

**AFCC Ninth Symposium on Child Custody Evaluations
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Workshop 4

The Use and Misuse of Expert Witnesses

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PRACTICE TIPS: For Lawyers In Custody Cases

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1. Know your judicial officer.
2. Know the Rules of Professional Conduct.
3. Know the Ethics Rules.
4. Consider all experts available for assistance in custody cases:
 - a. Marriage Counselors;
 - b. Therapist for the parents;
 - c. Therapist for the children;
 - d. Parenting coaches;
 - e. Guardians Ad Litem;
 - f. Parenting Consultants/Coordinators;
 - g. Parenting Time Expeditors; and
 - h. Custody evaluators.
5. Consider how and when to use any or all of these experts at different stages of the case:
 - a. Prior to the commencement of the action;
 - b. At the time temporary decisions/arrangements need to be made;
 - c. During settlement negotiations;
 - d. At the time of trial;
 - i. As direct testimony on the custody issue;
 - ii. As an expert on a particular issue;
 - iii. As assistant to the attorney (i.e. for cross examination).
 - e. When Post Decree issues arise.
6. Prepare your expert for what to expect and how to assist with the proceeding at hand, i.e. negotiation, mediation, arbitration, or trial.

7. Consider whether your personnel credibility will be attached to that of the expert who unsuccessfully tries to “pull the wool over” the court’s eyes.
8. Consider if your credibility will be attached to that of an expert with a bad reputation.
9. Have a clear understanding of the requirements for a custody evaluation in your home jurisdiction, i.e. know both the statutory and case law.
10. Study and understand the common psychological tests used in evaluations so that you can be an effective cross-examiner:
 - a. Determine at what point the evaluator completed the testing i.e. before, during, or at the end of the evaluation:

“If you believe in your testing and your testing showed X, isn’t it likely that you arranged all the data you gathered thereafter such that it supported the hypothesis you’d already formed?”
 - b. ALWAYS ALWAYS ALWAYS read the evaluators entire file and/or the file of any witness who will be testifying as an expert;
 - c. Be familiar with all types of mental and psychological disorders, i.e. depression, eating disorders, sexual disorders, personality disorders and their effect on children/custody/parenting time;
 - d. Be familiar with alcohol and drug abuse and its effect on children/custody/parenting time;
 - e. Consider yourself ethically obligated to actively promote conflict resolution:
 - i. Counsel clients about the negative consequences of custody disputes and the availability of resources to reduce conflict;
 - ii. Encourage cooperation with custody and mental health evaluators;
 - iii. Seek early intervention in high conflict cases and make referrals; and
 - iv. Cooperate in narrowing the issues, procedures and evidence needed to consider the best interest of the children.
11. Be aware of common emotional and psychological problems of clients going through a dissolution and when you believe that such problems may be interfering with your effective representation or with the client’s ability to function within your representation and recommendations, suggest that the client seek the help of a mental health professional.
12. In representing a client, the attorney should also consider the best interest of the children.

PRACTICE TIPS: For Mental Health Experts From the Lawyer's Perspective

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1. Be sure that your fees are clear and understandable to the attorney and the clients and what you expect in terms of timing of payments.
2. If you are hired as an expert by an attorney, make it clear whether or not your contract is with the attorney or with the client, and understand the difference.
3. If you are hired as a neutral expert in a case, NEVER talk to one of the attorneys without the other attorney also being present.
4. If you are an expert for one side, be sure and make that attorney aware of any and all articles and publications you have authored, as well as any prior ethical problems you may have had or any major issues in other cases in order to avoid the attorney being surprised by cross examination from the other side on those issues. "Skeletons in the closet" include any matter that might have an adverse impact on your credibility in court, i.e. current allegations of professional ethics violations, sanctions by a licensing board or ethics committee, prior cases in which you have been admonished by a judge, etc.
5. Always make your files easily available to the attorney(s) whether as an expert hired for one party or neutral expert. ALWAYS be candid with the attorney(s) about your findings, both positive and negative. This increases your credibility and appearance of objectivity.
6. When testifying:
 - a. Answer truthfully to the best of your knowledge (I don't know is perfectly acceptable);
 - b. Keep responses simple and comprehensible;
 - c. Keep responses on point regarding the questions asked;
 - d. Reflect objectivity rather than mere subjective opinion in all responses;
 - e. Respond accordingly to questions requiring description; reserve interpretations and conclusions for the proper question; and
 - f. Remain calm and answer directly and confidently; no matter the provocation DO NOT become defensive or combative in your testimony.
7. Be thoroughly knowledgeable about the statutory and case law for your jurisdiction.
8. Do not allow philosophical or personal beliefs to interfere with your ability to be highly objective, and if you do have such a strong belief, recuse yourself from being the expert.

