversial constructs. We illustrate our concerns by focusing on three in particular: (a) parental alienation syndrome (PAS), (b) children's wishes regarding custody, and (c) overnight visitation for very young children.

PAS: Asserting Science Where There Is None

"Parental alienation" is a construct ranked high on the list of factors evaluators consider to be directly relevant to custody decision making. There is no test instrument designed to measure parent alienation. Rather, it is a "diagnosis" reached through clinical interviews. Some experts have testified to making the diagnosis of parental alienation syndrome, and their testimony is claimed to be an important influence on judicial decision making (Gardner, 2004).

"Parental Alienation Syndrome" is a term created by psychiatrist Richard Gardner (2001) based on his clinical experience with custody disputes. Gardner asserts that PAS, which he says develops almost exclusively in the context of custody disputes, is characterized by one parent "programming" a child against the other parent (Gardner, 2001). The assumption is that a child's disdain for one parent is generally unjustified and solely attributable to denigration on the part of the other, alienating parent. Gardner (2004) also claims that PAS can be "diagnosed" reliably and validly by expert evaluators, although he offers no explicit criteria for doing so or objective evidence to support his claim (Emery, 2005).

We recognize that parents often undermine each other's relationships with their children following separation (Emery, 2005; Kelly & Johnston, 2001). We also note that many state statutes include a "friendly parent" rule, a preference for awarding custody to the parent who will be more likely to promote the children's relationship with the other parent (Elrod & Spector, 2004). However, the scientific status of PAS is, to be blunt, nil. As Gardner (2004) himself noted in a recent posthumous publication, only one study of parent alienation ever attempted a statistical analysis: his own. Very recently, Johnston conducted two studies of case records designed to identify the sources of alienation; she found many contributing factors leading to a child aligning with one parent against the other, including high-conflict custody litigation and poor parenting on the part of the "alienated" parent (cited in Johnston & Kelly, 2004).

We believe that it is blatantly misleading to call parental alienation a scientifically based "syndrome" (Emery, 2005). Careful assessments of each parent's willingness to support the other coparent clearly may be relevant to custody, but there is no established way of measuring "alienation." Evaluators therefore must carefully identify the sources of their information concerning a more or less "friendly" parent, as well as the inferences they draw from these assessments. Certainly, these assessments are best conducted by an evaluator who interviews both parents, something Gardner (2001) did not do in many cases.

Children's Wishes

Surveys indicate that custody evaluators place considerable importance on children's stated preferences regarding custo-

dy—particularly the preferences of adolescents, but also of children as young as 5 years old (Ackerman & Ackerman, 1997; Keilin & Bloom, 1986). This surely reflects the fact that children's wishes regarding custody typically are included in state laws as a factor to be considered when determining children's best interests. In fact, some statutes explicitly direct that the wishes expressed by a child of a given age—for example, 12 years old—should determine custody if there is no reason why those wishes should not be followed (Elrod & Spector, 2004). Although all agree that the wishes of teenagers can be influenced by unfortunate circumstances (e.g., a parent's greater material resources or permissiveness), laws regarding the expressed wishes of children of a certain age both respect the increasing autonomy of adolescents and recognize the realistic difficulty of trying to keep children in an arrangement to which both they and one parent object.

A policy of acting on the freely expressed wishes of an adolescent is not without problems, but far bigger problems (and controversies) arise in regard to wishes of children who (a) are school aged or even younger and/or (b) do not come forward with a freely expressed preference. Some psychologists have offered that, even in these circumstances, children should be encouraged to express a preference regarding custody as a means of empowering them (see Weithorn, 1987). Others express concern that, instead of giving children the right to have input, such policies give children the responsibility for making adult decisions—decisions that the adults have failed to make themselves (Emery, 2003). Still others say that children's preferences should be assessed only sensitively and indirectly and that this information should be used as feedback to facilitate independent parental decision making (McIntosh, Long, & Moloney, 2004).

One of us has taken a strong position against attempting to assess children's unexpressed wishes (Emery, 2003), but our present concern is more basic. The freely offered preferences of children—particularly older children—are important considerations in custody evaluations for both practical and legal reasons, but there is no direct evidence on how or indeed whether evaluators should assess the wishes of children who, for whatever reason, do not express them.

Overnights With Infants and Toddlers

A final controversy we will discuss is whether or to what extent infants and toddlers should have overnight visits with their nonresidential parents. Children's age in relation to overnights is not a consideration mentioned often in surveys of custody evaluators, but it stands as an example of the sorts of controversial issues that evaluators often are asked to address. Other such issues include the question of whether a residential parent with primary physical custody should be allowed (if there are good reasons) to move with the child away from a nonresidential parent, or under what circumstances parental conflict is so intense that joint physical custody is unworkable.

Using differing interpretations of attachment theory, leading psychological scientists have taken strong and very different positions on the issue of overnights involving young children. A document prepared for the Spokane (Washington) Bar Association, and endorsed by many leading attachment researchers, called attention to the psychological importance of young children's secure attachment with a primary attachment figure. Based on research and theory on the primary attachment, the report recommended against overnight visits with the nonresidential parent until children are 4 years old (Spokane County Bar Association, 1996). In contrast, in a paper published in a major family-court journal, other leading psychological scientists highlighted the importance of children's attachments to multiple caregivers. Focusing on the value of developing multiple attachments, the authors recommended that infants should have regular overnight visits with nonresidential parents in the first year of life (Kelly & Lamb, 2000). Both interpretations offered various caveats about the quality of children's relationship with the nonresidential parent, parental cooperation, and similar issues, but they clearly came to very different substantive conclusions about what psychological science indicates regarding whether, when, or how often infants and toddlers should have overnight visits with nonresidential parents.

There is only meager direct evidence on the harm (Solomon & George, 1999) or absence of harm (Pruett, Williams, Insabella, & Little, 2003) associated with overnight visits for very young children. As with the issue of children's wishes, the psychological scientists debating the question of overnight visits apparently come to logical conclusions based on their own, theoretical premises, yet the limited state of knowledge allows reasonable scientists to come to opposing conclusions. Such differences of opinion are of great value in science, but when translated into policy recommendations, they can confuse and confound judges, lawyers, evaluators, and parents. For example, we have had distraught mothers approach us in shock after being court-ordered to stop breast-feeding their infants to allow for smoother overnight visits, yet we also know of judges who claim to overturn consensual parenting plans if they include overnight visits for children 3 years of age or younger because of worries about disrupting attachments.

One of us has developed a set of guidelines for parents about overnights and other arrangements for young children that represents what we believe to be a balanced position (Emery, 2004). However, our point here is that, whatever conclusion one reaches, it is based on limited evidence. Psychological scientists need to recognize and acknowledge their limited data base.

Our bigger point, to which we turn shortly, is this: Custody decision making and custody evaluations have an impossible task in attempting to determine children's future "best interests" in cases where parents cannot agree. Neither the wisest judge nor the most insightful evaluator has good answers to impossible questions.

The custody report completed by Dr. Hagan in our fictional case illustrates our various concerns with the limited science of

custody evaluations and, more importantly, shows the problems that can arise under the regime of vague custody laws and vague professional and ethical standards for custody evaluators.

The Deer-Doe Case: Dr. Hagan's Custody Report

Dr. Hagan wrote a 35-page report summarizing his evaluation of the Deer-Doe family. The report contained precise details of the results of the various standardized tests, but the lawyers were only really interested in the final paragraphs under the heading, *Summary and Recommendations*.

"In summary, substantial evidence points to Ms. Deer-Doe's longstanding depression, her intense, repressed hostility toward Mr. Deer-Doe, and her alienation of the children against their father. In contrast, Mr. Deer-Doe appears to be well adjusted, is eager to promote the children's relationship with their mother, and is able and interested in being a full-time father. It therefore is recommended that, in order to promote his best interests, Carlos Deer-Doe be shifted immediately to his father's custody with regular visits with his mother, provided that she enters into individual psychotherapy.

"Although Isabella's intense anger at her father is largely a product of alienation, no change in custody is recommended for her at this point in time, because she is closely allied with her mother and is likely to continue to reject and rebel against her father's care. Instead, individual psychotherapy and family therapy with her father is recommended for Isabella, with further evaluation in 3 to 6 months depending upon the recommendations of Isabella's therapists and her mother's therapist, if relevant. A key consideration at that time will be whether Isabella's stated wish to live with her mother, if she continues to voice this preference, is a result of alienation."

When he read the evaluation, John Deer-Doe was jubilant. He felt vindicated, eager to be a full-time father again, and excited about the prospect of starting his new family. He vowed he was now going to get remarried "the day after my divorce is final." His lawyer, who also was encouraged by Dr. Hagan's report and recommendations, told John that the evaluation was not only a victory for him but for all fathers. "Sometimes the system really does work," she offered.

Jane Deer-Doe's reactions were understandably quite different. Shocked and panicked, she became emotionally distraught in her lawyer's office. He eventually helped Jane calm down by telling her that he had learned only recently that Dr. Hagan, who used to be fair and evenhanded, had become notoriously biased in favor of fathers as a result of losing custody in his own, bitter divorce. If he had known this a few months ago, Jane's lawyer told her, he never would have agreed to Dr. Hagan as the court-appointed evaluator.

Ms. Deer-Doe's attorney went on to offer that he would postpone the pending hearing in order to get a second evaluation by another mental health professional and have Dr. Hagan's evaluation reviewed by a third professional so as to identify any important limitations or weaknesses. If the court refused to appoint a more objective, neutral evaluator, then he would hire an expert who would do the job right. In any case, the postponement meant that, at a minimum, no changes in custody would take place for 6 to 9 months given the congested court calendar. In the meantime, he urged Ms. Deer-Doe to cheer up, continue to be a wonderful mother, and to be on her very best behavior so as not to give her soon-to-be-ex-husband any ammunition in his campaign against her and motherhood.

A Bigger Problem: The Legal and Emotional Context of Custody Disputes

We could conclude our monograph here with this summary: There is essentially no psychological science to support the measures and constructs designed specifically for the assessment of child custody arrangements for individual children. Moreover, established measures of clinical constructs must be used with caution due to threats to their validity and questions about the relevance in the custody context of the constructs they assess. We also could conclude that the state of psychological science is too limited to reach clear conclusions about controversial issues such as children's wishes, overnight visits, or even PAS, and remind the reader that the burden of proof falls on proponents of a particular hypothesis or recommendation. To these three points, we could add questions about ethics and professional practice—for example, potential concerns about systematic bias on the part of evaluators, questions about whether evaluators should address the "ultimate issue" (i.e., recommend specific custody arrangements), and worries about a battle of experts when each side hires its own evaluator.

However, we believe there are bigger problems in custody evaluations than shoddy science, and we also believe that consideration of these broader issues points the way to some promising solutions for custody evaluations, children, and families. Thus, we turn now to examine the more general literature on children's adjustment to their parents' separation and divorce. After this, we outline three general recommendations that we consider in light of psychological research, legal analysis, and professional responsibilities including various issues we raised about Dr. Hagan's custody evaluation.

AVERAGE EFFECTS AND VARIATION IN THE WELL-BEING OF CHILDREN FROM DIVORCED FAMILIES

There is a large, sophisticated, multidisciplinary research literature on how children are affected by parental separation and divorce. We cannot review many original sources from this literature in this limited space, although we have done so elsewhere (Emery, 1999b). In the following section, we offer an overview of the major conclusions researchers have drawn. After this, we consider what factors predict children's more or less adequate adjustment. For present purposes, research on the average well-being of children from divorced families is of interest primarily as a starting point for examining predictions of individual differences in outcome, one of the main goals of a custody evaluation. Thus, we review this extensive literature only briefly.

On average, parental divorce is associated with an increased risk for a variety of psychological problems among children

(Emery, 1999b; Hetherington & Kelly, 2002; McLanahan & Sandefur, 1994). In a meta-analysis of 92 studies, Amato and Keith (1991) found an average effect size of .14 standard deviation units when comparing children from divorced versus married families across all child outcomes. Another meta-analysis of studies in the 1990s found that the average effect size was somewhat larger than this earlier estimate, ranging from a low of .12 standard deviation units for measures of self-concept to a high of .22 standard deviation units for conduct problems (Amato, 2001).

While the effect sizes suggest a modest, average increase in psychological problems, it is important to underscore the variability in the psychological adjustment of children whose parents separate and divorce. Most children are resilient despite their parents' divorce, as indexed by measures of psychological maladjustment that do not differentiate them from children whose parents remain continuously married (Emery, 1999a; Emery & Forehand, 1994). Still, depending on the outcome, parental separation or divorce is linked with a 25% to 100% (a doubling) increase in the risk for psychological difficulties at the extremes of the distribution (Hetherington & Kelly, 2002; Zill, Morrison, & Coiro, 1993). Given the high prevalence of separation and divorce, even a modest increase in risk translates into an important societal concern.

Nonrandom Selection Into Divorce

Still, at least some of the putative "effects" of parental divorce on children, perhaps as much as 50% of the variance, are due to nonrandom selection into divorce. Many of the problems found among children from divorced families actually are present before the parents separate (Cherlin et al., 1991) and therefore cannot be consequences of parental divorce, although this selection effect seems to be stronger in accounting for the psychological difficulties of children than for those of young adults (Cherlin, Chase-Lansdale, & McRae, 1998). Behavior geneticists have raised the strongest selection argument, suggesting that children's risk in divorce may be fully or partially attributable to the passive gene–environment correlation, because genetic factors influence divorce and may also affect children's behavior (McGue & Lykken, 1992). Despite this important concern, in one adoption study (O'Connor, Caspi, DeFries, & Plomin, 2000) and one twin study (D'Onofrio et al., in press), divorce still was associated with a diminished but increased risk for psychological problems, particularly externalizing problems, among children.

Different Risks for Different Outcomes

Externalizing difficulties are the child emotional problems most strongly linked to parental separation and divorce (Amato, 2001; Amato & Keith, 1991; Emery, 1982, 1999b). Other emotional difficulties less strongly tied to parental marital status include depression; anxiety; poor school behavior and performance; and difficulties in romantic relationships, including an increased risk for divorce among offspring (e.g., McLanahan & Bumpass, 1988). A significantly increased risk for troubled family relationships, especially between children and their fathers, also accompanies divorce. One national study found that fully 65% of young adults between the ages of 18 and 22 whose parents were divorced had poor relationships with their fathers; only 29% of those whose parents were married had poor relationships with their fathers (Zill et al., 1993).

Scientific research notwithstanding, some clinical investigators point to case studies indicating that the adverse consequences of divorce for children are unexpectedly large (e.g., Wallerstein, Lewis, & Blakeslee, 2000). We believe that this conclusion, and much of the debate about it, is due to confusion of psychopathology with what one of us has termed psychological distress or "pain" (Laumann-Billings & Emery, 2000). Even resilient, well-functioning young people whose parents divorce report considerable distress in regard to their memories of their childhood ("I had a harder childhood than most people"), feelings about their current family relationships ("Sometimes I wonder if my father even loves me"), and concern over events where both of their parents will be present ("I worry about big events like graduations or weddings where both of my parents will have to come"; Laumann-Billings & Emery, 2000). Thus, even if resilience—as defined by the absence of mental health problems—is the normative outcome of divorce for children, children's resilience often is colored by painful memories of the past, difficult ongoing feelings about family members, and concerns about future family interactions. There is increasing agreement that making this distress-versus-disorder distinction may help clear up much of the controversy about the consequences of divorce for children (Kelly & Emery, 2003; Wallerstein, 2003).

PREDICTORS OF CHILDREN'S PSYCHOLOGICAL ADJUSTMENT TO DIVORCE

Average outcomes are an important backdrop to our discussion, but the prediction of individual differences in children's psychological well-being is more directly relevant to custody evaluations. In the following sections, we review research on different risk factors, relying primarily on secondary versus original sources because of space limitations and the large number of studies.

Parental Conflict

A large body of research demonstrates that conflict between parents is associated with an increased risk for psychological problems among children in all families, whether the parents are married, separated, or divorced (Ahrons & Miller, 1993; Ahrons & Tanner, 2003; Amato & Keith, 1991; Emery, 1982; Johnston & Roseby, 1997; Otto, Buffington-Vollum, & Edens, 2003). Although non-

random selection cannot be completely ruled out, many analogue experiments demonstrate that conflict simulated in the laboratory or recorded systematically at home directly causes some adverse reactions among children (Cummings & Davies, 1994; Davies, Harold, Goeke-Morey, & Cummings, 2002).

Parental conflict often precedes a separation or divorce, and various studies demonstrate that children fare better psychologically if they live in a harmonious divorced family than in a conflict-ridden two-parent family (Emery, 1982). Because separation can bring relief from the struggles of living with parents in a conflict-ridden marriage, we therefore must add improved psychological adjustment to the range of variability found in children's psychological outcomes following their parents' divorce. This "relief hypothesis" is supported by research findings that show children's improved adjustment after separation in high-conflict marriages. However, a new and important twist is what happens to children from low-conflict marriages: Several recent studies have found that children fare better following separation from a high-conflict marriage but worse when their low-conflict parents separate (Amato, Loomis, & Booth, 1995; Peris & Emery, in press). In fact, Amato (2001) argues that, in close to half of divorces, the marriage had been "good enough" from the children's perspective. That is, parental conflict had been sufficiently well contained that the children do more poorly following their parents' separation than they would have done had their parents stayed together.

Whether or not more parents could stay together for their children's sake, these data point to the psychological importance of conflict and to the fact that parental separation does not necessarily decrease it. Conflict can, in fact, increase following separation, continue for years, and come to focus more squarely on children who are a point of connection between former partners (Emery, Laumann-Billings, Waldron, Sbarra, & Dillon, 2001; Johnston, 1994).

Parental conflict can affect children directly by creating stress and anxiety (Kelly, 1998) and indirectly by undermining parenting quality and the children's relationship with one or both parents (Otto et al., 2003). As with divorce itself, conflict after divorce is linked with a variety of short- and long-term psychological problems among children, ranging from conduct problems to depression (Emery, 1999b; Schmidtgall, King, Zarski, & Cooper, 2000). However, not all conflict is equally disruptive to children's emotional well-being. The results of systematic analogue studies (Cummings & Davies, 1994), together with field research (Grych & Fincham, 1990) and clinical experience (Emery, 2004), suggest that conflict is least destructive when it (a) is contained between parents; (b) is relatively infrequent; (c) is less intense emotionally or physically; (d) resolves; (e) is not about the children or childrearing; and (f) does not involve the children—which includes not arguing in front of or around the children, not asking children to carry messages between parents, not deriding the other parent to the children, not expecting the children to take sides, not making a child a scapegoat or a mediator, and not asking children to make decisions that the parents themselves cannot make (Emery, 2004). Another brief excerpt from the Deer-Doe case illustrates the sort of conflicts that can be all too familiar in separation and divorce.

Conflict and the Deer-Doe Case

> As continued legal maneuvering delayed what he thought would be the speedy implementation of the recommendations made in Dr. Hagan's custody evaluation, John Deer-Doe grew extremely frustrated with his children's mother, with the legal system, and especially with not being able to see his children regularly. As a result of several letters from his lawyer and angry e-mails with Jane, for the first time since the separation, he had the children with him for a long, 3-day holiday weekend. John had a great time with Carlos on his Friday off and on Saturday, but he was deeply disappointed by Isabella's persistent distance and moodiness. His frustration erupted on Saturday evening when he asked Isabella why she didn't spend more time with him and answered his own question by blaming her mother's interference. Before Isabella could even react, he asked, "Wouldn't you like to live with me half of the time?" At this point, Isabella exploded. "I told Mom a hundred times. I want to live with her! I don't want to *see* you! I want to go *home*!"
>
> Hurt and angry, John screamed back, "Fine!" He threw Isabella's things into her backpack, and returned her to her mother's house. They drove in silence, but as Isabella opened the car door, John told her, "You can tell your mother that I'll bring Carlos back tomorrow . . . maybe." Isabella burst into tears, slammed the car door shut, and ran to her mother's front door. John drove away before the door opened, not knowing whether Jane was even home or not.

As this vignette illustrates, hurt, anger, and conflict between separated parents can take many forms, and can erupt even in the absence of the other parent. The vignette also shows how the conflicts that may undermine relationships between separated parents can lead to conflicts between parents and children that undermine crucial parent–child relationships as well.

Parent–Child Relationships

In most studies of children from divorced families, the quality of the relationship between a child and his or her primary residential parent is the strongest predictor of that child's psychological well being (e.g., Buchanan, Maccoby, & Dornbusch, 1996; Hetherington & Kelly, 2002; Martinez & Forgatch, 2002). The most widely accepted classification of parenting groups caretakers into four categories based on the degree of warmth and control they offer to their children (Lamborn, Mounts, Steinberg, & Dornbusch, 1991; Maccoby & Martin, 1983; Novak, 1996; Steinberg, 2001). *Authoritative* parents are warm and involved, and they consistently and democratically enforce developmentally appropriate rules and discipline. *Authoritarian* parents offer their children low warmth and high control, using

more frequent and autocratic punishment (Novak, 1996). *Permissive* parents are loving but indulgent, and they offer children little guidance and discipline about controlling their behavior. Finally, *neglectful* parents provide children with little affection or discipline.

Research on two-parent families consistently indicates that children of preschool age through adolescence who are raised by authoritative parents fare best on indicators of psychological and behavioral health, while the children of neglectful parents fare worst (Lamborn et al., 1991; Maccoby & Martin, 1983; Novak, 1996; Steinberg, 2001). Research on children in divorced families also shows that authoritative parenting by the primary residential parent is linked with better postdivorce adjustment (Buchanan et al., 1996; Fauber, Forehand, Thomas, & Wierson, 1990; Hetherington, Cox, & Cox, 1982; Hetherington & Kelly, 2002; Thomson, Hanson, & McLanahan, 1994). We should note, however, that more authoritarian parenting styles are found to be equally or more effective in certain contexts, for example among minority families living in potentially dangerous environments (where increased parental vigilance and authority may be needed; Deater-Deckard, Dodge, & Bates, 1996). Authoritarian parenting also predicts lower levels of substance use among adolescents living with divorced parents (Buchanan et al., 1996).

Mothers Versus Fathers

As noted above, most children live primarily with one parent following separation and divorce—approximately 75% live with their mothers and 10% live with their fathers. Although some early, small-scale studies indicated that children who lived with their same-gender parents were better adjusted than their counterparts living with opposite-sex parents (e.g., Santrock & Warshak, 1979), these findings have not been replicated in more recent research employing large samples (Buchanan et al., 1996; Downey & Powell, 1993). In general, researchers find that children of both genders function equally well living primarily either with their mothers or fathers (Downey, Ainsworth-Darnell, & Dufur, 1998); however, a few investigators have found that children do somewhat better in sole-mother residence than they do in sole-father residence (Buchanan et al., 1996). Still, differences between primary-mother versus primary-father residential arrangements, if they are found at all, are not large in magnitude. Thus, neither parental gender, nor the interaction between parent and child gender, has been found to moderate children's well-being in an important way.

The extent to which children's relationships with their "other" parents predicts their psychological well-being, particularly when there is parental conflict, is one of the most controversial issues in custody law (e.g., favoring or opposing joint physical custody) and in custody evaluations. Data are not conclusive, but there is research relevant to these issues. Given that the issue is so pressing, we believe it is important to draw some clear, if qualified, conclusions from the available research.

