

## **The Emerging Forensic Role for Work Product Review and Case Analysis in Child Access and Parenting Plan Disputes**

**William G. Austin, H. D. Kirkpatrick and James R. Flens<sup>1</sup>**

Mental health professionals of many disciplines have been called upon to provide a wider range of forensic services for the courts in parenting plan and child access disputes – e.g., evaluator, mediator, early neutral assessor/mediator, parenting coordinator, special master, arbiter/decision maker, and court-appointed treating therapist. An emerging role is that of the Reviewer of a court-appointed custody evaluator’s report and underlying case file. The Reviewer is retained by an attorney to conduct a review of the report and evaluation procedures. This may include quality of the data analysis, how substantive issues are addressed, and if the opinions correspond to the underlying data. Little has been written on this emerging role to provide guidance on the ethics and framework for delivering this service to attorneys and the court (see Gould, Kirkpatrick, Austin & Martindale, 2004; Martindale & Gould, 2008; Stahl, 1994). There are only two peer-reviewed articles on the subject. Professional guidelines or model standards for the Reviewer role have not yet been produced by professional organizations.<sup>2</sup> The role of Reviewer also has not been identified or regulated specifically by state licensing statutes. It is clear there is not yet a sufficient literature to help establish a “standard of practice” to guide

---

<sup>1</sup> The authors are appreciative of the help and insight from Bud Dale, Ph.D., J.D. on issues concerning the role and function of forensic mental health experts in child custody cases.

<sup>2</sup> The *Guidelines for child custody evaluations in divorce proceedings* (APA, 1994, III., 8) reference that a psychologist “may be asked to critique the assumptions and methodology of the assessment of another mental health professional.” The *AFCC Model standards of practice for child custody evaluation* contains one rule and two paragraphs on the role of Reviewer (Association of Family and Conciliation Courts, 2006/2007; Rule 8.5). The Code of Conduct of APA endorses the role of a psychologist reviewing records in lieu of personal evaluation [APA, 2002, Rule 9.01(c)]. The *Guidelines for child custody evaluations in family law proceedings* (APA, 2009, 12.) state “when psychologists are not conducting child custody evaluations *per se*, it may be acceptable to evaluate only one parent, or only one 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.”

the forensic work of Reviewers.<sup>3</sup> Yet, it is known that mental health experts from various disciplines are being called upon to provide work product review with increasing frequency in child custody disputes. Judges are becoming more aware of the involvement of consulting and reviewing experts involved in the case that may provide a review and second perspective on the work of the court's expert and the psycho-legal issues in the case. A Reviewer is sometimes employed as a retained expert in lieu of a party's motion for a second custody evaluation. If a Reviewer testifies, he or she may be generally critical of the evaluator's work product or may reinforce the opinions of the court's expert.

The Reviewer is distinct from the role of a second custody evaluator that occurs may occur in custody disputes. When a second evaluation is conducted, the expert is either agreed upon by a consent order or appointed by the court, and her/his primary undertaking roughly mirrors the original evaluator's approach: meeting the parties and children, contacting collaterals and forming an independent opinion about the case, though the evaluator may choose to review the quality of the first evaluation as a way to help reconcile any differences in conclusions and opinions between the two evaluations. In this way, the work product of the first evaluation may become nested within the database of the second evaluation. It is possible the first evaluator may then choose to offer a rebuttal report and be called upon to give rebuttal testimony. When this process occurs, of evaluators reviewing the report of another evaluator, then the role of court evaluator is transformed into a hybrid role of "evaluator-reviewer." The court, of course, would be pleased if there was a consensus of opinions between the two evaluators. The court's experts in this not-so-unusual context are serving different functions that are not incompatible. The

---

<sup>3</sup> The Association of Family and Conciliation Courts currently has a task force that is developing guidelines for mental health experts who provide forensic consultation and review services.

experts are discussing their data and the data gathered by the other expert-evaluator in light of the salient issues in the case. Both evaluators are trying to be helpful to the court.

Professional publications in attorney trade journals on forensic consultants and expert witness have emphasized their roles rather than function (Martindale, 2010; Tippins, 2009). While these are a type of “dual role,” we believe it is not an ethical conflict when a forensic expert provides both consultation and work product review as long as an objective review was conducted and honest feedback provided to the retaining attorney before consultation services are provided (for a discussion of the hybrid forensic role, see Austin & Flens, in press). The concern about combining the roles of a forensic consultant and a retained, testifying expert is mainly one of legal strategy. The testifying expert is subject to disclosure of his work product and if he has also assisted/consulted with the retaining attorney, then it is expected the testimony will be perceived as less objective and credible. This issue is for the court to decide so it should not be assumed the retained expert who is in this hybrid role of testifying expert and consultant will not be an effective witness. The forensic reality is that most litigants cannot afford to pay for the services of two experts, e.g., one consultant and one testifying expert-reviewer, and almost every testifying reviewer will consult with the attorney about the case to some degree. It will not be unusual, when there is a poor quality of work product, for the retained, testifying, consulting expert to be viewed as giving more balanced, objective, accurate, and helpful testimony to the court compared to the court’s own appointed expert evaluator.

