Parenting Plan Evaluation Standards and Guidelines for Psychologists: Setting the Frame

Mary Connell, Ed.D., ABPP*

This article explores how various sources of authority interact to govern psychologists’ parenting plan evaluations (child custody evaluations), and remedies that are available when an evaluation is poorly conducted. The law in some jurisdictions may establish specific elements to be included in such evaluations; the professional associations to which psychologists belong may set forth enforceable standards, aspirational guidelines, and white papers; and learned treatises may describe ideal practices. Psychologists may rely on these sources of authority to shape their evaluations, and, finally, may consult with colleagues for guidance. Copyright © 2010 John Wiley & Sons, Ltd.

THE MINIMALLY ACCEPTABLE LEVEL OF PRACTICE VS BEST PRACTICE

The question may arise as to whether professional organizations should promulgate rules of practice with the intent of establishing an ideal to guide practitioners to the highest level of practice, or with the intent of establishing a minimum threshold for adequate practice that would serve to protect the public from incompetence. As an alternative, professional organizations might promulgate both a floor and a ceiling, defining the minimally adequate level of practice and an exemplary level.

In the area of parenting plan evaluation,1 two organizations may have, working independently, established the lower threshold for adequacy and the higher bar for best or even exemplary practice. The American Psychological Association’s (APA) Ethical Principles of Psychologists and Code of Conduct (APA, 2002a, hereafter referred to as the Ethics Code) sets the minimal level of practice required of psychologists when engaged in any professional pursuits, including when conducting parenting plan evaluations. Compliance with the Ethics Code is an enforceable requirement for members of the APA and, because the Ethics Code has been incorporated into the rules of practice in many jurisdictions, even psychologists who are not members of APA may be held accountable for complying with the Ethics Code. Woven into the Ethics Code are issues of particular interest to forensic evaluators including, for example, informed consent, restricting

---

*Correspondence to: Mary Connell, Independent Practice, 100 East 15th Street Suite 635, Fort Worth, TX 76102-6566, USA. E-mail: mary@maryconnell.com

1 The term parenting plan evaluation is used in this article for what were historically called child custody evaluations. There is a trend in some jurisdictions to move away from the terminology of custody and vitiation to alternative language acknowledging a continuum of residential agreements and parental responsibilities. Terms such as ‘parenting’, ‘parenting plan or time’, or ‘parental rights and responsibilities’ have replaced custody in a number of states (American Law Institute, 2000, pp. 131–132). This will be discussed in more detail later.
opinions and formulations to those supported by the data, and directives for record-
keeping.

That minimal level or floor being established, psychologists conducting parenting
plan evaluations may then set about to identify best practice. The Association of Family
and Conciliation Courts Model Standards for Child Custody Evaluation (AFCC,
2007, hereafter called AFCC Model Standards or Model Standards) may be viewed as
one effort to establish best practice. The AAFC Model Standards may become
increasingly important to the mental health and legal professions in the evolving
appreciation for what constitutes the standard of care for parenting plan evaluators. The
Reporter, David Martindale, noted that these Model Standards were created to
‘...assist evaluators in performing their tasks more effectively and, in doing so, address
the needs and rights of those to whom evaluator services are provided’ (Martindale,
2007, p. 178). Noting that there may be a tendency to over-emphasize the distinction
between standards, guidelines, practice parameters, or model standards, Martindale
offered that the prudent provider takes all relevant sources of authority into account
and, regardless of their enforceability, embraces their contribution to the evolution of
the ‘best practice’ or standard of care as conceived by the law (Martindale, 2007).

Between the minimal level of practice established by the professional code of ethics,
then, and the best or idealized practice described by model standards are the practice
guidelines promulgated by professional organizations. APA (1995a) argued that doc-
toral level licensed professionals need not be provided with a list of required behaviors
(beyond the floor established by the Ethics Code), but rather, should be able to take into
account case-specific factors and utilize clinical judgment in determining the best
service. Guidelines – in the nomenclature of APA – are intended to educate and support
the efforts of practitioners to deliver services of high quality. Because guidelines are
aspirational and raise the level of practice, the public benefits.

The parenting plan evaluator may structure the evaluation process in different ways
depending on the nature of the question(s) posed by the court, the evaluator’s general
approach to parenting evaluations, and the jurisdictional mandates that govern these
evaluations. Few elements are universally agreed to be required. In these high-stakes
matters, in which courts need reliable and relevant assistance determining how best to
apportion parenting responsibility and time, it is important to know what is expected of
the evaluator, what recourse may be available when an evaluation falls below ex-
pectations, and how to distinguish a substandard evaluation process from a disappointing
evaluation outcome.

There are many reasons a court may seek a parenting plan evaluation, each
potentially calling for a somewhat different focus or technique(s). For example, an
evaluation sought for the purpose of assisting the court with a relocation request, when
in all other respects the parties agree each is a capable and loving parent, may require
one focus, whereas a parenting plan evaluation involving allegations of domestic vio-
lence and substance abuse may necessitate a substantially different approach and focus,
with an emphasis on safety concerns, treatment needs, and parent training.