PRACTICE TIPS: For Mental Health Therapists, Lawyers and Judicial Officers in Family Law Cases

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TWO VIEWS OF CUSTODY EVALUATIONS:

- A. Custody evaluations give the family court great insight into parenting through observation, evaluation, and investigation and the recommendations and conclusions made in these evaluations serve an invaluable purpose in custody and parenting disputes.

OR

- B. Custody evaluations serve as a clearinghouse for otherwise inadmissible hearsay and supplant the role of the judicial officer by setting forth opinions on the ultimate issue being decided at trial.

A short synopsis of the role of experts in court might be helpful for context: This was contained in an Order recently issued by a colleague, Judge Kevin Burke, after hearing from an advocacy expert in a custody case.

“The use and abuse of experts in American courts remains quite controversial. Neutral family court evaluations can assist trial judges, but they are not available in most Minnesota counties. Faced with proffer of expert testimony, in most a trial judge must determine at outset whether expert is proposing to testify to (1) scientific or specialized knowledge that (2) will the trier of fact of fact to understand or determine fact in issue. Judges must make an assessment of whether reasoning or methodology underlying testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to facts in issue. Rule 702. A definitive checklist or test does not exist in making preliminary assessment of whether reasoning or methodology underlying expert testimony is valid and whether that reasoning or methodology properly can be applied to facts in issue. Throughout, a judge assessing a proffer of expert testimony under Rule 702 should also be mindful of other applicable rules. Rule 703 provides that expert opinions based on otherwise inadmissible hearsay are to be admitted only if the facts or data are “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.” Rule 706 allows the court at its discretion to procure the assistance of an expert of its own choosing. Finally, Rule 403 permits the exclusion of relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury” Judge Weinstein has explained: “Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses.” Weinstein, 138 F.R.D., at 632. No matter how liberal one views the Rule of Evidence with respect to the use of experts, it is highly questionable whether (the evaluators’) testimony and report meet any standard for admissibility.”

1. INTAKE: In Hennepin County, cases are assigned to a permanent judicial officer (we have nine judges and five referees) and within three weeks of assignment, an initial case management

conference (ICMC) is held. At this ICMC , options for resolving parenting disputes are discussed with the parties and counsel, if the parties are represented. In 2009, 1,556 matters were referred to our Department of Family Court Services and the department provided 639 Early Neutral Evaluations, 307 custody evaluations, 334 mediations, 59 ready response services (this is an expedited or emergency service where the officer of the day meets with a parents, children, or interested third parties (or all of these) and gathers information and attempts settlement. If settlement is not achieved, the officer of the day provides oral feedback to the assigned judicial officer). At the ICMC, we have found that appropriate screening by a judicial officer provides the best opportunity for tailoring the appropriate service to each dispute. Total filings for Hennepin County in 2009 were 485 regarding custody (ROP only), 1,622 regarding divorce with children, and 1,323 regarding paternity.

2. SPECIAL ISSUES: Are custody evaluations (which average 40 hours of time when completed by our Court Services' department) necessary or even helpful if both parents could be described or would stipulate that the other is a good parent and that their dispute centers on who has the better plan for the family? Compare this family to families that present issues related to chemical dependency, mental health, domestic violence, parental alienation, or special needs children. In the latter, it is often helpful to the court to hear from an expert on the impact of these issues on custody and parenting time. With resources scarce (or maybe even if abundant), is it helpful to the court to have an evaluation that will take four to eight months to complete?
3. NEUTRALS: Our court has virtually eliminated competing experts in custody cases by brokering agreements to use neutrals at the outset and by issuing orders denying requests for competing evaluators when asked.
4. NON-NEUTRALS: When an expert is retained by one parent, it is crucial that the lawyer explain carefully the expert's role and the limitations the expert faces because he or she may not have access to the other parent or the child(ren). Nothing serves to undermine credibility more quickly than an expert who participates in making custody recommendations when the expert has only met one parent and relies entirely on the person hiring the expert for information. This includes experts who are hired to "critique" custody evaluations but frequently overstep the bounds of a critique by attempting to opine on issues outside the scope of the expert's knowledge. A better strategy may be to hire an expert to consult and plan a thoughtful cross-examination of a custody evaluation, rather than attempting to put in an expert "critique" which frequently fail to persuade.
5. EVIDENCE: Many evaluations are based upon scores of documents, conversations, e-mails and other information from people who will not be called to testify. Much of this information, absent proper foundation and the availability of the person with the first-hand knowledge is classic hearsay. While many arguments are made as to why certain information should be treated as an exception to the rule on hearsay, the fact is that custody evaluations serve as a

way to streamline the admission of evidence. Medical evidence is a classic case where medical records are admitted without the benefit of testimony from the treating physician. Most parents cannot afford to obtain the testimony of all of the people who might have important information, and most courts cannot afford the time necessary to hear from all of these witnesses. So perhaps custody evaluations and the reliance on hearsay evidence is the product of compromise by the players in our system (judicial officer, lawyer, evaluator). The question remains: is this devil's handshake helpful to families?