Contact Between Children and Nonresident Parents

An important demographic issue that we have not addressed, but that bears in a very important way on parent–child relationships following a separation, is the extent of contact between children and their nonresidential parents. Seltzer's (1991) analysis of the 1987–88 round of the National Survey of Families and Households data provides detailed and high-quality, if somewhat dated, evidence on this issue, especially on the frequency of contact between children and nonresidential fathers. Three broad trends characterized the findings from this national survey. First, contact between nonresident, separated, or divorced fathers and their children was not terribly frequent, even immediately after the separation. For example, only 43% of fathers separated for 2 years or less saw their children on a weekly basis or more frequently, while 30% of fathers separated for less than 2 years saw their children several times a year or less. Second, contact dropped off substantially over time, such that 6 to 10 years following separation, only 19% of nonresident fathers saw their children weekly or more, while 62% had face-to-face contact with their children several times a year or less. Third, higher contact levels were predicted by a variety of factors including less geographic distance between the parents' households, a shorter length of time since separation, absence of remarriages, the child having been born into a legal marriage instead of out of wedlock, and the child being older rather than younger (Seltzer, 1991). Other evidence from national samples shows that nonresidential mothers maintain somewhat more frequent contact with their children than nonresidential fathers do (Zill, 1988).

Some commentators believe that father contact has increased dramatically in the last 15 years, but the relatively modest increases in sole father custody and joint physical custody (reviewed earlier) make us skeptical that there have really been any dramatic changes. In the most recent national data we could locate, an analysis of 1998 U.S. Census data, 40% of nonresident fathers and 22% of nonresident mothers had had no contact with their children in the previous year. Among the 60% of nonresident fathers who had seen their children, contact occurred on an average of 69 days per year. The 78% of nonresident mothers who saw their children did so more often, an average of 86 days per year (Child Trends, 2002). These data were not disaggregated by levels of contact, overnight visits, or time since separation, and they included parents who did not live with their children for a variety of reasons (e.g., divorced, never married). Still, the evidence indicates that, even in a recent cohort, a substantial number of nonresident parents maintain little contact with their children, and contact in the range considered to be joint physical custody (about 100 overnights per year) is not the norm.

Nonresident Fathering and Children's Psychological Well-Being

The normative backdrop is important in considering the question of whether more frequent contact with nonresident parents predicts better psychological adjustment among children. A

meta-analysis of 63 studies examining the relationship between children's psychological well-being or academic success and different dimensions of the relationship between a child and his or her nonresident father (i.e., payment of child support, amount of contact, feeling close to the father, and authoritative parenting) indicated that the amount of contact is a poor predictor of children's psychological well-being (Amato & Gilbreth, 1999). As shown in Table 1, the weighted effect sizes (product–moment correlations) between contact levels and three indices of children's psychological well-being were uniformly very small. For externalizing problems and academic success, a fathers' payment of child support was a better predictor of his children's adjustment than was a father's contact with his children. In contrast, authoritative parenting and, to a lesser extent, closeness to the father consistently accounted for a significant if statistically small proportion of variance in all three measured outcomes.

The authors tested for a number of variables that might moderate these relationships, including child gender, age, race, divorce versus nonmarital birth, and remarriage of the parents, but none of these variables moderated the effect sizes in any meaningful way. Although the meta-analysis did not test for the moderating effects of parental conflict, Amato and Gilbreth (1999) discussed the critical role of parental conflict, including research indicating a positive effect of contact when parents cooperate and a negative effect when parents are in conflict (Amato & Rezac, 1994; Hetherington, Cox, & Cox, 1982).

Joint Custody and Children's Psychological Well-Being

Whether joint physical custody is linked with better psychological adjustment among children is an important question in its own right, and if children fare notably better under joint physical custody than in other arrangements, a nonlinear relationship also might explain the weak association between nonresident-father contact and child outcome. Children may benefit from spending more time with their fathers only when contact reaches some high threshold (see, e.g., Cabrera, Tamis-LeMonda, Bradley, Hofferth, & Lamb, 2000; Lamb, 1999; Lewis & Lamb, 2003). Surprisingly, relatively few investigators have examined how joint physical custody is associated with children's well-being. A recent meta-analysis (Bauserman, 2002) located only 11 published studies and 22 unpublished studies (21 of which were unpublished dissertations) with a combined sample size of 814 joint-custody children and 1,846 sole-custody children. Combining the results across measures, Bauserman reported a study-level overall effect size of .23 standard deviation units, slightly above what is traditionally considered to be a small effect. This analysis included both joint physical and joint legal custody, but surprisingly these arrangements did not differ significantly in their effects when compared to sole custody (joint physical, $d = .29$ for 20 studies; joint legal, $d = .22$ for 15 studies).

Importantly, neither presence of past parental conflict (5 studies) nor that of current parental conflict (14 studies) accounted for significant variance in the joint-custody effect sizes; perhaps of more importance, however, joint-custody groups had lower levels of both past and present conflict than sole-custody groups did (Bauserman, 2002). As Bauserman noted, this suggests the very important possibility that self-selection into joint custody may account for part or all of the results. We cannot extrapolate from voluntary joint physical custody to circumstances when joint physical custody is imposed upon parents by laws favoring joint physical custody, by evaluators who recom-

TABLE 1

Meta-Analysis of 63 Studies Showing How Strongly Different Relationships Between Children and Nonresident Fathers Predicted Children's Academic Success and Psychological Well-Being (Adapted From Amato and Gilbreth, 1999)

	Dimension of nonresident father–child relationship			
Child well-being index	Payment of child support by father	Amount of contact between child and father	Child feeling close to father	Authoritative parenting by father
Academic success				
Effect size (weighted *r*)	.09***	.03*	.06*	.15***
Number of effect sizes	17	17	7	11
Sum of sample sizes	7,156	4,918	1,212	1,185
Externalizing problems				
Effect size (weighted *r*)	−.08***	−.02	−.05*	−.11***
Number of effect sizes	8	37	12	26
Sum of sample sizes	2,917	6,808	1,586	2,657
Internalizing problems				
Effect size (weighted *r*)	−.01	−.03*	−.07*	−.12***
Number of effect sizes	8	43	14	13
Sum of sample sizes	1,916	4,841	1,617	545

*$p < .05$. **$p < .01$. ***$p < .001$.

mend that arrangement, or by judges who order it. Finally, it is important to note that, although conflict differences did not account for the advantage of joint over sole custody in the meta-analysis, this analysis does not address the possibility that joint physical custody may be the right solution for the wrong people in contested-custody or other high-conflict situations (Emery, 1999b). At least some research shows that high conflict predicts worse child adjustment within joint-physical-custody groups (Johnston, Kline, & Tschann, 1989).

Thus, our conclusion about the potential benefits of joint physical custody is a cautious one because of (a) the important and unanswered question of whether low-conflict couples self-select into that arrangement; (b) concerns about the potential damage to children caused by likely greater exposure to parental conflict in such an arrangement; (c) the null results for father contact found in a more extensive body of research where self-selection is less of a concern; and (d) the continued low prevalence rates of joint physical custody despite two decades of experimentation. We believe that joint physical custody benefits children when parental conflict is contained. Therefore, more parents who want to attempt joint physical custody (and therefore are likely to be fairly cooperative) should be encouraged to try it. However, joint physical custody seems to be a workable arrangement only for a minority of parents and should not be encouraged as the fair solution for parents who dispute custody or otherwise are in high conflict. Finally, we note that there is no clear line defining when joint physical custody is potentially beneficial or potentially harmful for children. The field would benefit greatly from research on what kinds and levels of parental conflict and cooperation distinguish "good" from "bad" joint physical custody.

Parents' Mental Health

The Uniform Marriage and Divorce Act explicitly indicates that the mental health of all parties should be a consideration in determining children's best interests. Statutes offer little more than this general guidance, however, thereby leaving much room for interpretation. Thus, although mental health professionals can assess mental health with adequate reliability and validity, questions arise about the specific relevance of parents' mental health problems for children, parenting, and custody arrangements.

Emery (1999b) suggested that four mental health problems among parents are of special concern to understanding the potential consequences of divorce for children: (a) depression, (b) antisocial behavior, (c) major mental illness (e.g., schizophrenia and bipolar disorder), and (d) personality disorders. Substance abuse should also be added to this list. Parental depression is associated with negative child outcomes in a number of studies (Otto et al., 2003), but the effects are likely to be mediated through parental conflict and inadequate parenting (Emery, Weintraub, & Neale, 1982). In their review of the literature, Otto and colleagues (Otto et al., 2003) reported that one of the most consistent findings is that parents who engage in antisocial behaviors tend to have children who exhibit a number of behavior problems, particularly aggression, delinquency, and other externalizing problems. Children whose parents suffer from schizophrenia also are at a significantly elevated risk both for schizophrenia and for a range of serious emotional problems, although the increased risk appears to result primarily from genetic effects as opposed to childrearing (Gottesman, 1991). Perhaps the greatest concern in regard to schizophrenia and other major mental illness is whether the parent with the disorder is, with treatment, functioning sufficiently well to care for his or her children. A similar concern arises regarding the well-being of children who have a substance-abusing parent. Evidence shows that both genetic and environmental liabilities contribute to the increased risk for psychological problems among such children (Walden, McGue, Iacono, Burt, & Elkins, 2004), but the most pressing issue is the parent's immediate functioning and whether or not this impairs the parent's ability to care for or protect the safety of his or her children. Finally, little research is available on how children are affected by parental personality disorders, although experts in custody disputes increasingly recognize that personality disorders often are an important concern, particularly in cases characterized by chronic high conflict (Ehrenberg, Hunter, & Elterman, 1996; Johnston & Roseby, 1997).

The literatures on parents' mental health, parent–child relationships, genetic transmission, and children's psychological well-being are too vast and complicated for us to consider in any detail here. Still, several broad conclusions seem clear. First, some evidence shows that children are adversely affected when their parents have emotional, behavioral, or substance-abuse problems, but the children's problems might be caused not by their invariably troubled relationships with their parents but by genetic risk or life hardships associated with their parents' psychological problems (Jenuwine & Cohler, 1999). Second, whether or not a parent is engaged in treatment is a major consideration for serious emotional problems like severe depression, substance abuse, or schizophrenia, since appropriate treatment can do much to mitigate symptoms and improve parents' functioning. Third, although the assessment of parents' mental health is of critical and obvious importance when a parent's emotional difficulties are serious enough to necessitate the involvement of child protective services, in other circumstances (i.e., when a parent's emotional difficulties would not lead to unwanted legal intervention in a two-parent family) such assessment seems to us to be merely a search for a "tie breaker" under a vague custody rule fraught with problems. Once again, our view is that it is better to change an impossible rule than to do one's best to follow it.

In summary we conclude that, as others have suggested (Herman et al., 1997; Otto et al., 2003), a parental diagnosis is not, in and of itself, the primary concern when deciding custody; rather, what is of utmost importance is the impact of parental psychological functioning on the child's development and behavior. When a parent's emotional problems are sufficiently

severe that they would warrant legal intervention independent of a custody dispute, we have no doubt that parental mental health should be a central consideration in custody cases. In more ordinary circumstances, however, we see no obvious reason why a history of parental depression, for example, should be a determinative factor in a custody dispute unless it clearly and substantially interferes with parenting.

Economic Well-Being

A family's standard of living falls after separation and divorce, if for no other reason than it is more expensive to live in two households than to live in one. We should note, however, that the average decline is greater for divorced women than for divorced men, as women typically have lower incomes and the extra expense of childrearing (Duncan & Hoffman, 1985). Economic strains can set into motion a number of changes for children, including possibly moving from the family home, changing schools, losing contact with old friends, and spending more time in childcare and having less contact with parents as the parents work to make ends meet. Not surprisingly, research shows that economic stability is an important predictor of postdivorce child functioning (Dunn, 2004; Lamb, Sternberg, & Thompson, 1997). The differences found between the adjustment of children in married and single-parent families are reduced by about half for academic measures like school attainment and by a lesser amount for internalizing and externalizing problems when income is statistically controlled for (Brooks-Gunn & Duncan, 1997; King, 1994; McLanahan, 1997; McLanahan & Sandefur, 1994).

But while family income no doubt is important, much of the variance in children's psychological adjustment in divorced and married families is not explained by economics. Moreover, income may exert its effects indirectly, for example by influencing parenting and other aspects of family functioning, rather than directly, for example by affecting living conditions and opportunities available to children. Results of one study indicated, for example, that divorced working mothers, but not married working mothers, provided less cognitive and social stimulation to their children than married nonworking mothers did (MacKinnon, Brody, & Stoneman, 1982), and other research indicates that parents under economic stress are less likely to be supportive (Thomson et al., 1994).

These findings suggest that caution should be exercised when using parents' incomes as a predictor of children's well-being following divorce; but we particularly call attention to a more basic issue. The suggestion that custody should go to the parent with the higher income sounds outlandish and biased; but we could, if we chose, muster arguments that living with the higher-income parent might be in a child's best interests in terms both of the correlates of greater wealth (e.g., health, well-being) and the direct benefits of greater wealth (e.g., living conditions, opportunities). We would not want to make such arguments too seriously, but we do believe they illustrate an important point: Why should parents' relative mental health, parenting skills, or any other factor determined on a case-by-case basis determine custody? We believe that the essential problem of determining children's "best interests" based on criteria that are only vaguely specified is the same whether evaluators consider children's economic or psychological best interests. In the latter case, the difference is that the core problem is more effectively disguised.

Ranking Predictors

Based on an extensive review of the literature, one of us (Emery, 1999b) concluded that the following four factors were the most consistent predictors of children's positive psychological adjustment following separation and divorce:

- A good relationship with an authoritative residential parent
- Minimal or controlled parental conflict that does not involve the children
- Economic security
- A good relationship with an authoritative nonresidential parent

Our present review is consistent with this earlier conclusion, and also with the suggestion (Emery, 1999b) that the four factors are ranked in their order of importance (defined as proportion of variance explained) for various measures of children's psychological well-being. Given this conclusion, we urge any professional intervening with separating and divorcing families to attempt to promote all four goals. Since this cannot always be accomplished, however, our rank ordering indicates that factors ranked higher should take precedence over factors ranked lower—if, that is, the objective is to minimize children's risk for developing psychological problems. This means, for example, that if parental conflict is high, and if the nature of that conflict is such that it harms children (e.g., revolves around issues of childrearing, involves the children in the parents' disputes) then frequent contact with both parents is likely to be more harmful than beneficial to children. In the face of high conflict, therefore, children would do better living primarily in one household with an authoritative mother or father and having more limited contact with the other parent. Even as we reach this conclusion, we recognize that philosophical or legal considerations might place a higher value on goals other than maximizing children's mental health—for example, the value that children should have frequent contact with both of their parents despite the presence of damaging conflict. We recognize that a degree of conflict between former partners, sometimes intense conflict, can be expected in divorce, but that conflict also can be contained, diminished, and hopefully resolved over time.

A Referral for the Deer-Does

Jane Deer-Doe was frightened and infuriated when she unexpectedly found Isabella knocking on her door a day early, after her father had returned her in a fury. Jane was more angry than worried about Isabella's flood of bitter tears. In the face of Dr. Hagan's adverse custody recommendation, she thought this was her opportunity to

turn the tables on John. Secretly, she also hoped for vindication not only for all of her actions since her separation but also for the choices, mistakes, and sacrifices she had made in marriage. Enraged and not wanting to waste a moment—and with Isabella listening in—Jane telephoned her lawyer at his home and tried to tell him about what happened and about her outrage. But he was abrupt with Jane and suggested that she instead come by his office on Monday morning. There was nothing to be done on a Saturday night.

To Jane's surprise, her lawyer did not launch into a case against John, even when she finally related all of the details in his office. He listened patiently, but told Jane he needed to give her a "reality check" about what the courts could and could not do. He talked about the cost of extending the litigation process, delays in hearing dates, legal counter-tactics like bringing up any and all of her vulnerabilities as a parent and as a person (and her husband certainly knew her weak spots), and how children can get caught in the middle of such contests. He pointed out that no court was going to deny John all of his rights as a father, so she was going to have to deal with him one way or another. He also noted that local court rules mandated that parents attempt mediation before a custody hearing could be held.

Jane's lawyer told her that he wanted her to try mediation to see if she and John might work out at least some issues about their children without going to court. He described how mediation works and offered that, even if it failed, her effort would look good if the case did go to court. Jane's lawyer eventually told her that he had, in fact, already spoken with John's lawyer and that she agreed that they should try mediation. John's lawyer had promised she would convince John to try it. After raising a number of objections to the idea, Jane eventually accepted her lawyer's advice—but only with great reluctance and trepidation.

Research shows what the Deer-Does' lawyers intuitively recognized: The process of change, the quality of family relationships, and the management of conflict are more important to children's psychological adjustment to divorce than are the structure of custody arrangements or, indeed, the structure of the family (Ahrons, 1998; Amato & Booth, 1997; Buchanan et al., 1996; Emery, 1999b; Hetherington & Kelly, 2002). This conclusion creates a problem for lawyers in traditional practice, however, because the adversary system on which our legal procedures are based can exacerbate rather than help to contain parental conflict and can further undermine rather than promote coordinated coparenting. The dilemma for lawyers and other professionals who work with custody disputes is particularly vexing under the regime of the vague children's-best-interests standard. We briefly evaluate this custody standard in historical context before turning to our specific recommendations for reform.

CHILDREN'S BEST INTERESTS: A STANDARD WITH NO STANDARDS

In theory, the "best interests of the child" standard gives judges the flexibility to craft custody decisions that are uniquely appropriate for each individual family. In practice, however, the standard has been widely criticized because it (a) encourages litigation by making judges' decisions unpredictable; (b) increases acrimony, because virtually any evidence that makes one parent look bad may be deemed relevant (recall the morality statutes found in some state laws); (c) increases the potential for bias in the exercise of judicial discretion; and (d) limits appellate review, because the guidelines governing judicial decision making are unclear (Garrison, 1996; Mnookin, 1975). In fact, the problems with the best-interests standard have led at least one distinguished legal commentator to propose a fair and simple alternative: Flip a coin (Chambers, 1984). This flip suggestion highlights the extent of the problems that lay hidden underneath the best-interests standard's superficial appeal.

Historical Perspective

Until the middle of the 19th century, custody laws were perfectly clear: Fathers were automatically granted custody of their children, who were viewed, like a wife, as a man's property (Wyer, Gaylord, & Grove, 1987). Laws began to change in the late 1800s with the emergence of the "tender years" doctrine, which held that mothers are uniquely suited to rear children (*Ex Parte Devine*, 1981; Lyman & Roberts, 1985; Mason, 1994; Wyer et al., 1987). The tender-years doctrine came to control custody decision making during much of the 20th century, but in the 1970s the presumption was challenged as sexist (Hall, Pulver, & Cooley, 1996; Mason, 1994). The subsequent decline of the tender-years presumption left courts without clear guidance in following the best-interests standard, a principle that had been place since the beginning of the 20th century (Mnookin, 1975). For decades, children were automatically placed with their mothers in their best interests (unless the mother was "unfit"), but the desire to avoid sexism left courts without a dominant guiding principle.

As we noted earlier, some states today list factors that they deem relevant to children's best interests, at least in general terms, but the ultimate goal is never defined (Mnookin, 1975). This presents judges with an impossible practical, legal, and ethical dilemma. As noted family law professor Robert Mnookin (1975) put it:

> Deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself. Should the judge be primarily concerned with the child's happiness? Or with the child's spiritual and religious training? Should the judge be concerned with the economic "productivity" of the child when he grows up? Are the primary values of life in warm interpersonal relationships, or in discipline and self-sacrifice? Is stability and security for a child more desirable than intellectual stimulation? These questions could be elaborated endlessly. And yet, where is the judge to look for the set of values that should inform the choice of what is best for the child? (pp. 260–261)

Custody Evaluations: A Solution to Judges' Dilemma?

Without clear guidance from the law, judges have turned to mental health professionals and custody evaluations for help in

discerning children's best interests (Feller, Davidson, Hardin, & Horowitz, 1992; Mnookin, 1975; Shuman, 2002; Wald, 1976). By doing so, the courts have implicitly embraced the value that children's psychological well-being—their happiness—comes first and foremost on the list of their best interests. Alternative experts the courts instead might employ include accountants who have evaluated each parent's ability to provide for their children economically, educators who can comment on the parents' relative commitment to promoting success in school, religious leaders or philosophers who have assessed the quality of each parent's moral values and training, or perhaps dieticians who have evaluated each parent's preference for healthy versus convenience food. These suggestions may seem outrageous, but so is the idea that custody should be awarded to a parent who has an edge over another parent in promoting children's psychological well-being, particularly when the construct is ill defined or undefined.

We appreciate the terrible dilemma that the vague best-interests standard creates for judges, custody evaluators, and, of course, parents and children. We also believe that a mental health professional or other neutral third party or parties may be in a better position than a judge bound by rules of legal procedure to make recommendations about custody. However, we believe it is legally, morally, and scientifically wrong to make custody evaluators de facto decision makers in custody cases, which is often what happens because judges often accept evaluators' recommendations. As law professor Daniel Shuman (2002) recently summarized, "the role of mental health professionals in custody litigation is being transformed from expert as expert to expert as judge" (p. 160). Shuman went on to point out:

> If society wishes to use mental health practitioners as experts in child custody cases, the law and science demand rigorous threshold scrutiny of their methods and procedures so that courts are informed consumers of this evidence. If society wishes to use mental health practitioners as judges in child custody cases, then social policy demands a public debate and legislative approval of this change . . . (p. 162)

We agree. Establishing panels of mental health professionals who would decide custody disputes would be a major procedural change in the law, perhaps an important one. However, we believe that there are simpler and likely more effective changes in policy that would improve custody decision making for children and divorcing families and simultaneously solve many of the problems faced by custody evaluators, lawyers, judges, and other professionals who now work with custody disputes. Our recommendations include (a) promoting parental self-determination through alternative dispute resolution and other means, (b) working to develop and implement clear custody standards, and (c) altering the practice of current custody evaluations under the best-interests standard.

RECOMMENDATION 1: ENCOURAGE ALTERNATIVE DISPUTE RESOLUTION AND PRIVATE SETTLEMENT

We believe that the best solutions to the problems posed by child custody disputes and unscientific custody evaluations involve changing the system of dispute resolution in ways that encourage parents to reach their own decisions about rearing their children following a separation (Emery, 1999b, 2004). Obviously, there will be fewer custody evaluations, and fewer cases that judges must decide, if more parents resolve their differences by deciding custody arrangements on their own. We also believe that encouraging private settlement is the best way to promote children's mental health in separation and divorce. If the research-based goals are to contain parental conflict, encourage cooperative coparenting, support both parents' authoritative relationships with the children, and preserve economic resources, then it seems reasonable to steer clear of something called "the adversary system," the method of dispute resolution embraced by the American system of justice (Emery & Wyer, 1987b). "Going to war" is not the way to promote peace, certainly not in a divorced family.

Over the last two decades, many legal and mental health professionals, and many divorced parents, have come to this same conclusion. As an alternative, they urge separated parents to determine their own children's best interests by grappling with and working out the difficult issues of residence and childrearing themselves. One important reason to do this from the outset of a separation is that parents ultimately must deal with custody decisions, parenting, and each other on their own. If a degree of cooperation in coparenting is the ultimate goal for promoting children's best interests, then it seems reasonable to hypothesize that a more cooperative approach like mediation, for example, will help parents achieve this outcome better than adversarial negotiations or litigation in the courtroom will.

More cooperative approaches to dispute settlement—those in which parents exercise a greater degree of control over both the process and the outcome than they do in the adversary system—include a range of options such as (a) *pro se* divorce, in which parents manage all legal matters on their own without the use of lawyers; (b) divorce education, usually involving court-mandated classes on parenting in divorce that encourage cooperative coparenting, even during settlement negotiations; (c) more informal, cooperative negotiations between parents and their attorneys, an approach that includes but is not limited to *collaborative law*, a new option invented by family lawyers in which both attorneys agree to represent their clients only so long as they negotiate in good faith and settle their disputes outside of court (Tesler, 2001); (d) family therapy and parent training, which, while not focused on resolving custody disputes, do focus on the importance of authoritative parenting and cooperation in coparenting for separated and divorced parents (Martinez & Forgatch, 2001; Wolchik et al., 2000); (e) divorce mediation, the most firmly established of the new approaches, in which parents

negotiate a settlement with the help of a neutral expert, usually a mental health professional or a lawyer (Emery, 1994); and (f) use of family coordinators, for that subset of high-conflict families that cannot participate in or benefit from any of the previous options (e.g., Coates et al., 2003).