In this article, we discuss the salient issues involved in the role of Reviewer and the potential contributions of Reviewers. The role of the Reviewer is presented as part of a process of forensic quality control for the court and the mental health profession concerning the value of court-ordered evaluations. In contrast to a commonly held perception that Reviewers are

mercenaries with opinions for hire, we describe the components of an ethical review of work product and testimony. We submit that the overriding ethical principle for Reviewers, like evaluators, is to be helpful to the court and to assess accurately the issues and data. We introduce the process of Case Analysis that we believe should be an inherent component of the educational function of either an evaluation or review. The structure for conducting a work product review has been described in detail elsewhere (Gould et al., 2004; Martindale & Gould, 2008) so we selectively discuss several important issues, including the need for evaluators to maintain a high quality case file or “record” and the importance of reviewers to strive to conduct a balanced and objective treatment of the evaluator’s data and issues in the case.

The forensic role of Reviewer is one of being an expert rebuttal witness that is common in other types of civil litigation and is defined and regulated by a state’s rules of civil procedure. It is common practice for attorneys to retain confidential, non-testifying experts to consult on matters of trial preparation, e.g., the preparation of cross-examination questions. It also would not be uncommon in civil litigation for there to be multiple rebuttal expert witnesses who may be both consulting with the attorneys and providing testimony. For a court not to allow either a rebuttal expert witness or a consulting expert could be a reversible error upon appeal (*Ake v. Oklahoma*, 1985; *Clements v. Davies*, 2009).

The rebuttal expert witness, as described here, is a “retained expert,” who, in the context of a parenting plan and child custody dispute, is retained to review the work product of the child custody evaluator and to do so in an ethical and objective manner. The child custody evaluator is the court-appointed expert or “the court’s expert.” If the Reviewer finds that the evaluator did an acceptable job with respect to methodology, data gathering, interpretation, and the formulation of opinions that correspond to the data, then it is unlikely the Reviewer will testify in the matter

unless it is to give general testimony on an issue in the case, discuss relevant research, or to reinforce that the evaluator did a competent job. Usually, after a review of the report, the ethical and prudent Reviewer would give the retaining attorney confidential, candid feedback about whether or not the original work product appears to be sound in methodology and its opinions. It would not be uncommon for the Reviewer to advise the retaining attorney that there were some minor methodological issues with the evaluation, but it appeared the evaluator basically got the bottom line correct for the court on the ultimate issue opinions. Within this scenario, it is unlikely the court's evaluator or opposing counsel would ever know the Reviewer had been involved. Until the expert is identified to be a testifying expert the retained expert's work and case file are privileged under attorney-client privilege doctrine (*Hickman v. Taylor*, 1947) that is incorporated in to state rules of civil procedure. The exception to the retained expert's anonymity would be in those cases when the evaluator must release the file or psychological data only to another mental health expert as opposed to a discovery release to the attorney, e.g., Florida. The sequence in this process of the reviewer first conducting an objective review of the evaluator's work product before moving towards agreeing to testify in the matter or provide any consultation to the attorney is important to establish the perception that the retained expert could provide objective testimony on the quality of the work product and addressing salient issues in the case.

When the anonymous and confidential review results in positive feedback about the evaluation it might play a significant role in prompting the attorney to work towards a settlement. On the other hand, if the Reviewer finds significant flaws in the work product from a critical analysis of the report, then the Reviewer probably would advise the retaining attorney to seek the evaluator's case file for review. This is a significant step, for it may mean that the Reviewer's role and identity will eventually become known to the opposing party and to the court, as the

retaining attorney probably has decided to define the reviewer's role as a testifying expert. The decision about the reviewer testifying is usually made after the objective and candid feedback is provided from reviewing the report. If it is determined there are substantial problems in one or more aspects of the evaluation, especially the basis for opinions on a comprehensive parenting plan, the Reviewer is likely to become an expert witness and communicate to the court about the quality of the evaluation and possible problems with the evaluator's opinions and recommendations in light of the methodology, how the forensic procedures were implemented, and if the data support the proffered opinions. The Reviewer's overall role is to review the report and underlying data, e.g., the case file, to determine if the evaluator likely "got it right for the court," and therefore was being helpful to the court. If the evaluator appears not to get it right on the bottom line or recommendations about the ultimate issue opinions about custody, parenting time, and decision making, then he/she obviously is not being helpful and the opinions and recommendations may potentially be harmful to the welfare of the child. If the forensic product quality is very poor, then court's evaluator may be misleading the court. The reviewer, then, becomes part of a type of "checks and balances" in being helpful to the court via entry into the process as a retained expert.

There are other parallel and sometimes overlapping forensic roles to that of a Reviewer. This role is sometimes combined with giving General Testimony on the relevant research and literature on a particular issue, such as overnight parenting time for a very young child, relocation, intimate partner violence, child sexual abuse, or substance abuse that may surface as a prominent focus in a case. As part of the review, the Reviewer as a rebuttal expert may find deficiencies in how the evaluator approached a complex problem, such as partner violence or relocation. The Reviewer's testimony on the literature on how to apply a systematic approach to