The capacities of parties to participate in the evaluation or the allegations raised
during the course of an evaluation may call for different techniques as well. A translator
may be required in one evaluation; an allegation of unsanitary home conditions may
arise in another, elevating the importance of visiting the home; or an evaluation that
occurs in the context of an extended period of interrupted contact between one parent
and the child may necessitate special consideration of how to arrange conjoint
observation or interview sessions. Aside from these situation-specific requirements that direct the evaluator’s attention to a particular area of parental functioning or that cause the evaluator to vary the assessment approach, however, there is the need to find a general approach that sets the frame for the parenting plan evaluation.

A SHIFT FROM CUSTODY AND VISITATION TO SHARED PARENTING

Most states in the US recognize some form of joint or shared parenting that apportions parental time and responsibility in a way designed to provide frequent and continuing contact with both parents so as to promote meaningful relationships between them and their children. It is no longer the default assumption that there will be a sole custodian and a visiting parent, and therefore the term ‘custody evaluation’ may have become a misnomer. For these reasons it may be appropriate to refer to the evaluations of families in such disputes by a term that more accurately reflects the psycholegal questions posed to the evaluator. In this article, the term ‘parenting plan evaluations’ is used for this reason. It is recognized that in many jurisdictions there may continue to be reference to child custody evaluation and this article describes the standards and guidelines for all such evaluations regardless of whether they are designated child custody evaluations, parenting time and responsibly evaluations, or some other descriptor.

This change in terminology is more than semantic, as it also reflects an important shift in how these assessments may be conceptualized. There is a sound empirical basis for moving away from language that increases the contentiousness of the matter. ‘Custody’ may imply ‘possession’ or ‘ownership’ in direct opposition to the concept of shared parenting. Parents share responsibility for decision-making regarding their child’s upbringing, and they generally enjoy some share of the child’s time. Children do not ‘visit’ with one parent, as use of the term ‘visitation’ implies; with most shared parenting arrangements, children spend significant amounts of time with both parents. The child may live part of the time in each parent’s home or may spend more time in one parent’s home because it is in the child’s best interests to do so. It does not follow that the parent then must be said to have ‘custody’, although the term custody may indeed be used in the legal environment.

Describing these assessments as ‘parenting plan evaluations’ is not intended to redefine the nature of the evaluation requested by the court in order to provide information so the court may make a more informed decision about what sharing of responsibility and time is in the child’s best interests to do so. It does not follow that the parent then must be said to have ‘custody’, although the term custody may indeed be used in the legal environment.

Describing these assessments as ‘parenting plan evaluations’ is not intended to redefine the nature of the evaluation requested by the court in order to provide information so the court may make a more informed decision about what sharing of responsibility and time is in the child’s best interests to do so. Rather, it is intended to more accurately describe, in behavioral terms, the general thrust of the questions posed to the examiner by the court. Additionally, the use of terms that reflect shared parenting may assist evaluators and litigants in recognizing that the focus is on ensuring that children have parents who work cooperatively to meet their needs rather than on a contest between two parents vying for the ‘custody’ prize.

AUTHORITY INFORMING PARENTING PLAN EVALUATIONS

Psychologists consider a series of authorities in determining how to conduct a parenting plan evaluation (see Figure 1). The evaluator considers, at the foundation, the legal
directives, including federal, state, and local statutes and case law, to have greatest authority. Working ‘up’ the pyramid, the degree of authority of the sources of guidance diminishes but the evaluator takes into consideration relevant information to find the most efficacious way to conduct the evaluation and to resolve conflicts or dilemmas that arise during the course of the evaluation. These sources of authority and guidance may build upon or be redundant with one another, in some respects, since the ambit of each source is to ensure the provision of sound professional services. In some cases, however, they may be at odds and the evaluator must determine what source of authority has precedence.

**Statutory Law, Case Law, and Administrative Codes**

First, as noted above, the evaluator should be guided by the law. When undertaking a parenting plan evaluation, examiners need to be familiar with:

- substantive law, both statutory and case law, pertaining to legal apportionment of parenting time and responsibility;
- law that regulates professional practice, including statutory law, case law, and administrative codes;
- both law and rules of legal procedure and evidence, whether statutory or case law or administrative code, governing admissibility and provision of expert testimony such as the examiner may eventually offer.

**Laws pertaining to parenting plan evaluations**

The family law statutes of many states define important legal and psycholegal concepts, identify important legal assumptions, and direct the parenting plan evaluator to proceed
in some specific ways. Case law may define ‘best interest of the child’ for the jurisdiction, or identify what is to be considered by the court (and thus, potentially, by the evaluator) in specific kinds of cases such as those dealing with relocation. Local courts may establish a list of evaluators approved for court appointment, direct the way in which attorneys can approach potential evaluators to discuss court appointment, or direct how material can be submitted by parties for the evaluator’s consideration. Statutory and case law regarding grandparent access, standing of de facto parents, and other such specific issues should be consulted when undertaking a case that involves such matters. The Board of Psychology may have adopted, as rules of practice, the APA Ethics Code or the Guidelines for Child Custody Evaluations in Family Law Proceedings (2009) or other guidelines or standards.

Laws that regulate professional practice

Federal, state, or provincial laws and administrative codes that govern all health service delivery (e.g., U.S. Department of Health and Human Services, 2003) are potentially applicable to forensic psychological services including parenting plan evaluations. These sources of authority may govern access to records, record retention, mandated reporting of child or elder abuse, and consent issues when providing services to minors. Beyond these generally applicable federal and state laws, the evaluator’s professional rules of practice, codified in the licensing act, may set specific requirements for forensic service delivery in addition to the requirements for all professionals holding the relevant license; these rules of practice are enforceable and also supersede practice guidelines. These rules of practice for the profession may identify what must be considered in competently providing parenting plan evaluations in the particular jurisdiction. The Board of Psychology may have adopted, as rules of practice, the APA Ethics Code or the Guidelines for Child Custody Evaluations in Family Law Proceedings (2009) or other guidelines or standards or may have crafted its own rules.