The Example of Divorce Mediation

Importantly, research shows that some of these new approaches do help encourage private settlement, cooperative coparenting, and a long-term perspective on childrearing following separation and divorce. The evidence is strongest for divorce mediation, which has been studied more thoroughly than other legal interventions in divorce, although there undoubtedly is a need for more research on all types of custody-dispute-resolution procedures—perhaps especially on the adversary settlement process itself (Beck & Sales, 2001). A few randomized trials and a number of evaluations of large-scale programs have shown the following: Relative to traditional adversary settlement (attorney negotiations and formal courtroom litigation), mediation (a) settles a large percentage of cases otherwise headed for court; (b) possibly speeds the time involved in reaching a settlement, saves money, and increases compliance with agreements; (c) clearly increases party satisfaction with the process of dispute resolution; and, most importantly, (d) leads to improved relationships between nonresidential parents and children, as well as between the separated or divorced parents themselves (Emery, Sbarra, & Grover, 2005).

One of us has conducted a randomized trial of custody mediation and litigation, including a 12-year follow-up of the 71 families in the study (Emery et al., 2001). The study included primarily young, low-income parents, all of whom could be considered high conflict because they failed to reach a settlement on their own and were recruited into the study at the time that they filed a petition for a contested-custody hearing. Participants were randomly assigned at this time to participate either in mediation or in an evaluation by the court (adversary control group), and various tests were conducted to examine self-selection and attrition over time (neither of which proved to bias the study's results in any detectable manner). Among the major findings of an initial study and replication (Emery et al., 2001; Emery, Matthews, & Kitzmann, 1994; Emery, Matthews, & Wyer, 1991; Emery & Wyer, 1987a) were the following:

- Only 11% of cases randomly assigned to mediation appeared in front of a judge, compared with 72% of cases randomly assigned to the adversary-settlement group.
- On average, parents reported greater satisfaction with mediation than with adversary settlement on items assessing both the presumed strengths of mediation (e.g., "your feelings were understood") and the presumed strengths of adversary settlement (e.g., "your rights were protected").
- Reports of greater satisfaction were notably stronger for fathers than for mothers, apparently as a result of a ceiling effect: Mothers almost always won in court and therefore generally were quite satisfied following adversary settlement.
- The pattern of results held not only immediately after the dispute resolutions but also in a 1.5-year follow-up and even 12 years later.
- Nonresidential parents who mediated were far more likely to maintain contact with their children. Thirty percent of nonresidential parents who mediated saw their children once a week or more 12 years after the initial dispute, in comparison to only 9% of parents in the adversary group. In the mediation group, fully 54% of nonresidential parents also spoke to their children on the telephone once a week or more 12 years later, in contrast to 13% in the adversary group.
- The increased contact between parents necessitated by greater nonresidential parent–child contact did not increase parent conflict; rather, conflict was somewhat lower in the mediation group.
- Among parents who mediated rather than continuing with the legal action over the custody dispute, 12 years later the residential parents reported that the nonresidential parents were significantly more likely to discuss problems with them; had a greater influence on childrearing decisions; and were more involved in the children's discipline, grooming, moral training, errands, holidays, significant events, school or church functions, recreational activities, and vacations.

These studies provide strong evidence about the potential for mediation to bring about improved family relationships after separation and divorce, even many years later. Still, while the study's internal validity is strong, its external validity can be questioned. The results of various other evaluations of mediation and adversary settlement help to support the generality of the findings, but an appropriate degree of caution is suggested by variation in the quality of mediation in different settings, the push in some court-based mediation programs to "get agreements" rather than focus on fostering positive postdivorce family relationships, and the general need for more research (Emery, Sbarra, & Grover, 2005).

The limited evidence on other legal and mental health procedures (e.g., divorce education, parent training) also suggests that encouraging parents to take the long view and work together as parents even in the middle of separation and divorce can benefit children, parent–child relationships, and coparents (Emery, Waldron, & Kitzmann, 1999). This is not to suggest that people should not feel hurt, angry, and bitter in the midst of separation and divorce, but instead that, if they have children, former partners who remain parents need to find a way not to act on their understandably painful emotions as they renegotiate their family relationships (Emery, 1994, 2004). Also, despite the proven benefits, it is important to acknowledge that mediation is not a panacea, and there may be a subset of parents for whom mediation is not indicated (e.g., families with a history of significant domestic violence).

The Deer-Does in Mediation

Neither John nor Jane Deer-Doe entered mediation with a sense of optimism, let alone a desire to be in the same room with one another. Their mediator, Dr. Cynthia Barnes, who also was a clinical psychologist and family therapist, was pleasant, calm, and clearly in control of the meeting, but she could not prevent the Deer-Does from erupting into an angry argument after only about 20 minutes. A tense discussion concerning their disagreements about the children exploded when John accused Jane of using the children to meet her own, limitless need for attention. Jane shot back, "It wasn't me who had an affair." In an angry, loud voice, John was retorting, "I never would have had to go outside the marriage if you . . ." when Dr. Barnes interrupted to ask to speak with each parent alone.

At first, Jane fumed during her caucus alone with Dr. Barnes, but she found herself in tears within a few minutes. "I just can't believe I'm losing my marriage," she said, "and now he wants me to lose my kids too." She talked about her feelings of loss, grief, fear, hurt, and anger, not about problems with the custody arrangement. At one point, Jane even confessed that at times she longed to get her marriage back; John had, after all, been a good father and husband. But this revelation quickly led Jane back to John's affair and the pain it caused her; she was becoming angry again when Dr. Barnes interrupted her.

Dr. Barnes offered that she recognized that Jane was in great pain in response to losing so many things, and that she needed to grieve. In fact, Dr. Barnes recommended a therapist for Jane to consult in order to discuss these issues. Yet, Dr. Barnes also pointed out that the goal of mediation was to preserve and protect the best part of Jane's relationship with John—their children. She wanted Jane to think about ways they might be able to try to do that.

John was far less emotional when he met with Dr. Barnes alone. He clearly was very frustrated, but kept saying that all he wanted was to have time with his children and get on with his life. Dr. Barnes acknowledged John's feelings, but suggested that maybe Jane—and maybe Isabella and Carlos too—were not as ready to move on as he was, especially in regard to his new relationship. She also obliquely suggested that John might want to slow down his current romantic relationship a bit for his own sake, as well. Her strong advice to John was to work on taking small but positive steps forward with the kids, and to focus on first rebuilding his relationship with them alone before including his new girlfriend in his time with them.

When the Deer-Does and the mediator got back together toward the end of their two hours, Dr. Barnes again acknowledged everyone's difficult emotions, but pointed out how mediation was focused on trying to solve problems. She repeated her theme about taking small but positive steps, and to the parents' surprise, they took one by arranging a plan for Carlos and Isabella to spend time with John for an overnight during the coming weekend. They agreed on very explicit details, not only for timing and transportation but also on what to tell the children about the plan and what to do if one of them grew distraught.

Jane and John did not work everything out in one mediation session, but they did discover a forum where they could bring their conflicts and try to sort them out. Mediation offered them an environment that accepted their painful emotions but simultaneously encouraged them to put their own feelings on hold and focus on a plan for their children. Jane and John did not realize it, but this is exactly what they needed to do in a much bigger way, in order to move forward as parents and also as people in the coming months and years.

RECOMMENDATION 2: ADOPT A CLEAR CUSTODY STANDARD LIKE THE APPROXIMATION RULE

Our primary recommendation is to continue to develop practices and policies that encourage parents to reach their own, hopefully reasonably amicable decisions about residence and parenting, even when they are in the midst of separation and divorce. We view mediation as only one of a range of options designed to facilitate that goal. Our second recommendation is that state legislatures move to enact clear guidelines for determining custody in cases where the parents cannot reach an agreement. A fair standard that results in more predictable outcomes should reduce the number of contested custody cases, alter the need for and nature of custody evaluations, and as a result, we believe, help to reduce or at least not exacerbate conflict between separating parents. In short, a clear, determinative custody rule is likely to serve the children's best interests in separation and divorce.

There is one proposal for a clear custody guideline whose potential we find particularly hopeful. The "approximation rule" suggests that parenting arrangements after divorce should approximate, as much as is possible, the respective involvement of the parents in childrearing during marriage (Scott, 1992). Parents who had equal or near-equal involvement during the marriage would maintain some form of joint physical custody after separation. Parents who divided their childrearing roles disproportionately during the marriage also would continue that arrangement. Parents who had agreed to change their roles over time, or who wanted a different postdivorce custody arrangement for whatever reason, would be encouraged to negotiate their own arrangements according to the primary, private settlement recommendation of those who have advocated for the approximation rule.

In our view, the most important advantage of the approximation rule is that it is a clear, determinative standard. Parents and their lawyers would know what to expect of the courts, and this knowledge would promote settlement. In custody disputes that are nevertheless litigated, the approximation rule would sharply limit the scope of the legal inquiry, as well as any custody evaluations that might occur. Rather than assessing children's future best interests, under the approximation rule judges and custody evaluators would focus on the far clearer and far narrower question of each parent's past involvement in childrearing.

No state has implemented the proposed approximation rule, so there is no evidence on its effectiveness. We note, however, that the American Law Institute (2002), whose model statutes

often become the basis for state law, has endorsed the approximation rule in its proposed reforms of divorce and custody law (along with the principle of parent self-determination, consistent with our first recommendation).

We also should be clear that our support of the approximation rule is motivated more by the problems created by the ill-defined nature of the current best-interests standard than by the approximation rule itself. We would be open to any clear and determinative rule for deciding children's best interests, but favor the approximation rule over its two major rivals: (a) a primary-caretaker parent standard, which would award sole legal and physical custody to the parent who did most of the childrearing; and (b) a presumption in favor of joint physical custody. We view the approximation rule as a pluralistic hybrid of these two alternatives.

We find the approximation rule appealing because it is a clear and determinative alternative but not a "one size fits all" solution. At the same time, we are aware that the approximation rule is not without problems. Parents' involvement changes over time and as children grow older (for example, fathers' involvement in childrearing tends to increase). In addition, parents and their lawyers certainly would debate circumstances like the Deer-Does, in which parents agree that one parent will temporarily become more involved in childrearing. We also would not expect the approximation rule to end strategic maneuvering. For example, an unhappily married parent might quit work or even get fired in order to be home with the children—and have an advantage in a future custody dispute.

We do not propose solutions to these possible difficulties, but again note that the best-interests standard is itself fraught with problems—some similar, and some much bigger, in our view. We believe that the benefits of a clear rule potentially far outweigh the costs and that implementing the rule is a social experiment well worth undertaking. In fact, divorce policy already has witnessed the success of moving from vague to specific guidelines. In the early 1980s, the rules governing child support were unclear, and this uncertainty encouraged conflict and poor enforcement. Federal legislation used financial incentives to encourage states to adopt clear child support guidelines by 1986 (National Institute for Child Support Enforcement, 1986). Despite struggles with initial implementation—and many continuing problems with child support—two decades later, all agree that the clear guidelines are a vast improvement for families, legal professionals, and the child-welfare system. We expect the same outcome when legislatures finally move to adopt a clear child custody rule.

RECOMMENDATION 3: LIMIT EXPERT TESTIMONY AND CLARIFY STANDARDS OF PRACTICE

As long as the best-interests principle remains in place as an ill-defined standard, our third and final recommendation is to utilize existing evidence law, professional ethics codes, and practice standards to limit the expert testimony of mental health professionals in child custody cases to the presentation of scientifically supported evidence. Until far stronger scientific support is forthcoming, this recommendation specifically includes the suggestions (reviewed earlier) to (a) abandon use of all custody-specific "tests" that purport to measure children's best interests directly or indirectly, (b) prohibit testimony about PAS or any other "syndrome" that lacks scientific support, (c) identify the specific nature and sources of inference based on unstructured interview and observational assessments, and (d) apply appropriate caution in interpreting established measures and integrating information across different areas of assessment.

Rules of Evidence

Our recommendation to limit expert testimony may seem radical, but our proposal simply urges the application of established rules for expert testimony to such testimony in custody cases (Shuman, 2002). Expert testimony in all legal proceedings is guided by rules of evidence that identify the circumstances under which such testimony is appropriate (Ewing, 2003; Shuman, 2000; Shuman & Sales, 1998). A key problem for courts and legislatures is determining exactly what makes testimony scientific and expert. Historically, the testimony of experts was admitted if it passed a legal test developed by a United States district court. In *Frye v. United States* (1923) the court wrote that

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to determine. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well recognized scientific principle for discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs (p. 1014).

The *Frye* test, however, has been criticized on a number of grounds (Shuman, 2000). Some have argued that it is too conservative and may result in exclusion of testimony based on novel-yet-valid techniques and approaches; others say it is too liberal and allows for testimony based on techniques that have gained general acceptance despite being invalid. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), the United States Supreme Court ruled that the general-acceptance test developed in *Frye* "is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence" (p. 2799). The Court ruled that the trial judge should ensure that the opinion is based on an "inference or assertion . . . derived by the scientific method" and determine "whether the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology can be applied to the facts in issue" (p. 2796).

The Court went on to identify four factors that judges could employ when considering specific testimony, including (a) the

"testability" of the theoretical basis for the opinion; (b) the error rates associated with the approach, if known; (c) whether the technique or approach on which the opinion is based has been subjected to peer review; and (d) whether the technique or approach is generally accepted in the relevant scientific community.

The guidance provided by *Daubert* could be used to examine whether the expert opinions offered by mental health professionals in custody disputes are science based, but there is no evidence indicating that trial judges have actively done this. Those offering anecdotal accounts or personal impressions, however, are essentially unanimous in their impression that evidence offered by experts in custody cases is rarely objected to and even less frequently excluded (Shuman, 2002). Similarly, a review of appellate cases also suggests that the opinions of mental health experts are rarely excluded on the grounds that the basis for the expert opinions offered does not meet required scientific standards. Our view is that the low scientific standards for expert testimony again can be traced to the vague best-interests principle and the impossible dilemma it creates for judges. For this reason, and because individual trial judges rarely have the time or the expertise to evaluate the scientific status of psychological measures, we believe that it is incumbent upon the mental health professions to develop clear professional standards regarding expert testimony in child custody cases.

Professional Standards and Guidelines

The American Psychological Association (APA; 1994), Association of Family and Conciliation Courts (AFCC; 1995), and American Academy of Child and Adolescent Psychiatry (AACAP; 1997) all have developed guidelines for professionals conducting custody evaluations. All of these guidelines recommend an assessment of childrens' needs, parents' abilities to meet these needs, and parents' abilities to provide for future needs. The APA and AACAP guidelines also identify a number of factors considered to be integral to child custody evaluations, including assessment of parenting abilities, assessment of capacity to provide a stable loving home, identification of inappropriate behavior that negatively influences the child (e.g., substance use/abuse), consideration of parental psychopathology as it affects parenting ability or the child directly, and consideration of the child's wishes.

Despite broad agreement about factors that should be assessed, there is little agreement about how to assess them. For example, the AFCC guidelines (which are currently undergoing revision) do not provide assessment guidelines, while APA and AACAP both generally advocate a multimethod approach combining clinical interviews, direct observation, and psychological tests. Guidelines promulgated by AACAP question the value of psychological testing, while suggesting that collateral information be obtained from school personnel, healthcare providers, childcare providers, family, friends, and other individuals who may provide information germane to child custody placement. The lack of consensus begs the question: What accounts for the variability in recommendations? We conclude that much of the variability is the result of a lack of requisite knowledge. There is not enough scientific evidence (and legal guidance) about how evaluations should be conducted and about what type of evaluation is most helpful. Accordingly, we urge professional organizations to develop very clear guidelines concerning acceptable, scientifically based practices and what inferences can appropriately be drawn from them. We have offered our review of the literature on these measures as a starting point to these discussions and negotiations.

We also urge professional organizations to adopt clear ethical standards for mental health professionals to follow in custody evaluations. For example, professional organizations have failed to take a clear stand on principles of practice that are widely embraced by those with extensive professional experience in the custody context. We suggest three such principles are worthy of becoming standards of practice: Evaluators should

- Show preference for evaluations conducted by mutually agreed-upon or court-appointed experts
- Promote settlement and other steps that will facilitate a degree of parental cooperation in childrearing and authoritative parent–child relationships—for example, by providing concrete, private feedback to the parties about the evaluator's opinion before submitting a final report
- Acknowledge that custody is ultimately a legal decision and thus avoid offering "expert opinion" on legal matters—such as who should enjoy primary legal or physical custody and under what conditions—despite considerable pressure to do so within the legal system

CONCLUDING COMMENT: A QUESTION OF VALUES

A clear custody rule—whether the approximation rule, the primary-caretaker-parent standard, a presumption in favor of joint physical custody, or some other law—would necessarily take a stand on values concerning family life, values that often are contested in our changing, pluralistic society. Custody laws once did take a clear and strong stand favoring fathers as property holders, and later, mothers as nurturers. Today, there is no social consensus about the appropriate family roles for men and women, and we believe this is one reason why legislatures have failed to adopt a clearer and more determinant custody standard. The "children's best interests" standard seems to embrace a laudable value, the well-being of children; yet as we have seen, the standard actually encourages uncertainty and parental conflict that is contrary to children's interests.

No matter what the goals or actual effects of the best-interests standard, it is impossible to sidestep the values issue. Beaber (1982) provides some illustrative examples of key value questions raised by child custody disputes:

1. Should brothers and sisters be in the custody of the same parent?
2. Should an older child, over age 12, have veto power in a custody dispute between two parents?
3. Should boys be placed with fathers and daughters with mothers?
4. Should young children, under age five, be placed with mothers?
5. Should continuity of residence and school district control placement?
6. Should children be placed with the parent who does not work outside the home or who works the fewest hours and/or the most convenient hours?
7. Should children be placed in the home that does not have/will not have a stepparent? (p. 319)

Science cannot answer such value questions. Philosopher of science Carl Hempel (1965) has argued for the demarcation between factual issues that science in principle can settle and value issues that it cannot, and it is perhaps nowhere more important to make this distinction than in matters of child custody. Hempel makes this point using a thought experiment involving Laplace's demon—a hypothetical entity who knows all scientific laws and all initial conditions and who can perfectly and instantaneously make all relevant calculations needed to make an empirical decision:

> Let us assume, then that faced with a moral decision we are able to call upon the Laplacean demon as a consultant. What help might we get from him? Suppose that we have to choose one of several alternative courses of action to use, and that we want to know which of these we *ought* to follow. The demon would then be able to tell us, for any contemplated choice, what its consequences would be for the future course of the universe, down to the most minute detail, however remote in space and time. But having done this for each of the alternative courses of action under consideration, the demon would have completed his task: he would have given us all the information that an ideal science might provide under the circumstances. And yet he would not have resolved out moral problem, for this requires a decision as to which of the several alternative sets of consequences mapped out by the demon as attainable to us is the best; which of them we ought to bring about. And the burden of this decision would still fall upon our shoulders; it is we who would have to commit ourselves to an unconditional judgment of value by singling out one of the sets of consequences as superior to its alternatives. Even Laplace's demon, or the ideal science he stands for, cannot relieve us of this responsibility. (pp. 88–89)

In short, even if all of the relevant empirical relations regarding various child custody options were known, we would still be left with the value questions of what outcomes are the best. This conclusion gives us a final perspective on our three sets of recommendations. Our recommendation favoring alternative dispute resolution and parent self-determination not only recognizes the psychological importance of renegotiating family relationships for children but embraces the value that, except in cases of abuse or neglect, parents themselves should have the option of determining their children's best interests. Our call for the enactment of a custody standard such as the approximation rule that has the potential to produce more predictable outcomes urges a clear articulation of "family values" as embodied in the law. Finally, our recommendation that mental health professionals limit their role in providing expert testimony in custody cases places the value of science above all others in professional practice.

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Association of Family and Conciliation Courts

Model Standards of Practice for Child Custody Evaluation

ASSOCIATION OF FAMILY AND CONCILIATION COURTS

AFCC

Model Standards of Practice for Child Custody Evaluation

Approved by the AFCC Board of Directors
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Association of Family and Conciliation Courts

Model Standards of Practice for Child Custody Evaluation

Prepared by

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Note to users:

Placed directly below the title of all but the brief model standards, readers will find, in bold letters, a summary of the model standard. The summaries have been added in order to facilitate the use of this document. They are not to be viewed as replacements for the fully-articulated model standards.

CONTENTS

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INTRODUCTION

I.1 PURPOSE

> **These *Model Standards for Child Custody Evaluation* are designed to promote good practice; to provide information to those who utilize the services of custody evaluators; and to increase public confidence in the work done by custody evaluators.**

These *Model Standards for Child Custody Evaluation* are designed to guide custody evaluators in all practice contexts. In disseminating these *Model Standards,* AFCC's goal is to contribute to the ongoing education of evaluators, thereby promoting good practice; to provide information to those who utilize the services of custody evaluators; and, to increase public confidence in the work done by custody evaluators. Unless and until these *Model Standards* are incorporated into law, included in the rules of a court system, or adopted by a licensing board or similar regulatory authority, they do not have the force of law. Nonetheless, the adoption of these *Model Standards* by AFCC, the sponsoring organization, should alert custody evaluators to the possibility that these *Model Standards* may be utilized in developing standards of care for custody evaluators.

I.2 ENFORCEMENT

> **AFCC believes it to be advisable that our members conform their practices to these *Model Standards*; however, AFCC does not have an enforcement mechanism.**

AFCC does not have and does not intend to establish an enforcement mechanism. We believe it to be advisable that our members conform their practices to the *Model Standards* articulated here, but membership in AFCC does not compel them to do so. These *Model Standards* may communicate expectations that exceed those established by law or by regulatory bodies. Where conflict exists, law, rules of the court, regulatory requirements, or agency requirements supersede these *Model Standards*. Where the standard articulated herein is higher than the standard required by law or regulation, it is hoped that AFCC members will be guided by the standard articulated here.

I.3 SCOPE

> **The *Model Standards for Child Custody Evaluation* are intended to address common concerns regarding the processes that lead to an analysis of the relative strengths and deficiencies of the litigants or that offer an analysis of different parenting plans under consideration by the evaluator.**

The *Model Standards of Practice for Child Custody Evaluation* are intended to address common concerns. The *Model Standards* are not intended to establish standards for the various components of those custody evaluation models that are collectively referred to as briefer models, such as focused evaluations, mini-evaluations, and early neutral evaluations. Neither are these *Model Standards* intended to apply to evaluations that may formally incorporate a settlement component and that are, therefore, hybrid models. It is recognized that reports that are the end products of competently conducted evaluations will often be utilized in a settlement process. Furthermore, the *Model Standards* are designed to apply only to processes that lead to an analysis of the relative strengths and deficiencies of the litigants or that offer an analysis of different parenting plans under consideration by the evaluator. If, however, a practitioner functioning in a capacity other than as an evaluator is offering an opinion regarding parenting arrangements or regarding relative parenting strengths and

deficiencies, the *Model Standards* shall be applicable to the evaluative techniques used by the practitioner.

PREAMBLE

P.1 Conceptualization of the Child Custody Evaluation Process

The child custody evaluation process involves the compilation of information and the formulation of opinions pertaining to the custody or parenting of a child and the dissemination of that information and those opinions to the court, to the litigants, and to the litigants' attorneys. Child custody evaluators shall secure from the court and/or attorneys reasonably detailed information concerning their role and the purpose and scope of the evaluation.

(a) Child custody evaluation is a process through which information and opinions bearing upon the custody of, parenting of, and access to children can be made known to the court, to the litigants, and to the litigants' attorneys in those cases in which the parents and/or other primary caregivers are unable to develop their own parenting plans. An evaluation may be requested by the parents or by their attorneys or may be ordered by the court. Though these *Model Standards* focus on evaluations that are being performed within a court system or for a court, they may be useful in other contexts as well. [Refer to Note P.1(a).]

