

# A Methodology for Reviewing the Reliability and Relevance of Child Custody Evaluations

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## Introduction

Mental health professionals are frequently appointed by courts to become involved in custody cases in the role of child custody evaluator. This role requires that the mental health professional assess the fit between a minor child's emerging developmental and socioemotional needs and the parents' comparative ability to meet those needs. In addition, the mental health professional is expected to tender recommendations to the court regarding the extent to which various parenting plans will further the child's best psychological interests.

The recommendations contained in child custody evaluations ("CCEs") exert considerable influence on the course of ongoing custody litigation. Many courts accord significant weight to the opinions of child custody evaluators, often accepting the evaluator's recommendations without challenge.<sup>1</sup> An evaluator's recommendations can also precipitate case settlement or material concessions once both parties become aware of the evaluator's findings. Given the import of CCEs, it is imperative that these

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<sup>1</sup> THE SCIENTIFIC BASIS OF CHILD CUSTODY DECISIONS (Robert Galatzer-Levy & Louis Kraus, eds., 1999); James N. Bow, J.N. & Francella A. Quinnell, *A Critical Review of Child Custody Evaluation Reports*, 40 FAM. CT. REV. 164 (2002).

36 *Journal of the American Academy of Matrimonial Lawyers*

evaluations be conducted with due regard for scientific methods, extant behavioral science research, and ethical guidelines. This responsibility is further heightened by the need to protect the well-being of children of divorcing parents,<sup>2</sup> and to avoid inadvertently harming families at a time of enormous stress and conflict.<sup>3</sup>

Unfortunately, CCEs frequently fall below professional forensic practice standards. Commentators have criticized the quality, reliability, and utility of CCEs by noting the lack of scientific methodology, empirical grounding, and psycholegal relevance common among these reports.<sup>4</sup> Other commentators have observed that many child custody evaluators do not adhere to recommended assessment procedures, and present data to courts in inappropriate or misleading ways.<sup>5</sup> Concern regarding the generally poor quality of CCEs has prompted some commentators to suggest an end to the use of CCEs in divorce proceedings.<sup>6</sup>

Given these widespread concerns, it is important that legal practitioners routinely analyze the reliability and utility of the CCEs they obtain from mental health professionals. Our goal in the present article is to present practical tools for such analysis.

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<sup>2</sup> Robert H. Woody, *CHILD CUSTODY: PRACTICE STANDARDS, ETHICAL ISSUES, AND LEGAL SAFEGUARDS FOR MENTAL HEALTH PROFESSIONALS* (2000).

<sup>3</sup> Marc J. Ackerman & Melissa C. Ackerman, *Child Custody Evaluation Practices: A 1996 Survey of Psychologists*, 30 *FAM. L. Q.* 565 (1996).

<sup>4</sup> *THE SCIENTIFIC BASIS OF CHILD CUSTODY DECISIONS*, *supra* note 5; Gary B. Melton, John Petrila, Norman G. Poythress, & Christopher Slobogin, *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* (2nd ed. 1997); Daniel A. Krauss & Bruce D. Sales, *Legal Standards, Expertise, and Experts in the Resolution of Contested Child Custody Cases*, 6 *PSYCHOL., PUB. POL'Y & L.* 843 (2000); Ira D. Turkat, *Questioning the Mental Health Expert's Custody Report*, 7 *AM. J. FAM. L.* 175 (1993).

<sup>5</sup> David M. Brodzinsky, *On the Use and Misuse of Psychological Testing in Child Custody Evaluations*, 24 *PROF. PSYCHOL.: RES. & PRAC.* 213 (1993); Kirk Heilbrun, *Child Custody Evaluations: Critically Assessing Mental Health Experts and Psychological Tests*, 29 *FAM. L. Q.* 63 (1995); Randy K. Otto, John F. Edens, & Elizabeth H. Barcus, *The Use of Psychological Testing in Child Custody Evaluations*, 38 *FAM. & CONCILIATION CTS. REV.* 312 (2000).

<sup>6</sup> William O'Donohue & April R. Bradley, *Conceptual and Empirical Issues in Child Custody Evaluations*, 6 *CLINICAL PSYCHOL.: SCI. & PRAC.* 310 (1999).

Thus, we will discuss appropriate forensic methods and procedures, identify methodological strengths and weaknesses relevant to the scientific strength of a report, and offer common examples of evaluator mistakes. Moreover, throughout our discussion, we will be using the legal concepts of *reliability* and *relevance* not only to refer to specific psycho-legal requirements for assessment measures and data-gathering techniques, but also as a general lens through which to critically evaluate the quality and utility of CCEs.

### **Differences Between Therapeutic and Forensic Mental Health Assessment**

Jonathan Gould has identified a number of concerns regarding the role of the forensic mental health professional in CCEs.<sup>7</sup> First, the recommendations offered by child custody evaluators frequently exceed the specific limitations of the data contained in the report as well as the general limitations of empirically-derived scientific knowledge. Second, child custody evaluators often use and interpret assessment tools in inappropriate ways, both in their choice of instruments and their presentation of data. Third, many child custody evaluators fail to integrate their recommendations with the existing empirical literature on child development and post-divorce adjustment. Fourth, many CCEs are poorly-written, jargon-laden reports that conflate data with the inferences drawn from data. Fifth, some child custody evaluators do not adequately understand the distinctions between a therapeutic and a forensic role. Finally, much of the testimony offered by child custody evaluators is based upon clinical impressions uninformed by empirical research, yet presented as empirical science.

These last two points merit further discussion. First, as the field of forensic mental health has grown to constitute a distinct subspecialty, commentators have noted the increasing need for practitioners to obtain specialized and advanced training.<sup>8</sup> The reason for this is that the field requires appreciably distinct com-

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<sup>7</sup> Jonathan W. Gould, *CONDUCTING SCIENTIFICALLY CRAFTED CHILD CUSTODY EVALUATIONS* (1998).

<sup>8</sup> Randy K. Otto & Kirk Heilbrun, *The Practice of Forensic Psychology: A Look Toward the Future in Light of the Past*, 57 *AM. PSYCHOLOGIST* 5 (2002).

petencies and skills than does the treatment of patients. Moreover, differences between forensic and therapeutic services have now been codified in ethical guidelines<sup>9</sup> and clarified in the behavioral science literature.<sup>10</sup> For example, Stuart Greenberg and Daniel Shuman list ten ways in which the custody evaluator role differs from that of the therapist:

**1) Patient/Litigant:** For the therapist, the client is the patient, whereas for the forensic examiner, the client is the court (or an attorney). Thus, the therapist is answerable to the patient, whereas the forensic examiner is answerable to the court. In the context of a custody evaluation, the forensic examiner evaluates the attorneys' clients (and their children), is paid by the attorneys, and tenders a work product to the attorneys and the court.

**2) Relational Privilege:** The therapist is governed by the therapist-patient privilege regarding disclosure of confidential material. The patient "owns" this privilege, which may be waived by patient authorization or by court order. In contrast, the forensic examiner can offer no privilege except as ordered by the court. There is no therapist-patient privilege in forensic examinations; litigants cannot expect that their disclosures to a forensic expert will be kept confidential, and they should be informed of that fact prior to initiation of the evaluation.

**3) Cognitive Set:** To facilitate the treatment alliance, the therapist typically maintains a supportive, empathic attitude toward the patient. In contrast, to facilitate data-gathering, the forensic examiner typically maintains a neutral, objective attitude toward the litigants. It is believed that this attitude will enhance the examiner's ability to assess the relevant psycholegal issues in a fair and impartial manner.

**4) Competency:** The therapist must develop competence in the assessment, diagnosis, and treatment of psychological or psychiatric pathology. For example, in the context of a patient suffering from depression, the therapist would need to be competent to differentiate the various conditions that might underlie the symptoms, and initiate an appropriate psychotherapeutic and/or pharmacological intervention designed to ameliorate the illness. In contrast, the forensic examiner must develop competence in the evaluation of behavior relevant

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<sup>9</sup> American Academy of Psychiatry and the Law, *ETHICAL GUIDELINES FOR THE PRACTICE OF FORENSIC PSYCHIATRY* (1995); Committee on Ethical Guidelines for Forensic Psychologists, *Specialty Guidelines for Forensic Psychologists*, 15 *LAW & HUM. BEHAV.* 655 (1991).

psychiatry. Bloomfield, CT: Author; American Psychological Association. (1991). "Specialty guidelines for forensic psychologists." *Law and Human Behavior*, 15(6), 655-665.

<sup>10</sup> Lyn R. Greenberg & Jonathan W. Gould, *The Treating Expert: A Hybrid Role with Firm Boundaries*, 32 *PROF. PSYCHOL.: RES. & PRAC.* 469 (2001).

to the pending legal decision. For example, in the context of a custody evaluation, the forensic examiner would need to be competent in the evaluation of the impact of depressive symptoms on a parent's caregiving capacity.

**5) Hypotheses:** The therapist uses his or her professional competence to generate and test a number of hypotheses regarding how to best treat the patient's subjective distress. In contrast, the forensic examiner uses his or professional competence to generate and test a number of hypotheses regarding the legal implications of the litigant's behavior.

**6) Scrutiny:** The therapist generally does not focus on the veracity of the information supplied by the patient. In therapy, historical truth is far less important than the patient's idiosyncratic perceptions and experiences. Furthermore, the patient is rationally motivated to give the therapist the most accurate information possible, so as to increase the efficacy of the therapy. In contrast, the forensic examiner actively seeks information to explore the validity of each litigant's claims, is alert for indications of misinformation, and recognizes that it may be in the litigants' self-interest to give misinformation.

**7) Structure:** In many forms of therapy, the therapist exerts little control over the content of psychotherapy. The patient chooses the topics to be discussed, the narrative material to be explored, and the areas of functioning to be improved. In contrast, the forensic examiner exerts considerable control over a highly-structured evaluation process in an attempt to respond to the court's concerns in a focused, thorough, and timely manner.

**8) "Adversarialness":** The therapist rarely, if ever, adopts an adversarial stance toward the patient. Even when challenging the patient's assumptions or worldview, the therapist maintains a collaborative and accepting attitude. In contrast, the forensic examiner may need to adopt an adversarial stance in the pursuit of historical truth. For example, should a forensic examiner need to confront a litigant with discrepancies, the impact of such a challenge to the examiner-examinee relationship is not of professional concern.