Laws that govern expert testimony in legal proceedings

Federal Rules of Evidence (FRE, Federal Magistrates) and rules of procedure, and their state law equivalents, address how expert testimony may be utilized in legal proceedings. FRE 401, 402, and 403 and their state equivalents establish criteria for relevance of the opinion or testimony to be offered and address whether the testimony would be probative (make the existence of a fact more or less probably) or prejudicial (confusing or misleading the jury, cumulative or a waste of time). FRE 702, 703, and 704 and their state equivalents are particularly relevant to considering the reliability/validity of expert testimony, addressing such issues as what constitutes expertise, the concept of helpfulness of expert testimony, and whether it is permissible for the expert to offer an opinion on the ultimate legal issue. Case law may explicate what specifically the court takes into account in determining whether to allow expert testimony on a particular issue [Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), Frye v. United States, 293 F. 1013 (D.C. Cir 1923), Kuhmo Tire v. Carmichael, 526 U.S. 137 (1999), and state equivalents], generally addressing the relevance and reliability of scientific, technical, and other expert evidence or testimony. Parenting plan evaluators should understand these laws bearing generally on admissibility of expert testimony or
specifically on a particular psycholegal question so that the evaluation findings and any recommendations will be of maximal usefulness to the court.

**Professional standards**

The (APA) Ethics Code and the CPA Code of Ethics (Canadian Psychological Association, 2000) establish the principles and standards for psychologists and include enforcement mechanisms to insure compliance. When the Ethics Code is in conflict with the law, the Ethics Code provides explicit guidance:

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

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

This clarification might involve, for example, informing legal authorities of the conflict between professional ethical mandates or guidance and the law, educating legal authorities regarding the bases for their position, and attempting to explicitly and clearly negotiate a resolution. The evaluator may need to request clarification of a court order or modification of an order of appointment in order to satisfactorily resolve the issue. For example, if a court order directs a psychologist to determine whether a child has been sexually abused – a determination the psychologist must acknowledge and explain cannot be made on the basis of psychological evaluation or expertise – the psychologist may ask the court to reformulate the referral question (Ethics Code, 2.04, Bases for Scientific and Professional Judgments).

Also applicable in parenting plan evaluations are the Standards for Educational and Psychological Testing (American Educational Research Association, American Psychological Association & National Council on Measurement in Education, 1999). These standards apply to all psychological test users including practitioners working in forensic settings. The standards direct the psychologist to use tests in ways that reflect an appreciation for standardization and consequent validity, reliability, and diversity considerations. The Standards recognize the importance of maintaining standard administration, scoring and interpretation. Psychologists who rely on psychological testing as part of the data collected in a parenting plan evaluation should be familiar with and adhere to these standards.

Membership in an organization may create an enforceable obligation to abide by the organization’s practice directives or ethics codes. For example, according to the APA Ethics Code (Introduction and Applicability):

APA may impose sanctions on its members for violations of the standards of the Ethics Code, including termination of APA membership, and may notify other bodies and individuals of its actions. Actions that violate the standards of the Ethics Code may also lead to the imposition of sanctions on psychologists or students whether or not they are APA members by bodies other than APA, including state psychological associations, other professional groups, psychology boards, other state or federal agencies, and payors for health services.

Conversely, psychologists who are not members of an organization or are not licensed in a specific jurisdiction may nevertheless be accountable to the codes, statutes,
or rules when performing the work of a psychologist (Drogin, 1999; Simon & Shuman, 1999; Shuman, Connell, Cunningham & Reid, 2003; Tucillo, DeFilippis, Denney, & Dsurney, 2002). For example, a non-APA member who is licensed in a state that has codified the APA Ethics Code may still be held accountable to that code; a psychologist practicing in a state other than the state in which licensure is held is very likely accountable for the rules of practice in that jurisdiction.

Although membership in an organization may create an enforceable obligation to abide by certain practice standards and guidelines, it is not always the case. Organizations may assign no enforcement mechanism to published standards. Nevertheless, a number of factors bear consideration in deciding whether to familiarize oneself with and adhere to specific practice standards and guidelines. The family court setting may anticipate or demand compliance with published standards or guidelines, and the expert’s credibility may be significantly compromised on the basis of ignorance of professional guidance. The well prepared evaluator wisely demonstrates familiarity with all relevant standards and guidelines, regardless of whether he or she is a member of the professional organization that publishes them, and regardless of their enforceability. Standards, guidelines, and model standards are intended to assist professionals to competently execute their work and there is no professionally justifiable basis for not being familiar with them.

**Professional Guidelines**

The APA distinguishes professional standards from professional guidelines (APA, 1995a). Guidelines promulgated by the APA are aspirational in nature, are not accompanied by an enforcement mechanism, and are intended to serve the profession by advancing the competent practice of psychology (APA, 2002b). The guidelines are to be well researched for the purposes of educating and informing psychologists and advancing the level of practice. It is anticipated by the APA that the guidelines it promulgates will stimulate professional debate and research and that psychologists will exercise judgment in their application (APA, 2002b). Guidelines are to provide psychologists with useful references for finding the relevant professional standards and law in an area of practice, inform the public regarding desirable professional practices, and provide a defensible basis for recommended conduct, taking into account best available information. Guidelines, as conceived by the APA, should not unnecessarily or inappropriately limit the practitioner (APA, 2002b).