(b) The application of the knowledge and skills of the mental health professions to the resolution of legal matters is, by definition, a forensic endeavor and these *Model Standards* have been written from that perspective. [Refer to Note P.1.(b)1.] Prior to commencing evaluations, evaluators shall take reasonable steps to secure court orders or consent agreements in which they are specifically named and in which their roles, the purposes of their evaluations, and the focus of their evaluations are clearly defined. [Refer to Note P.1.(b)2.]

(c) Evaluators shall perform their professional activities with a recognition of the investigative nature of the task, an acknowledgment of the limitations inherent in their evaluative procedures, and an understanding of the distinction between mental health issues and the specific legal questions before the court.

P.2 Evaluators

Child custody evaluators are qualified mental health professionals who function as impartial examiners.

Evaluations shall be performed by qualified mental health professionals who are part of a family court system or carried out privately by qualified individuals or teams. [Refer to section 1 for information regarding qualifications.] Regardless of the manner in which arrangements for their services have been made and regardless of the source of remuneration, evaluators shall always function as impartial examiners.

P.3 Scope of Evaluators' Obligations

Evaluators are responsible to all consumers of their services; namely, the courts, the participants in the evaluation process, and affected others.

(a) Custody evaluators have obligations to consumers of their services (such as the courts that seek their advisory input), to participants in their evaluations (adults and children; parties and non-parties; fee-payers and non-fee-payers), and to affected others (such as people whose privacy rights are affected when the rules of discovery require the disclosure of the contents of evaluators' files).

(b) Evaluators fulfill a role that is consistent with the needs of and directives from the court. When the specified role(s) cannot ethically be accepted and/or when the directives cannot ethically be followed, evaluators shall decline participation and shall articulate in writing the basis for the decision to decline. When evaluators give notice of their intention to decline an assigned evaluation, the written notice shall be provided to the court and to the attorneys.

P.4 Applicability

> **The *Model Standards for Child Custody Evaluation* apply to any situation in which a mental health professional offers recommendations concerning custody and/or access issues.**

The applicability of these *Model Standards* is to be determined by the nature of the services performed and not by the evaluator's declared professional affiliation, stated areas of expertise, or customary area(s) of practice. Specifically, these *Model Standards* are intended to apply in any situation in which mental health professionals who have foreknowledge that custody and/or access issues are involved in a matter offer recommendations concerning such custody and/or access issues to a court.

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1. TRAINING, EDUCATION, & COMPETENCY ISSUES

1.1 CUSTODY EVALUATION AS A SPECIALIZATION

A child custody evaluator shall have specialized knowledge and training in topics related to child custody work and shall keep abreast of the ever evolving research in the field.

Child custody evaluators shall gain specialized knowledge and training in a wide range of topics specifically related to child custody work. Evaluators shall gain broad knowledge of family dynamics. Evaluators conducting evaluations that raise special issues shall obtain specialized training. [Refer to 1.2 for a list of areas in which specialized training is required.] Since research and laws pertaining to the field of divorce or separation and child custody are continually changing and advancing, child custody evaluators shall secure ongoing specialized training.

1.2 EDUCATION AND TRAINING

Child custody evaluators shall have the minimum of a master's degree in a mental health field that includes formal education and training in the legal, social, familial and cultural issues involved in custody and access decisions.

(a) Child custody evaluators shall have a minimum of a master's degree (or its regionally-recognized equivalent) in a mental health field that includes formal education and training in child development, child and adult psychopathology, interviewing techniques, and family systems. In addition, by formal education or by supervised work experience, evaluators shall possess advanced knowledge of the complexities of the divorce or separation process, a working knowledge of the legal issues in divorce or separation in their jurisdictions of practice, knowledge of the sources of evaluator bias and methods for maintaining neutrality, and an understanding of the many issues—legal, social, familial, and cultural—involved in custody and access.

(b) Areas of expected training for all child custody evaluators include:

(1) the psychological and developmental needs of children, especially as those needs relate to decisions about child custody and access;
(2) family dynamics, including, but not limited to, parent-child relationships, blended families, and extended family relationships;
(3) the effects of separation, divorce, domestic violence, substance abuse, child alienation, child maltreatment including child sexual abuse, the effects of relocation, sexual orientation issues, and inter-parental conflict on the psychological and developmental needs of children, adolescents, and adults;
(4) the significance of culture and religion in the lives of parties;
(5) safety issues that may arise during the evaluation process and their potential effects on all participants in the evaluation;
(6) when and how to interview or assess adults, infants, and children;
(7) how to gather information from collateral sources;
(8) how to collect and assess relevant data and recognize the limits of the reliability and validity of different sources of data;
(9) how to address issues such as general mental health, medication use, and learning or physical disabilities;
(10) how to apply comparable interview, assessment, and testing procedures that meet generally accepted forensic standards to all parties;
(11) when to consult with or involve additional experts or other appropriate persons;

> *continued on next page.*

1.2 (b) continued.

(12) how to inform litigants, children, other participants, and collateral sources, of the purpose, nature, and method of the evaluation and the limits of confidentiality;
(13) how to assess parenting capacity and co-parenting capacity and to construct effective parenting and co-parenting plans;
(14) the legal context within which child custody and access issues are decided and additional legal and ethical standards to consider when serving as a child custody evaluator;
(15) how to make the relevant distinctions among the roles of evaluator, mediator, therapist, parenting coordinator, and co-parenting counselor;
(16) how to write reports for the courts to which they will be presented;
(17) how to prepare for and give testimony at deposition or at trial; and,
(18) how to maintain professional neutrality and objectivity when conducting child custody evaluations.

(c) Areas of additional specialized training include:

(1) the assessment of allegations of child sexual abuse issues;
(2) the assessment of children's resistance to spending time with a parent or parent figure and allegations of attempts to alienate children from a parent, parent figure, or significant other;
(3) the assessment of children's best interests in the context of relocation (move-away) requests by one parent;
(4) the assessment of substance abuse; and,
(5) the assessment of child abuse and domestic violence and the assessment of safety plans for both parents and children.

1.3 Experience Requirements

Child custody evaluators shall possess appropriate education and training. All evaluators who have fewer than two years experience are encouraged to seek ongoing supervision prior to offering to perform or accepting appointments to conduct evaluations.

Since child custody evaluation is a unique specialty area, anyone conducting child custody evaluations shall have obtained appropriate education and professional training prior to offering to perform or accepting an appointment to perform evaluations. Novice evaluators shall obtain supervision or consultation with another professional who meets the education, experience, and training requirements of this section. Evaluators who have fewer than two years of experience conducting custody evaluations are encouraged to continue receiving ongoing supervision or to arrange for consultation to be available and to utilize the services of a consultant when needed. [Refer to Note 1.3.]

2. KNOWLEDGE OF LAW

2.1 Knowledge of Statutes and Legal Precedents

All child custody evaluators shall have knowledge of the legal and professional standards, laws, and rules applicable to the jurisdiction in which the evaluation is requested.

(a) Evaluators shall be familiar with the applicable statutes, case law, and local rules governing child custody. These will vary from jurisdiction to jurisdiction, and evaluators must be knowledgeable concerning the criteria for original determination of custody, criteria for change of custody, the use of

custody evaluations, qualifications for custody evaluators, and the legal requirements of the custody evaluation process of the jurisdictions in which the evaluators will be performing their evaluations.

(b) Evaluators shall have a fundamental and reasonable level of knowledge and understanding of the legal and professional standards, laws, and rules that govern their participation as experts in the resolution of disputes concerning the custodial placement of children and specific parenting plans. Even if they are qualified to do so, evaluators shall not provide legal advice to those whom they are evaluating or to others with whom they may interact in the course of an evaluation.

2.2 Respect for the Legal Rights of Litigants and Others

Child custody evaluators shall have an understanding of the fundamental legal rights of those who are part of the evaluation process and shall conduct themselves in such a manner as to not violate or diminish those rights.

(a) Evaluators shall have a fundamental and reasonable level of knowledge and understanding of the legal rights of those whom they are evaluating and of individuals who may be affected by the evaluative process or by the evaluators' reports.

(b) Evaluators shall conduct themselves in such a manner as not to violate or diminish the due process rights of such individuals.

3. RECORD KEEPING AND RELEASE OF INFORMATION

3.1 "Record" Defined

As used in these Model Standards, the term "record" refers to the following documents relating to the evaluation: notes, recordings, pleadings and other court papers, assessment instruments and testing data.

The term "record", as used herein, applies to all notes, documents, recordings, correspondence in any form or on any medium, tangible, electronic, hand-written, or mechanical, that are specifically related to the evaluation being conducted. The term "record", as used herein, includes, but is not limited to, all a) reports, letters, affidavits, and declarations; b) notes, recordings, and transcriptions that were created before, during, or after interactions with persons in connection with the evaluation; c) fully or partially completed assessment instruments; d) scored and un-scored raw test data, scoring reports, and interpretations; e) billing, expense, and income records pertaining to the services provided; f) mechanical, digital, physical or electronic print, film, photocopy, tape, audio, video, or photographic records; and, g) all other notes, records, copies, and communications in any form that were created, received, or sent in connection with the evaluation.

3.2 Record-Keeping Obligations

Child custody evaluators have an obligation expeditiously to establish and to maintain a record-keeping system.

(a) Evaluators shall establish and maintain a system of record-keeping and professional communication that is consistent with law, rules, and regulations, and that safeguards applicable privacy, confidentiality, and legal privilege. Evaluators shall create all records expeditiously. Unless laws, rules of the court, directives from the court, rules promulgated by regulatory bodies, or private

agency policy specify otherwise, evaluators shall presume that their records are created, maintained, and preserved in anticipation of their review by others who are legally entitled to possess them and/or to review them.

(b) Records of all aspects of the evaluation shall be created in reasonable detail, shall be legible, shall be stored in a manner that makes expeditious production possible, and shall be made available in a timely manner to those with the legal authority to inspect them or possess copies of them. Excluded from the requirements alluded to in the foregoing discussion of records production are items that may be protected from disclosure by copyright laws.

(c) Where the policies of private agencies conflict with the requirements of law, rules of the court, directives from the court, or rules promulgated by regulatory bodies, the role of private agency policies shall be considered subordinate.

3.3 Active Control of Records

Child custody evaluators shall maintain active control of their records and shall take reasonable care to prevent the loss or destruction of records.

In creating and organizing their files, evaluators shall conceptualize all items pertaining to a particular case as elements of one file. Evaluators shall be mindful of the fact that distinctions often made in clinical contexts between progress notes and process notes or between a client's file and a treating practitioner's personal file are distinctions that are not recognized in child custody work. Evaluators shall maintain active control over records and information. Regardless of the form in which information is presented, once evaluators take possession of an item, it must be retained and reasonable care must be taken to prevent its loss or destruction. For example, evaluators shall not return items to litigants or others unless such return has been authorized by the attorneys for both litigants or by the court. [Refer to Note 3.3.]

3.4 Disclosure and/or Release of Records

Child custody evaluators shall establish policies regarding their procedures, including procedures for the release of information and payment of fees.

In describing their policies, procedures, and fees, evaluators shall address all issues pertaining to access to the records that are maintained by them. Evaluators' policies concerning the release of information and/or copies of portions of their files shall be guided by the policies and directives of the courts for which the evaluations are being or have been conducted.

4. COMMUNICATION WITH LITIGANTS, ATTORNEYS, & COURTS

4.1 Written Information to Litigants

Child custody evaluators shall provide each litigant with written information outlining the evaluator's policies, procedures and fees.

(a) Even when litigants are submitting to an evaluation in response to a directive from the court, evaluators shall provide detailed written information concerning their policies, procedures, and fees. In the portion of the document in which fees are outlined, it shall be made clear that the services to be

rendered are neither health services nor health service related and that no claims for health insurance reimbursement will be completed by the evaluator.

(b) The descriptive document provided by the evaluator shall specify the intended uses of the information obtained during the evaluation, shall include a list of those to whom the evaluator will make the report available and the manner in which the report will be released, and shall confirm that evaluator policies governing the release of items in the case file will be in conformance with applicable laws and court rules. This information shall be provided to the litigants and to their attorneys in advance of the first scheduled session, so that litigants may obtain advice of counsel and be able to examine the document in an unhurried manner and in an atmosphere that is free of coercive influences. When the parties are not represented by counsel, the detailed information alluded to herein shall, nevertheless, be forwarded to them prior to the initial evaluative session.

4.2 Reviewing Policies, Procedures, and Fees

Child custody evaluators shall review their policies and procedures with the litigants prior to commencing an evaluation.

In the initial meeting with the parties, evaluators shall review key elements of their policies and procedures, respond to any questions, and seek assurance that the policies and procedures are fully understood. The obligation to take reasonable steps to avoid harm where it is possible to do so and to minimize harm that is foreseeable but unavoidable extends to all those with whom evaluators professionally interact; to all those who are involved in the evaluative process in any manner, including children; and, to those from whom evaluators seek collateral source information. Evaluators shall inform children of the limits of confidentiality, using language that is chosen based upon each child's cognitive capacity and receptive language abilities.

4.3 Informed Consent of Collaterals

Child custody evaluators shall take steps to ensure that collaterals know and understand the potential uses of the information that they are providing.

Individuals from whom information is sought shall be informed in writing of the manner in which information provided by them will be utilized and reminding them that information provided by them is subject to discovery. The aforementioned notice may be provided orally where time constraints make providing written notice not feasible.

4.4 Ex Parte Communication

Child custody evaluators shall not have substantive ex parte communications about a case with the Court or with the attorney's representing the parties.

From the time that evaluators learn of their assignments until the time that their evaluations have been completed and their reports have been submitted, evaluators shall take all reasonable steps to minimize ex parte communication with the court and with attorneys representing the parties. Where ex parte communication occurs, all reasonable steps shall be taken to limit discussions to administrative or procedural matters; to avoid discussion of substantive issues; and, to refrain from accepting or imparting significant information orally. Evaluators shall respect local rules or court orders with respect to ex parte communication with attorneys representing children.

4.5 Interim Recommendations

Child custody evaluators shall refrain from making interim recommendations.

Evaluators shall refrain from offering interim recommendations or treatment interventions pertaining to custodial placement, access, or related issues and shall refrain from negotiating settlements with the parties and/or with their attorneys. [Refer to Note 4.5.]

4.6 Presentation of Findings and Opinions

Child custody evaluators shall strive to be accurate, objective, fair and independent in their work and are strongly encouraged to utilize peer-reviewed published research in their reports.

(a) Evaluators shall not present data in a manner that might mislead the triers of fact or others likely to rely upon the information and/or data reported. In their reports and when offering testimony, evaluators shall strive to be accurate, objective, fair, and independent. Evaluators shall resist partisan pressure to report their information and data or to communicate their opinions in ways that might be misleading. [Refer to 5.3, below.]

(b) Evaluators are strongly encouraged to utilize and make reference to pertinent peer-reviewed published research in the preparation of their reports. Where peer-reviewed published research has been alluded to, evaluators shall provide full references to the cited research.

(c) Evaluators recognize that the use of diagnostic labels can divert attention from the focus of the evaluation (namely, the functional abilities of the litigants whose disputes are before the court) and that such labels are often more prejudicial than probative. For these reasons, evaluators shall give careful consideration to the inclusion of diagnostic labels in their reports. In evaluating a litigant, where significant deficiencies are noted, evaluators shall specify the manner in which the noted deficiencies bear upon the issues before the court.

(d) Evaluators shall recognize that information not bearing directly upon the issues before the court may cause harm when disclosed and may have a prejudicial effect. For these reasons, evaluators shall avoid including information in their reports that is not relevant to the issues in dispute. Notwithstanding the foregoing, evaluators shall retain all information gathered by them and shall be responsive to lawful requests for the production of that information.

5. DATA GATHERING

5.1 Establishing the Scope of the Evaluation

The scope of the evaluation shall be delineated in a Court order or in a signed stipulation by the parties and their counsel.

(a) Evaluators shall establish the scope of the evaluation as determined by court order or by a signed stipulation by the parties and their attorneys. If issues not foreseen at the outset of an evaluation arise and if it is the evaluator's professional judgment that the scope of the evaluation must be widened, the evaluator shall seek the approval of the court or of all attorneys prior to going beyond the originally designated scope of the evaluation. Any changes in the scope of the evaluator's assigned task shall be memorialized in writing and signed by the court or by all attorneys, as applicable. [Refer to Note 5.1(a).]

(b) Evaluators shall employ procedures that are most likely to yield information that will meet the needs of the court and shall conduct the data gathering phase of their evaluations in a manner consistent with state, provincial, or territorial statutes, or with judicial rules governing such evaluations. When circumstances demand that an evaluation be limited in scope, evaluators shall take steps to ensure that the boundaries to the evaluation and the evaluator's role are clearly defined for the litigants, attorneys, and the court.

5.2 Factors or Variables to be Assessed

Child custody evaluators shall assess the factors and variables pertinent to the evaluation. These factors or variables shall be determined according to local statutes, case law, referring questions and research.

Evaluators shall assess factors or variables that are statutorily defined; dictated by case law; presented in the referring questions, court orders or stipulations; and/or deemed to be pertinent on the basis of peer-reviewed published research. If additional factors are brought to the evaluator's attention or emerge during data collection, the evaluator shall use discretion and professional judgment and shall initially seek direction from the attorneys, if needed, as decisions are made concerning the applicability of these factors to the issues before the court. [Refer also to 5.1(a).] If the attorneys are unable to agree or if, for any reason, further guidance is needed, the evaluator shall seek direction from the court.

5.3 Commitment to Accuracy

Child custody evaluators shall strive to be accurate, objective, fair and independent in gathering their data and shall be prepared to defend decisions made by them concerning their methodology.

In gathering data, evaluators shall be committed to accuracy, objectivity, fairness, and independence; shall treat all participants and weigh all data, opinions, and alternative hypotheses thoroughly and impartially; and, shall be prepared to articulate the bases for decisions made by them concerning their methodology.

5.4 Use of Diverse Methods

Child custody evaluators shall strive to use multiple data gathering methods in order to increase accuracy and objectivity.

Evaluators shall use multiple data-gathering methods that are as diverse as possible and that tap divergent sources of data, thereby facilitating the exploration of alternative plausible hypotheses that are central to the case. The referral questions and issues in the case may be cast as testable hypotheses for the evaluator's investigation. Decisions concerning the selection of data gathering methods shall be made with the circumstances of the evaluation in mind.

5.5 Use of a Balanced Process

Child custody evaluators shall strive to use a balanced process in order to increase objectivity, fairness and independence.

(a) Evaluators shall endeavor to employ procedures that will create a sense of balance for those involved in the process. As one element of a balanced process, the evaluative criteria employed shall be the same for each parent-child combination. In the interests of fairness and sound methodology, evaluators shall ensure that any allegation concerning a matter that the evaluator is likely to consider in formulating his/her opinion shall be brought to the attention of the party against whom the allegation is registered so that s/he is afforded an opportunity to respond.

(b) The chosen assessment instruments shall be used with both parties and the interview time with each party shall be essentially the same, except where circumstances warrant a departure from this procedure. Where circumstances warrant a departure from the foregoing standard, the reasons shall be articulated.

5.6 Use of Reliable and Valid Methods

Child custody evaluators shall use empirically-based methods and procedures of data collection.

Because evaluators are expected to assist triers of fact, evaluators have a special responsibility to base their selection of assessment instruments and their choice of data gathering techniques on the reliability and validity of those instruments and techniques. Evaluators shall strive to use methods and procedures of data collection that are empirically-based. In the selection of methods and procedures, evaluators shall be aware that the use of greater numbers of instruments (particularly when some of those instruments may be of questionable reliability or validity) does not necessarily produce more reliability and validity in the data set. In selecting methods and procedures, evaluators shall be aware of the criteria concerning admissibility and weight of evidence employed by courts in their jurisdictions.

5.7 Assessment of Parents and Parenting Figures

Child custody evaluators shall strive to assess each parent and all adults who perform a caretaking role and/or live in the residence with the children.

(a) Except where contraindicated by special circumstances, evaluators shall assess each parent and any other adults who are currently living in a residence with the children and performing a caretaking role. Additionally, except where contraindicated by special circumstances, evaluators shall assess any other adults who are likely to be living in a residence with the children and performing a caretaking role. [Refer to Note 5.7(a).] Special circumstances may arise in situations in which the court has specified who is to be evaluated and the evaluator believes it is appropriate to evaluate other individuals who are living in the home or who have continued close contacts with the children. In those circumstances, evaluators, using their professional judgment, shall either (1) seek the court's authority to evaluate the additional individuals, if doing so is deemed necessary; (2) decline assignments in which, in the evaluator's judgment, obtaining sufficient information will require the assessment of additional individuals; or (3) clearly articulate the limitations applicable to the information obtained and the opinions expressed in light of being unable to assess the other individuals.

(b) It is recognized that individuals who are not parties to the litigation cannot ordinarily be compelled to participate in an evaluation.

5.8 Assessment of Children

Child custody evaluators shall individually assess each child who is the subject of the evaluation.

(a) Evaluators shall assess each child whose placement is at issue and shall be attentive to any special developmental needs of the children. Evaluators shall consider the stated wishes and concerns of each child as these relate to the allocation of parental rights and responsibilities if the child is of sufficient developmental maturity to independently express informed views. Evaluators shall describe the manner in which information concerning a child's stated perceptions and/or sentiments was obtained and shall specify the weight given by the evaluator to the child's stated perceptions and/or sentiments.

(b) Evaluators shall assess and describe sibling relationships. If a parenting plan that is under consideration involves the placement of siblings in different residences, the advantages and disadvantages of such a plan shall be clearly articulated.

5.9 Assessment of Adult-Child Relationships

Child custody evaluators shall assess the relationships between each child and all adults who perform a caretaking role and/or living in the residence with the child.

Evaluators shall assess the relationships between each child and all adults residing with the child or functioning in caretaking capacities, or reasonably likely to be functioning in caretaking capacities, except when such adults are paid caretakers, or where the circumstances described in 5.7(a) apply.

5.10 In Person and Telephonic Interviews

Child custody evaluators shall conduct at least one in person interview with each parent and other adults who perform a caretaking role and/or are living in the residence with the child(ren). Telephonic interviews are an acceptable means for collecting data from collaterals.

Telephonic communication is an acceptable means for obtaining interview data from collateral sources and as a supplemental technique with primary parties. Except where contraindicated by special circumstances, evaluators shall conduct at least one in person interview with each parent and any other adults who are currently living in a residence with the child(ren) and performing a caretaking role. Additionally, except where contraindicated by special circumstances, evaluators shall conduct at least one in person interview with any other adults who are likely to be living in a residence with the child(ren) and performing a caretaking role.

5.11 Data Bearing Upon Special Issues

Special issues such as allegations of domestic violence, substance abuse, alienating behaviors, sexual abuse; relocation requests; and, sexual orientation issues require specialized knowledge and training. Evaluators shall only conduct assessments in areas in which they are competent.

Evaluators shall have the professional knowledge and training needed to conduct assessments in which special issues are reasonably likely to arise. Such special issues may include acknowledged or alleged domestic violence, acknowledged or alleged substance abuse, acknowledged or alleged alienating behaviors, acknowledged or alleged child maltreatment including child sexual abuse, relocation requests, and sexual orientation issues. When evaluators lack specialized training in particular areas of concern for the evaluation, they shall either decline the appointment for the evaluation or seek professional consultation in the assessment of that portion of the evaluation. Where

such consultation has been obtained, this shall be noted in the evaluator's report. Evaluators shall utilize a generally recognized and systematic approach to the assessment of such issues as domestic violence, substance abuse, child alienation, child maltreatment including child sexual abuse, relocation, and sexual orientation issues. [Refer to Note 1.3.]