**9) Goal:** The goal of the therapist is to assist the patient in effectively recovering from emotional distress. In contrast, the goal of the forensic examiner is to assist the trier of fact in acquiring and understanding psycholegal information relevant to the pending legal dispute. "Doing good" or advocating for the litigant is not an appropriate forensic goal.

**10) Critical Judgment:** The therapist suspends or minimizes critical judgment in an attempt to maximize the patient-therapist alliance. In contrast, the forensic examiner relies upon critical judgment to assess complex and occasionally contradictory information, and to integrate that information for the benefit of the trier of fact. The impact of criti-

40 *Journal of the American Academy of Matrimonial Lawyers*

cal judgment on the relationship between examiner and examinee is not of concern to the forensic expert.<sup>11</sup>

A number of forensic mental health professionals have written about the problems caused by the use of clinical judgment in a forensic context. The concern is that all too frequently, mental health professionals offer expert testimony that consists of little more than subjective and idiosyncratic speculation. Daniel Shuman and Bruce Sales note that the empirical literature on human judgment and decision-making helps to explain the inherent unreliability of clinical judgment.<sup>12</sup> For example, social science research indicates that actuarial (statistical) decision-making predictably outperforms clinical decision-making in terms of both consistency and accuracy:

“[C]linical decision-makers often err in assuming the representativeness of events by failing to consider sample sizes and base rates. Also, they often overestimate their knowledge about a decision, evaluate information and attribute causality on the basis of their subjective framing of the information, and make stereotypical decisions and select information to support those decisions on the basis of conclusions reached before receiving data about those decisions.”<sup>13</sup>

Therefore, expert judgment that is clinically-derived, as opposed to actuarially-derived, is as susceptible to error as is lay judgment. To the extent that an expert relies on clinical experience in drawing inferences that go beyond the data, he or she is engaging in clinical decision-making despite his or her scientific training, and legal practitioners should be aware of the error rates associated with such clinical judgment.

The court’s opinion in the New York case of *In re Matter of Eli*<sup>14</sup> addressed this issue of clinical versus scientific decision-making. The *Eli* court noted that the “clinical method”<sup>15</sup> consists of thorough examinations of a small number of patients (often

<sup>11</sup> Stuart A. Greenberg & Daniel W. Shuman, *Irreconcilable Conflict Between Therapeutic and Forensic Roles*, 28 *PROF. PSYCHOL.: RES. & PRAC.* 50 (1997).

<sup>12</sup> Daniel W. Shuman & Bruce D. Sales, *The Admissibility of Expert Testimony Based upon Clinical Judgment and Scientific Research*, 4 *PSYCHOL., PUB. POL’Y & L.* 1226 (2000).

<sup>13</sup> *Id.* at 1226.

<sup>14</sup> 607 N.Y.S.2d 535, 540 (1993).

<sup>15</sup> The “clinical method” should not be confused with a “clinical evaluation.” A clinical evaluation consists of the application of accepted principles of

seen in treatment), and a subsequent extrapolation of general principles from those examinations. For example, a therapist who is treating several sexually abused five-year-old girls, all of whom masturbate, might form the hypothesis that masturbation is an indication of sexual abuse in young girls. However, the clinical method evidences the problem of *selection bias*: If subjects select themselves into a given sample (as when patients choose to visit a psychotherapist, or are brought by their parents), then the sample will likely be homogenous according to certain variables (e.g. socioeconomic status, attitudes toward psychotherapy). In the example described above, the therapist could not testify in court that an association exists between masturbation and sexual abuse in five-year-old girls absent a discussion of the base rates of such behavior in the general population (e.g. among all five-year-old girls, including those who had not been sexually abused). Thus, while the clinical method is well-suited to making decisions about the evaluation and treatment of individual patients, it is generally not sufficiently reliable to support psycholegal conclusions rendered in court.<sup>16</sup>

An apposite example of the kinds of problems engendered by the merging of clinical and forensic roles, or of clinical and forensic decision-making, is the problem of “dual roles.” Dual roles, or the practice of simultaneously filling two distinct professional roles vis-a-vis a client, is of particular ethical and professional concern in the context of forensic evaluations. For example, the Specialty Guidelines for Forensic Psychologists<sup>17</sup> specifically discourage psychologists from engaging in dual professional roles in forensic matters. A common example of dual roles in the child custody context is when a therapist who has treated one of the parent-litigants offers testimony about comparative custodial suitability. This situation is rife with ethical and practical problems. For example, the therapist who treats

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diagnosis and assessment to an individual with the goal of evaluating and treating psychological distress.

<sup>16</sup> In contrast, the “experimental method” assesses specific factors while examining large numbers of subjects of various backgrounds, with the goal of finding relationships among the factors assessed. An important characteristic of this method is that the results are *replicable* (e.g. another researcher performing the same experiment under the same conditions would get the same results).

<sup>17</sup> Committee on Ethical Guidelines for Forensic Psychologists, *Specialty Guidelines for Forensic Psychologists*, 15 LAW & HUM. BEHAV. 655 (1991).

only one custody litigant has insufficient and biased information about the larger family system, and should not offer a forensic opinion. Similarly, the therapist is offering testimony beyond the scope of first-hand knowledge, including providing testimony about individuals whom the therapist has not personally evaluated. The therapist may be advancing testimony beyond the scope of his or her training and expertise. The therapist has two mutually exclusive aims (e.g. remaining the therapeutic ally of the patient and providing an unbiased opinion to the court), and may also be guilty of malfeasance (doing harm) to the patient. Finally, the therapist is likely in violation of ethical codes. Therapists who proffer expert opinions about psycholegal issues are not only merging the clinical and forensic paradigms, but are also substituting clinical judgment for forensic investigation. Although the provision of such testimony is not *per se* actionable, it constitutes poor professional practice and fails to meet professional practice guidelines.<sup>18</sup>

Another example of the inappropriate merging of clinical and forensic paradigms, this one from the reverse perspective, is when a forensic evaluator refuses to release test data to counsel on the grounds that such release would violate the “confidentiality” of the litigants, despite receipt of valid authorizations for the release of information from both parties. Such a refusal raises a number of substantive and procedural problems. For example, it is unclear on whose behalf the therapist-patient privilege is being asserted, particularly when both litigants want the information. The identities of “patient” and “therapist” are similarly indistinct, particularly when no mental health services have been delivered or received. There are due process implications to denying litigants their right to review the evidence (data) to be used at trial. Moreover, there exists an *ab initio* absence of any expectation of confidentiality in the context of forensic evaluation. Finally, if the evaluator refuses to release the data upon which his or her conclusions are based, then an argument can be made that the evaluator’s testimony and the basis for it (e.g. the report) should be similarly barred. Perhaps in partial recognition of these issues, the most recent version of the *Ethical Principles*

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<sup>18</sup> See, e.g., American Psychological Association, *Guidelines for Child Custody Evaluations in Divorce Proceedings*, 49 AM. PSYCHOLOGIST 677 (1994).



of *Psychologists and Code of Conduct* has removed all ambiguity regarding psychologists' duty to release raw test data pursuant to a valid release.<sup>19</sup>

Thus, forensic evaluation and therapeutic assessment differ in terms of conceptual parameters (e.g. purpose, nature of professional relationship) as well as structural parameters (e.g. identity of the client, limitations on confidentiality).<sup>20</sup> Moreover, many commentators have noted that what makes forensic mental health evaluation particularly unique is its *functional approach*.<sup>21</sup> Essentially, a functional approach to evaluation necessitates the assessment of actual behaviors and skills; as such, a functional approach consists of the assessment of *competencies*.<sup>22</sup> The objectives of a functional forensic approach include an assessment of a litigant's strengths and deficits in the areas defined by the relevant legal standard; an assessment of the reasons for any competency deficits; and an assessment of the ways in which these deficits affect behaviors relevant to the pending legal issue.<sup>23</sup>

In the context of a CCE, a functional approach requires that the assessment of parenting capacity address "what the caregiver understands, believes, knows, and is capable of doing" related to childrearing.<sup>24</sup> The focus of such an assessment must be on the parent's competencies *as a parent*, and on the parent-child relationship.<sup>25</sup> Moreover, because children will vary according to the demands they place on their caregivers,<sup>26</sup> a functional assessment

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<sup>19</sup> American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct*, 57 AM. PSYCHOLOGIST 1060 (2002). § 9.04 ("Release of Test Data") ("Pursuant to a client/patient release, psychologists provide test data to the client/patient or other persons identified in the release").

<sup>20</sup> Kirk Heilbrun, *PRINCIPLES OF FORENSIC MENTAL HEALTH ASSESSMENT* (2001).

<sup>21</sup> Thomas Grisso, *EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS* (1986); Melton et al, *supra* note 8.

<sup>22</sup> Grisso, *supra* note 21.

<sup>23</sup> Thomas Grisso, *COMPETENCY TO STAND TRIAL EVALUATIONS: A MANUAL FOR PRACTICE* (1988).

<sup>24</sup> Grisso, *supra* note 21, at 201.

<sup>25</sup> Karen S. Budd, *Assessing Parenting Competence in Child Protection Cases: A Clinical Practice Model*, 4 CLINICAL CHILD AND FAM. PSYCHOL. REV. 1 (2001).

<sup>26</sup> For example, very different parenting demands are presented by the following three children: a 10-year-old who is socioemotionally mature and in-

of parenting competency must also focus on each child's developmental needs. CCEs should therefore emphasize each parent's caregiving strengths and deficits, each child's developmental needs (and corresponding caregiving demands), and the resultant *quality of fit* between each parent and each child. Areas of parental competencies to be assessed include caregiving beliefs and values, disciplinary and behavior management strategies, methods of providing structure and support, methods of providing affection and nurturance, and developmental expectations and knowledge.

### **Expert Testimony in Child Custody Evaluations**

Expert testimony regarding parenting competency and comparative custodial suitability must also meet legal standards of admissibility. Prior to 1993, the general standard for admissibility of expert testimony in most jurisdictions was the *Frye*<sup>27</sup> rule, which permits admission of evidence when the foundational scientific principle has achieved "general acceptance" in the scientific field. However, in 1993, the U.S. Supreme Court redefined the federal standards for expert testimony. In *Daubert v. Merrell Dow Pharmaceuticals Inc.*,<sup>28</sup> the court reinterpreted Rule 702 of the Federal Rules of Evidence and established criteria for the admissibility of scientific expert testimony. Amended Rule 702 reads:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if, (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.<sup>29</sup>

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tellectually gifted; a 10-year-old who is socioemotionally mature and intellectually gifted, but who has a serious physiological disorder that requires a complex daily medical regimen; and a 10-year-old who is emotionally, behaviorally, and/or developmentally delayed.