a complex issue would then be a type of hybrid role of review and general testimony. Providing consultation services to an attorney on the case, such as helping with direct and cross-examination questions or developing the theory for the case is a non-testimonial expert role, unless it is combined with being a Reviewer. When the Reviewer provides these types of services, the Reviewer is more likely to be perceived as compromising the neutrality that is needed for the court to view the Reviewer's testimony as credible and helpful. We think that if a Reviewer provides ethical, balanced, and unbiased consultation, the Reviewer can overcome the understandable perception of being merely an extension of the retaining counsel's advocacy. The Reviewer, by assisting in the elicitation of needed evidence (or data from the evaluator), is not just helping the retaining attorney and his or her client, but also is being helpful to the court, and ultimately to the child. If the Reviewer is to be called as a witness, his or her own file is discoverable just like the original evaluator's; therefore, any consultation service work product can be obtained by the other attorney once the Reviewer's identity is made known by the retaining attorney. If the major goal of any expert is to be helpful to the court via testimony delivered in an ethical manner, then discovery should not be much of a concern. The issues are what they are; the data are what they are. This should be the mantra of all testifying experts. We appreciate, however, that the position of some respected forensic psychologists is not to combine the testifying forensic role with case consultation (Zervopoulos, 2008).

### **Shared Data Set, Keeping the Record, and Evaluator vs. Reviewer Roles**

If the Reviewer identifies conspicuous or plausible deficiencies after reviewing a parenting plan or child access report, then a complete copy of the evaluator's file should be obtained by the retaining attorney and provided to the Reviewer. It is this file that contains all the documents the Reviewer should use in the review, e.g., interview notes, parent-child

observation notes, psychological testing data, pertinent records and reports, and the pleadings.<sup>4</sup> The evaluator's data thus become the Reviewer's data. It is a shared dataset. Staying within the confines of this shared dataset is important so the Reviewer can recreate the evaluator's assimilation, interpretation and integration of the data, and determine whether the recommendations flow from these data. A review of the original evaluator's file may illuminate that she/he overlooked, was unaware of, or did not pursue data that may be substantive and/or significant, e.g., reviewing a complete record of the child protection records in cases containing abuse and neglect allegations. On one hand, the Reviewer needs to be careful not to collect willy-nilly any new data, such as meeting with a party or child or reviewing any substantive new documentary data, because to do so might move the Reviewer more into an evaluator role and create a possible ethical bind of being in a dual role (APA, 2002; Rule 3.05), which could lead to professional sanctions (*Grossman v. State Board of Psychology*, 2003), as well as undermine the value of any testimony by the Reviewer.<sup>5</sup> It cannot be concluded that this one case generalizes to other states and the issue probably is best interpreted not in terms of dual roles, e.g., reviewer vs. evaluator, but the sufficiency of the data available to the testifying expert for the opinions offered. To wit, the evaluator should have sufficient data to testify about the parties, the child, and the ultimate issues. The Reviewer should have sufficient data to testify about the quality of the evaluator's work product and specific issues based on the evaluator's data. On the other

---

<sup>4</sup> A common issue in the obtaining of the evaluator's file concerns an assertion of confidentiality or privilege regarding the release of testing data. This issue is addressed by APA (2002, Rule 9.04) and it is a situation where professional ethics and the law clash since with few exceptions there is no special exclusion of testing data from the rules of civil procedure and discovery. Psychologists often assert there is a copyright obligation to the publisher of the tests, but this does not inhibit judges from ordering the psychologist to release the data. This position is recognized by AFCC (2006, Rule 3.2b). A professional compromise is usually reached by the psychologist agreeing to release the data only to a licensed psychologist who is consulting to the attorneys. If an attorney does not want to retain a psychologist, the court will surely order the release of the test data except in a few jurisdictions (i.e., FL).

<sup>5</sup> However, if a Reviewer learns that data exist that might reasonably have been known or considered by the evaluator, but for reasons were not considered, the Reviewer has an obligation to make these data known to the retaining attorney and, if identified as a rebuttal witness, make these data known to the court.



hand, if a Reviewer determines that significant data were not part of the original dataset, and their omission, for whatever the reasons, creates a potential fatal flaw in the original work product's findings and recommendations, this issue must be addressed by the Reviewer in an ethical manner. The Reviewer also may need to obtain a limited amount of specific, factual information to clarify an issue or facts that were not clear in the evaluator's file and report, e.g., a time line of events.

Additionally, the Reviewer may find it prudent to conduct additional analyses with the original dataset. Such additional analyses would remain true to the evaluator's original dataset. As an example, assume the evaluator administered the MMPI-2 to both parents. There are a number of scoring and interpretive options available for the MMPI-2 from NCS Pearson Assessment. For argument's sake, assume the evaluator scored the MMPI-2 using the "Basic Service Report,"<sup>6</sup> a report that only provides data on three validity scales and ten clinical scales. The psychometrically savvy reader will understand that the "Extended Score Report"<sup>7</sup> provides significantly more data for a more thorough analysis of the resulting profile<sup>8</sup>. For the Reviewer to re-score the MMPI-2 protocol from the evaluator's evaluation would be remaining true to the original dataset. In this scenario, the Reviewer is using data that was available to the evaluator, had she/he elected to use a more detailed scoring option, and does not create the conflict discussed regarding the incompatibility of merging Reviewer and evaluator roles.