5.12 Incomplete, Unreliable, or Missing Data

Child custody evaluators shall disclose incomplete, unreliable or missing data.

In their forensic reports, evaluators shall make known to the court when there are incomplete, unreliable, or missing data. Where data are incomplete, unreliable or missing, evaluators shall identify the incomplete, unreliable, or missing data, shall offer an explanation if doing so is possible, and shall articulate the implications of the incomplete, unreliable, or missing data upon any opinions communicated in reports or testimony.

6. USE OF FORMAL ASSESSMENT INSTRUMENTS

6.1 The Decision to Use Formal Assessment Instruments

Use of formal assessment instruments is within the discretion of the child custody evaluator.

The use of formal assessment instruments is not always necessary. Where those who are legally permitted to administer and score psychological assessment instruments elect not to do so, they shall recognize that they may be called upon to articulate the basis for that decision. [Refer to Note 6.1.]

6.2 Evaluator Background in Testing

Child custody evaluators not trained and experienced in the selection and administration of formal assessment instruments and not reasonably skilled in data interpretation shall not conduct testing.

Some of the model standards that follow apply to the use of any formal assessment instruments or procedures; some are applicable only when psychometric testing is employed. If testing is advisable and if the evaluator does not have sufficient education, training and/or experience, s/he should refer the testing portion of the evaluation to a case consultant who has sufficient training and experience, including education and training in the interpretation of psychometric test data within a forensic context. [Refer to Note 1.3.]

6.3 Selection of Assessment Instruments

When formal assessment instruments are employed, child custody evaluators shall be prepared to articulate the bases for selecting the specific instruments used.

Evaluators shall be prepared to articulate the criteria utilized by them in selecting assessment instruments and shall be prepared to provide the bases for their selection of the instruments utilized in a particular case. Some assessment instruments, data-gathering techniques, and tests that are acceptable in health care settings may not meet the evidentiary demands associated with forensic work. In selecting methods and procedures, evaluators shall be aware of the criteria employed by

courts in their jurisdictions in rendering decisions concerning admissibility and weight. Evaluators shall be mindful of issues pertaining to the applicability of psychometric test data to the matters before the court and shall be familiar with published normative data applicable to custody litigants. Evaluators shall carefully examine the available written documentation on the reliability and validity of assessment instruments, data gathering techniques, and tests under consideration for use in an evaluation.

6.4 Proper Use of Assessment Instruments

Formal assessment instruments shall be used for the purpose for which they have been validated and the testing shall be conducted according to the instructions.

(a) Evaluators shall utilize assessment instruments and tests in accordance with the instructions and guidance contained in the manuals that accompany the instruments and tests. When utilizing tests, evaluators shall not make substantial changes in test format, mode of administration, instructions, language, or content, unless extraordinary circumstances require that such changes be made. When such changes have been made, evaluators shall have an affirmative duty to articulate the rationale for having made such changes.

(b) Evaluators shall not use instruments for purposes other than those for which they have been previously validated. Evaluators shall be mindful of cultural and language diversity and the impact that these may have on test performance and the resultant data.

6.5 Inclusion in Reports of Data From Previous Reports

Child custody evaluators shall take note of any prior formal assessments conducted on the subjects of the evaluation.

Evaluators shall give careful consideration to the inclusion of testing data from previous evaluations. In doing so, evaluators shall consider how current the data are; the qualifications of the previous evaluator; the context of the previous evaluation; and, the importance of examining the raw data.

6.6 Use of Computer-Generated Interpretive Reports

Caution shall be exercised by any child custody evaluator when utilizing computer-generated interpretive reports and/or prescriptive texts.

Evaluators shall exercise caution in the use of computer-based test interpretations and prescriptive texts. In reporting information gathered, data obtained, and clinical impressions formed and in explaining the bases for their opinions, evaluators shall accurately portray the relevance of each assessment instrument to the evaluative task and to the decision-making process. Evaluators shall recognize that test data carry an aura of precision that may be misleading. For this reason, evaluators shall not assign to test data greater weight than is warranted, particularly when opinions expressed have been formulated largely on some other bases.

7. THE TEAM APPROACH TO EVALUATION

7.1 Competence of Team Members

A team approach to conducting child custody evaluations is appropriate.

A team approach to conducting child custody evaluations is appropriate, provided that all of the mental health professionals are competent to fulfill their assigned roles. In jurisdictions where court-appointed evaluations are governed by licensure laws, unlicensed team members shall receive close supervision by a designated licensed team member.

7.2 Responsibility for Team-Conducted Evaluations

Any team member who signs the forensic report shall be knowledgeable and answerable to the court on all aspects of the final forensic work product.

8. ROLE CONFLICT AND DUAL ROLE ISSUES

8.1 Maintaining Objectivity

> **Child custody evaluators shall strive for objectivity and shall take reasonable steps to avoid multiple relationships with any and all participants of an evaluation.**

The responsible performance of a child custody evaluation requires that evaluators be able to maintain reasonable skepticism, distance, and objectivity. For this reason, evaluators shall take reasonable steps to avoid multiple relationships. Evaluators shall recognize 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. Evaluators shall recognize that relationships cannot be time delimited; specifically, prior relationships or the anticipation of future relationships may have the same deleterious effects upon evaluator objectivity as current relationships would have.

8.2 Disclosure of Potential Conflicts

> **Child custody evaluators shall disclose any and all professional and social relationships with any subject of the evaluation, attorney or judge involved in the proceeding.**

It is recognized that in some geographic areas evaluators may not be able to avoid professional or social relationships with individuals whom they may subsequently be asked to evaluate, with attorneys for those individuals, or with judges hearing the disputes. When avoiding multiple relationships is not feasible, evaluators shall be alert to the ways in which their objectivity may be impaired and prior to accepting an appointment, they shall provide a reasonably detailed written disclosure of current, prior, or anticipated relationships with others involved in the litigation. Such disclosure shall be made in a timely manner.

8.3 Dealing with Unavoidable Multiple Relationships

> **Multiple relationships may be unavoidable in some jurisdictions. When an evaluator is asked or ordered to function in multiple roles and where doing so can be avoided, the child custody evaluator shall have the affirmative duty to inform the appointing agent(s) of the disadvantages of multiple roles and to decline one of the assigned roles.**

(a) It is recognized that it may sometimes be necessary to provide both forensic and therapeutic services, or both forensic and parenting coordination services, such as when another reasonably skilled and competent provider is unavailable to provide either service.

(b) When requested or ordered by a court to provide either concurrent or sequential forensic and therapeutic, mediation, or parenting coordination services and when the circumstances described in 8.3(a) do not apply, the evaluator shall inform the court of the disadvantages of this arrangement and shall decline one of the assigned tasks.

8.4 Avoidance of Therapeutic Intervention

Child custody evaluators shall not offer advice or therapeutic interventions to anyone involved in the child custody evaluation process.

Though therapeutic interventions and the offering of advice are deemed inappropriate under most circumstances, it is recognized that it may be necessary for an evaluator to intervene or to offer advice when there is credible evidence of substantial risk of imminent and significant physical or emotional harm to a litigant, child(ren), or others involved in the evaluative process. [Refer also to 4.6.] The term "advice", as used herein is not intended to include offering information concerning appropriate resources or offering a referral to an appropriate resource. Where therapeutic intervention has been employed or advice has been offered, as soon thereafter as is practical, the evaluator shall prepare a description of the intervention or advice and the bases upon which intervention or advice was deemed necessary, and shall forward the description to the attorneys. [Refer to Note 8.4.]

8.5 Role Delineation in Consulting

Practitioners who are hired to review the work of a child custody evaluator shall restrict their role to that of a reviewer and shall avoid relationships with the participants in the evaluation.

Practitioners shall consider the importance of role delineation in undertaking reviews of the work of evaluators, shall avoid multiple roles, and shall not meet with litigants, family members, or allies of litigants (other than counsel). Reviewers shall not have had any prior relationship with any member of the family that is the subject of the evaluation being reviewed.

9. INTERVIEWING CHILDREN

9.1 Critical Factors in Child Interviewing

Child custody evaluators shall be trained and skilled in interview strategies with children and shall follow generally recognized procedures when conducting interviews with children.

Children who are the focus of custody/access disputes shall be interviewed if they have reasonable receptive and expressive language skills. When structuring interviews, evaluators shall consider a range of hypotheses and base their interview strategies on published research addressing the effects upon children's responses of various forms of questioning. Evaluators shall have knowledge of and shall consider the factors that have been found to strongly affect children's capacities as witnesses. Evaluators shall have knowledge of and shall follow generally recognized procedures in establishing the structure and sequence of interviews with children. Evaluators shall commence interviews with children by informing them that what they tell the evaluator is not confidential.

10. OBSERVATIONAL – INTERACTIONAL ASSESSMENT

10.1 Awareness of Observer Effects

Evaluators shall be mindful of the fact that their presence in the same physical environment as those being observed creates a risk that they will influence the very behaviors and interactions that they are endeavoring to observe.

10.2 Parent-Child Observations

Each parent-child combination shall be observed directly by the child custody evaluator, unless there is a risk to the child's physical or psychological safety.

(a) All children, including pre-verbal children, shall be observed with their parents, unless verifiable threats to a child's physical or psychological safety will create foreseeable risk of significant harm to the child or where conducting such an observation is impossible (as when a parent is incarcerated or overseas). Where parent-child observations have not been conducted on the basis of possible risk to a child, evaluators shall have an affirmative obligation to articulate the bases for their decisions.

(b) Observations of parents with children shall be conducted in order that the evaluator may view samples of the interactions between and among the children and parents, and may obtain observational data reflecting on parenting skills and on each parent's ability to respond to the children's needs. In the course of such observations, evaluators shall be attentive to (1) signs of reciprocal connection and attention; (2) communication skills; (3) methods by which parents maintain control, where doing so is appropriate; (4) parental expectations relating to developmentally appropriate behavior; and, (5) when parents have been asked to bring materials for use during the interactive session, the appropriateness of the materials brought.

(c) Each parent-child combination shall be observed, unless doing so is not feasible [Refer 10.2(a) above.]; parent-child observations shall be conducted subsequent to the first set of interviews with the parents, unless there are compelling reasons to do otherwise; evaluators shall refrain from offering custody and/or access recommendations if observations of both parents with all children have not been completed; and, in formulating their opinions concerning the significance of parent-child interactions, evaluators shall consider religious, cultural, ethnic, and lifestyle factors.

10.3 Procedural Issues

Child custody evaluators shall inform the subjects of the evaluation of the purpose for which observational sessions are conducted and such observations shall be scheduled and overt.

(a) Parent-child observations shall ordinarily be scheduled and overt. Unannounced observations or covert observations (as with hidden cameras or hidden microphones) are deemed unacceptable unless consent to such observational methods has been given in advance by the parties. [Refer to Note 10.3(a).]

(b) The parties shall be provided with information regarding the purpose of the parent-child observation; the manner in which observational sessions differ from other sessions shall be explained; and, the parties shall be made aware of any special guidelines for the visit before the meeting takes place.

(c) A detailed record of the observational session shall be created. If neither audio- nor videotaping is done and if, for any reason, contemporaneous note taking is difficult, notes must be entered as soon as possible following the session.

(d) If and when interviews or observational sessions are being audiotaped or videotaped, all introductory comments, all questions, all responses, and all statements made by the evaluator in providing closure shall be included on the audiotape or videotape.

11. USE OF COLLATERAL SOURCE INFORMATION

11.1 THE IMPORTANCE OF COLLATERAL SOURCE INFORMATION

Valid collateral source information is critical to a thorough evaluation. Sufficiency and reliability of collateral source information is a determination to be made by the child custody evaluator.

(a) Evaluators shall be mindful of the importance of gathering information from multiple sources in order to thoroughly explore alternative hypotheses concerning issues pertinent to the evaluation. Evaluators shall recognize the importance of securing information from collateral sources who, in the judgment of the evaluators, are likely to have access to salient and critical data.

(b) Decisions concerning the sufficiency of collateral source information shall be made by evaluators. Accordingly, the data sources may include, but are not limited to, oral and/or written reports from collateral sources; school, medical, mental health, employment, social service, and law enforcement records; computer files; financial information; and, video and audio data that have been legally obtained.

(c) When collateral and documentary data are not available, then this limitation shall be made known to the court in the forensic report.

11.2 CORROBORATION OF INFORMATION RELIED UPON

Collateral source information is essential. Child custody evaluators shall disclose situations where uncorroborated information was utilized in the formulation of an opinion expressed by the evaluator.

Evaluators shall acknowledge the limits in the ability to discern the truthfulness of oral reports from the primary participants and so shall seek from collateral sources information that may serve either to confirm or to disconfirm oral reports, assertions, and allegations. When assessing the reports of participants in the evaluation, evaluators shall seek from other sources information that may serve either to confirm or disconfirm participant reports on any salient issue, unless doing so is not feasible. Where seeking such confirming or disconfirming information is not feasible, evaluators shall exercise caution in the formulation of opinions based upon unconfirmed reports and shall clearly acknowledge, within the body of their written reports, statements that are not adequately corroborated and why it may or may not be appropriate to give weight to such data.

11.3 AWARENESS OF HEARSAY RULES

Child custody evaluators shall be aware of their local practices regarding hearsay in reports and in testimony.

Because collateral information constitutes hearsay when included in a forensic work product, evaluators shall be aware of exceptions to hearsay rules and other rules governing the admissibility of expert opinion that may apply to forensic evaluations in the legal jurisdictions in which their evaluations have been performed. Evaluators shall also be mindful of the fact that the interpretation of hearsay rules and exceptions may vary considerably from judge to judge and as a function of the unique elements of the case.

11.4 Formulation of Opinions

Evaluators shall be prepared to explain how different sources and different types of information were considered and weighted in the formation of their opinions. [Refer to Note 11.4.] In utilizing collateral sources, evaluators shall seek information that will facilitate the confirmation or disconfirmation of hypotheses under consideration.

11.5 Identification of Collateral Sources

All collateral sources contacted shall be disclosed by the child custody evaluator.

Evaluators shall list all collateral informants who were contacted and all data sources that were utilized, whether or not the information obtained was utilized by the evaluators in formulating their opinions. Where unsuccessful attempts have been made to contact collaterals, those collaterals shall be identified and an appropriate notation shall be made.

11.6 Securing Authorization

The subjects of the evaluation shall provide explicit authorization for the child custody evaluator to contact collateral sources unless the authority is provided in the order appointing the evaluator or is statutorily provided. The child custody evaluator shall inform collateral sources that there is no confidentiality in the information that is being discussed between the collateral sources and the evaluator.

(a) Evaluators shall secure authorization to contact collateral sources who, in the evaluators' judgment, are likely to have information bearing upon the matters before the court. Such authorizations shall be secured from the parties in the legal action, unless such authorization is clearly articulated in the order appointing the evaluator or such authorization is provided by statute. Evaluators shall clearly explain the purpose of the evaluation and how the collateral's information will be used. Evaluators shall provide potential collateral informants with written information that shall include an unambiguous statement concerning the lack of confidentiality in a forensic mental health evaluation.

(b) The information alluded to in 11.6(a) may be provided orally only where time constraints make providing written information not feasible. Evaluators shall not promise confidentiality to collateral sources who volunteer to contribute information for the evaluation, including children, unless there is a legal exemption by statute, case law, judicial administrative rule, or court order.

12. PRESENTATION AND INTERPRETATION OF DATA

12.1 COMPETENCE

Evaluators shall only offer opinions to the court in those areas where they are competent to do so, based on adequate knowledge, skill, experience, and education.

12.2 ARTICULATION OF THE BASES FOR OPINIONS EXPRESSED

> **Opinions expressed by child custody evaluators shall be based upon information and data obtained through the application of reliable principles and methods. Evaluators shall differentiate among information gathered, observations made, data collected, inferences made, and opinions formulated.**

Evaluators shall only provide opinions and testimony that are a) sufficiently based upon facts or data; b) the product of reliable principles and methods; and c) based on principles and methods that have been applied reliably to the facts of the case. In their reports and in their testimony, evaluators shall be careful to differentiate among information gathered, observations made, data collected, inferences made, and opinions formulated. Evaluators shall explain the relationship between information gathered, their data interpretations, and opinions expressed concerning the issues in dispute. There shall be a clear correspondence between the opinions offered and the data contained in both the forensic report and the case file.

12.3 ADEQUACY OF DATA

An evaluator shall provide written or oral evidence about the personality characteristics of a particular individual only when the evaluator has conducted a direct examination of that individual and has obtained sufficient information or data to form an adequate foundation for the information provided and/or opinions offered.

12.4 ARTICULATION OF LIMITATIONS

In reports and in testimony evaluators shall articulate any limitations to the evaluation with respect to methodology, procedure, data collection, and data interpretation. [Refer to 5.4.] When the available data do not enable evaluators to opine responsibly on the relative advantages and disadvantages of different parenting plans under consideration, they shall decline to offer an opinion.

12.5 RECOGNITION OF THE SCOPE OF THE COURT ORDER

Evaluators shall avoid offering opinions to the court on issues that do not directly follow from the court order of appointment or signed stipulation or are not otherwise relevant to the purpose of the evaluation.

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ENDNOTES

NOTE P.1a: Because of the frequency with which evaluators' reports are utilized for settlement purposes, evaluators are urged to include in their reports information needed by the families in addition to the information needed by the courts. This includes situations in which disputes arise concerning the need, or lack thereof, to modify an existing parenting plan.

NOTE P.1(b)1: In some jurisdictions, the term "forensic" is not employed in the construction of court orders and the evaluations performed for the courts may be referred to as "clinical" evaluations. Our purpose in emphasizing the forensic nature of the evaluative task is to call attention to two aspects of custody evaluations that distinguish them from other evaluations performed by mental health practitioners. First, because custody evaluations are performed in order that evaluators will be able to assist triers of fact by formulating opinions that can responsibly be expressed with a reasonable degree of professional certainty, sufficiency of information (both from a qualitative and from a quantitative perspective) is judged by a higher standard than that which might be applied to evaluations conducted within a treatment context. Second, notwithstanding the fact that reports prepared by evaluators are used for settlement purposes more often than they are used by the judges who have ordered the evaluations, evaluations must be conducted and reports must be written with the needs of the court in mind.

NOTE P.1(b)2: As used herein, the term "court order" includes orders that result from stipulations by the parties.

NOTE 1.3: When the services of a consultant have been utilized, the consultant shall be identified and his/her role in the evaluative process shall be briefly described.

NOTE 3.4: Evaluators can meet their obligation to retain file items by formally notifying the attorneys and litigants of the intention to copy items and return the originals and retaining original items only if concerns are raised with regard to (a) issues of authenticity, (b) the degree to which the copy is a sufficiently accurate reproduction of the original, or (c) an objection is raised to the return of the originals for any reason.

NOTE 4.5: Attention is called to the introductory section of the *Model Standards* (in particular, "I.3 Scope") in which it is stated that the *Model Standards* are not "intended to apply to evaluations that may formally incorporate a settlement component and that are, therefore, hybrid models." If an evaluator will be participating in settlement negotiations, this must be established at the outset of the evaluation and the ramifications of this role change shall be fully explained in writing.

NOTE 5.1: Though Standard 5.5 does not specify that approval must be explicit as opposed to tacit, evaluators are urged to obtain legal advice if they are considering a notification/tacit approval approach. In jurisdictions in which evaluators are protected by some form of immunity, the protection may be dependent upon conformity with the terms of the court order and it is possible that anything other than explicit, written direction from the court would void whatever immunity might otherwise be in place.

NOTE 5.7(a): Two examples of such special circumstances follow. (1) A non-party declines to participate. Ordinarily, individuals who are not parties to the litigation cannot be compelled to participate in an evaluation. (2) a current or potential caretaker is deemed acceptable by both parties. Example: one set of grandparents is actively involved in a child's care; intend to continue being active; and no objections or concerns are expressed by either party.

NOTE 6.1: In these Model Standards, a distinction is made between "formal assessment instruments" and "tests". The definition of a test has been taken from the *Standards for Educational and Psychological testing* [American Educational Research Association, American Psychological Association & National Council on Measurement in Education (1999). Standards for educational and

psychological testing. Washington, DC: American Psychological Association.] "A test is an evaluative device or procedure in which a sample of an examinee's behavior in a specified domain is obtained and subsequently evaluated and scored using a standardized process" (p. 3). The term "formal assessment instruments" includes tests but also includes structured procedures and techniques that are not "scored using a standardized process". Terms such as "assessment procedures" and "data-gathering techniques" refer to instruments and procedures the data from which are not scored.

NOTE 8.4: The language of the court order, local rule, or local custom may determine whether the information alluded to in 8.4 shall be forwarded to the court at the same time that it is forwarded to the attorneys or, alternatively, included in the custody evaluator's final report.

NOTE 10.3(a): This standard is not intended to apply to unintentional observations such as those that may occur in the waiting room or in public areas in which evaluators and evaluees may encounter one another.

NOTE 11.4: It is not intended that evaluators will assign numerical values to different sources and types of information as a means by which to communicate the weight assigned to them.

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Specialty Guidelines for Forensic Psychology

American Psychological Association

In the past 50 years forensic psychological practice has expanded dramatically. The American Psychological Association (APA) has a division devoted to matters of law and psychology (APA Division 41, the American Psychology–Law Society), a number of scientific journals devoted to interactions between psychology and the law exist (e.g., *Law and Human Behavior; Psychology, Public Policy, and Law; Behavioral Sciences & the Law*), and a number of key texts have been published and undergone multiple revisions (e.g., Grisso, 1986, 2003; Melton, Petrila, Poythress, & Slobogin, 1987, 1997, 2007; Rogers, 1988, 1997, 2008). In addition, training in forensic psychology is available in predoctoral, internship, and postdoctoral settings, and APA recognized forensic psychology as a specialty in 2001, with subsequent recertification in 2008.

Because the practice of forensic psychology differs in important ways from more traditional practice areas (Monahan, 1980) the "Specialty Guidelines for Forensic Psychologists" were developed and published in 1991 (Committee on Ethical Guidelines for Forensic Psychologists, 1991). Because of continued developments in the field in the ensuing 20 years, forensic practitioners' ongoing need for guidance, and policy requirements of APA, the 1991 "Specialty Guidelines for Forensic Psychologists" were revised, with the intent of benefiting forensic practitioners and recipients of their services alike.

The goals of these Specialty Guidelines for Forensic Psychology ("the Guidelines") are to improve the quality of forensic psychological services; enhance the practice and facilitate the systematic development of forensic psychology; encourage a high level of quality in professional practice; and encourage forensic practitioners to acknowledge and respect the rights of those they serve. These Guidelines are intended for use by psychologists when engaged in the practice of forensic psychology as described below and may also provide guidance on professional conduct to the legal system and other organizations and professions.

For the purposes of these Guidelines, *forensic psychology* refers to professional practice by any psychologist working within any subdiscipline of psychology (e.g., clinical, developmental, social, cognitive) when applying the scientific, technical, or specialized knowledge of psychology to the law to assist in addressing legal, contractual, and administrative matters. Application of the Guidelines does not depend on the practitioner's typical areas of practice or expertise, but rather, on the service provided in the case at hand. These Guidelines apply in all matters in which psychologists provide expertise to judicial, administrative, and educational systems including, but not limited to, examining or treating persons in anticipation of or subsequent to legal, contractual, or administrative proceedings; offering expert opinion about psychological issues in the form of amicus briefs or testimony to judicial, legislative, or administrative bodies; acting in an adjudicative capacity; serving as a trial consultant or otherwise offering expertise to attorneys, the courts, or others; conducting research in connection with, or in the anticipation of, litigation; or involvement in educational activities of a forensic nature.