6. **DIRECT EXAMINATION:** Our court has implemented a procedure (discretionary with each judicial officer but widely accepted) whereby written expert reports (on all issues, including custody and parenting time) serve as the expert's direct examination and the expert is produced at trial for cross-examination and redirect examination. This policy has significantly raised the quality of the reports received, allows all parties to know the basis for an expert's report, provides the Court an opportunity to read the report prior to trial, and improves the chances of settlement because the expert reports are generally required at least 30 days prior to trial. The trial order provides the following language regarding the direct examination of experts: "The direct examination of all experts shall take place by pre-marked written report and the reports are due in chambers no later than one week before trial. The party adducing the expert testimony must produce the expert at trial for cross-examination. Any evidentiary objections shall be asserted to the Court one business day before trial by letter explaining why the exhibit is not permissible."
7. **SETTLEMENT TOOL:** We have long found that custody evaluations are useful settlement tools because a significant percentage of evaluations result in settlement either during the process (remember, four to eight months) or after the report is issued. Recently, we have returned to a practice in many cases of having evaluators issue oral reports to provide an opportunity for settlement and if no settlement is reached, then the written report – which takes up a huge percentage of time – is issued. The question constantly confronting our court is whether the use of 40 hours of evaluator time is a smart use of resources during a time when the resources are diminishing at a rapid rate?
8. **FACTS NOT THEORIES:** Many parents and lawyers present cases to evaluators (and later to the court) based on theories or wishes, not on facts. The best evaluations focus on the facts that can be obtained from outside sources and records rather than on the persuasive abilities of a parent or a lawyer. Trying facts, at times, appears to have become passé. Ultimately, an expert report grounded in facts and supplemented by the first-hand observations of the evaluator is the most persuasive type of report.
9. **OBSERVATIONS:** Judicial officers don't make home visits, most are loath to interview children in chambers, it is a nearly universal opinion in our court that a child testifying in family court is proof of failed case management, failed lawyering, and importantly, failed parenting. That said, the first-hand observations of the family and all of the various interactions is one of the best purposes a custody evaluation can serve .

10. EDUCATION: Lawyers need to know their judicial officer and learn whether he or she possesses family law expertise or not. In our court, like many, judges rotate in and out in two-year cycles and many have never been involved in a custody case. If a lawyer has a case before a judicial officer lacking family law experience, educating the court on issues like attachment, the impact of domestic violence, or parental alienation is crucial and can be persuasive. One suggestion is to provide an appendix to the expert's report that reproduces some of the key research relied upon in the expert's report.

11. DON'T FORGET THE POSITIVE: Finally, it would be remiss not to mention something that should be clear: if a parent cannot articulate positive reasons for adopting his or her plan for the child(ren) and instead must rely almost exclusively on attacks on the other parent in an attempt to "win" the case, most judicial officers will be unconvinced by such tactics. While criticizing the other parent certainly has a role in family court disputes, reminding parents of the need to focus on positive aspects of his or her plan and having the ability to acknowledge the other parent's strengths are crucial to persuading the court.

PRACTICE TIPS: For Mental Health Experts in Family Law Cases

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1. Understand that attorney's ethical requirements and those for mental health professionals are very different. Don't expect an attorney to know about your ethical boundaries. Educate in a respectful way.
2. Before agreeing to take a referral, be sure you understand what is being asked of you. It's always best to get it in writing so there can be no misunderstanding.
3. Just about anything you are asked to do requires a contract. Be clear about who should sign it – the attorney or the client(s).
4. Being hired by one side doesn't change how you approach your job: For instance, why would you agree to different custody evaluation procedures depending on who hires you?
5. Informed consent is an essential part of the intake process, whether for evaluation or therapy. Be sure clients have a chance to ask questions before starting the process.
6. Engage in alternative hypothesis testing from the start of the process to the end. Is there really only one way to think about this client or the evaluation data?
7. Gather enough of the right kind of data to support an opinion. Ask for information you think you need if it is not offered by the client(s) or attorney(s).
8. Develop opinions based on sufficient forensic and/or clinical experience and knowledge of the research.
9. In writing reports clearly specify the source of your data: therapy sessions, records, evaluation interviews, collateral sources, testing, etc.
10. Testifying is an opportunity for education, clarification and elaboration. Advocate for your opinion, not a client.
11. Be very careful to stay within the bounds of your role: Therapists are not evaluators; custody evaluators need sufficient basis to offer diagnoses; and working with one member of the family does not allow conclusions about others.
12. Avoid one-sided communication if you are a neutral; be assertive with requests that begin "I just..."