There is an ethical quandary for the Reviewer when new data become known after the release of the custody evaluator's report and prior to the work product review, either due to new events or important, conspicuous data that were not gathered by the evaluator, i.e., portions of a

---

<sup>6</sup> [www.pearsonassessments.com](http://www.pearsonassessments.com)

<sup>7</sup> *Id*

<sup>8</sup> The Extended Score Report provides data on 9 validity scales, 9 Restructured Clinical scales, 15 Content scales, 15 Supplementary scales, 5 Psy-5 scales, 31 Harris-Lingoes subscales, 27 Content Component scales, and a list of omitted items and a list of Critical Items.

protective services agency report on child sexual abuse that was not examined. For the Reviewer to examine and opine on the new or missing data would seem to open the door to providing an evaluation function. To not address the data is to potentially ignore data on a vital issue that would be necessary to be helpful to the court. A purist perspective on holding firm on the distinction between “reviewer vs. evaluator” would be that the reviewer should not consider any new data for fear that colleagues might view his actions as trying to evaluate with an emphasis on the roles versus function of forensic testimony. A compromise position is to make sure the evaluator was provided with the same data or new information so that it becomes part of the evaluator’s case file, albeit in post hoc fashion, after the evaluator’s report was released so the Reviewer and evaluator continue to work with the same shared dataset. Or, the Reviewer could opine about the missing or incomplete data in response to hypothetical questions after the data were introduced as evidence. It would seem the court would not want the testifying experts to ignore crucial data just because they were not contained in the original case file of the evaluator. We appreciate that some forensic psychologists will take the position that any data not contained within the evaluator’s case file should not be examined because of the emphasis on keeping the evaluator vs. reviewer role bifurcated and clear.

We propose that sound forensic practice begins with the evaluator developing a protocol for generating and maintaining a high quality record that can be efficiently examined by others. The record contains the data that are the foundation for the evaluator’s opinions and the reference for the communications to the court. The evaluator’s record consists of any information or data either generated by the evaluator or received by the evaluator during the course of the evaluation. This means anything and every piece of data, ranging from interview and phone call notes, to e-mails, testing protocols, and records reviewed.

We advocate that evaluators should go into the parenting plan and child access evaluation with the expectation that their work product will be reviewed by a colleague, attorneys, and the court. There is a high probability parts of the evaluator's record will become part of the court record if testimony is given. APA Record Keeping Guidelines (2007, Rule 1) state:

“Psychologists are urged to organize their records in a manner that facilitates their use by the psychologist and other authorized persons” (p. 4) and the Guidelines for Child Custody Evaluations in Family Law proceedings (APA, 2009, 14) states: “Test and interview data are documented with an eye toward their eventual review by other qualified professionals.”

Our position is that each evaluator should be vigilant in taking steps to insure a high quality physical and electronic work product so that it is easy to determine what the data are and the data interpretation is clear. The Forensic Specialty Guidelines [1991, Part VI (B)] indicate: “The standard to be applied to such documentation or recording anticipates that the detail and quality of such documentation will be subject to reasonable judicial scrutiny; this standard is higher than the normative standard for general clinical practice” (p. 661). This perspective requires self-monitoring by the evaluator as part of a proactive forensic quality control process. A well-organized and clear case file does not guarantee a high quality of work product, nor does it guarantee getting it right for the court, but it is a necessary step in creating a sound dataset that documents the evaluation process. It is part of being helpful to the court and acting responsibly as part of the litigation process and being the court's expert.

The Association of Family and Conciliation Courts (AFCC, 2006/2007) Model Standards call for a well organized and legible record for a child custody case file that can easily be obtained and reviewed [2006/2007, Rule 3.2(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 fashion to those with legal authority to inspect or possess copies of them” (p. 11).

In light of these guidelines and model standards, it seems clear there is no professional basis for an evaluator to be either defensive in response to being reviewed, or to be obstructionist in response to a request for the record. A mental health professional who conducts parenting plan and child access evaluations for the court may not like another mental health looking over her/his shoulder and providing a critique of her/his work, but an examination of one’s work, created in a forensic context, comes with the territory. Feedback from colleagues is also part of an evaluator’s continuing education on the complexities of custody evaluation.

Despite the explicit guidelines above, as Reviewers, we frequently find that custody evaluators are disorganized in how they maintain their case file. We have encountered case files that almost appear to have a random sorting in the materials. Lack of legibility of notes seems to be the rule rather than the exception. If an evaluator’s notes are not legible, then the court could order her/him to have the notes transcribed at considerable cost of time and money. A well organized and legible file is part of a principle of transparency that should govern an evaluator’s record keeping and response to discovery and review (Martindale, 2004). An efficient way to achieve data transparency is to take notes with a laptop and to make an electronic audio digital recording of each interview. The latter has the advantage of having an exact record of the true data and to take the mystery out of what a party or collateral said to the evaluator, or what questions were asked by the evaluator. Our experience is that evaluators are resistant to these two simple steps toward quality control. Resistance to being reviewed and for being transparent

creates the impression that evaluators do not want to be held accountable for the quality of their work, or worse yet, risk giving the impression of trying to hide something. When the record is unclear, then the evaluator is implicitly telling the court to “trust me” as if she/he was “Oz behind the curtain” with mysterious powers (Martindale, 2006).

