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Use of Ethics Conflicts in Custody Cases

Clearly, there are conflicts between the Codes of Ethics of custody evaluators and those of attorneys. The most obvious, as recited by Ackerman & Kane in their book, Psychological Experts in Divorce Actions, is that the expert's obligation to address the "best interests of the child" is often at odds with the attorney's obligation to zealously represent the client.[1] Also, a conflict may result when the psychologist attempts to keep therapy notes or test responses confidential when our obligation is to review all documents that may have any bearing upon the Report.[2]

Often times it is beneficial to use the applicable ethical standards of psychologists for:

a) admissibility arguments under Daubert or Indiana Evidence Rule 702[3]; or

b) for purposes of cross-examination.

Admissibility

The ethics code currently used by psychologists is the "Ethical Principles of Psychologists and Code of Conduct" ("*Principles*"), which were effective December 1, 1992. According to Ackerman & Kane, four (4) of the ethical standards set forth in the *Principles* have particular relevance to the expert witness "gate-keeping" determination. Those are:

> Standard 2.04 which requires psychologists "to rely on scientifically and professionally derived knowledge" in their professional work.

[1] Ackerman & Kane, Psychological Experts in Divorce Actions, Third Edition, Section 2.1 "Codes of Ethics" p. 69.
[2] Id., p. 69. See also the discussion of this issue at p. 8, et seq.
[3] Attached to these materials is an article authored by William J. Hughes, Judge, Hamilton Superior Court 3, "Out of the Frye Pan and into the Fire: The Judge's Role as Gate keeping in the Admission of Expert Testimony" which addresses the Daubert standard within the parameters of Indiana case law and Indiana Evidence Rule 702.

> Standard 9.02 (a) which requires psychologists to use assessment instruments and methodology "in a manner and for purposes that are appropriate in light of the research on evidence of the usefulness and proper application of the techniques," as well as prevent misuse of those instruments or the information they provide.
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> Standard 9.06, which requires that psychologists be familiar with the psychometric properties and limits of instruments they use, and to make adjustments, when necessary, based on individual situations.
>
> Standard 9.06, which require(s) psychologists to explicitly state "any significant reservations they have about the accuracy or limitations of their interpretations."[4]

In the view of Ackerman & Kane, the psychologist who meets those requirements "should have no significant difficulty passing judicial muster under the Daubert requirements."[5] In support of their observations, Ackerman & Kane cite an article by Frederick Rotgers and Deidre Barrett.[6]

Cross Examination Material

Generally speaking:

> Forensic psychologists have an *obligation* to present to the court, regarding the specific matters to which they will testify, the boundaries of their competence, the factual bases (knowledge, skill, experience, training, and education) for their qualification as an expert, and the relevance of those factual bases to their qualifications as an expert on the specific matters at issue.[7]

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[4] Id., at p. 70. The Standard citations have been changed by the author to conform as nearly as possible to the 2002 *Principles* effective 6/1/03.

[5] Id., at p. 70.

[6] Frederick Rotgers & Deidre Barrett, Daubert v. Merrell Dow *and Expert Testimony by Clinical Psychologists: Implications and Recommendations for Practice*, 27 Prof. Psychol. Res. & Prac. 467, 471 (1996), as cited by Ackerman & Kane, supra, at p. 70.

[7] Specialty Guidelines for Forensic Psychologists III.B, as cited in Ackerman & Kane, supra, at pp. 71 and 72.

A psychologist who claims to have expertise without having first undertaken "appropriate study, training, supervision, and/or consultation from persons who are competent in those areas or techniques will be in violation of the *Principles*. [8]

As we are all aware, therapists assign DSM-IV diagnostic codes to clients for purposes of forensic evaluation and/or testimony. The practice arises from the requirement of insurance companies that such a designation accompany therapist billings. At p. 125, Ackerman & Kane note that Standard 6.06 of the *Principles* provides that "Psychologists do not exploit . . . payors with respect to fees;" "psychologists fee practices are consistent with law;" and, "psychologists do not misrepresent their fees." Standard 6.06 of the *Principles* provides "In their Reports to payers for services . . ., psychologists accurately state the nature of the . . . service provided, [and] the fees or charges."[9] Custody evaluations do not fall under the general category of "reasonable and necessary medical expenses." Therefore, Ackerman & Kane conclude at p. 126 that the psychologists' services cannot be legitimately billed to the carrier as if one was billing for a clinical evaluation for purposes of treatment.

At page 126, Ackerman & Kane recognize three (3) possible exceptions to this Rule:

1. If the evaluator specified on the statement that "the following services were provided as part of a child custody evaluation," with each service fully described; Some health insurance companies will provide at least partial payment, most likely predicated on the proposition that the policyholder gained psychological benefit from the service.
2. If the person evaluated became the patient of the evaluator after the evaluation was completed, or if the individual's therapist did the evaluation because the situation fit one of the rare exceptions to the rule that a therapist should not act as an expert witness for his or her own patient . . . .
3. If the individual is convinced to seek psychotherapy by the results of the evaluation (and the results of the evaluation are given to the therapist), or if the evaluation was given to the individual's current therapist in order to facilitate ongoing psychotherapy.

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[8] Ackerman & Kane, supra, at p. 72
[9] Id., at p. 125.

The issue of the true reason a DSM-IV diagnosis is assigned is often times a fertile source of material for cross-examination.