Psychological practice is not considered forensic solely because the conduct takes place in, or the product is presented in, a tribunal or other judicial, legislative, or administrative forum. For example, when a party (such as a civilly or criminally detained individual) or another individual (such as a child whose parents are involved in divorce proceedings) is ordered into treatment with a practitioner, that treatment is not necessarily the practice of forensic psychology. In addition, psychological testimony that is solely based on the provision of psychotherapy and does not include psycholegal opinions is not ordinarily considered forensic practice.

For the purposes of these Guidelines, *forensic practitioner* refers to a psychologist when engaged in the practice of forensic psychology as described above. Such professional conduct is considered forensic from the time the practitioner reasonably expects to, agrees to, or is legally mandated to provide expertise on an explicitly psycholegal issue.

The provision of forensic services may include a wide variety of psycholegal roles and functions. For example, as

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These Specialty Guidelines for Forensic Psychology were developed by the American Psychology–Law Society (Division 41 of the American Psychological Association [APA]) and the American Academy of Forensic Psychology. They were adopted by the APA Council of Representatives on August 3, 2011.

The previous version of the Guidelines ("Specialty Guidelines for Forensic Psychologists", Committee on Ethical Guidelines for Forensic Psychologists, 1991) was approved by the American Psychology–Law Society (Division 41 of APA) and the American Academy of Forensic Psychology in 1991. The current revision, now called the "Specialty Guidelines for Forensic Psychology" (referred to as "the Guidelines" throughout this document), replaces the 1991 "Specialty Guidelines for Forensic Psychologists."

These guidelines are scheduled to expire August 3, 2021. After this date, users are encouraged to contact the American Psychological Association Practice Directorate to confirm that this document remains in effect.

Correspondence concerning these guidelines should be addressed to the Practice Directorate, American Psychological Association, 750 First Street, NE, Washington, DC 20002–4242

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researchers, forensic practitioners may participate in the collection and dissemination of data that are relevant to various legal issues. As advisors, forensic practitioners may provide an attorney with an informed understanding of the role that psychology can play in the case at hand. As consultants, forensic practitioners may explain the practical implications of relevant research, examination findings, and the opinions of other psycholegal experts. As examiners, forensic practitioners may assess an individual's functioning and report findings and opinions to the attorney, a legal tribunal, an employer, an insurer, or others (APA, 2010b, 2011a). As treatment providers, forensic practitioners may provide therapeutic services tailored to the issues and context of a legal proceeding. As mediators or negotiators, forensic practitioners may serve in a third-party neutral role and assist parties in resolving disputes. As arbiters, special masters, or case managers with decision-making authority, forensic practitioners may serve parties, attorneys, and the courts (APA, 2011b).

These Guidelines are informed by APA's "Ethical Principles of Psychologists and Code of Conduct" (hereinafter referred to as the EPPCC; APA, 2010a). The term *guidelines* refers to statements that suggest or recommend specific professional behavior, endeavors, or conduct for psychologists. Guidelines differ from standards in that standards are mandatory and may be accompanied by an enforcement mechanism. Guidelines are aspirational in intent. They are intended to facilitate the continued systematic development of the profession and facilitate a high level of practice by psychologists. Guidelines are not intended to be mandatory or exhaustive and may not be applicable to every professional situation. They are not definitive, and they are not intended to take precedence over the judgment of psychologists.

As such, the Guidelines are advisory in areas in which the forensic practitioner has discretion to exercise professional judgment that is not prohibited or mandated by the EPPCC or applicable law, rules, or regulations. The Guidelines neither add obligations to nor eliminate obligations from the EPPCC but provide additional guidance for psychologists. The modifiers used in the Guidelines (e.g., *reasonably, appropriate, potentially*) are included in recognition of the need for professional judgment on the part of forensic practitioners; ensure applicability across the broad range of activities conducted by forensic practitioners; and reduce the likelihood of enacting an inflexible set of guidelines that might be inapplicable as forensic practice evolves. The use of these modifiers, and the recognition of the role of professional discretion and judgment, also reflects that forensic practitioners are likely to encounter facts and circumstances not anticipated by the Guidelines and they may have to act upon uncertain or incomplete evidence. The Guidelines may provide general or conceptual guidance in such circumstances. The Guidelines do not, however, exhaust the legal, professional, moral, and ethical considerations that inform forensic practitioners, for no complex activity can be completely defined by legal rules, codes of conduct, and aspirational guidelines.

The Guidelines are not intended to serve as a basis for disciplinary action or civil or criminal liability. The standard of care is established by a competent authority, not by the Guidelines. No ethical, licensure, or other administrative action or remedy, nor any other cause of action, should be taken *solely* on the basis of a forensic practitioner acting in a manner consistent or inconsistent with these Guidelines.

In cases in which a competent authority references the Guidelines when formulating standards, the authority should consider that the Guidelines attempt to identify a high level of quality in forensic practice. Competent practice is defined as the conduct of a reasonably prudent forensic practitioner engaged in similar activities in similar circumstances. Professional conduct evolves and may be viewed along a continuum of adequacy, and "minimally competent" and "best possible" are usually different points along that continuum.

The Guidelines are designed to be national in scope and are intended to be consistent with state and federal law. In cases in which a conflict between legal and professional obligations occurs, forensic practitioners make known their commitment to the EPPCC and the Guidelines and take steps to achieve an appropriate resolution consistent with the EPPCC and the Guidelines.

The format of the Guidelines is different from most other practice guidelines developed under the auspices of APA. This reflects the history of the Guidelines as well as the fact that the Guidelines are considerably broader in scope than any other APA-developed guidelines. Indeed, these are the only APA-approved guidelines that address a complete specialty practice area. Despite this difference in format, the Guidelines function as all other APA guideline documents.

This document replaces the 1991 "Specialty Guidelines for Forensic Psychologists," which were approved by the American Psychology–Law Society (Division 41 of APA) and the American Board of Forensic Psychology. The current revision has also been approved by the Council of Representatives of APA. Appendix A includes a discussion of the revision process, enactment, and current status of these Guidelines. Appendix B includes definitions and terminology as used for the purposes of these Guidelines.

1. Responsibilities

Guideline 1.01: Integrity

Forensic practitioners strive for accuracy, honesty, and truthfulness in the science, teaching, and practice of forensic psychology and they strive to resist partisan pressures to provide services in any ways that might tend to be misleading or inaccurate.

Guideline 1.02: Impartiality and Fairness

When offering expert opinion to be relied upon by a decision maker, providing forensic therapeutic services, or teaching or conducting research, forensic practitioners strive for accuracy, impartiality, fairness, and independence (EPPCC Standard 2.01). Forensic practitioners rec-

ognize the adversarial nature of the legal system and strive to treat all participants and weigh all data, opinions, and rival hypotheses impartially.

When conducting forensic examinations, forensic practitioners strive to be unbiased and impartial, and avoid partisan presentation of unrepresentative, incomplete, or inaccurate evidence that might mislead finders of fact. This guideline does not preclude forceful presentation of the data and reasoning upon which a conclusion or professional product is based.

When providing educational services, forensic practitioners seek to represent alternative perspectives, including data, studies, or evidence on both sides of the question, in an accurate, fair and professional manner, and strive to weigh and present all views, facts, or opinions impartially.

When conducting research, forensic practitioners seek to represent results in a fair and impartial manner. Forensic practitioners strive to utilize research designs and scientific methods that adequately and fairly test the questions at hand, and they attempt to resist partisan pressures to develop designs or report results in ways that might be misleading or unfairly bias the results of a test, study, or evaluation.

Guideline 1.03: Avoiding Conflicts of Interest

Forensic practitioners refrain from taking on a professional role when personal, scientific, professional, legal, financial, or other interests or relationships could reasonably be expected to impair their impartiality, competence, or effectiveness, or expose others with whom a professional relationship exists to harm (EPPCC Standard 3.06).

Forensic practitioners are encouraged to identify, make known, and address real or apparent conflicts of interest in an attempt to maintain the public confidence and trust, discharge professional obligations, and maintain responsibility, impartiality, and accountability (EPPCC Standard 3.06). Whenever possible, such conflicts are revealed to all parties as soon as they become known to the psychologist. Forensic practitioners consider whether a prudent and competent forensic practitioner engaged in similar circumstances would determine that the ability to make a proper decision is likely to become impaired under the immediate circumstances.

When a conflict of interest is determined to be manageable, continuing services are provided and documented in a way to manage the conflict, maintain accountability, and preserve the trust of relevant others (also see Guideline 4.02 below).

2. Competence

Guideline 2.01: Scope of Competence

When determining one's competence to provide services in a particular matter, forensic practitioners may consider a variety of factors including the relative complexity and specialized nature of the service, relevant training and experience, the preparation and study they are able to devote to the matter, and the opportunity for consultation with a professional of established competence in the subject matter in question. Even with regard to subjects in which they are expert, forensic practitioners may choose to consult with colleagues.

Guideline 2.02: Gaining and Maintaining Competence

Competence can be acquired through various combinations of education, training, supervised experience, consultation, study, and professional experience. Forensic practitioners planning to provide services, teach, or conduct research involving populations, areas, techniques, or technologies that are new to them are encouraged to undertake relevant education, training, supervised experience, consultation, or study.

Forensic practitioners make ongoing efforts to develop and maintain their competencies (EPPCC Standard 2.03). To maintain the requisite knowledge and skill, forensic practitioners keep abreast of developments in the fields of psychology and the law.

Guideline 2.03: Representing Competencies

Consistent with the EPPCC, forensic practitioners adequately and accurately inform all recipients of their services (e.g., attorneys, tribunals) about relevant aspects of the nature and extent of their experience, training, credentials, and qualifications, and how they were obtained (EPPCC Standard 5.01).

Guideline 2.04: Knowledge of the Legal System and the Legal Rights of Individuals

Forensic practitioners recognize the importance of obtaining a fundamental and reasonable level of knowledge and understanding of the legal and professional standards, laws, rules, and precedents that govern their participation in legal proceedings and that guide the impact of their services on service recipients (EPPCC Standard 2.01).

Forensic practitioners aspire to manage their professional conduct in a manner that does not threaten or impair the rights of affected individuals. They may consult with, and refer others to, legal counsel on matters of law. Although they do not provide formal legal advice or opinions, forensic practitioners may provide information about the legal process to others based on their knowledge and experience. They strive to distinguish this from legal opinions, however, and encourage consultation with attorneys as appropriate.

Guideline 2.05: Knowledge of the Scientific Foundation for Opinions and Testimony

Forensic practitioners seek to provide opinions and testimony that are sufficiently based upon adequate scientific foundation, and reliable and valid principles and methods that have been applied appropriately to the facts of the case.

When providing opinions and testimony that are based on novel or emerging principles and methods, forensic practitioners seek to make known the status and limitations of these principles and methods.

Guideline 2.06: Knowledge of the Scientific Foundation for Teaching and Research

Forensic practitioners engage in teaching and research activities in which they have adequate knowledge, experience, and education (EPPCC Standard 2.01), and they acknowledge relevant limitations and caveats inherent in procedures and conclusions (EPPCC Standard 5.01).

Guideline 2.07: Considering the Impact of Personal Beliefs and Experience

Forensic practitioners recognize that their own cultures, attitudes, values, beliefs, opinions, or biases may affect their ability to practice in a competent and impartial manner. When such factors may diminish their ability to practice in a competent and impartial manner, forensic practitioners may take steps to correct or limit such effects, decline participation in the matter, or limit their participation in a manner that is consistent with professional obligations.

Guideline 2.08: Appreciation of Individual and Group Differences

When scientific or professional knowledge in the discipline of psychology establishes that an understanding of factors associated with age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, language, socioeconomic status, or other relevant individual and cultural differences affects implementation or use of their services or research, forensic practitioners consider the boundaries of their expertise, make an appropriate referral if indicated, or gain the necessary training, experience, consultation, or supervision (EPPCC Standard 2.01; APA, 2003, 2004, 2011c, 2011d, 2011e).

Forensic practitioners strive to understand how factors associated with age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, language, socioeconomic status, or other relevant individual and cultural differences may affect and be related to the basis for people's contact and involvement with the legal system.

Forensic practitioners do not engage in unfair discrimination based on such factors or on any basis proscribed by law (EPPCC Standard 3.01). They strive to take steps to correct or limit the effects of such factors on their work, decline participation in the matter, or limit their participation in a manner that is consistent with professional obligations.

Guideline 2.09: Appropriate Use of Services and Products

Forensic practitioners are encouraged to make reasonable efforts to guard against misuse of their services and exercise professional discretion in addressing such misuses.

3. Diligence

Guideline 3.01: Provision of Services

Forensic practitioners are encouraged to seek explicit agreements that define the scope of, time-frame of, and compensation for their services. In the event that a client breaches the contract or acts in a way that would require the practitioner to violate ethical, legal or professional obligations, the forensic practitioner may terminate the relationship.

Forensic practitioners strive to act with reasonable diligence and promptness in providing agreed-upon and reasonably anticipated services. Forensic practitioners are not bound, however, to provide services not reasonably anticipated when retained, nor to provide every possible aspect or variation of service. Instead, forensic practitioners may exercise professional discretion in determining the extent and means by which services are provided and agreements are fulfilled.

Guideline 3.02: Responsiveness

Forensic practitioners seek to manage their workloads so that services can be provided thoroughly, competently, and promptly. They recognize that acting with reasonable promptness, however, does not require the forensic practitioner to acquiesce to service demands not reasonably anticipated at the time the service was requested, nor does it require the forensic practitioner to provide services if the client has not acted in a manner consistent with existing agreements, including payment of fees.

Guideline 3.03: Communication

Forensic practitioners strive to keep their clients reasonably informed about the status of their services, comply with their clients' reasonable requests for information, and consult with their clients about any substantial limitation on their conduct or performance that may arise when they reasonably believe that their clients expect a service that is not consistent with their professional obligations. Forensic practitioners attempt to keep their clients reasonably informed regarding new facts, opinions, or other potential evidence that may be relevant and applicable.

Guideline 3.04: Termination of Services

The forensic practitioner seeks to carry through to conclusion all matters undertaken for a client unless the forensic practitioner–client relationship is terminated. When a forensic practitioner's employment is limited to a specific matter, the relationship may terminate when the matter has been resolved, anticipated services have been completed, or the agreement has been violated.

4. Relationships

Whether a forensic practitioner–client relationship exists depends on the circumstances and is determined by a number of factors which may include the information exchanged between the potential client and the forensic practitioner prior to, or at the initiation of, any contact or service, the nature of the interaction, and the purpose of the interaction.

In their work, forensic practitioners recognize that relationships are established with those who retain their services (e.g., retaining parties, employers, insurers, the

court) and those with whom they interact (e.g., examinees, collateral contacts, research participants, students). Forensic practitioners recognize that associated obligations and duties vary as a function of the nature of the relationship.

Guideline 4.01: Responsibilities to Retaining Parties

Most responsibilities to the retaining party attach only after the retaining party has requested and the forensic practitioner has agreed to render professional services and an agreement regarding compensation has been reached. Forensic practitioners are aware that there are some responsibilities, such as privacy, confidentiality, and privilege, that may attach when the forensic practitioner agrees to consider whether a forensic practitioner–retaining party relationship shall be established. Forensic practitioners, prior to entering into a contract, may direct the potential retaining party not to reveal any confidential or privileged information as a way of protecting the retaining party's interest in case a conflict exists as a result of pre-existing relationships.

At the initiation of any request for service, forensic practitioners seek to clarify the nature of the relationship and the services to be provided including the role of the forensic practitioner (e.g., trial consultant, forensic examiner, treatment provider, expert witness, research consultant); which person or entity is the client; the probable uses of the services provided or information obtained; and any limitations to privacy, confidentiality, or privilege.

Guideline 4.02: Multiple Relationships

A multiple relationship occurs when a forensic practitioner is in a professional role with a person and, at the same time or at a subsequent time, is in a different role with the same person; is involved in a personal, fiscal, or other relationship with an adverse party; at the same time is in a relationship with a person closely associated with or related to the person with whom the forensic practitioner has the professional relationship; or offers or agrees to enter into another relationship in the future with the person or a person closely associated with or related to the person (EPPCC Standard 3.05).

Forensic practitioners strive to recognize the potential conflicts of interest and threats to objectivity inherent in multiple relationships. Forensic practitioners are encouraged to recognize that some personal and professional relationships may interfere with their ability to practice in a competent and impartial manner and they seek to minimize any detrimental effects by avoiding involvement in such matters whenever feasible or limiting their assistance in a manner that is consistent with professional obligations.

Guideline 4.02.01: Therapeutic–Forensic Role Conflicts

Providing forensic and therapeutic psychological services to the same individual or closely related individuals involves multiple relationships that may impair objectivity and/or cause exploitation or other harm. Therefore, when requested or ordered to provide either concurrent or sequential forensic and therapeutic services, forensic practitioners are encouraged to disclose the potential risk and make reasonable efforts to refer the request to another qualified provider. If referral is not possible, the forensic practitioner is encouraged to consider the risks and benefits to all parties and to the legal system or entity likely to be impacted, the possibility of separating each service widely in time, seeking judicial review and direction, and consulting with knowledgeable colleagues. When providing both forensic and therapeutic services, forensic practitioners seek to minimize the potential negative effects of this circumstance (EPPCC Standard 3.05).

Guideline 4.02.02: Expert Testimony by Practitioners Providing Therapeutic Services

Providing expert testimony about a patient who is a participant in a legal matter does not necessarily involve the practice of forensic psychology even when that testimony is relevant to a psycholegal issue before the decision maker. For example, providing testimony on matters such as a patient's reported history or other statements, mental status, diagnosis, progress, prognosis, and treatment would not ordinarily be considered forensic practice even when the testimony is related to a psycholegal issue before the decision maker. In contrast, rendering opinions and providing testimony about a person on psycholegal issues (e.g., criminal responsibility, legal causation, proximate cause, trial competence, testamentary capacity, the relative merits of parenting arrangements) would ordinarily be considered the practice of forensic psychology.

Consistent with their ethical obligations to base their opinions on information and techniques sufficient to substantiate their findings (EPPCC Standards 2.04, 9.01), forensic practitioners are encouraged to provide testimony only on those issues for which they have adequate foundation and only when a reasonable forensic practitioner engaged in similar circumstances would determine that the ability to make a proper decision is unlikely to be impaired. As with testimony regarding forensic examinees, the forensic practitioner strives to identify any substantive limitations that may affect the reliability and validity of the facts or opinions offered, and communicates these to the decision maker.

Guideline 4.02.03: Provision of Forensic Therapeutic Services

Although some therapeutic services can be considered forensic in nature, the fact that therapeutic services are ordered by the court does not necessarily make them forensic.

In determining whether a therapeutic service should be considered the practice of forensic psychology, psychologists are encouraged to consider the potential impact of the legal context on treatment, the potential for treatment to impact the psycholegal issues involved in the case, and whether another reasonable psychologist in a similar position would consider the service to be forensic and these Guidelines to be applicable.

Therapeutic services can have significant effects on current or future legal proceedings. Forensic practitioners

are encouraged to consider these effects and minimize any unintended or negative effects on such proceedings or therapy when they provide therapeutic services in forensic contexts.

Guideline 4.03: Provision of Emergency Mental Health Services to Forensic Examinees

When providing forensic examination services an emergency may arise that requires the practitioner to provide short-term therapeutic services to the examinee in order to prevent imminent harm to the examinee or others. In such cases the forensic practitioner is encouraged to limit disclosure of information and inform the retaining attorney, legal representative, or the court in an appropriate manner. Upon providing emergency treatment to examinees, forensic practitioners consider whether they can continue in a forensic role with that individual so that potential for harm to the recipient of services is avoided (EPPCC Standard 3.04).

5. Fees

Guideline 5.01: Determining Fees

When determining fees forensic practitioners may consider salient factors such as their experience providing the service, the time and labor required, the novelty and difficulty of the questions involved, the skill required to perform the service, the fee customarily charged for similar forensic services, the likelihood that the acceptance of the particularba employment will preclude other employment, the time limitations imposed by the client or circumstances, the nature and length of the professional relationship with the client, the client's ability to pay for the service, and any legal requirements.

Guideline 5.02: Fee Arrangements

Forensic practitioners are encouraged to make clear to the client the likely cost of services whenever it is feasible, and make appropriate provisions in those cases in which the costs of services is greater than anticipated or the client's ability to pay for services changes in some way.

Forensic practitioners seek to avoid undue influence that might result from financial compensation or other gains. Because of the threat to impartiality presented by the acceptance of contingent fees and associated legal prohibitions, forensic practitioners strive to avoid providing professional services on the basis of contingent fees. Letters of protection, financial guarantees, and other security for payment of fees in the future are not considered contingent fees unless payment is dependent on the outcome of the matter.

Guideline 5.03: Pro Bono Services

Forensic psychologists recognize that some persons may have limited access to legal services as a function of financial disadvantage and strive to contribute a portion of their professional time for little or no compensation or personal advantage (EPPCC Principle E).

6. Informed Consent, Notification, and Assent

Because substantial rights, liberties, and properties are often at risk in forensic matters, and because the methods and procedures of forensic practitioners are complex and may not be accurately anticipated by the recipients of forensic services, forensic practitioners strive to inform service recipients about the nature and parameters of the services to be provided (EPPCC Standards 3.04, 3.10).

Guideline 6.01: Timing and Substance

Forensic practitioners strive to inform clients, examinees, and others who are the recipients of forensic services as soon as is feasible about the nature and extent of reasonably anticipated forensic services.

In determining what information to impart, forensic practitioners are encouraged to consider a variety of factors including the person's experience or training in psychological and legal matters of the type involved and whether the person is represented by counsel. When questions or uncertainties remain after they have made the effort to explain the necessary information, forensic practitioners may recommend that the person seek legal advice.

Guideline 6.02: Communication With Those Seeking to Retain a Forensic Practitioner

As part of the initial process of being retained, or as soon thereafter as previously unknown information becomes available, forensic practitioners strive to disclose to the retaining party information that would reasonably be anticipated to affect a decision to retain or continue the services of the forensic practitioner.

This disclosure may include, but is not limited to, the fee structure for anticipated services; prior and current personal or professional activities, obligations, and relationships that would reasonably lead to the fact or the appearance of a conflict of interest; the forensic practitioner's knowledge, skill, experience, and education relevant to the forensic services being considered, including any significant limitations; and the scientific bases and limitations of the methods and procedures which are expected to be employed.

Guideline 6.03: Communication With Forensic Examinees

Forensic practitioners inform examinees about the nature and purpose of the examination (EPPCC Standard 9.03; American Educational Research Association, American Psychological Association, & National Council on Measurement in Education [AERA, APA, & NCME], in press). Such information may include the purpose, nature, and anticipated use of the examination; who will have access to the information; associated limitations on privacy, confidentiality, and privilege including who is authorized to release or access the information contained in the forensic practitioner's records; the voluntary or involuntary nature of participation, including potential consequences of par-

ticipation or nonparticipation, if known; and, if the cost of the service is the responsibility of the examinee, the anticipated cost.

Guideline 6.03.01: Persons Not Ordered or Mandated to Undergo Examination

If the examinee is not ordered by the court to participate in a forensic examination, the forensic practitioner seeks his or her informed consent (EPPCC Standards 3.10, 9.03). If the examinee declines to proceed after being notified of the nature and purpose of the forensic examination, the forensic practitioner may consider postponing the examination, advising the examinee to contact his or her attorney, and notifying the retaining party about the examinee's unwillingness to proceed.

Guideline 6.03.02: Persons Ordered or Mandated to Undergo Examination or Treatment

If the examinee is ordered by the court to participate, the forensic practitioner can conduct the examination over the objection, and without the consent, of the examinee (EPPCC Standards 3.10, 9.03). If the examinee declines to proceed after being notified of the nature and purpose of the forensic examination, the forensic practitioner may consider a variety of options including postponing the examination, advising the examinee to contact his or her attorney, and notifying the retaining party about the examinee's unwillingness to proceed.