### **Helpfulness as Applied to the Roles of Evaluator and Reviewer**

The main purpose of expert testimony is to be helpful to the court. This is both a practical truism and legal principle. This should be the mindset of both evaluator and Reviewer as they approach their forensic roles and tasks. To be helpful, the expert’s work product and testimony need to be consistent with professional guidelines or standards and be reliable, valid, and have a scientific foundation, at least to the extent possible. Because the stakes are so high in parenting plan and child access disputes, experts should welcome this expectation and not be wary of close scrutiny and accountability.

The role and function of the evaluator is to make predictions concerning future parenting behaviors and the child’s long-term adjustment and development. These predictions take the form of opinions that are formulated about the child’s projected developmental outcomes and the parents’ abilities and capacities to be responsive to the child’s needs. The opinions are embodied in the recommendations for a parenting plan concerning parenting time and decision making. The evaluator should be considering all of the factors found in statutory and case law and other relevant, salient factors. These factors can be thought of as predictor or independent variables, with the child’s developmental outcomes or adjustment as dependent variables. In order to be helpful, the evaluator needs to “get it right for the court” in terms of accuracy of conclusions and predictions on the child’s *psychological* best interests. This is one measure of the evaluator’s helpfulness or value to the court (Austin, 2009). Other measures of value or utility from the

evaluation would be promotion of settlement and the satisfaction of the consumers of the work product, i.e., the court and parties, (Kelly & Ramsey, 2008). In contrast, the function of the Reviewer is to assist the court in the determination of the likelihood that the evaluator got it right. This is the manner in which the Reviewer is helpful to the court.

The principle of helpfulness thus applies to the Reviewer, except the Reviewer, in the role of a rebuttal witness, generally is not collecting any new data or applying any forensic procedures that would be subject to scrutiny on the basis of reliability or validity of procedures.<sup>9</sup> There is no clear, bright line here, however. Thus, the court's gatekeeping or screening of Reviewer testimony on helpfulness is quite different. The Reviewer's helpfulness is one of helping the court determine the quality of the evaluator's work product, including the reliability and appropriateness of procedures, and accuracy in data interpretation. The Reviewer's helpfulness follows from her/his ethical duties to be objective in the analysis and to help the court "get it right," even in the role of a retained, testifying expert. The Reviewer has an ethical duty to be true to the data, especially the historical truth within the case specifics, and stay clear of a bias towards the retaining counsel's advocacy.

The ethical evaluator will strive to follow a scientifically-grounded approach in a parenting plan/child access evaluation because legal standards on admissibility require such an approach: "(1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case" (FRE, 2008, Rule 702, p. 127). As examples, these evidentiary rules would apply to the examination of a specific medical test (DNA), a theory used to interpret facts in a case ("Shaken Baby Syndrome" or "Parental Alienation Syndrome"), and

---

<sup>9</sup> The Reviewer's procedures obviously can be scrutinized by cross-examination, but no new data collection procedures typically are used. There are exceptions noted above, as when a reviewer determines that an evaluator overlooked, missed, or did not pursue substantive data significant to the psycho-legal questions in the case.

possibly a system for organizing data and making predictions about future outcomes (typology of intimate partner violence or relocation risk assessment). A strict interpretation of *Daubert*-like standards is that expert testimony will be helpful and allowed if the methodology is sufficiently reliable/valid (*People v. Ramirez*, 2007, i.e., reliability of a medical exam for child sexual abuse). This judicial perspective and standard will be applied to an array of experts who rely upon “scientific, technical, or other specialized knowledge” (FRE, 2008, p. 127) and this standard, to our mind, encompasses child custody expert testimony. There is on-going debate over whether it is appropriate for family courts to strictly apply a *Daubert* test and an *in limine* motion to exclude the report of a court-appointed evaluator (Bala, 2005; Tippins & Wittman, 2005) in child custody cases. Rebuttal testimony by a Reviewer could lead the court to give little weight to the court’s evaluator or even totally disregard the report if a significant flaw is identified. We have observed courts afford the opinions of its own expert/evaluator little, if any, weight following relevant review testimony. Judges recognize incompetent work product and are more likely do so when there is a helpful and relevant Reviewer-rebuttal expert who offers balanced and reasoned opinions. Thus, to be helpful, the evaluator should follow reliable procedures (*Daubert*) that are also generally accepted as appropriate for a parenting plan and child access evaluation (*Frye*).<sup>10</sup> Today, following state rules of evidence that often mimic the federal rules and evolving case law on admissibility, child custody experts are being held more accountable for the integrity of the procedures used and quality of the work product.

As stated above, a Reviewer may conclude that the original evaluation is relatively well done and generally helpful, and may encourage the retaining counsel to consider a case settlement. The Reviewer may identify areas of potential compromise in a parenting plan that might facilitate settlement. Secondly, the Reviewer, like the evaluator, serves an educative

---

<sup>10</sup> In effect, the *Frye* standard has been absorbed into the fabric of *Daubert* as its 4<sup>th</sup> “general observation.”

function for the retaining attorney and the court in discussing issues with the evaluation and providing a case analysis of the issues, research, etc (see below in Case Analysis). For example, when a Reviewer discusses how an evaluator approached a relocation case or intimate partner violence, and describes appropriate ways to deal with the issue, or the use of forensic models, then the court is being educated about the complexities of the issue and the implications for the parenting plan and child access. The analysis of the work product demonstrates for the court the pros and cons of how the evaluator treated the relevant complex issues. Thirdly, the Reviewer provides an educative function *for the evaluator* if there were deficiencies. In this way the evaluator should be able to improve her/his product for the court in the future. The reactions by mental health professionals to having their work “reviewed” and “criticized” are not addressed here.