<sup>27</sup> *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

<sup>28</sup> 509 U.S. 579, 113 S. Ct. 2786 (1993).

<sup>29</sup> Federal Rules of Evidence. United States Code. Title 28.

The *Daubert* court held that the word scientific implies “a grounding in the methods and procedures of science,” and that the word knowledge implies “more than subjective belief or unsupported speculation.”<sup>30</sup> Thus, in any case in which a party seeks to admit scientific or expert testimony, the judge must first ascertain whether the testimony would assist the trier of fact in assessing the disputed issue, as well as whether the testimony has a scientific connection to a disputed issue. If the answer is affirmative, the judge must inquire whether the reasoning or methodology underlying the testimony is scientifically valid, and whether that reasoning or methodology can be properly applied to the facts in issue. In this sense, the *Daubert* ruling suggests that the judge is responsible for ensuring that expert testimony is based upon methods and procedures that are both *reliable* and *relevant* to the underlying legal issue.<sup>31,32</sup>

<sup>30</sup> *Daubert*, 113 S. Ct. at 2797.

<sup>31</sup> Not all states have adopted the *Daubert* standard for admissibility of expert testimony. Some states have retained the *Frye* general acceptance criterion, or some modification thereof, or are using a combination of *Frye* and *Daubert*. It is essential, then, to attend to the evidentiary standards of the jurisdiction in which the testimony is given. Generally, even in locales where *Frye* and similar standards continue in force, custody evaluators are increasingly expected to base their opinions on scientifically sound methods. At minimum, evaluators should clearly state the methodological basis for their opinions.

<sup>32</sup> In jurisdictions that continue to use the *Frye* rule, the proponent of the expert testimony must establish the qualifications of the expert, as well as that the espoused theory has gained general acceptance in the expert's scientific field. When the expert testimony being offered is not scientific, but rather is based upon observation and experience, *Frye* does not apply and no *Frye* hearing is required. However, the court may still conduct a hearing on the reliability of the testimony being offered. *Berry v. City of Detroit*, 25 F.3d 1342, 1349-50 (6th Cir. 1994). In a *Frye* jurisdiction, counsel should be prepared to lay the following foundation for admissibility of expert testimony: (1) the evidence that is being proffered; (2) the fact that the proffered testimony will assist the trier of fact in understanding the evidence or determining facts in issue (and the way in which the proffered testimony will so assist); (3) whether the proffered testimony constitutes “science;” and (4) the qualifications of the expert (including knowledge, skill, training, experience, and education) to testify and render an opinion. *See, e.g.*, *In re Jawad*, 759 N.E.2d 1002 (Ill. App. Ct. 2001). Whether or not *Daubert* has replaced *Frye* in a given jurisdiction, the concepts established by *Daubert* seem to be finding their way into *Frye* jurisdictions. *See, e.g.*, *Harris v. Cropmate Co.*, 706 N.E.2d 55 (Ill. App. Ct. 1999) for a comparison of *Daubert* and *Frye* that describes the evolution of *Frye* into a “*Frye* plus reliability” standard for the introduction of novel scientific evidence.

According to *Daubert*, a “scientific expert” is an expert who relies upon the application of scientific principles, rather than upon skill or experience, in forming his or her opinions. Moreover, according to *Kumho Tire Co., Ltd. v. Carmichael*,<sup>33</sup> *Daubert* applies to all expert testimony, not just to scientific testimony. Thus, in *Daubert* jurisdictions, the distinction between scientific and non-scientific expert testimony is not significant in establishing admissibility; the same criteria apply to both. Moreover, the admissibility of expert testimony based upon personal observation and clinical experience is subject to judicial scrutiny regarding its reliability. Expert testimony that goes to the causation of a condition is also subject to scrutiny for reliability.<sup>34</sup>

The *Daubert* court made clear that when it used the term *reliability*, it was referring both to scientific reliability and scientific validity. Essentially, scientific reliability refers to consistency. In the realm of psychological testing, scientific reliability refers to the consistency of test scores. For example, assume that a psychologist wishes to construct a new measure of depression, with responses summed on a scale of zero to one hundred. If a test subject takes the test four separate times, and each time receives a widely divergent score (despite the fact that his or her mood has remained stable), then we can say that the test is not reliable, since the test subject did not receive scores that were consistent over time. Similarly, if the test subject receives widely divergent scores when different psychologists administer the measure, then we can say that the test is not reliable, since the test subject did not receive scores that were consistent across raters. Another way to think about reliability is as the answer to the question, “Are we measuring something (e.g. a genuine trait, behavior, factor, or phenomenon) consistently?”

Scientific validity refers to accuracy and utility (mental health professionals use the term “validity” to refer to what legal professionals call “reliability”). In the realm of psychological testing, scientific validity refers to the extent to which the test measures what it purports to measure. In the example above,

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<sup>33</sup> 526 U.S. 137 (1999).

<sup>34</sup> See, e.g., *Commonwealth v. Lanigan*, 641 N.E.2d 1342, 1348 (Mass. 1994), which applies the *Daubert* and *Kumho Tire Co.* criteria. See also *In Re Canovan's Case*, 733 N.E.2d 1042, 1047-51 (Mass. 2000) for a summary of the standards for admission of expert testimony.

once the psychologist has established that the new measure of depression is reliable, he or she will want to know whether it actually measures depression - as opposed to, say, the physical lethargy that frequently accompanies depression. If that is the case, the measure will not be able to discriminate between test subjects who are depressed and test subjects who are experiencing physical illness but who are not depressed (e.g. the measure will lack "discriminant validity"). Another way to think about validity is as the answer to the question, "Are we measuring what we think we're measuring?" As the above example makes clear, a test must be scientifically reliable to be scientifically valid, although the reverse is not true. In other words, reliability is part of what makes a test valid, since if a test cannot consistently measure some factor, then it is highly unlikely that the test can impart any useful information.

*Relevance* refers to the extent that the gathered data bear upon the issue before the court. In the context of a CCE, in which the issue before the court is one of comparative custodial suitability, relevant data will include information that relates to the litigants' parenting strengths and deficits, the child's relationship with each parent, and the quality of fit between the child's needs and the parents' respective caregiving competencies. For example, data relevant to a CCE will include information regarding how each parent supervises, disciplines, supports, nurtures, and instructs the child.

Relevance also refers to the extent to which a data-gathering technique is valid (e.g. useful) for the purpose for which it is used. A psychological test can be reliable and valid, and still lack relevance in the context of a CCE because it is not valid for the purpose of determining parenting capacity. For example, with the exception of serious cognitive impairment that would make adequate childcare difficult, there is no empirically established relationship between intellectual functioning and parenting capacity.<sup>35</sup> Since there is no way to discern how a parent's I.Q. scores might impact (if at all) on his or her parenting capabilities, it is unlikely that tests of intellectual functioning will be valid (e.g. useful) for the purpose of determining parenting competen-

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<sup>35</sup> Thomas Grisso, *The Economic and Scientific Future of Forensic Psychological Assessment*, 42 AM. PSYCHOLOGIST 831 (1987).

cies. In this sense, tests of intellectual functioning are not relevant to the legal issue of comparative custodial suitability.

Reliability and relevance can be illustrated by the *multi-trait/multi-method model of assessment*. Forensic assessment is predicated upon the idea of convergent validity, or the idea that particular issues should be investigated from a variety of viewpoints and with a variety of methods. Addressing the same issue via a number of different data sources will likely increase the reliability of the information gathered, since the evaluator can then look for consistent trends across the data. Hence, competent forensic evaluation utilizes multiple sources of information to assess multiple aspects of a situation; this is referred to as the multi-trait/multi-method model of assessment. This model of obtaining convergent data from multiple sources for a CCE has achieved increasing professional consensus over the past five years, and has been described as the model that best serves the evidentiary needs of the court.<sup>36</sup> Furthermore, this model is included in almost all recommended ethical standards and professional practice guidelines for conducting forensic evaluations, including the American Psychological Association,<sup>37</sup> the Association of Family and Conciliation Courts,<sup>38</sup> and the Specialty Guidelines for Forensic Psychologists.<sup>39</sup>

Hence, the objective of a CCE is to assess functional parenting competencies in a reliable and relevant manner. Currently, there exist a number of different CCE models;<sup>40</sup> no requisite set of procedures or tests has been defined. However, there is an emerging consensus in the behavioral science literature regarding the manner in which CCEs should be conducted and the procedures that are most likely to ensure the assessment's reliability

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<sup>36</sup> Ackerman & Ackerman, *supra* note 7; Jon K. Amundson, Roshni Daya, & Eamon Gill, *A Minimalist Approach to Child Custody Evaluations*, 18 AM. J. FORENSIC PSYCHOL. 63 (2000).

<sup>37</sup> American Psychological Association, *supra* note 22.

<sup>38</sup> Association of Family and Conciliation Courts, *Model Standards of Practice for Child Custody Evaluations*, 32 FAM. & CONCILIATION CTS. REV. 504 (1994).

<sup>39</sup> Committee on Ethical Guidelines for Forensic Psychologists, *supra* note 21.

<sup>40</sup> See, e.g., Marc J. Ackerman, CLINICIANS GUIDE TO CHILD CUSTODY EVALUATIONS (1995); Philip M. Stahl, CONDUCTING CHILD CUSTODY EVALUATIONS: A COMPREHENSIVE GUIDE (1994).

and relevance. Gould<sup>41</sup> has proposed a five-part methodological framework that synthesizes the legal and behavioral science literature,<sup>42</sup> empirical research,<sup>43</sup> ethical guidelines,<sup>44</sup> and model standards of practice<sup>45</sup> regarding CCEs. This framework for CCE incorporates five core data-gathering components:

- (1) a definition of the scope of the evaluation;
- (2) the use of forensic interview techniques;
- (3) psychological testing with objective and self-report measures;
- (4) direct behavioral observations of parent-child interactions; and
- (5) interviews with collateral sources and review of relevant records.