PRACTICE TIPS: For Lawyers from the Psychologist's Perspective

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1. Expect mental health professionals to be surprised, confused and irritated by your requests. It's not you, it's the role differences. Mental health professionals do not go out for a drink, eat lunch with or go to their clients' Halloween parties.
2. We speak different languages: tell us when we're psychobabbling and we'll tell you when we need clarification of those Latin phrases.
3. Tell us if you don't really know what you want/need and we can discuss options with pros and cons.
4. Be sure you know who the client(s) is/are.
5. Just because you can find someone to do what you ask, doesn't make it good advocacy for your client. Think about how the Court will view someone who is willing to make recommendations based on little data or professional experience.
6. If you hire a neutral, include the other attorney in any correspondence with the expert.
7. If you think you want a second opinion, carefully consider what this will accomplish (or not) and how the second professional might do their job in the least expensive and most time-saving way. Do you want an entire second custody evaluation or just a deeper look at one or a few issues? Do you want to require a child to see a new therapist or could a consultant work with the therapist for some fresh ideas, approaches?
8. If you are asking for a critique of a report, have you looked at the first professional's file and know what is in it?
9. Be sure your expert knows your expectations regarding confidentiality, work product, and your client's willingness to sign releases to obtain information.
10. Be sure any due dates have been provided in writing.
10. Expect neutrals to refuse ex parte communication about anything substantive.

THE USE & MISUSE OF EXPERTS

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ROLE

- Custody evaluator
- Therapist
 - Child
 - Parent
 - Couple
 - Family
- Parenting Coordinator/Consultant


CLARIFY

- Who is making the request for use of an expert?
- What is the expert being asked to do?
 - As a neutral
 - For one side
- Is the expert competent?
- What are the benefits/disadvantages to hiring an expert?

SCOPE OF WORK

- Was there a contract and/or a court order?
- What did the expert do?
- Is the process different if hired by one side?
- What were the sources of information?
- What did the expert conclude?
- Can/should the expert make recommendations?

OPINIONS VS. FACT



- Based on:
 - Clinical practice
 - Forensic information
 - Professional lore
 - Research
 - Psych testing

SCOPE OF TESTIMONY

- “Research says” vs. This set of facts
- Children in general vs. This child in particular
- Opinions based on work performed
- Record review only
- Actual evaluation/Parenting Consultant process results

LANDMINES

- Confidentiality
- Neutrality
- Payment
- Previous testimony
- Role confusion



WHAT LAWYERS WANT IN AN EVALUATION

- Fairness/lack of bias
 - ◆ Obvious
 - ◆ Subtle
- Thoroughness



LADDER OF INFERENCE

- Conclusions
- Reasoning
- Observations of Data
- Data



TIPS FOR REVIEWING REPORTS

- ☞ Are the sources of information clearly identified?
- ☞ Is there any obvious slant to the report?
- ☞ Have you compared the information in the report with the original source, when possible?



TIPS FOR REVIEWING REPORTS

- ☞ Was significant data ignored?
- ☞ Do the conclusions follow from the data?
- ☞ Do the recommendations follow from the conclusions?
- ☞ Are the recommendations appropriate both in the short-term and in the long-term?

TIPS FOR REVIEWING REPORTS

- ☞ Are there other possible conclusions?
- ☞ Are these recommendations similar to or different from the evaluator's recommendations in other cases?

RESEARCH REFERENCES

- Do they add anything?
- Are they reliable?
- Responding to the premise: "You can find research that says anything"
- If you start, where do you stop?
- Do you attach the article(s)?

CONCERNING PRACTICES

- Conclusions based on information from only one source
- Conclusions about people the professional has never met
- Recommendations after paper review
- Neutral having ex parte communication

CONCERNING PRACTICES

- Neutral assisting w/ trial prep
- Sequential roles
- Therapists making ultimate conclusions
- Is the expert aware of/meeting national standards?
- Conclusions depend on who hired expert