When an individual is ordered to undergo treatment but the goals of treatment are determined by a legal authority rather than the individual receiving services, the forensic practitioner informs the service recipient of the nature and purpose of treatment, and any limitations on confidentiality and privilege (EPPCC Standards 3.10, 10.01).

Guideline 6.03.03: Persons Lacking Capacity to Provide Informed Consent

Forensic practitioners appreciate that the very conditions that precipitate psychological examination of individuals involved in legal proceedings can impair their functioning in a variety of important ways, including their ability to understand and consent to the evaluation process.

For examinees adjudicated or presumed by law to lack the capacity to provide informed consent for the anticipated forensic service, the forensic practitioner nevertheless provides an appropriate explanation, seeks the examinee's assent, and obtains appropriate permission from a legally authorized person, as permitted or required by law (EPPCC Standards 3.10, 9.03).

For examinees whom the forensic practitioner has concluded lack capacity to provide informed consent to a proposed, non-court-ordered service, but who have not been adjudicated as lacking such capacity, the forensic practitioner strives to take reasonable steps to protect their rights and welfare (EPPCC Standard 3.10). In such cases, the forensic practitioner may consider suspending the proposed service or notifying the examinee's attorney or the retaining party.

Guideline 6.03.04: Evaluation of Persons Not Represented by Counsel

Because of the significant rights that may be at issue in a legal proceeding, forensic practitioners carefully consider the appropriateness of conducting a forensic evaluation of an individual who is not represented by counsel. Forensic practitioners may consider conducting such evaluations or delaying the evaluation so as to provide the examinee with the opportunity to consult with counsel.

Guideline 6.04: Communication With Collateral Sources of Information

Forensic practitioners disclose to potential collateral sources information that might reasonably be expected to inform their decisions about participating that may include, but may not be limited to, who has retained the forensic practitioner; the nature, purpose, and intended use of the examination or other procedure; the nature of and any limits on privacy, confidentiality, and privilege; and whether their participation is voluntary (EPPCC Standard 3.10).

Guideline 6.05: Communication in Research Contexts

When engaging in research or scholarly activities conducted as a service to a client in a legal proceeding, forensic practitioners attempt to clarify any anticipated use of the research or scholarly product, disclose their role in the resulting research or scholarly products, and obtain whatever consent or agreement is required.

In advance of any scientific study, forensic practitioners seek to negotiate with the client the circumstances under and manner in which the results may be made known to others. Forensic practitioners strive to balance the potentially competing rights and interests of the retaining party with the inappropriateness of suppressing data, for example, by agreeing to report the data without identifying the jurisdiction in which the study took place. Forensic practitioners represent the results of research in an accurate manner (EPPCC Standard 5.01).

7. Conflicts in Practice

In forensic psychology practice, conflicting responsibilities and demands may be encountered. When conflicts occur, forensic practitioners seek to make the conflict known to the relevant parties or agencies, and consider the rights and interests of the relevant parties or agencies in their attempts to resolve the conflict.

Guideline 7.01: Conflicts With Legal Authority

When their responsibilities conflict with law, regulations, or other governing legal authority, forensic practitioners make known their commitment to the EPPCC, and take steps to resolve the conflict. In situations in which the

EPPCC or the Guidelines are in conflict with the law, attempts to resolve the conflict are made in accordance with the EPPCC (EPPCC Standard 1.02).

When the conflict cannot be resolved by such means, forensic practitioners may adhere to the requirements of the law, regulations, or other governing legal authority, but only to the extent required and not in any way that violates a person's human rights (EPPCC Standard 1.03).

Forensic practitioners are encouraged to consider the appropriateness of complying with court orders when such compliance creates potential conflicts with professional standards of practice.

Guideline 7.02: Conflicts With Organizational Demands

When the demands of an organization with which they are affiliated or for whom they are working conflict with their professional responsibilities and obligations, forensic practitioners strive to clarify the nature of the conflict and, to the extent feasible, resolve the conflict in a way consistent with professional obligations and responsibilities (EPPCC Standard 1.03).

Guideline 7.03: Resolving Ethical Issues With Fellow Professionals

When an apparent or potential ethical violation has caused, or is likely to cause, substantial harm, forensic practitioners are encouraged to take action appropriate to the situation and consider a number of factors including the nature and the immediacy of the potential harm; applicable privacy, confidentiality, and privilege; how the rights of the relevant parties may be affected by a particular course of action; and any other legal or ethical obligations (EPPCC Standard 1.04). Steps to resolve perceived ethical conflicts may include, but are not limited to, obtaining the consultation of knowledgeable colleagues, obtaining the advice of independent counsel, and conferring directly with the client.

When forensic practitioners believe there may have been an ethical violation by another professional, an attempt is made to resolve the issue by bringing it to the attention of that individual, if that attempt does not violate any rights or privileges that may be involved, and if an informal resolution appears appropriate (EPPCC Standard 1.04). If this does not result in a satisfactory resolution, the forensic practitioner may have to take further action appropriate to the situation, including making a report to third parties of the perceived ethical violation (EPPCC Standard 1.05). In most instances, in order to minimize unforeseen risks to the party's rights in the legal matter, forensic practitioners consider consulting with the client before attempting to resolve a perceived ethical violation with another professional.

8. Privacy, Confidentiality, and Privilege

Forensic practitioners recognize their ethical obligations to maintain the confidentiality of information relating to a client or retaining party, except insofar as disclosure is consented to by the client or retaining party, or required or permitted by law (EPPCC Standard 4.01).

Guideline 8.01: Release of Information

Forensic practitioners are encouraged to recognize the importance of complying with properly noticed and served subpoenas or court orders directing release of information, or other legally proper consent from duly authorized persons, unless there is a legally valid reason to offer an objection. When in doubt about an appropriate response or course of action, forensic practitioners may seek assistance from the retaining client, retain and seek legal advice from their own attorney, or formally notify the drafter of the subpoena or order of their uncertainty.

Guideline 8.02: Access to Information

If requested, forensic practitioners seek to provide the retaining party access to, and a meaningful explanation of, all information that is in their records for the matter at hand, consistent with the relevant law, applicable codes of ethics and professional standards, and institutional rules and regulations. Forensic examinees typically are not provided access to the forensic practitioner's records without the consent of the retaining party. Access to records by anyone other than the retaining party is governed by legal process, usually subpoena or court order, or by explicit consent of the retaining party. Forensic practitioners may charge a reasonable fee for the costs associated with the storage, reproduction, review, and provision of records.

Guideline 8.03: Acquiring Collateral and Third Party Information

Forensic practitioners strive to access information or records from collateral sources with the consent of the relevant attorney or the relevant party, or when otherwise authorized by law or court order.

Guideline 8.04: Use of Case Materials in Teaching, Continuing Education, and Other Scholarly Activities

Forensic practitioners using case materials for purposes of teaching, training, or research strive to present such information in a fair, balanced, and respectful manner. They attempt to protect the privacy of persons by disguising the confidential, personally identifiable information of all persons and entities who would reasonably claim a privacy interest; using only those aspects of the case available in the public domain; or obtaining consent from the relevant clients, parties, participants, and organizations to use the materials for such purposes (EPPCC Standard 4.07; also see Guidelines 11.06 and 11.07 of these Guidelines).

9. Methods and Procedures

Guideline 9.01: Use of Appropriate Methods

Forensic practitioners strive to utilize appropriate methods and procedures in their work. When performing examinations, treatment, consultation, educational activities, or scholarly investigations, forensic practitioners seek to

maintain integrity by examining the issue or problem at hand from all reasonable perspectives and seek information that will differentially test plausible rival hypotheses.

Guideline 9.02: Use of Multiple Sources of Information

Forensic practitioners ordinarily avoid relying solely on one source of data, and corroborate important data whenever feasible (AERA, APA, & NCME, in press). When relying upon data that have not been corroborated, forensic practitioners seek to make known the uncorroborated status of the data, any associated strengths and limitations, and the reasons for relying upon the data.

Guideline 9.03: Opinions Regarding Persons Not Examined

Forensic practitioners recognize their obligations to only provide written or oral evidence about the psychological characteristics of particular individuals when they have sufficient information or data to form an adequate foundation for those opinions or to substantiate their findings (EPPCC Standard 9.01). Forensic practitioners seek to make reasonable efforts to obtain such information or data, and they document their efforts to obtain it. When it is not possible or feasible to examine individuals about whom they are offering an opinion, forensic practitioners strive to make clear the impact of such limitations on the reliability and validity of their professional products, opinions, or testimony.

When conducting a record review or providing consultation or supervision that does not warrant an individual examination, forensic practitioners seek to identify the sources of information on which they are basing their opinions and recommendations, including any substantial limitations to their opinions and recommendations.

10. Assessment

Guideline 10.01: Focus on Legally Relevant Factors

Forensic examiners seek to assist the trier of fact to understand evidence or determine a fact in issue, and they provide information that is most relevant to the psycholegal issue. In reports and testimony, forensic practitioners typically provide information about examinees' functional abilities, capacities, knowledge, and beliefs, and address their opinions and recommendations to the identified psycholegal issues (American Bar Association & American Psychological Association, 2008; Grisso, 1986, 2003; Heilbrun, Marczyk, DeMatteo, & Mack-Allen, 2007).

Forensic practitioners are encouraged to consider the problems that may arise by using a clinical diagnosis in some forensic contexts, and consider and qualify their opinions and testimony appropriately.

Guideline 10.02: Selection and Use of Assessment Procedures

Forensic practitioners use assessment procedures in the manner and for the purposes that are appropriate in light of the research on or evidence of their usefulness and proper application (EPPCC Standard 9.02; AERA, APA, & NCME, in press). This includes assessment techniques, interviews, tests, instruments, and other procedures and their administration, adaptation, scoring, and interpretation, including computerized scoring and interpretation systems.

Forensic practitioners use assessment instruments whose validity and reliability have been established for use with members of the population assessed. When such validity and reliability have not been established, forensic practitioners consider and describe the strengths and limitations of their findings. Forensic practitioners use assessment methods that are appropriate to an examinee's language preference and competence, unless the use of an alternative language is relevant to the assessment issues (EPPCC Standard 9.02).

Assessment in forensic contexts differs from assessment in therapeutic contexts in important ways that forensic practitioners strive to take into account when conducting forensic examinations. Forensic practitioners seek to consider the strengths and limitations of employing traditional assessment procedures in forensic examinations (AERA, APA, & NCME, in press). Given the stakes involved in forensic contexts, forensic practitioners strive to ensure the integrity and security of test materials and results (AERA, APA, & NCME, in press).

When the validity of an assessment technique has not been established in the forensic context or setting in which it is being used, the forensic practitioner seeks to describe the strengths and limitations of any test results and explain the extrapolation of these data to the forensic context. Because of the many differences between forensic and therapeutic contexts, forensic practitioners consider and seek to make known that some examination results may warrant substantially different interpretation when administered in forensic contexts (AERA, APA, & NCME, in press).

Forensic practitioners consider and seek to make known that forensic examination results can be affected by factors unique to, or differentially present in, forensic contexts including response style, voluntariness of participation, and situational stress associated with involvement in forensic or legal matters (AERA, APA, & NCME, in press).

Guideline 10.03: Appreciation of Individual Differences

When interpreting assessment results, forensic practitioners consider the purpose of the assessment as well as the various test factors, test-taking abilities, and other characteristics of the person being assessed, such as situational, personal, linguistic, and cultural differences that might affect their judgments or reduce the accuracy of their interpretations (EPPCC Standard 9.06). Forensic practitioners strive to identify any significant strengths and limitations of their procedures and interpretations.

Forensic practitioners are encouraged to consider how the assessment process may be impacted by any disability an examinee is experiencing, make accommodations as

possible, and consider such when interpreting and communicating the results of the assessment (APA, 2011d).

Guideline 10.04: Consideration of Assessment Settings

In order to maximize the validity of assessment results, forensic practitioners strive to conduct evaluations in settings that provide adequate comfort, safety, and privacy.

Guideline 10.05: Provision of Assessment Feedback

Forensic practitioners take reasonable steps to explain assessment results to the examinee or a designated representative in language they can understand (EPPCC Standard 9.10). In those circumstances in which communication about assessment results is precluded, the forensic practitioner explains this to the examinee in advance (EPPCC Standard 9.10).

Forensic practitioners seek to provide information about professional work in a manner consistent with professional and legal standards for the disclosure of test data or results, interpretation of data, and the factual bases for conclusions.

Guideline 10.06: Documentation and Compilation of Data Considered

Forensic practitioners are encouraged to recognize the importance of documenting all data they consider with enough detail and quality to allow for reasonable judicial scrutiny and adequate discovery by all parties. This documentation includes, but is not limited to, letters and consultations; notes, recordings, and transcriptions; assessment and test data, scoring reports and interpretations; and all other records in any form or medium that were created or exchanged in connection with a matter.

When contemplating third party observation or audio/video-recording of examinations, forensic practitioners strive to consider any law that may control such matters, the need for transparency and documentation, and the potential impact of observation or recording on the validity of the examination and test security (Committee on Psychological Tests and Assessment, American Psychological Association, 2007).

Guideline 10.07: Provision of Documentation

Pursuant to proper subpoenas or court orders, or other legally proper consent from authorized persons, forensic practitioners seek to make available all documentation described in Guideline 10.05, all financial records related to the matter, and any other records including reports (and draft reports if they have been provided to a party, attorney, or other entity for review), that might reasonably be related to the opinions to be expressed.

Guideline 10.08: Record Keeping

Forensic practitioners establish and maintain a system of record keeping and professional communication (EPPCC Standard 6.01; APA, 2007), and attend to relevant laws and rules. When indicated by the extent of the rights, liberties, and properties that may be at risk, the complexity of the case, the amount and legal significance of unique evidence in the care and control of the forensic practitioner, and the likelihood of future appeal, forensic practitioners strive to inform the retaining party of the limits of record keeping times. If requested to do so, forensic practitioners consider maintaining such records until notified that all appeals in the matter have been exhausted, or sending a copy of any unique components/aspects of the record in their care and control to the retaining party before destruction of the record.

11. Professional and Other Public Communications

Guideline 11.01: Accuracy, Fairness, and Avoidance of Deception

Forensic practitioners make reasonable efforts to ensure that the products of their services, as well as their own public statements and professional reports and testimony, are communicated in ways that promote understanding and avoid deception (EPPCC Standard 5.01).

When in their role as expert to the court or other tribunals, the role of forensic practitioners is to facilitate understanding of the evidence or dispute. Consistent with legal and ethical requirements, forensic practitioners do not distort or withhold relevant evidence or opinion in reports or testimony. When responding to discovery requests and providing sworn testimony, forensic practitioners strive to have readily available for inspection all data which they considered, regardless of whether the data supports their opinion, subject to and consistent with court order, relevant rules of evidence, test security issues, and professional standards (AERA, APA, & NCME, in press; Committee on Legal Issues, American Psychological Association, 2006; Bank & Packer, 2007; Golding, 1990).

When providing reports and other sworn statements or testimony in any form, forensic practitioners strive to present their conclusions, evidence, opinions, or other professional products in a fair manner. Forensic practitioners do not, by either commission or omission, participate in misrepresentation of their evidence, nor do they participate in partisan attempts to avoid, deny, or subvert the presentation of evidence contrary to their own position or opinion (EPPCC Standard 5.01). This does not preclude forensic practitioners from forcefully presenting the data and reasoning upon which a conclusion or professional product is based.

Guideline 11.02: Differentiating Observations, Inferences, and Conclusions

In their communications, forensic practitioners strive to distinguish observations, inferences, and conclusions. Forensic practitioners are encouraged to explain the relationship between their expert opinions and the legal issues and facts of the case at hand.

Guideline 11.03: Disclosing Sources of Information and Bases of Opinions

Forensic practitioners are encouraged to disclose all sources of information obtained in the course of their professional services, and to identify the source of each piece of information that was considered and relied upon in formulating a particular conclusion, opinion, or other professional product.

Guideline 11.04: Comprehensive and Accurate Presentation of Opinions in Reports and Testimony

Consistent with relevant law and rules of evidence, when providing professional reports and other sworn statements or testimony, forensic practitioners strive to offer a complete statement of all relevant opinions that they formed within the scope of their work on the case, the basis and reasoning underlying the opinions, the salient data or other information that was considered in forming the opinions, and an indication of any additional evidence that may be used in support of the opinions to be offered. The specific substance of forensic reports is determined by the type of psycholegal issue at hand as well as relevant laws or rules in the jurisdiction in which the work is completed.

Forensic practitioners are encouraged to limit discussion of background information that does not bear directly upon the legal purpose of the examination or consultation. Forensic practitioners avoid offering information that is irrelevant and that does not provide a substantial basis of support for their opinions, except when required by law (EPPCC Standard 4.04).

Guideline 11.05: Commenting Upon Other Professionals and Participants in Legal Proceedings

When evaluating or commenting upon the work or qualifications of other professionals involved in legal proceedings, forensic practitioners seek to represent their disagreements in a professional and respectful tone, and base them on a fair examination of the data, theories, standards, and opinions of the other expert or party.

When describing or commenting upon clients, examinees, or other participants in legal proceedings, forensic practitioners strive to do so in a fair and impartial manner.

Forensic practitioners strive to report the representations, opinions, and statements of clients, examinees, or other participants in a fair and impartial manner.

Guideline 11.06: Out of Court Statements

Ordinarily, forensic practitioners seek to avoid making detailed public (out-of-court) statements about legal proceedings in which they have been involved. However, sometimes public statements may serve important goals such as educating the public about the role of forensic practitioners in the legal system, the appropriate practice of forensic psychology, and psychological and legal issues that are relevant to the matter at hand. When making public statements, forensic practitioners refrain from releasing private, confidential, or privileged information, and attempt to protect persons from harm, misuse, or misrepresentation as a result of their statements (EPPCC Standard 4.05).

Guideline 11.07: Commenting Upon Legal Proceedings

Forensic practitioners strive to address particular legal proceedings in publications or communications only to the extent that the information relied upon is part of a public record, or when consent for that use has been properly obtained from any party holding any relevant privilege (also see Guideline 8.04).

When offering public statements about specific cases in which they have not been involved, forensic practitioners offer opinions for which there is sufficient information or data and make clear the limitations of their statements and opinions resulting from having had no direct knowledge of or involvement with the case (EPPCC Standard 9.01).

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Appendix A
Revision Process of the Guidelines

This revision of the Guidelines was coordinated by the Committee for the Revision of the Specialty Guidelines for Forensic Psychology ("the Revisions Committee"), which was established by the American Academy of Forensic Psychology and the American Psychology–Law Society (Division 41 of the American Psychological Association [APA]) in 2002 and which operated through 2011. This committee consisted of two representatives from each organization (Solomon Fulero, PhD, JD; Stephen Golding, PhD, ABPP; Lisa Piechowski, PhD, ABPP; Christina Studebaker, PhD), a chairperson (Randy Otto, PhD, ABPP), and a liaison from Division 42 (Psychologists in Independent Practice) of APA (Jeffrey Younggren, PhD, ABPP).

This document was revised in accordance with APA Rule 30.08 and the APA policy document "Criteria for Practice Guideline Development and Evaluation" (APA, 2002). The Revisions Committee posted announcements regarding the revision process to relevant electronic discussion lists and professional publications (i.e., the Psy-law-L e-mail listserv of the American Psychology–Law Society, the American Academy of Forensic Psychology listserv, the American Psychology–Law Society Newsletter). In addition, an electronic discussion list devoted solely to issues concerning revision of the Guidelines was operated between December 2002 and July 2007, followed by establishment of an e-mail address in February 2008 (sgfp@yahoo.com). Individuals were invited to provide input and commentary on the existing Guidelines and proposed revisions via these means. In addition, two public meetings were held throughout the revision process at biennial meetings of the American Psychology–Law Society.

Upon development of a draft that the Revisions Committee deemed suitable, the revised Guidelines were submitted for review to the Executive Committee of the American Psychology–Law Society (Division 41 of APA) and the American Board of Forensic Psychology. Once the revised Guidelines were approved by these two organizations, they were submitted to APA for review, commentary, and acceptance, consistent with APA's "Criteria for Practice Guideline Development and Evaluation" (APA, 2002) and APA Rule 30-8. They were subsequently revised by the Revisions Committee and were adopted by the APA Council of Representatives on August 3, 2011.

(*Appendices continue*)

Appendix B
Definitions and Terminology

For the purposes of these Guidelines:

Appropriate, when used in relation to conduct by a forensic practitioner means that, according to the prevailing professional judgment of competent forensic practitioners, the conduct is apt and pertinent and is considered befitting, suitable, and proper for a particular person, place, condition, or function. ***Inappropriate*** means that, according to the prevailing professional judgment of competent forensic practitioners, the conduct is not suitable, desirable, or properly timed for a particular person, occasion, or purpose; and may also denote improper conduct, improprieties, or conduct that is discrepant for the circumstances.

Agreement refers to the objective and mutual understanding between the forensic practitioner and the person or persons seeking the professional service and/or agreeing to participate in the service. See also Assent, Consent, and Informed Consent.

Assent refers to the agreement, approval, or permission, especially regarding verbal or nonverbal conduct, that is reasonably intended and interpreted as expressing willingness, even in the absence of unmistakable consent. Forensic practitioners attempt to secure assent when consent and informed consent cannot be obtained or when, because of mental state, the examinee may not be able to consent.

Consent refers to agreement, approval, or permission as to some act or purpose.

Client refers to the attorney, law firm, court, agency, entity, party, or other person who has retained, and who has a contractual relationship with, the forensic practitioner to provide services.

Conflict of Interest refers to a situation or circumstance in which the forensic practitioner's objectivity, impartiality, or judgment may be jeopardized due to a relationship, financial, or any other interest that would reasonably be expected to substantially affect a forensic practitioner's professional judgment, impartiality, or decision making.

Decision Maker refers to the person or entity with the authority to make a judicial decision, agency determination, arbitration award, or other contractual determination after consideration of the facts and the law.

Examinee refers to a person who is the subject of a forensic examination for the purpose of informing a decision maker or attorney about the psychological functioning of that examinee.

Forensic Examiner refers to a psychologist who examines the psychological condition of a person whose psychological condition is in controversy or at issue.

Forensic Practice refers to the application of the scientific, technical, or specialized knowledge of psychology to the law and the use of that knowledge to assist in resolving legal, contractual, and administrative disputes.

Forensic Practitioner refers to a psychologist when engaged in forensic practice.

Forensic Psychology refers to all forensic practice by any psychologist working within any subdiscipline of psychology (e.g., clinical, developmental, social, cognitive).

Informed Consent denotes the knowledgeable, voluntary, and competent agreement by a person to a proposed course of conduct after the forensic practitioner has communicated adequate information and explanation about the material risks and benefits of, and reasonably available alternatives to, the proposed course of conduct.

Legal Representative refers to a person who has the legal authority to act on behalf of another.

Party refers to a person or entity named in litigation, or who is involved in, or is witness to, an activity or relationship that may be reasonably anticipated to result in litigation.

Reasonable or ***Reasonably***, when used in relation to conduct by a forensic practitioner, denotes the conduct of a prudent and competent forensic practitioner who is engaged in similar activities in similar circumstances.

Record or ***Written Record*** refers to all notes, records, documents, memorializations, and recordings of considerations and communications, be they in any form or on any media, tangible, electronic, handwritten, or mechanical, that are contained in, or are specifically related to, the forensic matter in question or the forensic service provided.

Retaining Party refers to the attorney, law firm, court, agency, entity, party, or other person who has retained, and who has a contractual relationship with, the forensic practitioner to provide services.

Tribunal denotes a court or an arbitrator in an arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. A legislative body, administrative agency, or other body acts in an adjudicative capacity when a neutral official, after the presentation of legal argument or evidence by a party or parties, renders a judgment directly affecting a party's interests in a particular matter.