Consistent with *Daubert*, this approach to CCEs assesses parental competencies within the parameters of reliability and relevance, and thus constitutes a genuinely scientific methodology. Moreover, this approach can also be used as an organizational

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<sup>41</sup> Gould, *supra* note 7.

<sup>42</sup> See, e.g., Grisso, *supra* note 25; Melton et al, *supra* note 8; Richard Rogers, *DIAGNOSTIC AND STRUCTURED INTERVIEWING: A HANDBOOK FOR PSYCHOLOGISTS* (1995); Benjamin M. Schutz, Ellen B. Dixon, Joanne C. Lindenberger, & Neil J. Ruther, *SOLOMON'S SWORD: A PRACTICAL GUIDE TO CONDUCTING CHILD CUSTODY EVALUATIONS* (1989); Amundson et al, *supra* note 40; David L. Faigman, *The Evidentiary Status of Social Science under Daubert: Is it 'Scientific,' 'Technical,' or 'Other' Knowledge?*, 1 *PSYCHOL., PUB. POL'Y*, & L. 960 (1995); David L. Faigman, *Struggling to Stop the Flood of Unreliable Expert Testimony*, 76 *MINN. L. REV.* 877 (1992); Jane Goodman-Delahunty, *Forensic Psychological Expertise in the Wake of Daubert*, 21 *LAW & HUM. BEHAV.* 121 (1997); Kirk Heilbrun, *The Role of Psychological Testing in Forensic Assessment*, 16 *LAW & HUM. BEHAV.* 257 (1992).

<sup>43</sup> See, e.g., Marc J. Ackerman & Melissa C. Ackerman, *Custody Evaluation Practices: A Survey of Experienced Professionals (Revisited)*, 28 *PROF. PSYCHOL.: RES. & PRAC.* 137 (1997); Peter Ash & Melvin J. Guyer, *Biased Reporting by Parents Undergoing Child Custody Evaluations*, 30 *J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY* 835 (1991); Kay Bathurst, Allen W. Gottfried, & Adele E. Gottfried, *Normative Data for the MMPI-2 in Child Custody Litigation*, 9 *PSYCHOL. ASSESSMENT* 205 (1997); Chery Hysjulien, Barbara Wood, & G. Andrew H. Benjamin, *Child Custody Evaluations: A Review of Methods Used in Litigation and Alternative Dispute Resolution*, 32 *FAM. & CONCILIATION CTS. REV.* 466 (1994).

<sup>44</sup> American Psychological Association, *supra* note 22; Committee on Ethical Guidelines for Forensic Psychologists, *supra* note 21.

<sup>45</sup> Association of Family and Conciliation Courts, *supra* note 42.

structure with which to evaluate the methodological strengths and shortcomings of other CCEs.<sup>46</sup>

Elsewhere, we have reviewed the psycholegal and theoretical foundations of this five-part methodological approach, and presented a conceptual framework for evaluating and critiquing CCEs.<sup>47</sup> Our goal in the present article is to extend our prior discussion by using Gould's five-part methodology as the organizing structure for an analysis of the reliability and relevance of CCEs.

## I. Definition of the Scope of the Evaluation

When a forensic mental health professional begins a CCE, he or she should identify the specific questions to be investigated prior to the initiation of the evaluation.<sup>48</sup> In this way, the evaluator clearly defines the questions and areas of concern that guide the entire evaluation. This approach has been termed a "minimalist approach," because it provides focused support and information for the trier of fact in determining a child custody dispute.<sup>49</sup> Thus, an important responsibility of the child custody evaluator is to take the legally relevant dimensions that are the court's concern and to define each dimension in a manner that allows for proper psychological assessment. This results in a *reliable* child custody evaluation. Moreover, the evaluator must also demonstrate that these psycholegal dimensions have an empirical

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<sup>46</sup> Jonathan W. Gould & Debra H. Lehrmann, *Evaluating the Probative Value of Child Custody Evaluations*, 53 JUV. & FAM. CT. J. 17 (2002); Jonathan W. Gould & Lisa C. Bell, *Forensic Methods and Procedures Applied to Child Custody Evaluations: What Judges Need to Know in Determining a Competent Forensic Work Product*, 38 JUV. & FAM. CT. J. 21 (2000).

<sup>47</sup> Robert M. Galatzer-Levy, Dana Royce Baerger, Jonathan W. Gould, & Sandra G. Nye, *Evaluating the Evaluation: How to Understand and Critique Custody Evaluations*, in 2003 FAMILY LAW UPDATE (Ron Brown & Laura Morgan, eds., 2003).

<sup>48</sup> Jonathan W. Gould, *Conducting Scientifically Crafted Child Custody Evaluations, Part One: A Model for Interdisciplinary Collaboration in the Development of Psycholegal Questions Guiding Court Ordered Child Custody Evaluations*, 37 FAM. & CONCILIATION CTS. REV. 64 (1999); Jonathan W. Gould, *Conducting Scientifically Crafted Child Custody Evaluations, Part Two: A Paradigm for the Forensic Evaluation of Child Custody Determination*, 37 FAM. & CONCILIATION CTS. REV. 135 (1999).

<sup>49</sup> Amundson et al, *supra* note 36.



foundation in the psychological literature, and that they are related to the questions that are before the court.<sup>50</sup> This results in a *relevant* child custody evaluation.

The scope of a custody evaluation is properly determined by the court's order. Court orders regarding CCEs vary widely in the extent to which they specify the questions to be addressed by the evaluator. Frequently, court orders simply direct the litigants to undergo an evaluation in accordance with a cited custody statute. Alternatively, many orders request a "psychological evaluation" of the parent-litigants and their children. Too often, child custody evaluators do not further query the court or the attorneys involved in the case regarding the specific concerns that led to the order for evaluation. This common practice on the part of evaluators constitutes poor practice.<sup>51</sup> Moreover, it may reflect a lack of understanding that the proper role of a forensic specialist in assisting the trier of fact is to provide reliable psychological information that is relevant to the pending legal issue.

Judges and attorneys can greatly increase the utility of evaluations by crafting court orders that pose referral questions specific to each family. This practice increases the likelihood that evaluators will address matters of central importance to the litigation, and diminishes the likelihood that evaluators will address irrelevant issues that confuse the litigation and increase the cost of the evaluation. For example, in a case in which one party has made allegations of excessively harsh physical discipline against the other, useful referral questions might focus on issues such as the manner in which each parent disciplines the children, the manner in which the children respond to each parent's behavior management strategies, whether the children fear the parent against whom the allegations were made, and each parent's capacity to tolerate frustration.

In the context of defining the scope of the evaluation, *problems of reliability* refer to instances in which the evaluator uses unreliable methods or goes beyond the scope of his or her training and expertise in offering opinions to the court. For example, many child custody evaluators go beyond their expertise

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<sup>50</sup> Failing that, the evaluator must make clear the basis on which his or her opinions are given, so that the court may decide how much weight to give the opinion.

<sup>51</sup> Gould, *supra* note 48.

in offering opinions on issues such as the comparative educational quality of school districts, the quality of community life in a particular geographic area, or the benefits of certain financial arrangements. When evaluators engage in this practice, they are no longer properly testifying as experts.

*Problems of relevance* refer to instances in which the evaluator offers opinions about issues irrelevant to the pending legal issue, or fails to explain the relationship between the parties' observed capacities and the pending legal issue. A particularly problematic situation can arise when an evaluator offers opinions about issues that are both irrelevant to the pending legal issue and highly prejudicial. For example, consistent with their primary training as clinicians who diagnose and treat psychiatric disorders, many child custody evaluators routinely report psychiatric diagnoses for both parent-litigants. We maintain that it is poor professional practice for evaluators to report such diagnoses in the absence of any indication that the court has concerns about the parents' diagnostic status, and in the absence of any demonstration how these diagnoses impact the litigants' capacity to parent. Placing a child in the primary custodial care of a parent suffering from "Generalized Anxiety Disorder and Personality Disorder Not Otherwise Specified, with avoidant and obsessive-compulsive features" sounds almost negligent — despite the fact that this diagnosis may have nothing whatever to do with caregiving capacity.

## II. Interviewing

A CCE represents an assessment of two parents' comparative custodial strengths and limitations. Thus, the evaluator must gather interview information regarding the litigants' parenting competencies according to variables that are directly related to the pending legal issue. This includes gathering information regarding, among other relevant variables, the parents' respective capacities to nurture, support, discipline, instruct, and supervise their child. In this manner, the evaluator will be able to compare and assess the parents' responses to interview questions that are directly relevant to the court's concerns. Moreover, the evaluator must make direct comparisons of similar sets of parental competencies in order to reach conclusions that will be of use to the court.

The child custody evaluator ensures the *relevance* of the interviews by asking questions that directly relate to the pending legal issue. According to the functional approach to CCEs,<sup>52</sup> a parent's past and present caretaking abilities are of greater relevance than distal events that do not relate to parenting. For example, in a case in which there are concerns regarding one parent's alleged propensity for harsh corporeal discipline, the evaluator should interview both parents about their disciplinary styles, behavior management strategies, methods of dealing with frustration, and beliefs regarding concepts such as obedience and deference to authority. Issues such as a parent's work history or prior romantic relationships may indeed have bearing on a given case, and we are not suggesting that evaluators should refrain from addressing topics not directly related to childcare. However, such issues should be evaluated within a prevailing discussion of functional parenting competencies. The evaluator's primary interviewing goal should be to elicit information from both parents regarding their caregiving strengths and limitations.

The child custody evaluator ensures the *reliability* of the interviews by gathering a reasonably uniform set of interview data, and by examining a parent's responses for consistency across various sources of parenting information. For example, a parent's responses can be examined for consistency across time (i.e. a comparison of the parent's responses to identical questions given at different times), across question formats (i.e. a comparison of the parent's responses to structured and unstructured questions), across parties (i.e. a comparison of the parent's responses to the responses given by the other parent, and/or by the children), and across collateral sources (i.e. a comparison of the parent's responses with the responses given by collateral sources).<sup>53</sup> Returning to the case in which allegations have been made regarding one parent's excessively harsh physical discipline, the evaluator can examine each parent's responses to questions of disciplinary and behavior management strategies for consistency across a number of different sources of information. For example, one parent's vociferous denial of allegations of excessive

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<sup>52</sup> See, e.g., Grisso, *supra* note 21.