The most relevant guidelines for psychologists performing parenting plan evaluations are the APA Guidelines for Child Custody Evaluations in Family Law Proceedings (APA, 2009; hereafter called the APA Child Custody Guidelines or Child Custody Guidelines). These guidelines orient the psychologist to the purpose of assisting the court as it goes about determining the best interests of the child, noting that the child’s welfare is paramount. The guidelines direct that the evaluation focus on parenting attributes, the child’s psychological needs, and the resulting fit. In preparing to do a parenting plan or custody evaluation, the psychologist is encouraged to gain and maintain specialized competence, strive for impartiality, engage in culturally informed, non-discriminatory evaluation practices, and avoid conflicts of interest and multiple relationships. Procedurally, the evaluator is advised to establish the scope of the evaluation in a timely fashion consistent with the nature of the referral question, obtain appropriate informed consent, and employ multiple methods of data gathering. The
evaluator is encouraged to interpret assessment data in a manner consistent with the
context of the evaluation and refrain from offering opinions about persons not
examined. Recommendations, if any, are to be based on the psychological best interests
of the child, and the psychologist is reminded of the need to create and maintain
professional records in accordance with ethical and legal obligations.

In many respects the Child Custody Guidelines echo requirements embodied in the
Ethics Code and remind parenting plan evaluators that, in the specific context of
conducting evaluations for the court, the general practice standards that shape the
work of psychologists continue to apply. However, the evaluator will also find sound
reasoning, within the Child Custody Guidelines, for those expectations. The Child
Custody Guidelines direct the evaluator’s attention to the needs of the court, noting
that the court will find most useful the work of objective, unbiased evaluations that
produce clinically astute and scientifically sound opinions. By contrast, comparatively
little weight may be afforded to evaluations that ignore the context and referral
questions and provide general assessments of parents’ personalities. Similarly, the Child
Custody Guidelines include an explanation of the court’s need to know if the parenting
plan evaluator has a multiple relationship or other conflict that might affect objectivity,
noting that psychologists’ ethical obligations regarding conflicts of interest and multiple
relationships provide an explainable and understandable basis for declining court
appointments and private referrals. In this way the Child Custody Guidelines somewhat
echo the Ethics Code, but also amplify the specific rationale for the standards in the
parenting plan evaluation context.

Parenting plan evaluators should be familiar with the Specialty Guidelines for Forensic
Psychologists (hereafter called the SGFP, Committee on Ethical Guidelines for Forensic
Psychologists, 1991), even if they do not consider themselves to be ‘forensic
psychologists’. The SGFP, the purpose of which is to improve the quality of forensic
psychological service, provide an important frame for all psychologists working in
forensic settings. The SGFP were designed to be consistent with the Ethics Code and to
provide more specific direction in matters forensic. Thus, although they were not
specifically developed for parenting plan evaluators, they nevertheless provide useful
guidance. The SGFP recommend that when an evaluation is court ordered, the
evaluator should provide reasonable notice to the examinee’s legal representative of the
nature of the evaluation and, if that legal representative objects to the evaluation, notify
the court issuing the order and respond as directed IV.E2. The SGFP also call for
record-keeping that is sufficient to withstand judicial scrutiny, noting this to be a higher
standard than is normative for general clinical practice VI.B.

Other potentially relevant guidelines include the Practice Parameters for Child Custody
Evaluation promulgated by the American Academy of Child and Adolescent Psychiatry
(1997). They are far more directive and specific than guidelines promulgated under the
auspices of the APA and are intended to inform psychiatric evaluations. Psychologists
may consider them as another source of useful suggestions and insights. These
guidelines include recommendations that might be viewed as somewhat controversial
for psychologists. There is a recommendation to avoid psychological testing of parents,
for example, on the theory that tests were not developed for this purpose and the
findings are often not relevant to the issues and are potentially distracting. This reco-
mendation raises issues that are beyond the scope of this discussion, but for the
present, it is useful to observe that guidelines are often reflective of the political positions
of their sponsoring organizations and at times may be informed by guild concerns.
Similarly, the guidelines describe inclusion of an assessment of parents’ financial capacities to meet the child’s needs—a matter psychologists might consider to be beyond their training and expertise (as well as the training and expertise of psychiatrists). The guidelines also recommend making explicit recommendations for custody and visitation, a controversial matter in forensic psychological publications that will be discussed in greater detail below.