### **Reviewer’s Case Analysis**

We believe the court wants to know how and why the child custody evaluator reached the conclusions and recommendations in parenting plan and child access report. The following is what we think a Reviewer should consider in order to generate an ethical, objective case analysis that will be relevant to the court’s own judgment about the helpfulness of the original report:

- Did the evaluator answer the referral (psycho-legal questions) questions?
- Were the formulations used to answer the questions based on clearly articulated, sound, and transparent methodology that is generally accepted by the field?
- Did the evaluator conform to recognizable professional guidelines, standards, and practice parameters?
- Does the evaluation demonstrate the consideration of alternative hypotheses and the search for convergent validity on the salient issues?



- Does the evaluation raise any professional ethical concerns?
- Were the data used by the evaluator sufficient in scope and depth—particularly as regards collateral documents and collateral informants?
- Did the evaluator make use of sufficient, appropriate, and current social science research?
- Were the opinions and recommendations consistent with the research literature?
- Was there any evidence of confirmatory bias by the evaluator?
- Did the evaluator address, in an open and frank manner, any limitations to the evaluation that needed to be understood by counsel, the parties, and the court?
- Did the evaluator discuss thoroughly and appropriately the substantive and possibly specialized issues in the particular case, e.g., relocation?
- Based on the Reviewer’s knowledge of the evaluator’s education, training, and experience, did the evaluator have the requisite specialized training and knowledge to assess a specialized, substantive area within the case?
- If the evaluator did not have the specialized knowledge, did the evaluator seek appropriate consultation?
- Did the evaluator use the appropriate forensic models or conceptual approach to a complex issue in the case, e.g., intimate partner violence, relocation, child alienation?
- Was there any evidence of the evaluator over-reaching the data, i.e., formulating opinions and recommendations not supported by the data, or answering questions not asked or that fall beyond the scope of the appointment order?
- Were appropriate tests and measures used in the evaluation? Were the tests used in accordance with standardized administration procedures? Were the tests actually

appropriate to the task at hand? Were the interpretations of the test data in the report consistent with the test data in the evaluator's file?

- Did the Reviewer find any data in the evaluator's file that appear probative but were missing from the report?
- Was the quality of the record kept by the evaluator sufficient to be analyzed by the Reviewer?
- When the Reviewer was retained as a consulting expert, did the Reviewer receive data from the retaining attorney that was probably available to the evaluator, but not considered by the evaluator?
- Did the evaluator and the report show sufficient and appropriate knowledge of applicable laws, rules, and applied case law relevant to the case?

For the Reviewer, the counterpart to ultimate issue opinions is an assessment of the overall quality and utility of the work product. This bottom line for the Reviewer points to the following questions:

- Are there any weaknesses or fatal flaws that probably undermine the accuracy and helpfulness of the report?
- Did the report appear competently done?
- Was there any evidence that the report could, intentionally or unintentionally, mislead the court?
- Overall, can the Reviewer identify the evaluation's strengths and weaknesses?

The Reviewer, as a retained expert, should be prepared for scrutiny by the cross-examining attorney and court. The legitimacy and credibility of the Reviewer expert are likely to

be examined perhaps more rigorously than a court-appointed expert. Relevant questions include the following on the issue of the Reviewer's objectivity:

- Were the concerns and criticisms of the evaluation process and report raised by the retaining counsel and his/her client on target and legitimate, or was the request for a Review based on questionable motives?
- Was the Reviewer being asked to impeach the report at all costs?
- Was the request for the Review being driven by something less than child-centered motives, perhaps something more insidious and pathological? In effect, is there an appearance of an unethical "hired gun?"
- Did the Reviewer appear biased in his or her interpretations of the evaluator's data? Did the Reviewer consider alternative hypotheses?

At the end of the trial it will be the judge who determines if the retained, testifying expert in the role of reviewer was perceived to be balanced and objective in his or her treatment of the evaluator's data and salient issues for the case. The court will assess the credibility of both the expert evaluator and expert reviewer. The court will determine how helpful each expert was in the function of case analysis and how objective they were in their testimony.

Both the evaluator and Reviewer can be helpful to the court by presenting a conceptual framework on the salient issues. The evaluation report and testimony can better articulate the reasons that underlie the proffered opinions and recommendations by an efficient conceptual framing-in of the issues. Reports almost always contain psychological concepts to organize the data and explicate the opinions, e.g., parent conflict, attachment, alienation, etc. We believe the best evaluation reports provide lucid framing for the court with well-articulated concepts. A Reviewer may take issue with the framework used or the evaluator's failure to appropriately

frame the issues. The conceptual framework may be the best vehicle to provide the educational function for the court while acknowledging that custody cases are always “fact-driven.”

When there are deficiencies in a work product, the Reviewer can provide the checks and balances function by correcting a faulty conceptual analysis or by providing a framework when none exists in the original work product. A common problem in parenting plan and child access evaluations is the lack of a systematic approach to complex problems such as intimate partner violence or relocation. This situation calls for the Reviewer to frame the issues for the court so the evaluator’s data can be placed into a systematic, logical approach to the salient problem. When there is a faulty or missing conceptual framework, then it is likely the evaluator will not have gathered the necessary and sufficient data. It is also likely that the collected data will not have been efficiently and accurately analyzed. In other words, if a systematic approach to relocation is absent, then there are likely to be missing data, and that the evaluator’s report will be of limited value to the court.