<sup>53</sup> Richard Rogers, *supra* note 46; Richard Rogers, *Structured Interviews and Dissimulation*, in *CLINICAL ASSESSMENT OF MALINGERING AND DECEPTION* (Richard Rogers ed. 1988).

physical punishment may be contradicted by interview data generated by the other parent, by the children, by a variety of collateral sources, and by the allegedly abusive parent's own responses to interview questions regarding parenting values and beliefs, disciplinary strategies, and frustration tolerance.

When reviewing a CCE, it is also important to assess the weight assigned by the evaluator to the interview data. In distinguishing between therapeutic and forensic roles, Stuart Greenberg and Daniel Shuman state that forensic evaluators must place a higher level of scrutiny on interview information than do therapists.<sup>54</sup> They note that forensic interviews take place in a significantly different context than do therapeutic or diagnostic interviews. In a therapeutic interview, the patient perceives that there is benefit to providing accurate and detailed information about his or her emotional condition, with the expectation that such information will assist treatment. In this context, the patient is motivated to provide the therapist with information that is as truthful as possible, even if the patient harbors concerns that such information might create an unfavorable impression. In contrast, in a child custody interview, the parent perceives that there is benefit to providing complimentary information about his or her parenting, with the expectation that such information will assist his or her legal goal. In this context, the parent is motivated to supply the evaluator with caregiving information that is as favorable as possible, and to withhold information that might create an unfavorable impression of his or her parenting. Although it is possible that a given parent is being truthful and not attempting to influence the interview, it is more likely that the parent is attempting to positively influence the evaluator's perception of the parent's caregiving capabilities. It is important to remember that mental health professionals are not more skilled than are laymen at assessing the credibility of interview statements.<sup>55</sup> Therefore, in a forensic context, evaluators should assess the utility of interview data by comparing them to other sources of information, and by searching for general trends and consistencies across multiple data sources.

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<sup>54</sup> Greenberg & Shuman, *supra* note 11.

<sup>55</sup> Paul Ekman, *TELLING LIES* (1992).

One way that a child custody evaluator can increase the reliability and relevance of interviews is by using a questionnaire that asks parents a standard set of questions, while also providing for opportunities to ask questions regarding areas of functioning that may be unique to only one parent. This method is referred to as a *semi-structured interview format*.<sup>56</sup> Unlike a fully structured interview format, which consists of a fixed set of questions that allow no opportunity for digression, a semi-structured format is sufficiently flexible to permit exploration of topics that are not predetermined but that may be of substantial importance nonetheless. Unlike an unstructured interview format, which lacks any predetermined questions, a semi-structured format is sufficiently methodical to permit a common set of questions to be asked to each parent. A semi-structured interview format allows the evaluator to ask the same set of general questions to each parent, while also permitting deviation from those questions into areas unique to that particular parent and his or her relationship with the child.<sup>57</sup> In this way, while collecting a set of data common to both parents, the evaluator can pursue additional areas that are specific to one parent or to the context of the evaluation. Therefore, the use of a semi-structured interview protocol provides a systematic and scientific means of data collection that is consistent with evidentiary requirements for scientific information.<sup>58</sup>

When evaluating the quality of interviews in the context of a CCE, attorneys should be attentive to problems of reliability and relevance. *Problems of reliability* refer to the evaluator's gathering of interview data in a subjective, partial, or unscientific manner. One example of a reliability problem is "confirmatory bias," or an evaluator's tendency to seek out data that supports his or her preconceived hypothesis, and to ignore data that is inconsistent with that hypothesis.<sup>59</sup> Confirmatory bias can significantly

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<sup>56</sup> See, e.g., Grisso, *supra* note 21; Schutz et al, *supra* note 42.

<sup>57</sup> Gould, *supra* note 7; Gould & Lehrmann, *supra* note 46.

<sup>58</sup> Gould & Bell, *supra* note 50; Jonathan W. Gould & Philip M. Stahl, *The Art and Science of Child Custody Evaluations: Integrating Clinical and Mental Health Models*, 38 FAM. & CONCILIATION CTS. REV. 392 (2000).

<sup>59</sup> Randy Borum, Randy Otto, & Stephen Golding, *Improving Clinical Judgment and Decision Making in Forensic Evaluation*, 21 J. Psychiatry & L. 35 (1993).

distort the reliability and utility (validity) of interview data, and can lead the evaluator to inaccurate or one-sided conclusions unsupported by other evidence. Gould provides an excellent example of how confirmatory bias can diminish the reliability of interview information in a CCE:

The evaluator directed the judge to pay particular attention to the father's interview data. It was highly credible, she testified. The father had been living with his 17-year-old son for about a year. Each had a history of relationship difficulties with the mother. . . .

The evaluator interviewed the father and son over 3 days. She concluded that the father and son had an accurate view of the mother. Their opinions were judged to be credible and consistent. Based solely upon the information drawn from the father's and son's interviews, the evaluator concluded that the mother was abusive and therefore a threat to her children. Custody of all three boys was recommended to the father.

When the mother was interviewed, the evaluator began by complimenting her son and former husband for teaching her so much about their family life. She followed this statement with asking the mother, "How long have you been abusing your children?" In the body of the report, the evaluator commented that as the interview with the mother continued, the mother appeared to become increasingly defensive and unwilling to provide detailed answers. The evaluator never saw how her opening comments frightened the mother, creating a cognitive set of caution and distrust. Based on the mother's defensive responses, the evaluator concluded that the child's credibility was firmly established. . . .

When I [JWG] became involved and gained access to collateral information, it became clear that the younger children's teachers, coaches, youth minister, therapist, and neighborhood parents described mother-child interactions as above average. These same sources described the father-child and father-mother interactions as significantly problematic. The father was a weekend alcoholic who often became violent and verbally abusive. Police records showed three arrests for DUI and one court appearance for disorderly conduct. The 17-year-old son had also been drinking for about 18 months and developed a style of verbal abuse similar to his father's. He had his license suspended until he was 21 for driving while under the influence. Father and son often drank together during the evenings.

Furthermore, [test] data revealed a father whose scores were significantly elevated on a number of scales suggestive of severe psychopathology. Elevation on each scale was tied directly to collateral data supportive of the father's substance abuse, disregard for rules, and highly suspicious beliefs. . . .

Finally, interview data from the younger children revealed children who were afraid of their father, particularly when he was drinking. In separate interviews, they reported that their older brother often hit them and verbally abused them while the father was in the kitchen observing their interactions, sipping a beer and doing nothing to intervene.<sup>60</sup>

*Problems of relevance* refer to the evaluator's gathering of interview data in a manner that fails to address the pending psycholegal issue of comparative parenting capacity. One example of a relevance problem is the use of a traditional "clinical interview" in the context of a CCE. The primary purpose of a clinical or diagnostic interview is the identification of psychopathology and emotional distress. An additional purpose is the identification of intervention or treatment methods most likely to facilitate the subject's recovery. Unless the court will evaluate an issue regarding a parent's diagnostic status or psychological well-being, clinical data regarding psychopathology is not relevant to the pending legal issue. Child custody evaluators who engage in traditional clinical interviewing are not only likely to fail to adequately address the pending legal issue, but are also on a "fishing expedition" for psychopathology that can lead them astray from the court's need for reliable and relevant information.

An example is drawn from a recent evaluation of a CCE: one of us [DRB] reviewed a child custody evaluation in which it was clear that the evaluator had used traditional clinical interviews with both parents. The evaluator did not discuss any psychological or functional concepts relevant to parenting capacity, including parenting philosophies or values, parenting practices, parenting strengths and weakness, or disciplinary or behavior management strategies. The evaluator did not address the parents' concerns regarding one another's respective parenting capacity, or the parents' assessment of their own caregiving strengths and weakness. Moreover, the evaluator did not report any collateral information regarding either parent's functional parenting behavior. Instead, the majority of the report consisted of voluminous material related to each parent's individual developmental history and personality functioning, including perinatal and gestational development, memories of their infancy and toddler years, social and academic experiences in elementary and

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<sup>60</sup> Gould, *supra* note 7, at 74-75.

middle school, and pre-adolescent and adolescent experimentations with alcohol, drugs, and sexuality. Although there may exist cases for which such a thorough description of parents' early development is appropriate, when such a description is offered in the absence of any information relevant to parenting or the issues before the court, we believe that the use of such interview techniques poorly serves the needs of the court. The result is likely to be a report that lacks the relevant information needed to render a CCE of psycholegal utility to a court.

### III. Psychological Testing

The purpose of psychological testing in CCEs is to provide the court with a set of objective, scientific data. Psychological tests can provide a reliable and valid set of data that allow for more precise measurement of individual characteristics than can be obtained from interviews alone. Along with data generated by other sources of information, psychological test data can provide objective support to an expert's opinion and produce data grounded in empirical research.<sup>61</sup> Moreover, the objective data generated by psychological tests can balance the bias and potential errors inherent in clinical interview data.<sup>62</sup> By using multiple tests, the evaluator can search for trends across the data, and can cross-check his or her hypotheses. By incorporating multiple measures of multiple dimensions of functioning, the evaluator can gather a wide range of information with which to understand each parent's comparative caregiving strengths and limitations, both as compared to one another and as compared with a group of peers.<sup>63</sup>

In his analysis of the role of psychological testing in forensic evaluation, Kirk Heilbrun lists seven criteria that should be met

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<sup>61</sup> David L. Shapiro, *PSYCHOLOGICAL EVALUATION AND EXPERT TESTIMONY: A PRACTICAL GUIDE TO FORENSIC WORK* (1984).

<sup>62</sup> *FORENSIC APPLICATIONS OF THE MMPI-2* (Yossef S. Ben-Porath, John R. Graham, Gordon C.N. Hall, Richard D. Hirschman, & Maria S. Zaragoza, eds., 1995); Joseph T. McCann & Frank J. Dyer, *FORENSIC ASSESSMENT WITH THE MILLON INVENTORIES* (1996).

<sup>63</sup> Gregory J. Meyer, Stephen E. Finn, Lorraine D. Eyde, Gary G. Kay, Kevin L. Moreland, Robert R. Dies, Elena J. Eisman, Tom W. Kubiszyn, & Geoffrey M. Read, *Psychological Testing and Psychological Assessment: A Review of Evidence and Issues*, 56 *AM. PSYCHOLOGIST*, 128 (2001).



by assessment instruments used in a forensic context.<sup>64</sup> Heilbrun states that tests used in forensic mental health assessment should be: (1) commercially available, adequately documented in technical manual, and reviewed in at least two professional sources; (2) sufficiently reliable; (3) relevant to the ultimate legal issue, or to a psychological construct underlying the ultimate legal issue; (4) administered in a standard manner; (5) applicable to the population being assessed; (6) evidencing an objective test format with an actuarial basis for diagnosis and prediction (as opposed to a subjective or impressionistic interpretive method); and (7) amenable to the explicit assessment of response style.