There are many related guidelines, not specific to parenting plan evaluations, that may bear consideration as well. Two of these are the APA’s Record Keeping Guidelines (2007b), useful to all psychologists in crafting an effective plan for record creation, maintenance, dissemination, and eventual disposal; and the Guidelines for Psychological Evaluations in Child Protection Matters (Child Protection Guidelines, 1999; these guidelines are undergoing revision). In some parenting plan evaluations there are allegations of child maltreatment that invoke child protective services agency involvement and necessitate coordination so that the parenting plan evaluator’s work does not obstruct the state-mandated investigation of those allegations. In some cases child protective services investigators may seek evaluation of parents and children for purposes of casework planning and safety determinations. Those evaluations, informed by the Child Protection Guidelines, are sometimes similar to parenting plan evaluations but, because of different psycholegal questions, there are also important distinctions in the evaluation. For example, the parenting plan evaluation often involves assessment of two parents who have at least minimally adequate parenting skills but who cannot agree on how to apportion parenting time and responsibility. In contrast, in a child protection matter the evaluation may focus on whether the parent has the capacity to achieve a minimally adequate level of parenting in order to resume care of a child who has been temporarily placed in foster care (Budd, Connell, & Clark, in press). Nonetheless, in that subset of cases in which there are allegations of abuse or neglect, the parenting plan evaluator may find the Child Protection Guidelines helpful in crafting assessments that adequately address allegations of child maltreatment.

Model Standards

In addition to standards and guidelines, ‘model standards’ may be promulgated by professional associations to assist legislators and others who seek authoritative guidance in their efforts to establish enforceable standards. These model standards may represent idealized practice parameters or, conversely, may outline minimal standards, depending upon the intent of the developers.

One such set of model standards meriting consideration, as noted above, are the AFCC Model Standards for Child Custody Evaluation (Model Standards). From the Introduction (1.1) to the Model Standards it is clear they are:

...designed to guide custody evaluators in all practice contexts. In disseminating these Model Standards, AFCC's goal is to contribute to the ongoing education of evaluators, thereby promoting good practice; to provide information to those who utilize the services of custody evaluators; and, to increase public confidence in the work done by custody evaluators.

To place these Model Standards in the hierarchy of authoritative sources, it is useful to examine what ‘teeth’ they have. The developers conveyed their position on enforceability of the Model Standards in the Introduction:

Unless and until these Model Standards are incorporated into law, included in the rules of a court system, or adopted by a licensing board or similar regulatory authority, they do not
have the force of law. Nonetheless, the adoption of these Model Standards by AFCC, the
sponsoring organization, should alert custody evaluators to the possibility that these Model
Standards may be utilized in developing standards of care for custody evaluators.

There exists no enforcement mechanism within the AFCC for the Model Standards,
and no jurisdictions have incorporated the Model Standards as part of their practice acts
for mental health professionals:

1.2. Enforcement. AFCC believes it to be advisable that our members conform their practices
to these Model Standards; however, AFCC does not have an enforcement mechanism.

AFCC does not have and does not intend to establish an enforcement mechanism. We
believe it to be advisable that our members conform their practices to the Model Standards
articulated here, but membership in AFCC does not compel them to do so. These Model
Standards may communicate expectations that exceed those established by law or by
regulatory bodies. Where conflict exists, law, rules of the court, regulatory requirements, or
agency requirements supersede these Model Standards. Where the standard articulated
herein is higher than the standard required by law or regulation, it is hoped that AFCC
members will be guided by the standard articulated here.

Nevertheless, as noted earlier, examiners should familiarize themselves with all
relevant standards, guidelines, and model standards pertaining to parenting evaluation,
and the Model Standards are no exception. In fact, the Model Standards are highly
detailed and specific in describing parenting evaluations that are conducted in a
balanced, thoughtful, and thorough manner. Family court judges and attorneys may be
familiar with these Model Standards and query the examiner about adherence to them.

**Position Papers**

Other useful guidelines and position papers (‘white papers’ or ‘best practice’ treatises)
are promulgated by organizations including the APA, the Canadian Psychological
Association, other organizations of interest to psychologists practicing in various
specialties, and the organizations of allied professions. The APA has published such a
paper, for example, on the vicissitudes of memories of childhood abuse (APA, 1995b).
Regarding parenting plan evaluations in general, psychologists may look forward to
Fuhrmann and Robert A. Zibbell to be edited by Thomas Grisso, Kirk Heilbrun, and
Alan Goldstein, acting in concert with the American Academy of Forensic Psychology
and published, in the near future, by Oxford University Press.

**Learned Treatises**

Many additional resources can assist psychologists who conduct parenting plan
evaluations. Writings that amplify ‘best practices’ in the field offer substantial guidance
for the new evaluator, more seasoned evaluators, and those facing a potential ethical
dilemma.

The thrust of recommendations from learned authorities (Grisso, 2003; Heilbrun,
2001; Melton, Petrila, Poythress, & Slobogin, 2007; Otto, Buffington-Vollum, & Eden,
2003; Sales & Shuman, 1998) is that evaluations should be accomplished using a
multi-method, multi-trait approach of parenting competency with an eye toward
gathering information that may be of use to the trier of fact, with the child’s best interest as the frame of reference. These sources of guidance, whether discussing forensic assessment in general or parenting evaluations specifically, caution against offering opinions on the ultimate legal issue, noting generally that such legal questions embrace values and moral decision-making for which psychologists have no special training (Grisso, 2003; Heilbrun, 2001; and Melton et al., 2007). Sales and Shuman (1998) most directly capture the essence of the matter in indicating that it is not the ultimate legal issue *per se* that should concern the ethical practitioner, but rather, the need for opinions to be relevant and reliable. These writers and others, to varying degrees, also discuss specific tests worthy of use for parenting plan or custody evaluation and analyze their strengths and weakness in parenting assessment (see, for example, Otto, Buffington-Vollum, & Eden, 2003). A specific test battery has not been recommended in any widely acknowledged learned treatise and there is considerable disagreement among scholars and practitioners regarding the psychometric vitality of many of the commonly used instruments (a review of these arguments is beyond the scope of this article but see Erard, 2007; Erickson, Lilienfeld, & Vitacco, 2007a; Erickson, Lilienfeld, & Vitacco, 2007b; Flens & Drozd, 2006; Otto et al., 2003; Tippins & Wittman, 2005).