Trier of Fact refers to a court or an arbitrator in an arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. A legislative body, administrative agency, or other body acts in an adjudicative capacity when a neutral official, after the presentation of legal argument or evidence by a party or parties, renders a judgment directly affecting a party's interests in a particular matter.

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Guidance for Improving Forensic Reports: A Review of Common Errors

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Abstract: This study employed a national sample of forensic reports that had been critiqued by a panel of advanced forensic mental-health practitioners serving as reviewers for the American Board of Forensic Psychology. The study describes all of the discrete types of faults that reviewers encountered in the reports, and then converts them to prescriptive statements to guide forensic report writing. The study also identifies the most frequent report-writing problems in this sample. The results were not intended to describe the quality of forensic reports in the U.S., but rather to offer guidance for improving the quality of forensic reports.

Keywords: Forensic, Psychological, Reports, Assessments

Introduction

Until the past decade, forensic mental-health examiners looking for guidance to improve their forensic report writing have had a limited number of resources. More recently, discussions of forensic report writing have appeared in a number of journal articles and chapters in forensic psychology or psychiatry handbooks (e.g., Ackerman, 2006; Felthous & Gunn, 1999; Griffith & Baranoski, 2007; Nicholson & Norwood, 2000; Silva, Weinstock & Keram, 2003; Simon, 2007; Weiner, 2006) and a book (Greenfield & Gottschalk, 2009). They tend to focus on the ways in which forensic reports place different demands on examiners than do general clinical reports, especially with regard to their very different uses.

Several authors have offered specific guides, tips or rules that writers might follow to improve their writing of reports in forensic cases. Some of these efforts have addressed forensic evaluations generally (rather than specific types of forensic cases). For example, *Psychological Evaluations for the Courts* (third edition: Melton, Petrila, Poythress, Slobogin, 2007) offers a chapter that includes an array of forensic report samples. An accompanying chapter discusses forensic report writing, describes a standard scheme for organizing the content of forensic reports, and describes four specific suggestions for improving forensic reports: (a) "Separate facts from inferences," (b) "Stay within the scope of the referral question" (including linking data to one's opinions), (c) "Avoid information over (and under) kill" (including avoiding irrelevant information), and (d) "Minimize clinical jargon".

Conroy (2006) discussed a number of key factors for good forensic report writing: (a) identify forensic reason for referral; (b) document confidentiality warning, (c) list all

sources of collateral data, (d) list procedures followed, (e) provide reasoning for forensic conclusions, (f) explain evidence that seems to contradict one's conclusions (entertain alternative interpretations), (g) avoid jargon, (h) avoid details not related to the forensic issue, and (i) avoid offering prejudicial or pejorative information.

Forensic Mental Health Assessment: A Casebook (Heilbrun, Marczyk & DeMatteo, 2002) offers a collection of "Principles" and "Teaching Points" explaining various important issues when conducting and reporting forensic assessments. The "teaching points" are amplified with sample forensic reports demonstrating the relevant principles, which were selected from among 29 principles described in Heilbrun's (2001) earlier *Principles of Forensic Mental Health Assessment.* Some of those principles (approximately a dozen) refer specifically to features of forensic report writing (e.g., "attribute information to sources," "identify the relevant forensic issues"). Most of them are similar to factors described by Melton et al. and Conroy.

Lander and Heilbrun (2009) asked a panel of forensic mental-health professionals (some legal, some clinical) to rate the "relevance," "helpfulness," and "quality" of 41 forensic mental-health reports. All reports were also rated by the research team on 20 of Heilbrun's 29 principles. Six principles manifested significant correlations with the panels' ratings of the reports' usefulness. Three of them are in the Melton et al. and/or Conroy lists: (a) use multiple sources of information, (b) include data that are relevant for the forensic issue, and (c) consider and explain alternative opinions. The other three do not appear in the prior lists: (d) obtain (identify) appropriate authorization to perform the evaluation, (b) attribute sources of information when describing facts, and (c) use a logical outline for organizing reports.

Advice offered in the published works cited at the beginning of this introduction suggests that a consensus has arisen about the general organization of a forensic report. It should begin with an introductory section that identifies the reason for the referral, the sources of data, and the manner in which the examinee was informed of the limits of confidentiality. A section that reports all relevant data that were obtained to address the forensic question should follow this. The final section should offer the examiner's interpretations that are relevant for the forensic referral question. This general outline allows (as it should) for considerable variation in subheadings within such sections, in response to local jurisdictional demands, different types of forensic questions, and the examiner's own preferences for the sequencing of content that best communicates a particular case.

Overall, however, there is nothing particularly "forensic" about this consensual approach to the organization of forensic reports. It is very much like the outline of most good clinical reports, and even bears a considerable resemblance to standards for organizing research reports in scholarly journals.

What makes forensic reports different from general clinical reports has mostly to do with content and style. The content is often different because of the need to address forensic questions that require different data than most clinical reports. The style differs

because forensic reports are written to meet the demands of legal forums, non-clinical readers and decision makers, and due-process constraints. Some reports for use by courts are indeed clinical reports in terms of their content, when the examiner is asked simply to address clinical issues rather than apply them to a forensic question. Even in those cases, however, the information must be conveyed in different ways than in general clinical reports because of the demands of a non-clinical audience and legal use.

For example, reports written for general clinical use can be offered in clinical language, whereas reports written for legal forums (even when they do not provide opinions about forensic issues) must avoid undefined clinical labels and terms. Clinical reports often base interpretations on the examinee's self-reported information, but several sources suggest that forensic examiners typically should offer important interpretations only when the data on which they are based are verified by two or more methods (e.g., examinee self-report, test data, collateral interviews, or past records). This reliance on multiple data sources and cross-method corroboration has arisen partly because of the increased likelihood of error in reliance on the self-report of examinees in forensic cases, which often involve circumstances that could motivate examinees to exaggerate, minimize, or falsify the information they provide.

Wettstein (2005) recently reviewed 10 studies that examined the nature and quality of forensic reports using empirical research methods. Six of those studies examined samples of forensic reports to identify the frequency of various strengths and weaknesses in their style and content. One general finding stood out in four of those six studies (Christy et al., 2004; Hecker & Steinberg, 2002; Robbins, Waters & Herbert, 1997; Skeem, Golding, Cohn & Berge, 1998). Examiners often reported relevant clinical data, and the forensic question was often addressed, but reports frequently failed to actually identify the examiner's reasoning about the connection between clinical data and the examiner's opinion about the examinee's legally relevant deficits. In other words, they failed to spell out how their data were related to their opinions or the logic that connected them. In a national survey, Borum and Grisso (1996) did not find a consensus among forensic mental-health experts at that time as to whether it was essential to fully explain in a report the reasoning for one's opinion. In recent years, however, report-writing commentators have made it clear that forensic reports must describe how one's opinion is supported by one's clinical data, and the logic with which the evidence leads to the forensic opinion (e.g., Conroy, 2006; Heilbrun, 2001; Melton et al, 2007; Wettstein, 2010).

Past studies, therefore, have identified some common errors in forensic reports. However, they have not provided a comprehensive view of the types and frequency of shortcomings found in forensic reports. This was the purpose of the present study. The study used a national sample of forensic reports that had been submitted to the American Board of Forensic Psychology by candidates for forensic board certification. A panel of advanced forensic mental-health practitioners had critiqued the reports, and the review process had resulted in non-acceptance of the reports. In this study, the reviewers' evaluations of these reports were used to create an inventory of all of the discrete

types of "errors," "faults," or "problems" encountered in the reports. This method also provided an indication of the faults that arose most frequently.

Materials and Methods

Sample

The study used 62 forensic reports written by 36 forensic mental-health professionals. Each professional was a candidate in the national evaluation process for becoming a diplomate (equivalent to board certification) in forensic psychology through the American Board of Forensic Psychology (ABFP). Part of this process (discussed later) required them to submit two forensic reports as "practice samples" for review. The 62 reports in the present sample constituted all of the reports that were (a) reviewed by ABFP during January 2007 through June 2009 and (b) were not approved for use in the final step of candidacy, the oral examination. Some candidates had two reports disapproved, and some had one approved and one disapproved. Reports that were approved for use in the examination were not included in the sample. The 36 candidates whose reports were not approved constituted 39% of the candidates whose samples were reviewed during the study period. (That does not constitute a final "fail" rate for the ABFP practice sample review process, because many of these candidates later submitted new samples that were approved to proceed to oral examination.)

Forensic referral questions in these reports included both criminal and civil forensic issues. Criminal forensic questions included adjudicative competence (25% of the total sample), criminal responsibility (19%), general or sexual risk of violence/recidivism (18%), sentencing and amenability to rehabilitation (7%), and capacity to waive *Miranda* rights (4%). Civil forensic questions included child custody and abuse cases (8% of the total sample), evaluations for personal injury, disability, workers' compensation, fitness for duty (14%), and other civil issues (5%). The candidates were from throughout the U.S.

Context

A brief explanation of the ABFP review process and its reviewers is important to provide the context for the reviews that constitute the data in this study. Requirements for admission to, and completion of, candidacy for ABFP certification are posted at www.abfp.com. As a threshold matter, candidates for ABFP certification must meet certain requirements regarding proper doctoral degree, years of post-doctoral forensic practice (four to five, depending on relevant pre-doctoral supervised hours), supervision and continuing education. Then they must pass a written examination, a review of their "practice samples," and finally an oral examination.

All candidates must submit two practice samples for review. Practice samples are forensic reports that were written and used in actual practice (although a scholarly document such as a recent journal article by the candidate may be substituted for one

of these). The report must represent a forensic evaluation that was neither supervised nor conducted jointly with other professionals.

When the chair of Practice Sample Reviews receives a candidate's two reports, the chair submits both reports to two reviewers for their comments and recommendations. During the period of time when the present sample of reports was reviewed, the author of this article was the chair of ABFP Practice Sample review process. (He performed no reviews but recorded and summarized the comments of the reviewers.) At the beginning of the study period in question, ABFP had re-developed its practice sample review process, refining its procedures and establishing an "ABFP Faculty" of reviewers. The ABFP faculty during the period of this study consisted of a national panel of 10 to 14 ABFP diplomate forensic psychologists chosen for their advanced practice in forensic psychology and their willingness to volunteer their service as reviewers. They serve on two- or four-year rotations, although all were serving their first term during most of this study period.

The purpose of the practice sample review is to decide whether both, one, or neither of a candidate's reports is appropriate for use in the future oral examination. If both reviewers agree that they are appropriate, the candidate is notified and oral examination is scheduled. (The oral examination uses the reports as the primary focus of the oral examination.) If either or both of the reports are not considered adequate for use in the oral examinations, the chair of the ABFP Practice Sample review process develops an individualized letter to the candidate based on written comments of the reviewers. It describes each of the specific concerns raised by the reviewers, and the candidate is provided an opportunity to submit new reports for a second review. If both of the candidate's reports have not been approved, the feedback letter identifies the faults for both reports separately.

The reviews during the study period did not employ specific criteria or any scoring mechanism. Initial training of the faculty late in 2006 included a review of some "common problems" encountered in forensic reports, but reviewers were free to raise any concerns that they felt were important as they proceeded to perform their reviews. After this process had been in place for about one year, one of the faculty members constructed a template for doing reviews. The template offered some structure (Introductory Information, Organization, Data, Psychological Testing, Interpretation, etc.), and provided brief questions under each of these categories to cue reviewers to attend to certain common concerns. Reviewers were still free, however, to raise any faults or problems they wished within this semi-structured format.

Throughout the period of these reviews, reviewers were instructed that they should *not* try to determine whether a report represented "adequate or advanced practice," or whether the candidate was likely to pass the oral examination. Instead, they were asked to determine whether the candidate's reports were so seriously flawed (contained "many and diverse" problems) that the candidate was highly likely to fail the oral examination, or that the reports were too poor to serve as a basis for the oral examination.

Pairs of practice sample reviewers did not communicate with each other while they were reviewing a set of reports. Nevertheless, across the 2.5-year review period, faculty members had substantial contact of a type that would allow a consensus to arise regarding review criteria. Specifically, after a candidate's reports had been reviewed, the two faculty members received copies of each other's reviews, as well as a copy of the chair's feedback letter to the candidate. Moreover, each faculty member was paired with a number of other faculty members across time as they were given their review assignments. Finally, the ABFP faculty met semi-annually to discuss and refine the overall practice-sample review process and to reflect on any unusual issues that had arisen in recent reviews.

Procedure

ABFP retains the records of all candidates' practice sample reviews. In those records, all non-approved cases within the time frame were located, as well the feedback letters to the candidates. Those feedback letters were the source of data for this study. Each discrete fault or problem described in the letter was identified for each of the one or two non-approved reports to which the letter referred, and these faults were tallied across all of the non-approved reports. This produced (a) a non-redundant list representing the domain of faults mentioned by the reviewers, and (b) a tally of the frequency with which each fault was mentioned across all reports.

When the domain of concerns or faults was completed, each of the entries was converted from the negative form (e.g., "Failure to list all sources of data") to a prescriptive form (e.g., "List all sources of data"). Thus, the product offers a potential domain of factors to guide the construction or evaluation of forensic reports.

Results

The review produced 30 discrete factors raised by the reviewers of the forensic reports. The factors are listed in Table 1 within five categories for convenience of review and discussion. Originally stated as faults by the reviewers, the factors as shown in Table 1 have been converted to prescriptive recommendations.

Table 1. Factors Mentioned in Reviewers' Critiques of Forensic Reports (converted to prescriptive statements)

Introductory Material

Provide accurate information on the examinee's identity and dates of evaluation.

Describe the manner in which the examinee was informed of the purpose of the evaluation and limits of confidentiality.

List all sources of data for the evaluation.

Clearly state the legal standard that defines the forensic purpose of the evaluation, including the specific questions the examiner was asked to address.

Organization and Style

Organize the report in a manner that is logical and assists the reader's understanding.

Report only data, not inferences, in one data-based section of the report.

Report inferences and opinions in another section, which uses the earlier data but offers no new data.

Use language that minimizes the potential for bias or the appearance of gratuitous evaluative judgments.

Use language that will be understood by non-clinicians, taking care to simplify complex concepts and professional technical terms.

Attend to professional appearance of the document, avoiding typographical errors, incomplete sentences, and colloquialisms.

Data Reporting

Obtain and report all data that would be important when addressing the referral question.

Report *only* those data that are relevant for the forensic referral question.

Clearly identify the sources of various data as the data are described.

Avoid inclusion of self-incriminating data in pre-trial reports of evaluations involving defendants with open criminal charges.

Include multiple sources of data, whenever possible, when describing events, behaviors, and examinee attributes.

Report efforts to obtain data that ultimately were not obtained and may have been relevant for the case.

Psychological Test Reporting (Data and Interpretations)

When psychological test data are obtained from past records, report only those data that will be relevant for addressing the clinical or forensic questions in the case.

Employ psychological tests based on appropriateness for addressing the forensic and clinical referral questions.

When reporting test data, identify scores and offer explanations of their normative meaning, but do not describe them as attributes of the examinee.

Offer interpretations of tests only when the test is appropriate for the circumstances (e.g., examinee age and race; validity demonstrated in the forensic context in question).

Score and interpret psychological tests accurately and consistent with their empirical limits and values.

Interpretations and Opinions

Address the forensic question that was asked in the referral process.

Address *only* the clinical and forensic questions that were asked in the referral process.

Provide a clear explanation for every important opinion or conclusion that you offer, summarizing the relevant data and how they logically support the opinion.

Identify alternative interpretations that might be considered, and explain how the data were used to weigh these interpretations against the opinion you are offering.

Describe any important ways in which one's data or interpretations leave room for error or alternative interpretations.

Produce interpretations and opinions that are logical and internally consistent (not contradictory).

Use multiple sources of data to seek support for a hypothesis.

When opinions or recommendations require specialized knowledge (e.g., medical conditions or their treatment), express opinions only on matters for which you are qualified and competent.

When using examinee self-reported data as a basis for an opinion, offer the opinion only when other reasonably reliable sources of data offer corroborative or logically consistent support.

Table 2 identifies the faults most frequently mentioned by the practice sample reviewers, as well as the percent of reports for which they were mentioned. Two of them ("Opinions Without Sufficient Explanations" and "Forensic Purpose Unclear") were identified in more

than one-half of the non-approved reports. Another three faults arose in about one-third of the reports.

Table 2. Ten Most Frequent Faults in Forensic Report Writing (Percent of Reports in Which They Were Identified)

1. **Opinions without sufficient explanations (56%)**
   Major interpretations or opinions were stated without sufficiently explaining their basis in data or logic (regardless of whether the report's data could have sustained the opinion)

2. **Forensic purpose unclear (53%)**
   The legal standard, legal question, or forensic purpose was not stated, not clear, inaccurate, or inappropriate

3. **Organization problems (36%)**
   Information was presented in disorganized manner (usually without a reasonable logic for its sequence)

4. **Irrelevant data or opinions (31%)**
   Data and/or some opinions included in the report were not relevant for the forensic or clinical referral questions

5. **Failure to consider alternative hypotheses (30%)**
   Data allowed for alternative interpretations, while report did not offer explanations concerning why they were ruled out (often response style/malingering alternative, sometimes diagnostic)

6. **Inadequate data (28%)**
   The referral question, case circumstances, or final opinion required additional *types* of data that were not obtained or were not reported, and for which absence was not explained in report

7. **Data and interpretation mixed (26%)**
   Data and interpretations frequently appeared together in section that reports data

8. **Over-reliance on single source of data (22%)**
   An important interpretation/opinion relied wholly on one source of data when corroborating information from multiple sources was needed (often over-reliance on examinee's self-report)

9. **Language problems (19%)**
   Multiple instances of jargon, biased phrases, pejorative terms, or gratuitous comments

10. Improper test uses (15%)
Test data were used in inappropriate ways when interpreted and applied to the case, or tests were not appropriate for the case itself

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Discussion

The nature of the 30-factor domain (Table 1) should be interpreted in light of the review process that gave rise to the list. The factors are not the product of reviewers performing their tasks independently. As noted in the Method section, the reviewers did not communicate with each other while reviewing a set of reports, but they received feedback later regarding their colleague's reviews of the same reports. Moreover, the semi-structured template for providing comments on the reports, which arose midway in the study period, included suggestions regarding common faults that had begun to be apparent as the reviewing process matured. Therefore, it is best to interpret the domain of factors identified in this study as having evolved through a 2.5-year consensus-building process among a group of advanced, highly experienced forensic psychologists who practice nationwide, faced with the review of reports addressing many types of forensic questions.

The majority of the factors in Table 1 focus on the demands of forensic reports specifically rather than offering generic guidance for clinical reports in general. Many of these demands derive from the fact that forensic reports are written not for other clinicians, but for lay persons (professionals in law) who would use them as evidence in legal forums. A few examples of this logic will be provided.

- "List all sources of data for the evaluation." This requirement refers to the need for an actual detailed listing of all sources of data that were used by the examiner: for example, interviews and their dates and length, each record and file, every phone call and to whom, and all psychological tests. This is helpful (although not essential) in general clinical cases. However, it is essential in forensic reports, because legal cases require that all evidence, and the basis for (origin of) any evidence in the case, must be revealed in the event that it is needed for discovery and verification of evidence on which the examiner's opinions are based.

- "Report test data as scores and/or explanations of their normative meaning, but not as attributes of the examinee." Great care must be taken not to lead lay readers to suppose that a test's results, when first described, necessarily identify the examinee's actual clinical or cognitive characteristics. Often there are inconsistencies between scores on one test compared to another, or the meaning must be interpreted in light of other data.

- "Address only the clinical and forensic questions that were asked in the referral process." Clinical reports often will address questions that were not originally asked, when evidence arises that might be of benefit to the welfare of the

examinee. In contrast, similar reporting behavior by forensic examiners would exceed the bounds of their legal authority, potentially introducing information that is contrary to rules of evidence and due-process protections of examinees.

Caution is warranted in accepting the 30 entries in Table 1 as the universe of factors that are relevant for good forensic report writing. It is possible that other factors did not arise in this process because they were satisfied even by these reports that were not approved for use in ABFP oral examinations. Also, forensic examiners who are familiar with debates about report writing and testimony will notice that certain faults or problems they might have expected to see in this list did not arise. For example, no factor emerged that would encourage or restrict the reporting of one's opinion regarding the "ultimate legal question" (e.g., "In my opinion, the defendant is not competent to stand trial"). This might have been a function of the ABFP review context. Training of ABFP faculty reviewers at the beginning of the process excluded this factor as a "fault." There were two reasons for excluding it. First, accepted guidelines for forensic cases (Committee on Ethical Guidelines for Forensic Psychologists, 1991) neither prohibit nor encourage such opinions. Second, ultimate-opinion statements are required by some courts and prohibited in others.

Regarding the list of the ten most frequent faults or problems (Table 2), six of them are mentioned in two or more of the earlier references that prescribed specific guidelines or rules for forensic report writing (Conroy, 2006; Heilbrun, 2001; Lander & Heilbrun, 2009; Melton et al., 2007). Three others (3, 8, 10) are in Heilbrun's list of principles. Moreover, the top two—those faults that were identified in over one-half of the sample of reports—are highlighted by all of those commentators, and the most frequent error has been affirmed in several empirical studies of forensic reports (Christy et al., 2004; Hecker & Steinberg, 2002; Robbins, Waters, & Herbert, 1997; Skeem, Golding, Cohn, & Berge, 1998). Therefore, the top two deserve special comment.

"Opinions without sufficient explanations" refers to instances in which important conclusions of the examiner were stated without demonstrating how they were formulated. The necessary formulations involve both data and logic. Regarding data, reports sometimes lacked descriptions that identified the data supporting examiner's forensic opinion (e.g., inability to satisfy competence criteria, or an opinion about malingering). Sometimes the information that would have supported the opinion might have been described in the earlier Data section of the report. Nevertheless, in forensic reports, the critical data supporting the opinion must be laid out at that point in the report where the opinion is offered. The data do not all have to be reported in detail; for example, one might simply refer to "the results of the intelligence test," rather than repeating the actual scores and the details of the meanings. Regarding logic, examiners are expected to lay out the reasoning that knits the data together to reach the conclusion. For example, "Evidence regarding the examinee's high level of functioning at work, which was inconsistent with his very low IQ score in this evaluation, supported the conclusion that he was attempting to appear less capable than he is."

"Forensic purpose unclear" refers to a failure to establish, in the introductory part of the report, the forensic and clinical referral question. This is of utmost importance. This statement of purpose drives everything that follows in a forensic evaluation and its report. It guides the data collection and the interpretations that eventually answer the referral question. Moreover, this statement demonstrates to the court (as any testimony will require) that the examiner understood the forensic question and the legal purpose of the evaluation. The statement is easily made by reporting the definition of the legal question (for example, providing the specific wording of the state's statutory definition of competence to stand trial) and citing the relevant statute or case law that provides this definition. In addition, it is often helpful to explain, in a few words, how the examiner identified the types of data that would be needed to address the forensic question. For example, after reporting the state's definition of competence to stand trial, an examiner might further state, "Therefore, the evaluation focused on obtaining relevant information about the defendant's clinical and psychological condition, his functional abilities associated with participation in his trial, and, if these capacities were limited, the likelihood that they could be remediated."

The top ten faults have several potential uses. They are endorsed not only by the ABFP-experienced forensic reviewers, but also in earlier publications by authorities in forensic psychology. Therefore, they provide an authoritative "short list" of factors on which less-experienced forensic examiners—and, of course, candidates in the ABFP examination process—can focus as they seek to refine their report-writing skills. For educators, the list offers a way to prioritize one's curricular outline of forensic report-writing errors to correct and avoid. One should recognize, however, that the fact that these faults are in the top ten, or that some of them are positioned high on the list, does not necessarily refer to their degree of "seriousness." The method used in this study simply indicates the relative frequency with which they arose. Further research could offer insight into experienced forensic examiners' perceptions of the relative importance or "egregiousness" of these forensic report-writing factors.

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