Essentially, these seven criteria demand that assessment instruments used in a forensic context be both reliable (i.e. valid) and relevant.<sup>65</sup> Important considerations in choosing a psychological test include published psychometric data supporting its reliability and validity, its acceptance as scientific evidence in other jurisdictions, its relevance to the psycholegal questions being examined, and its basis in scientific theory.<sup>66</sup> An additional consideration is that it be a tool generally relied upon by professionals in the field for use in child custody matters.<sup>67</sup> Finally, the test should generate hypotheses that are directly relevant to the psycholegal questions posed by the court. For example, in the assessment of parental competencies, several personality tests

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<sup>64</sup> Kirk Heilbrun, *The Role of Psychological Testing in Forensic Assessment*, 16 LAW & HUM. BEHAV. 257 (1992).

<sup>65</sup> Forensic assessment is premised upon the idea of convergent validity. A critical issue in the use of a multi-trait/multi-method model is the extent to which distinct assessment methods provide unique versus redundant information. It is important to recognize that more data does not always mean more accurate results. For example, when using tests that are intercorrelated, it is possible that the predictive power of the two tests combined is less than the predictive power of the psychometrically sounder test. The idea behind multi-trait/multi-method assessment is to increase the predictive power of the data. If a method does not increase the ability of the data to predict the behavior of interest, then there is no incremental validity derived from the use of the method. If there is no incremental validity, then there is no reason to administer the test.

<sup>66</sup> FORENSIC APPLICATIONS OF THE MMPI-2, *supra* note 66; McCann & Dyer, *supra* note 66; Kenneth S. Pope, K.S., James N. Butcher, & Joyce Seelen, *THE MMPI, MMPI-2 & MMPI-A IN COURT: A PRACTICAL GUIDE FOR EXPERT WITNESSES AND ATTORNEYS* (2nd ed., 2000).

<sup>67</sup> Ackerman & Ackerman, *supra* note 43.

are available that may be used to generate hypotheses about whether measured personality features influence an individual's parenting. However, it is important to note that no personality tests measure parenting competency, nor has any constellation of personality traits been linked to skill as caregiver.<sup>68</sup> It is impossible to determine from test results alone if a parent's measured response patterns are related, either directly or indirectly, to parenting competencies.<sup>69</sup>

When discussing test results, child custody evaluators must remember that whether the test results accurately describe a parent is dependent upon the degree to which other sources of information provide confirming or disconfirming data. Current forensic practice is to frame psychological test interpretations as hypotheses or general trends, and to avoid considering test results in isolation.<sup>70</sup> Similarly, current forensic practice is to describe interpretative statements as actuarial and expert predictions based upon test results. Personality test results may indicate that a parent exhibits characteristics similar to individuals with similar response patterns; however, such test results are probabilistic in nature. Moreover, evaluators should interpret test results cautiously and in light of other data collected from multiple sources.<sup>71</sup> It is critical that the evaluator understand that test results provide only hypotheses, which then must be subjected to verification from alternative data sources.<sup>72</sup> Finally,

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<sup>68</sup> Grisso, *supra* note 21; McCann & Dyer, *supra* note 62.

<sup>69</sup> Schutz et al, *supra* note 42.

<sup>70</sup> Elizabeth M. Ellis, *DIVORCE WARS: INTERVENTIONS WITH FAMILIES IN CONFLICT* (2000); Brodzinsky, *supra* note 9.

<sup>71</sup> Gould, *supra* note 7.

<sup>72</sup> In *In re B.M.* 682 A.2d 477, 482 (Vt. 1996), a termination proceeding, the Vermont appellate court addressed the limitations of testing in a forensic assessment of parenting capacity:

“[T]he court's emphasis on psychological testing is disturbing. Such tests, when relied on by expert witnesses, may have a small place in the overall evaluation of a person's parenting ability. Parents facing the loss of parental rights, however, must be judged on their conduct, not on their test-taking skills or psychological traits. In this case, for example, the court first labeled [father], based on his MMPI results, as ‘a person with hedonistic, narcissistic and impulsive tendencies and over controlled hostilities.’ The court then linked these personality traits to likely behaviors, noting that ‘[s]uch persons typically seek immediate gratification, blame others for their own problems, and manipulate others for their own desires, experiencing little guilt about the effects of their

the use of psychological tests in a forensic evaluation should include a discussion of the limitations of the test data.<sup>73</sup>

Examination of the scientific integrity of the measurement tools used in CCE goes to the heart of the question of *reliability*. If an evaluator elects to use a given measurement tool in a CCE, the tool should evidence an appropriate level of scientific reliability and validity with regard to the specific issue in dispute. Such psychometric information allows the evaluator to consider the strength and limitations of the test data; without such information, evaluators have little ability to gauge the accuracy of the data upon which their conclusions are based. If a test used to measure a factor does not have adequate reliability, then the data upon which the evaluator's interpretations, conclusions, and recommendations are based will be seriously flawed.<sup>74</sup> Moreover, if an evaluator elects to use a given measurement tool in a CCE, the evaluator should provide information about whether the instrument in question has normative data for male and female custody litigants (and, if so, how each parent's scores com-

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actions on others.' Finally, the court closed the door on possible changes or improvements, finding that 'these are consistent and pervasive traits which no form of intervention will change.' Although recognizing that parenting skills can be learned, the court nonetheless found that 'in times of stress [father] will fall back on his inherent personality traits.' The court was apparently further persuaded by the correlation of father's test results, finding that the 'PASS results [and] MMPI scores reinforce each other and show a pervasive lack of empathy.' We are unable to share the court's confidence in this fact, as the findings and the record lack a meaningful explanation of the purposes, appropriate uses, or scoring methods for these tests. For example, expert testimony and the court's findings emphasize that father's PASS results were 'clinically low.' According to the PASS manual, however, the PASS is scored subjectively, by the individual evaluator (B. Bricklin, Parent Awareness Skills Survey Manual 6, 1990). There is no evidence in the record to explain the expert's scoring decisions or standard for comparison, or to justify reliance on the test score in a proceeding to terminate parental rights. . . . The [PASS] manual provides little help in understanding the test scores, however, because the scoring is subjective. . . . Whether the tests are accurate enough for such use is an open question; any such test raises concerns of cultural, educational, and socioeconomic bias. Moreover, characterizing individuals as bad parents based on 'pervasive traits which no form of intervention will change' is inconsistent with the goal of fostering parental improvement."

<sup>73</sup> Committee on Ethical Guidelines for Forensic Psychologists, *supra* note 21; American Psychological Association, *supra* note 18.

<sup>74</sup> Gould & Lehrmann,, *supra* note 46.

62 *Journal of the American Academy of Matrimonial Lawyers*

pare to such normative data). An increasing pool of empirical data is developing with regard to how male and female custody litigants score on a number of psychological tests commonly used in CCEs.<sup>75</sup>

In addition to demonstrating reliability, psychological tests ought to yield data that are *relevant* to the issues of concern to the court. In other words, psychological tests used in CCEs should demonstrate a valid scientific connection to the pending legal issue. For example, many evaluators use the Minnesota Multiphasic Personality Inventory - Second Edition (MMPI-2) and the Millon Clinical Multiaxial Inventory - Third Edition (MCMI-III) in child custody evaluations.<sup>76</sup> Although neither test directly measures parenting capacity, the inferences drawn from these tests may provide useful information about a parent's personality characteristics and emotional style. These constructs are relevant in the context of a CCE because a parent's psychological functioning is relevant to the issue of comparative custodial suitability. Normative data regarding male and female custody litigants have now been published<sup>77</sup> that enable evaluators to compare a given parent's scores on the MMPI-2 and MCMI-III to normative scores obtained by other custody litigants, thereby further increasing the relevance of the obtained data.

In the context of psychological testing, *problems of reliability* refer to the use of measurements tools that lack the requisite scientific reliability and/or validity. One example of a reliability problem is the use of projective drawings to make inferences about a parent's psychological functioning, or about the issue of comparative parenting ability. Projective drawings lack the necessary validity and reliability for admissibility in court.<sup>78</sup> At a minimum, the subjectivity of the administration and interpretation procedures for projective drawings render them inappropriate for use in a legal proceeding. No normative data exist regarding the personality correlates of projective drawings

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<sup>75</sup> See, e.g., Bathurst et al, *supra* note 47; Joseph T. McCann, James R. Flens, Vicky Campagna, Pamela Collman, Thomas Lazzaro, & Ed Conner, *The MCMI-III in Child Custody Evaluations: A Normative Study*, 1 J. FORENSIC PSYCHOL. PRAC. 27 (2001).

<sup>76</sup> Ackerman & Ackerman, *supra* note 47; Bow & Quinnell, *supra* note 5.

<sup>77</sup> Bathurst et al, *supra* note 47; McCann et al, *supra* note 79.

<sup>78</sup> Faigman, *supra* note 46.

among adults. Similarly, no empirical behavioral science literature exists demonstrating that projective drawings are related to any specific element of a parent-child relationship, or are predictive of any particular parenting practices or developmental outcomes. It therefore constitutes poor professional practice for an evaluator to render psycholegal conclusions about adult personality structure and psychological functioning on the basis of projective drawings.

*Problems of relevance* refer to the use of psychological tests that do not provide data that is related, either directly or indirectly, to the pending legal issue. For example, many child custody evaluators administer measures of intellectual functioning to each parent.<sup>79</sup> However, unless specific concerns arise regarding a parent's intellectual functioning, such data will be irrelevant to the evaluation. In other words, a psychological test ought to provide data that is useful in answering some question or issue before the court. Therefore, unless parental intellectual functioning is an issue before the court, there is no psycholegal reason to administer such a test. Significantly, there exists no empirical data to suggest that parents of above-average intellectual functioning provide more competent parenting than do parents of average intellectual functioning. Similarly, there exists no empirical data that links above-average intellectual functioning with superior caregiving skills, or with any uniquely positive elements of a parent-child relationship. One parent's superior scores on a test of intellectual functioning might inadvertently give the court the incorrect impression that the "smarter" parent will make the "better" parent. In such an instance, the presentation of data that appears to suggest a scientific comparison, but does not, will be more prejudicial than probative.