**Consultation with Colleagues**

Finally, consultation with colleagues is an invaluable resource, both in gaining perspective on a specific issue and in raising awareness of case-specific and general forensic practice issues that may otherwise escape the psychologist’s awareness. This may be accomplished by way of a formal consultative relationship, in regular case staffing with office companions or colleagues, or through internet discussion lists. Regarding professional internet lists, it is of course important to keep in mind the public nature of this avenue for consultation and to keep questions general to protect privacy interests.

**IMPLICATIONS FOR PROFESSIONAL LIABILITY AND DISCIPLINE**

When a parent or attorney believes an evaluation may fall below the standard set by the profession and searches for recourse, it may be difficult, as noted above, to find a single authoritative source describing how the evaluation should have been conducted. Bad evaluations do sometimes occur and, given the potentially grave consequences of an adverse parenting plan evaluation and the enormous power that lies in the hands of the evaluator, there should be avenues for redress. Following are the ways that evaluators can be held accountable and the consequences to the evaluator.

**Cross-examination and Collegial Review**

In the adversarial setting an expert opinion must be probed for its basis. This probe is often guided by an expert retained specifically to review the opinions to be offered through report and/or testimony, along with the underlying data. The retained consultant may assist the attorney who intends to challenge the opinions of the testifying expert or even the attorney who intends to proffer the testifying expert. The retained
consultant may point out the relationship between the testifying expert’s professional qualifications and the nature of the forensic task; strengths and weaknesses of the methodology; the degree of adherence to professional standards and guidelines; and finally, whether the opinions offered flow logically from the underlying data.

The parenting evaluator should be able to offer a well articulated basis for diverging from a particular recommended practice and the consequences, if any. In reviewing such divergences, the consultant assesses how that divergence stood in contrast to the evaluator’s other practices, if the situation called for the divergence, how the outcome was affected by the divergence, and whether the divergence bespoke carelessness, bias, naiveté, or malice. It is rare to see a perfectly executed evaluation or for seasoned experts to agree about all aspects of an evaluation. In rendering an opinion about the adequacy of an evaluator’s methods, in reaction especially to the complaints of a litigant who may have tremendous emotional investment in the outcome, it is important to be fair and reasonable. Contextual differences may cause evaluation methodologies to vary to some extent, and the multifarious other factors that affect how the evaluation unfolds challenge notions that there should be some template of perfection against which to assess each evaluator’s product. Brodsky and McKenzie (2002) noted that psychologists bear an ethical obligation to report serious weaknesses or breaches in the ethics underpinning the work of colleagues, but noted the precursor obligation to confront the psychologist about the concern before making an ethics complaint, providing, of course, that the delay would not put others at risk for greater harm. In forensic cases it is difficult to know when or whether this confrontation should occur. Brodsky and McKenzie (2002) observed that complaints also breed further complaints and suggested that a series of collegial letters might provide a way of fulfilling one’s ethical obligation, remedying the problem and avoiding ratcheting up the level of contentiousness between the psychologists.

Forensic examiners should anticipate that there will be times when another expert is employed for the purpose of challenging the basis of their opinions. Judges who appoint an evaluator and then serve as a trier of fact may take into consideration testimony regarding the reliability and relevance of the evaluator’s methods and procedures. Attorneys whose clients want to challenge the court-appointed evaluator will find it far easier to do when their own retained expert has conducted a review of the court-appointed evaluator’s work in a methodical and dispassionate manner, much like a forensic assessment (Gould, Kirkpatrick, Austin, & Martindale, 2004). The consequence to the evaluator is exposure of any weaknesses in methodology, potentially resulting in fewer referrals. The potential gain, through the adversarial process, is that the court is assisted in identifying the admissibility of expert testimony or the weight it is to be given, thereby serving justice. The evaluator may seize this opportunity to improve methodology and correct weaknesses.

Civil remedies and the Question of Immunity

In addition to cross-examination, the litigant who believes an evaluation has been improperly conducted or falls far below the ‘standard of care’ (a legal, not psychological, term) can attempt to right the perceived wrong through various other avenues. One of those is filing a tort action alleging malpractice. In a civil action against an evaluator, the plaintiff may invoke ethical standards of the profession. For psychologists (APA, 2002a):
The Ethics Code is intended to provide guidance for psychologists and standards of professional conduct that can be applied by the APA and by other bodies that choose to adopt them. The Ethics Code is not intended to be a basis of civil liability. Whether a psychologist has violated the Ethics Code standards does not by itself determine whether the psychologist is legally liable in a court action, whether a contract is enforceable, or whether other legal consequences occur.

The evaluator’s status as a court-appointed evaluator may invoke the notion of quasi-judicial immunity and, further, a more general litigation privilege, so that there may be some protection from civil suit when the evaluator is simply doing the job as appointed or directed by the court.