### **Child Custody Evaluators Under Scrutiny**

The emerging role of Reviewer has become more prominent with a call by authorities for an examination of the utility of custody evaluations. There have been loud critics of comprehensive child custody evaluations (CCCEs) on the grounds of inadequate procedures, lack of scientific basis for recommendations on parenting plan recommendations, and the vagueness of the legal concept “best interests of the child” (Melton Petril, Poythress & Slobogin, 2007; O’Donahue & Bradley, 1999; Emery, O’Donahue & Bradley, 2005). As a suggested evidence-based approach to these problems and criticisms, Kelly and Ramsey (2008) called for a system-level analysis of the outcomes associated with custody evaluations and a cost/benefit analysis. Kelly and Ramsey (2008) start with a positive view of the CCCE and

hypothesize that participants in an evaluation should report more satisfaction in their experience with custody litigation, and children who were involved might show better long-term adjustment compared to the cohort of children of divorce who had not been involved in an evaluation. Kelly and Ramsey (2008) call for research regarding the outcomes of children from divorce, e.g., children's emotional well-being, to determine if evaluators and courts are accurate in their predictions on the best parenting arrangements, i.e., did they "get it right?" Kelly and Ramsey (2008) also hypothesize that getting it right with recommendations and predictions by the evaluators requires a high quality in the forensic work product. Part of their proposed research would be an assessment of the quality of the evaluations. The quality of CCCEs would be an independent variable. Our experience is that it is not rare to encounter a CCCE work product that is of very poor quality. This reality probably reflects the complexity of the forensic task in a CCCE and the great variety in training and experience among evaluators. It would be helpful to have a study with a random sample of CCCE reports reviewed by a panel of top level evaluators to determine the frequency of very good, satisfactory, or poor work product quality. Because of time and cost considerations, this review process as part of the proposed research would be limited to reviewing the reports only, and not the evaluator's case file. This would be a limitation, but reading a CCCE report usually can reveal the strengths and weaknesses of the overall evaluation.

The call for outcome research on custody evaluations follows or has co-occurred with the revision of professional child custody evaluation model standards (AFCC, 2006/2007) and guidelines (APA, 2009) by these two prominent professional organizations. It would appear there is now a climate to take a closer look at how well mental health professionals are executing this complex forensic work. Because the stakes are so high in child custody litigation, outcome

research on the efficacy and quality of CCCEs should be welcomed by the mental health and legal professions.

The Reviewer's role and contribution to the court can be viewed as part of the need to enhance quality of custody evaluations as suggested by Kelly and Ramsey (2008). The review helps insert accountability into the system of mental health professionals who are providing this forensic service to the court. If evaluators anticipate they may be reviewed (as well they should), then it is expected they will be more mindful of considerations of quality and accuracy. A mindset of "plan on being reviewed" should inject a needed sense of humility and appreciation of how complex their task is and the high stakes involved if their predictions miss the mark.

Austin (2009), in commenting on and endorsing Kelly and Ramsey's (2008) call for greater scrutiny of the process and outcomes of CCCE as a system, exhorted courts and evaluators alike to strive for high quality service and product:

"Courts need to be mindful consumers and expect there will be wide variation in the quality of expert opinions and reports they receive. This is inevitable when the task is so complex and the training (and personalities) of the professionals who deliver the service are so varied...I would hope the judicial lens of the courts is kept on the quality of forensic service and forensic quality control. Kelly and Ramsey (2008) 'have kept this at the forefront'" (p. 550).

Competent and ethical child custody evaluators should welcome scrutiny or review of their work. Doing custody evaluation work is a continual learning process and the review can be instructive and help with problem solving in a complex case, just as a second opinion in

medicine can help insure accuracy in diagnosis and correctness of a treatment plan. We hope evaluators can come to see reviews in a positive light and not with personal defensiveness.

In doing review work, it is gratifying to determine there was high quality in a colleague's work. It is not rocket science to follow the basic steps involved in a CCCE and to follow professional guidelines, standards, and parameters in this area. But the successful implementation of the structure in a CCCE takes an extraordinary degree of knowledge and experience. The evaluator needs a firm grounding in clinical methods and experience, knowledge of research, an understanding on what it means to investigate issues and formulate alternative hypotheses, and how to bring it all together in a coherent set of relevant recommendations to the court. It logically follows that the Reviewer should have a firm grounding in conducting child custody evaluations.

When there is poor quality in the CCCE product, then the Reviewer's function for the court becomes one of damage control. When there are egregious deficiencies, these may constitute fatal flaws and the communication of the expert opinions by the evaluator are a disservice, since the court is being misinformed. All CCCEs are like a house of cards. The conceptualization and forensic procedures lay the foundation so that it becomes likely the evaluator will get it right for the court. In such situations, Reviewers examining the foundation of a CCCE may feel like they are "forensic janitors" when they try to sort through some messy work and attempt to reframe correctly the issues and point out deficiencies in methodology and opinion formulation of the CCCE. It is important for reviewers to keep in mind the need to be respectful of colleagues and take a constructive approach to educating the court and the evaluator on the issues involved in the dispute, especially when there is a need to be highly critical of a colleague's work product.