#### IV. Observation of Parent-Child Interactions

When a forensic evaluator is assessing a parent's caregiving capacities, the evaluator must engage in direct observation of parent-child interactions.<sup>80</sup> This is true regardless of whether the

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<sup>79</sup> Ackerman & Ackerman, *supra* note 43.

<sup>80</sup> Some commentators suggest that such observations are not always necessary for older children involved in custody disputes (*see, e.g.,* Stahl, *supra* note 44). We are not in agreement with this position.

evaluator is assessing child custody, parental competency, or parental risk to the child.<sup>81</sup> For example, the Guidelines for Child Custody Evaluations in Divorce Proceedings state that a child custody evaluation should include “an evaluation of the interaction between each adult and child.”<sup>82</sup> Direct behavioral observation can provide information about a parent’s caregiving strengths and weaknesses, such as a parent’s communication skills, perception of the child, provision of structure and support, manner of expressing love, manner of providing discipline, and knowledge and expectations regarding the child’s developmental needs and abilities. Since the heart of any CCE is the relationship between parent and child, direct behavioral observation increases the *relevance* of the data. Moreover, since observation provides an opportunity to test hypotheses regarding parental strengths and weaknesses, direct behavioral observation increases the *reliability* of the data.

Observation of parent-child interactions can occur in structured or unstructured formats. Structured observational formats typically require a parent and child to engage in a series of tasks, or require an observer to score the parent and child according to a series of interactional ratings. For example, the Parent-Child Early Relational Assessment<sup>83</sup> is a structured parent-child observation system that can be used to assess the quality of the relationship between a young child and his or her parent. The parent and child are observed interacting during four segments of an observational protocol: (1) a feeding exercise; (2) a structured task (e.g. reading); (3) free play; and (4) a separation and reunion.<sup>84</sup> Unstructured parent-child observation consists of simply

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<sup>81</sup> American Psychological Association, *supra* note 18; Association of Family and Conciliation Courts, *supra* note 38; Committee on Professional Practice and Standards, APA Board of Professional Affairs, Guidelines for Psychological Evaluations in Child Protection Matters, 54 AM. PSYCHOLOGIST 586 (1999); Schutz et al, *supra* note 42.

<sup>82</sup> American Psychological Association, *supra* note 18, at 678.

<sup>83</sup> Roseanne Clark, THE PARENT-CHILD EARLY RELATIONAL ASSESSMENT (1985); Roseanne Clark, Andrew Paulson, & Susan Conlin, *Assessment of Developmental Status and Parent-Infant Relationships*, In HANDBOOK OF INFANT MENTAL HEALTH (Charles Zeanah, ed., 1993).

<sup>84</sup> An evaluator may indicate that he or she has followed a standardized procedure to gather observational data. Although some of these standardized procedures have an empirical basis, some have little or no empirical evidence to

observing the parent and child together in an office setting or a naturalistic environment such as the home, where observations can be made of daily activities such as meals and bedtime routine.<sup>85</sup> In practice, Ackerman and Kane are likely correct in their assertion that “There are probably as many different ways to perform observations as there are evaluators.”<sup>86</sup>

Regardless of the setting and structure for the observation, the evaluator’s task is to assess the nature and quality of the interactions between the parent and child, including assessing such critical issues as the way in which the parent expresses love, affection, or support to the child; the way in which the parent provides discipline or structure to the child; the parent’s capacity to understand and respond to the child’s cues; the parent’s capacity to experience the child as a separate individual, with distinct preferences and relationships; the parent’s sense of enjoyment or competence in the parenting role; and the parent’s sense of frustration or inadequacy in the parenting role. Careful observation of parent-child interactions can be significantly revealing, as the evaluator has the opportunity to witness patterns of interaction outside the parent’s awareness. For example, phenomena such as a parent’s sour expression when the other parent is mentioned, or a parent’s repeated depreciation of the child in an attempt to be educative, may become obvious during an observation session. Even more important, the child’s responses to parental behavior also become clear. An example follows:

During interviews, Ms. Jones seemed overly concerned with her four-year-old son’s cognitive development to the exclusion of almost all other aspects of the child’s development. Instructed by the evaluator to bring materials to the observation session with which she and her son would like to work, Ms. Jones brought in a large shopping bag full of reading material and games designed to teach arithmetic. She pro-

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support their validity. Moreover, some empirically-based observational procedures require that a practitioner undergo extensive training to qualify as an expert in their use (e.g. the “strange situation,” which is used to classify young children’s attachment status). Whenever an evaluator claims to be using a standardized observational method, the attorney should attempt to clarify the support the method has from validation studies, as well as the evaluator’s qualification to use the method.

<sup>85</sup> Stahl, *supra* note 40.

<sup>86</sup> Marc J. Ackerman & Andrew W. Kane, *PSYCHOLOGICAL EXPERTS IN DIVORCE ACTIONS* 159 (1998).

ceeded to invite the child to work with them. To the evaluator's surprise, the child instantly cuddled up to his mother, who put her arm around him with warm affection. He worked assiduously at the games with evident delight. When he grew tired of an activity, he readily communicated this to his mother; his mother repeatedly responded by encouraging him to select an activity he would enjoy more, or by gently telling him that the activity was difficult at this point in time but that she was sure he could do it if he persisted. Observing the mother and child together, the evaluator concluded that mother's style, which might have been problematic for some children, worked extremely well for her son.

*Problems of reliability* can occur when an evaluator offers conclusions in the absence of any observational data. For example, many evaluators describe observational sessions as revealing "a warm relationship" or "a positive attachment," without elucidating the data upon which these conclusions are based. In the absence of any observational data to support this conclusion (e.g. warm physical contact, gentle redirection, verbal praise and encouragement), it is not possible to assess the reliability of the evaluator's conclusions. *Problems of relevance* can occur when an evaluator offers peripheral data that lack any relationship to the underlying psycholegal issue of comparative parenting capacity. For example, some evaluators report observational sessions as verbatim transcripts, and do not appear to employ any guiding observational methodology. In the absence of a conceptual framework with which to organize and understand observational data, it is likely that the evaluator's conclusions will lack the requisite relevance.

Finally, videotaping behavioral observation sessions can facilitate both the reliability and relevance of the data gathered. Currently, the videotaping of such sessions is uncommon in most jurisdictions. Videotaping has some disadvantages, including cost, time, and potential evidentiary problems. However, videotapes can provide a particularly informative record of parent-child interactions. Reviewing the videotape can allow the evaluator to observe exchanges that went unnoticed during the observation session itself. Moreover, videotaping permits third parties (such as the court) to see the data described in the evaluator's report, including gestures and vocal tones, which can be extremely significant. We believe that because videotaped recordings provide one of the best means of reducing reliance on impressionistic descriptions of parent-child interactions, and thus



increase the reliability of behavioral observations, legal professionals should encourage videotaping of observation sessions whenever practical.

## V. Collateral Interviews

The acquisition of reliable and relevant collateral information is arguably the most important component of a child custody evaluation. Forensic evaluation differs from clinical evaluation in its emphasis on establishing historical truth.<sup>87</sup> Forensic evaluators can utilize collateral data sources to help determine the facts underlying the psycholegal issue before the court. Collateral data serves a number of important functions in a CCE. First, such data can support or contradict a custody litigant's allegations regarding comparative parenting competency. Second, such data can control for the potential effects of deception and malingering, since parents may — intentionally or unintentionally — distort information in a manner that serves their legal position. Third, such data can provide a way for the evaluator to increase the confidence of interpretations and conclusions, because the obtained information derives from sources external to the evaluation and provides external validation in support of one or more hypotheses. Fourth, such data can make a significant contribution to an understanding of the litigant's behavior prior to the current legal dispute. For example, in a child custody case, collateral interviews can provide historical data about the parent-child relationship that may be critical to the examiner, yet otherwise unavailable.

The decision to interview collateral sources should be “based upon criteria of relevancy, reliability and necessity.”<sup>88</sup> A more valuable collateral source will be one who is not related to either parent, and who has no vested interest in the outcome of the evaluation. We support Austin's model<sup>89</sup> of diagramming collateral sources as a series of concentric circles in which more distant emotional relationships with the litigants produce more

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<sup>87</sup> Greenberg & Shuman, *supra* note 11.

<sup>88</sup> Herbert N. Weissman, *Child Custody Evaluations: Fair and Unfair Professional Practices*, 9 BEHAV. SCI. & L. 469, 473 (1993).

<sup>89</sup> William G. Austin, *Guidelines for Utilizing Collateral Sources of Information in Child Custody Evaluations*, 40 FAM. CT. REV. 177 (2002).

neutrality. According to this diagrammatic model, inner circles are occupied by family members and friends; circles of middle distance are occupied by individuals such as coaches and scout leaders; and outer circles are occupied by individuals such as pediatricians, teachers, and other community professionals.

The *reliability* of collateral interviews is increased when the evaluator uses neutral, non-aligned sources who can provide a credible view of the litigants' parenting over time. The *relevance* of collateral interviews is increased when the evaluator gathers information about a parent's real-life caregiving practices, competencies, and difficulties.<sup>90</sup> Any competent CCE must include information about how the parent and child operate in the real world, outside the artificial and contrived circumstances of the evaluator's office. Obtaining information from people who have direct observational knowledge of the parent and child in different situations is often the most important data obtained in a CCE. Evaluators can also interview sources who do not have knowledge of parent-child interactions, but who have observational knowledge of the child's functioning and adjustment in a variety of domains (e.g. academic, social, emotional), such as teachers or day care providers.

*Problems of reliability* can occur when the evaluator interviews individuals who are aligned with one litigant, and who are therefore personally invested in the outcome of the litigation. Examples of such individuals include a litigant's parents, siblings, or new spouse.<sup>91</sup> Although it will be helpful to talk with such

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<sup>90</sup> Austin, *supra* note 89; Gould, *supra* note 7.