Should the matter go to civil litigation and not be summarily dismissed, the party bringing suit would need to demonstrate that the evaluator’s work fell below some standard for the service that was performed. When there is an allegation of malpractice, the legal issue does not center on a practitioner’s bad judgment, bad faith, or intentional malfeasance. Rather, it explores whether there has been a breach of an objective standard of professional practice (Tan, 2006). The first task is for that professional standard to be elucidated for the fact-finder – the standard that the profession has identified. What the legal decision-maker then determines, typically based on expert testimony about the standard of practice, is whether the particular evaluator met the standard of care. As a rule, the standard of care is set on a case-by-case basis through expert testimony that takes into account relevant professional treatises or authoritative texts, the specific case data, and professional standards.

Expert testimony, rather than lay judgment, is required to establish the custom of the profession or the standard of practice. Both the litigant (plaintiff) and the evaluator (defendant) may need to produce experts to inform judgments about what constitutes standard, as opposed to substandard, care. These retained experts, by virtue of their skills, knowledge, experience or education and supported by authoritative texts and treatises, then articulate the standard of practice as it applies to the particular case (Tan, 2006), and the legal decision-maker can use this to inform judgments about the standard of care established by the law. Caudill and Pope (1995) defined the standard of care, for psychologists, as ‘the minimum standard below which a practitioner cannot fall. It is based on the average competent professional, not the best or the brightest’ (p. 564).

The civil suit represents an effort to impose liability upon the psychologist based on the premise that the evaluation caused the examinee injury, potentially including psychological injury, a difficult proposition to prove. Several issues would be explored. Was there injury? Would there have been injury if the evaluator had conducted the evaluation differently? Where injury was alleged to have occurred, the complaining party must still prove that the alleged injury is caused by the psychologist’s breach of the standard of care and not by some other variable. Even though the risk of being held liable may be reasonably limited, the emotional and financial costs of malpractice litigation are burdensome (Montgomery, Cupit, & Wimberly, 1999).

**Licensing Board Complaints**

Redress may also be sought through filing a complaint with the evaluator’s professional board. Licensing boards generally must review any formal written complaint about a psychologist’s services or behavior. Montgomery, Cupit, and Wimberly (1999), in a
study of Texas psychologists, found that licensing complaints and malpractice actions alleging wrongdoing in the context of a parenting plan evaluation were second in frequency only to allegations of sexual misconduct.

Boards take action to discipline a psychologist who has provided incompetent or unprofessional services or engaged in unethical, illegal, or otherwise inappropriate behavior. This avenue generally demands that the complainant invest some energy in learning what rules govern professional practice for the evaluator and then determining whether any of those specific rules seem to have been violated. Although the complaint should not be predicated on a quarrel with the outcome of the evaluation, this may not be the case. If the methodology was sound and the evaluator’s findings and opinions were supported by the data, then the board’s review will probably result in no action against the evaluator. Professional boards are, however, generally concerned with protecting consumers from unscrupulous or incompetent practice, and if an evaluator’s methodology is unsound, the review may rightly lead to some action against the practitioner.

Administrative board proceedings may result in a number of adverse outcomes for the practitioner, including, in cases of gross violations of rules of practice, loss of the license to practice. Other less drastic dispositions can include orders to cease performing parenting plan or custody evaluations, to obtain further training before doing parenting plan or custody evaluations, to perform parenting plan or custody evaluations only under the supervision of an experienced evaluator, or to review certain rules of practice. Although the consequences can be grave, generally the practitioner has the freedom to work toward gaining competence while continuing to practice in some vein. Practically, however, it is necessary to disclose the outcome in any further court cases, and to disclose the necessity for working under supervision. As a result, an unfavorable ruling from a licensing board may severely limit the professional’s ability to continue working in the area.

The evaluator’s practice may be negatively affected in a number of other ways during and after a licensing board complaint. It may take years for a board to process a complaint (Thomas, 2005), during which time the evaluator must report the complaint to the professional malpractice insurance carrier, third party payor panels on which the evaluator serves, and any professional licensing boards and professional organizations to which the practitioner applies for licensure or membership status or renewal. Any of these reports may be expected to require provision of additional information and ultimately may affect the practitioner’s professional viability and capacity to maintain the previous level of practice. Professional malpractice insurance costs may also increase or it may become more difficult to purchase such insurance.

Psychologists who face malicious complaints have little recourse and must respond to each and every board investigation, often requiring substantial investment of time. Although the evaluator who is harassed by a malicious, unfounded complaint could bring suit against the complainant to attempt to recover some of the defense costs resulting from complaints, most states and provinces provide immunity from monetary liability for reporting suspected misconduct to a licensing board (Association of State and Provincial Licensing Boards, undated).

Presumably in response to concerns about the filing of unfounded allegations of substandard conduct, the licensing boards in some states have instituted special provisions that shape their review of complaints that are filed by custody litigants. For example, the Texas State Board of Examiners of Psychologists fashioned an exemption that offered some protection to parenting plan evaluators by requiring that, if a
complaint is predicated on violation of a court order, there must be a letter from that
court indicating that the evaluator did indeed violate the order (Tex. Admin. Code tit.
22, §469.9):

No complaint will be processed against a licensee if such complaint is predicated upon a
violation of a court order unless such complaint includes certified court documents which
show that the court has decided that the licensee did violate the specific court order and the
court’s response to such violation.