In summary, the emerging role of the Reviewer has become more prominent as legal and mental health professions become increasingly aware of not only what is at stake in a parenting plan and child access evaluations, but also what constitutes a competently done evaluation that is helpful to the court. In this article, we advocate that an objective and ethical review can add to the helpfulness to the court in its determination of the child's best interests, and can be helpful to enhance the quality control of parenting plans and child access evaluations. We are also hopeful that mental health professionals who conduct parenting plan and child access evaluations for courts can come to see reviews of their work as helpful. Our assumption is that a competently done review can help the professions of law and mental health obtain better analysis of whether or not an underlying evaluation and report truly is helpful and promotes a child's psychological best interests.

### References

Ake v. Oklahoma, 470 U.S. 68 (1985).

American Psychological Association, Committee on Professional Practice and Standards. (1994). Guidelines for child custody evaluations in divorce proceedings. *American Psychologist*, 49, 677-680.

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

American Psychological Association (2007). Record keeping guidelines. *American Psychologist*, 62(9), 993-1004.

American Psychological Association (2009, February). Guidelines for child custody evaluations in family law proceedings. Unpublished manuscript, Approved by APA Council of Representatives. <http://www.apa.org/practice/guidelines/child-custody.pdf>



- Association of Family and Conciliation Courts (2006, May). *Model standards of practice for child custody evaluation*. Madison, WI: Author; Martindale, D. M., Martin, L., Austin, W. G. et al. (2007). Model standards of practice for child custody evaluation. *Family Court Review*, 45(1),70-91.
- Austin, W. G. (2009). Responding to the Call to Child Custody Evaluators to Justify the Reason for their Professional Existence: Some Thoughts on Kelly and Ramsey (2009). *Family Court Review*, 47 (3), 544-551.
- Austin, W. G., & Flens, J. R. (2011, in press). Expert Roles in Child Custody Cases: Work Product Review, Case Consultation, and Case Analysis. *Journal of Child Custody*, 8(1).
- Bala, N. (2005). Tippins and Wittmann asked the wrong question: Evaluators may not be “experts,” but they can express best interests opinions. *Family Court Review*, 43, 554-562.
- Clements v. Davies, 2009 WL 399844 (Colo.App.)
- Committee on Ethical Guidelines for Forensic Psychologists (1991). Specialty guidelines for forensic psychologists. *Law and Human Behavior*, 15, 336-345.
- Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).
- Emery, R. E., Otto, R. K., & O’Donohue, W. T. (2005). A critical assessment of child custody evaluations. *Psychological Science in the Public Interest*, 6(1), 1-29.
- Federal Rules of Evidence (2008)* 2008-2009 ed. West Publishing.
- Frye v. US, 293 F. 1013 (1923)
- Gould, J. W., Kirkpatrick, H. D., Austin, W. G., & Martindale, D. (2004). A Framework and Protocol for Providing a Forensic Work Product Review: Application to Child Custody Evaluations. *Journal of Child Custody: Research, Issues, and Practices*, 1, 37-64.

- Grossman v. State Board of Psychology, 825 A.2d 748 (Pa.Cmwlth., 2003).
- Hickman v. Taylor, 329 U.S. 495 (1947).
- Idaho v. Wright, 497 U.S. 805 (1990).
- Kelly, R. F., & Ramsey, S. H. (2009). Child custody guidelines: The need for systems-level outcome assessments. *Family Court Review*, 47(2), 286-303.
- Martindale, D. A. (2004). Integrity and transparency: A commentary on record keeping in child custody evaluations. *Journal of Child Custody*, 1, 31-40.
- Martindale, D. A. (2006). The Oz illusion: The expert behind the curtain. *The Matrimonial Strategist*, 24, 5-6.
- Martindale, D. A. (2010). Psychological experts and trial tactics: The impact of unarticulated contingencies. *The Matrimonial Strategist*, 28, 5-6.
- Martindale, D. A., & Gould, J. W. (2008). Evaluating the evaluators in custodial placement disputes (Ch. 17). In H. Hall (Ed.), *Forensic psychology and neuropsychology for criminal and civil cases*. Boca Raton, FL: Taylor & Francis.
- Melton, G. B., Petrila, J., Poythress, N. G., & Slobogin, C. (2007). *Psychological evaluations for the courts*, 3rd ed. New York: Guilford.
- O'Donohue, W., & Bradley, A. R. (1999). Conceptual and empirical issues in child custody evaluations. *Clinical Psychology: Science and Practice*, 6, 310-322.
- People of the State of Colorado v. Ramirez, 155 P.3d 371 (Colo. 2007).
- Stahl, P. M. (1994). *Conducting child custody evaluations: A comprehensive guide*. Thousand Oaks, CA: Sage.
- Tippins, T. M. (2009). Expert witnesses and consultants. *The Matrimonial Strategist*, 27(3), 1, 3-4.

Tippins, T., & Wittmann, J. (2005). Empirical and ethical problems with custody recommendations. *Family Court Review*, 43, 193-222.

Zervopoulos, J. A. (2008). *Confronting mental health evidence: A practical guide to reliability and experts in family law*. Chicago: American Bar Association.