<sup>91</sup> It is also important for the evaluator to understand how each collateral informant may know each parent. For example, it is not uncommon for a teacher to have more contact with a stay-at-home mother than with a working father. When such situations arise, it is important for the evaluator to examine the degree to which a teacher, who otherwise would be considered a neutral informant, may have aligned herself with one parent due to her increased contact with that parent and that parent's perspective on the custodial conflict. Similarly, when interviewing a child's therapist, it is important for the evaluator to determine whether the therapist has received information from both parents before determining that the therapist is a neutral source of information. Therapists, who may be viewed as credible because of their professional credentials, may become aligned with their adult patient or with the parent of their child patient who supports treatment. Therefore, they may be an unreliable source of collateral information.

individuals, it is critical that the evaluator treat their reports similarly to information from the parent-litigants themselves: as data that may be intentionally or unintentionally biased, and that therefore must be corroborated with other sources of information. The more emphasis an evaluator places on collateral informants from within the parent's close emotional circle, the greater the likelihood that the obtained information is biased. Conversely, when information from a parent's close friends and family is corroborated by information from neutral and non-aligned informants, an evaluator can have greater confidence in the accuracy and utility of the information.

*Problems of relevance* can occur when the evaluator accepts and considers information not relevant to the issue of comparative parenting capacity. For example, parents may ask their family and friends to provide letters that serve as "character affidavits" attesting to the parent's good will and moral character. When such letters are provided by friends or co-workers who have no observational knowledge of parent-child interactions, and little or no knowledge of the child involved in the dispute, they lack the requisite relevance to be of use. There may be cases in which such information is of use, and we are not suggesting that evaluators should never consider input from friends or co-workers. However, in our experience, these letters rarely contain any information relevant to the issue of parenting capacity.

## **VI. Complex Issues in Child Custody Evaluations: Domestic Violence and Child Alienation**

It is particularly important for legal professionals to assess the reliability and relevance of CCEs in complex cases that involve allegations of domestic violence, abuse, or child alienation. The forensic assessment of such allegations remains a controversial topic in CCEs. These assessments present a unique challenge because of the complexity of psychological variables involved in a comprehensive assessment, and because of the social policy implications and political passions that are evoked when such allegations are part of a custody case.

Writing about allegations of domestic violence in the context of child custody litigation, Austin notes, “there is probably no forensic question on which overreaching by mental health professionals has been so common and egregious.”<sup>92</sup> Overreaching occurs because evaluators reach conclusions based upon inadequate or incomplete data, or upon outdated research or personal beliefs presented as professional judgments. Significantly, there exists a relationship between allegations of child alienation and domestic violence. Recently, the concept of alienation has undergone both revision<sup>93</sup> and critique.<sup>94</sup> Child alienation is currently viewed as a family system process in which the alienating parent, the alienated parent, and the child all contribute to dysfunctional relationships within the family system.

One important criticism of CCEs that assess for domestic violence or child alienation is that evaluators often are poorly trained to discriminate alienation from abuse. A parent who has been abused, or who is protecting a child from abuse, may appear to be alienating the child from the abusive parent when, in fact, the protective parent is attempting to keep the child safe. As a result of this criticism, some researchers have re-conceptualized alienation by looking at the child’s behaviors and attachments, and assessing whether the parent’s behaviors may be alienating in nature.<sup>95</sup> These researchers have proposed a series of areas to explore in determining whether abuse and/or alienation are present in a custody case. Among the questions to investigate are: (1) is there a problem with the child’s attachments?;

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<sup>92</sup> William G. Austin, *Assessing Credibility in Allegations of Marital Violence in the High Conflict Child Custody Case*, 38 FAM. & CONCILIATION CTS. REV. 462, 463 (2000).

<sup>93</sup> Joan B. Kelly & Janet R. Johnston, *The Alienated Child: A Reformulation of Parental Alienation Syndrome*, 39 FAM. CT. REV. 249 (2001); Richard A. Warshak, *Current Controversies Regarding Parental Alienation Syndrome*, 19 AM. J. FORENSIC PSYCHOL. 29 (2001).

<sup>94</sup> Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting it Wrong in Child Custody Cases*, 35 FAM. L. Q. 527 (2001); Kathleen C. Faller, *The Parental Alienation Syndrome: What It Is and What Data Support It*, 3 CHILD MALTREATMENT 100 (1998).

<sup>95</sup> Leslie Drozd, Toby Kleinman, & Lenore Walker, *How To’s in Family Law Cases Involving Domestic Violence*, In CONFLICT RESOLUTION, CHILDREN AND THE COURTS: 38TH ANNUAL CONFERENCE OF THE ASSOCIATION OF FAMILY AND CONCILIATION COURTS 309 (2001).

(2) is there a problem with the child's behavior?; (3) if so, is there a reality-based reason for the child's troubled behavior?; (4) are there reasons to believe that the child has been exposed to some form of abuse?; (5) are there reasons to believe that the child has been the victim of some form of abuse?; (6) are there reasons to believe that the child has interpreted events as abusive?; and (7) if the child has been exposed to or a victim of abuse, is the abuse "pure abuse" or is it combined with alienation dynamics?

The competent evaluator needs to be aware of how different factors are empirically linked to specific areas of family functioning. The competent evaluator also needs to systematically explore each of the variables known to be associated with different forms of violence and maltreatment. For example, if a referral question focuses attention on partner violence during the marriage, the evaluator must explore concerns about child abuse perpetrated *by each parent*, and not merely by the alleged aggressor.

## VII. Considerations in Using Mental Health Professionals in Child Custody Litigation

Given the above analysis of methodological problems common to CCEs, a threshold question in the preparation of a custody dispute case is whether to use a forensic mental health expert at all. In cases in which the facts clearly mitigate in favor of one parent and against the other as custodian, expert testimony may add little or no new information. Conversely, a CCE will be indicated in cases in which expert testimony can assist the trier of fact in understanding the evidence or in determining the facts at issue, and when the expert is qualified by adequate knowledge, skill, experience, training, or education.<sup>96</sup>

If lawyers are generally ill-prepared to cope with scientific and technical material, many mental health professionals are similarly unprepared to work with legal concepts and evidentiary issues. Nonetheless, forensic training is more available in the

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<sup>96</sup> While a licensed mental health professional may generally be permitted to opine in all areas of his or her discipline, when a matter arises in a new and emerging field that is highly specialized, most courts also require additional expertise before admitting testimony on the subject. Examples of such highly specialized areas include clinical phenomena such as recovered memories of sexual abuse, and clinical diagnoses such as Munchausen's Syndrome by Proxy.

mental health field than is behavioral science and research training in the legal field. The preferred custody expert is one who has had significant education in the area in which he or she is opining, as well as experience with the rules of evidence.<sup>97</sup> Review and verification of the expert's curriculum vitae is essential; copies of prior forensic mental health reports and authored articles may also prove useful. If psychological tests will be used, the expert can be asked for a copy of the manual and any articles in the legal and scientific literature that explain or critique the tests and their application in CCEs.

Local rules will govern discovery opportunities with respect to adverse expert testimony. To the extent permitted by local law, production can be demanded of all notes and material in any media (including electronic media), and any test results (including raw data). Practitioners should demand an index of any material asserted to be privileged, the nature of the material, and the basis for the assertion of privilege. This can constitute the foundation for a subsequent motion to compel production, or for an *in camera* inspection of the material asserted to be privileged. Finally, since most law school curricula do not include statistics or research methodology classes — fields of learning essential to the litigation of admissibility issues and the examination and cross-examination of scientific experts — counsel may wish to

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<sup>97</sup> Who qualifies as an expert obviously depends upon the issues in a given case. Where a specific clinical condition is at issue, it would appear that training and experience relevant to the diagnosis and treatment of that condition would be necessary. However, this is not necessarily the case. Jurisdictions do not agree as to the necessity of a local license or specific training and experience. For example, North Dakota takes the position that Federal Evidence Rule 702 does not require licensure in a particular field, or licensure in the court's jurisdiction, to qualify as an expert. Rather, it is the witness's actual qualifications that count. *Anderson v. A.P.I. Co.*, 559 N.W.2d 204, 206-07 (N.D. 1997); *State v. Carlson*, 559 N.W.2d 802, 809 (N.D. 1997); *Oberlander v. Oberlander*, 460 N.W.2d 400, 402, (N.D.1990). Furthermore, in North Dakota, any educated and experienced psychologist should be able to qualify as an expert to testify about child custody factors. Unfamiliarity with the statutory factors affecting the legal determination of custody, a potential conflict of interest, and bias might affect the weight given the opinion, but these factors go to the credibility — not to the admissibility — of the evidence. *Kluck v. Kluck*, 561 NW3d 263, 266 (N.D. 1997). Obviously, a review of the local jurisdiction's views on these issues is necessary both in choosing an expert and in questioning an adverse expert.

hire a consulting expert who can explain the scientific methodology underlying the expert's opinions, critique flawed or unscientific methodologies, and assist in preparing direct and cross examination.<sup>98</sup>

## VIII. Conclusion

Legal professionals can assess the quality of CCEs by examining each of five distinct evaluation components: a definition of the scope of the evaluation; forensic interview techniques; psychological testing; direct behavioral observations; and collateral interviews. It is our hope that the conceptual framework outlined herein will prove useful in the analysis of the reliability and relevance of CCEs.

Given the psycholegal import of CCEs, it is imperative that forensic mental health professionals tender evaluations that have been conducted with due regard for scientific methodology, behavioral science literature, and ethical guidelines. Evaluators who purport to assess the best psychological interests of children involved in custody disputes must take precautions not to inadvertently harm those interests. As Chief Justice Frank D. Celebrezze of the Ohio Supreme Court wrote, "While statutes can be amended and case law can be distinguished or overruled, we take judicial notice of the fact that children grow up only once. When a mistake is made in a custody dispute, the harmful effects are irrevocable."<sup>99</sup>

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<sup>98</sup> See also Barbara Ellen Handschu, *Tips, Strategies for Questioning Your Expert on Direct Exam*, 15 *MATRIM. STRATEGIST* 1 (Dec. 1997); James J. Jimmerson, *Cross-Examining an Opposing Expert at Trial: Preparation (Part I of II)*, 18 *FAIR\$HARE* 2 (May 1998); Stuart B. Walzer & Jan C. Gabrielson, *Strategic Cross-Examination in Family Law*, 21 *FAM. L.Q.* 243 (1987); Irving Younger, *A Letter in Which Cicero Lays Down the Ten Commandments of Cross-Examination*, 3 *LITIGATION* 18 (Winter 1977).

<sup>99</sup> *In Re Wonderly*, 423 N.E.2d 420, 427 (Ohio 1981).