Only one state, Colorado, actually exempts psychologist-evaluators from having
to defend court-appointed custody complaints (Colorado Mental Health Statute,
2007) by exempting them, during the scope of the evaluation, from licensing board
regulation:

The provisions of this article shall not apply to mental health professionals acting within the
scope of a court appointment to undertake custodial evaluations in domestic relations cases
in the courts of this state or to mental health professionals acting within the scope of a court
appointment to undertake domestic and child abuse evaluations for purposes of legal
proceedings in the courts of this state.

It could be argued that exemptions like the one that Colorado extends to court-
appointed evaluators go too far in reacting to what may be thought to be a fairly low base
rate occurrence. Kirkland and Kirkland (2001) surveyed 61 member boards of the
Association of State and Provincial Psychology Boards regarding complaints and
disciplinary actions related to custody evaluations and found that such complaints were
on the increase. They concluded, however, that although psychologists who conduct
custody evaluations are ‘extremely likely’ (p. 171) to experience a complaint, only about
1% of complaints filed actually resulted in findings of formal fault or probable cause
against licensees (Kirkland & Kirkland, 2001). Redress should be available when there
is patently egregious conduct. It appears that state licensing boards may be cautious
about concluding that unhappy litigants have bases for complaint and are instead
leaving the vast majority of these matters where they may arguably belong; in the court
that ordered the evaluation and that provides for cross-examination to explore the
methodology underlying the evaluator’s opinions.

Ethics Committee Complaints

Professional organizations that promulgate ethics codes may establish rules making
adherence to the codes mandatory or simply advisable for continuing membership.
Organizations may set forth the rule that membership cannot be voluntarily suspended
during the investigation of an ethics complaint. The APA, for example, explains within
the Ethics Code (Introduction and Applicability):

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

Membership in professional organizations is not mandatory. The number of clinically trained doctoral-level psychologists who are members of the APA was estimated to be at least 61,304 in 2002 – 69% of the estimated 88,491 clinically trained psychologists identified nationally by the U.S. Department of Health and Human Services National Mental Health Information Center (2005). Although a practitioner who does not belong to the primary or leading organizations of the profession may be viewed in a somewhat less than favorable light, a practitioner who is expelled from the organization for ethical violations is likely to be viewed much more negatively. A painful line of questioning on the witness stand would elicit the rarity of that event so that the expelled psychologist would be distinguished as one of very few APA members subjected to an ethics investigation, much less sanctioned or expelled as a consequence. For all practical purposes, it would be virtually impossible to continue practicing in the forensic arena. It would be necessary, for example, to disclose the expulsion to every potential referral source and litigant before the examination began so they could choose whether to proceed with the examiner.

The APA Ethics Committee publishes an annual report of the complaints handled. An examination of the report for 2006 sheds light on the frequency of complaints in general and complaints about child custody evaluation specifically. Although complaints heard by the APA Ethics Committee may not be resolved within a year, the average time is 9.1 months (APA Ethics Committee, 2007a). At any one time, there may be active complaints from several years; the total number of active matters at all stages (inquiry, preliminary investigation, etc.) during 2006 was 567. The numbers of active complaints being handled by the APA Ethics Committee each year for 2002 through 2005, respectively, were reported as 569, 604, 541, and 558. In 2006, 29 new cases were opened, and during the previous 5 years examined in this report, the numbers of new cases opened for each year from 2002 to 2005, respectively, were 35, 25, 20, and 31. In 2006, three of those cases, or 10%, involved specifically child custody evaluations, while five (17%) had child custody evaluation as one of the issues in the complaint.

Generally, the finding of the APA Ethics committee that an ethics violation has occurred may result in a fairly light penalty, as evidenced in a study by Glassman (1998). In that review of Ethics Committee records for the period 1990 through 1994, between 7 and 10% of all submitted complaints concerned a custody matter and the range of ethical and licensure board punishments went from mandatory continuing education to monetary fines. Even in the rare cases involving findings of probable cause, no serious disciplinary action such as suspension or revocation was taken.

There has been at least one unsuccessful effort to invoke quasi-judicial immunity to set aside an ethics investigation. When an unhappy litigant reported a custody evaluator to the APA Ethics Committee and sought disciplinary action against the evaluator, the evaluator attempted to invoke protection through quasi-judicial immunity and litigation privilege (Howard Budwin v. APA, 1994) but that protection was not granted. Clearly, the evaluator does not become immune, simply by being court-appointed, from professional ethics any more than from the potential for licensing board review.
CONCLUSION

This article has explored the sources of authority or guidance that illuminate the process of conducting a parenting plan evaluation, and their relative enforceability, the manner in which they may be enforced, and the consequences of not following them. Tippins (2008) observed that, with the exception of the AFCC Model Standards, there is not a set of standards or guidelines sufficiently detailed to approximate the ‘practice protocol’ that might serve as a direct yardstick for measuring adequacy of an evaluation. Clearly, the complexities of parenting plan evaluations owing to the variations among families being evaluated, the nature of the allegations or concerns in a particular case, and the developmental capacities of the children challenge any such attempt. Tippins (2008) called for some definitive, authoritative protocol that would direct the evaluator to use relevant and reliable methods to develop data that can be reasonably relied on by the fact finder, and to limit any formulations to those drawn directly from the data. These are the very standards by which expert testimony should be evaluated by the gatekeeper. If bad work is getting into evidence, it may be not because of a missing protocol, but because attorneys fail to challenge bad work or judges exercise excessive leniency in what is admitted.

REFERENCES