Psychologists are obligated to avoid "dual relationships" which involve potentially conflicting roles. Standard 3.05 (a) defines multiple relationships as follows:

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

Standard 3.05 (c) of the *Principles* allows a psychologist to testify as a fact witness despite having had a professional relationship with an individual in the event the therapist considers the effect the relationship may have had on professional objectivity and opinions, but requires in the event "multiple and potentially conflicting roles" cannot be avoided, the therapist "clarify role expectations."[10]

According to Ackerman & Kane, in a custody case the primary loyalty of the psychologist is to the "best interest of the child" but the psychologist also owes the duty of loyalty to the court, each person evaluated, and unless the psychologist is court-appointed, to one or more attorneys.[11] Given the scope of the duty referenced by Ackerman & Kane, how can an expert avoid the appearance of a "dual relationship?" Ackerman & Kane answer this inquiry at p. 85 by stating that the expert should limit telephone calls from litigants, request that any information which the litigant seeks to add to the materials provided during the session be written down and mailed to the expert, and make notes on all calls received because calls are part of the relevant clinical record. If those steps are not taken, on cross-examination, the attorney

[10] Id., at p. 79.
[11] Id., at p. 78.

should inquire into the ethical violation by the psychologist as it relates to the psychologists' credibility.

Psychologists are generally obligated to identify all substantive factors that need to be addressed prior to stating an opinion, and to refuse to do an evaluation (or to limit its scope) if those factors cannot, for whatever reason, be addressed.[12] Such factors include:

a. the failure of the psychologist to have access to and interview all parties in the dispute;
b. medical, school, social service, or other records not reviewed or not requested;
c. the failure of the psychologist to review all relevant sources of data, including the records referred to above, psychological tests, interviews of the parties and interviews of others who have potentially relevant input;
d. the imposition by the psychologist of an arbitrary limit on the number of hours he/she will devote to data gathering and analysis, as such a limit certainly implies relevant factors may not be adequately addressed;
e. the therapist should not allow fatigue to play a role in the results of the evaluation, and therefore, the amount of time the parties are asked to participate in the evaluation process in a single day should be reasonable.[13]

The failure of a child custody evaluator to address such factors should be used for purposes of impeachment of the report.

<u>Testing</u>

In the final analysis, although I am certain many of you may disagree with this observation, the custody evaluator's conclusion is really nothing other than a subjective expression of his/her opinion. Psychologists are required to use the best methods available to conduct the evaluation. Psychologists attempt to cloak their opinions with the aura of validity by psychological testing. Standard 9.2 now dictates that psychologists only use tests/assessments which are "valid" and "reliable" for the population being bested. If validity and reliability have

[12] *Ethical Principals of Psychologists and Code of Conduct*, Ethical Standards 2.01(a), (b), 7.02(a), (b), (c); *Specialty Guidelines for Forensic Psychologists* VI.C.; Steven B. Bisbing et al., Sexual Abuse by Professionals: A Legal Guide 517 (1995), as cited in Ackerman & Kane, supra, at p. 86.

[13] Ackerman & Kane, supra, at pp. 86-87.

not been established, the psychologist must describe the strengths and limitations of the results and interpretation.

If tests are used, the psychologist should report: a) what the test validly addresses; and, b) how the intermediate factor(s) might be expected to impact the ability of an individual to parent or the needs of the child.[14] The example given by Ackerman & Kane is:

> "if a child is determined to have a very substantial need for nurturing, while a given parent is found to have a severe narcissistic personality disorder or frequent, ongoing major depressive episodes, it is reasonable to conclude that there is a poor fit between this need of the child and the ability of the parent to address the need - not because the test showed the degree of fit, but because the test yielded information that could be analyzed and addressed in drawing this conclusion."[15]
>
> The "best methods" available must be utilized to conduct the evaluation. Those methods do two things: (a) promote the principles of objectivity and scientific competence, and, (b) provide data that are as relevant as possible for the questions faced by the court . . . [In general,] standardized methods promote objectivity better than non-standardized methods . . . Among other things, standardized means that the examiner has less opportunity to be swayed by personal bias or simple error in seeking information about a parent or child."[16]

A method does not have to be a "test" to be standardized. There are standardized interview schedules which may be used . . .Moreover, a method does not have to be "published" in order to be standardized . . . [If used] consistently from one case to another, the test can be said to have the quality of standardization . . The most common standardized methods now used in custody evaluations are traditional clinical psychological tests.[17]

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[14] Id., at p. 99.
[15] *Psychological Evaluations in Divorce Custody* at 162-63; Ethical Principles of Psychologists and Code of Conduct, Ethical Standard 7.04, as cited by Ackerman & Kane, supra, at p. 99.
[16] Ackerman & Kane, supra, at p. 88.
[17] Grisso, *Evolving Guidelines for Divorce/Custody Evaluations*, 28 Fam. & Conciliation Cts. Rev 37 (1990), as cited by Ackerman & Kane, supra, at p. 88.

When a test designed for one purpose is used in a different setting, it may not satisfy the requirement to use "best methods." A study done by Ackerman indicated that 92% of psychologists surveyed used the MMPI or MMPI-2 with adults and 48% used Rorschach. If the evaluator does not administer commonly used instruments, or uses instruments not generally used, he/she must have an appropriate explanation, as the norm is arguably the "best method."[18]

Tests must be correctly administered. It is the psychologist's responsibility to be certain such occurs. To be certain tests are correctly administered, the psychologist should administer the tests personally. Administration of tests by the psychologist will ensure correct procedures are used and "that extra-test behavior (reaction, expressions, and side comments, for example) is noted, and that the entire realm of test-taking behavior is considered in the interpretation done by the psychologist.[19]

If any circumstances might have affected the results of psychological testing, such as dim lighting, frequent interruptions, a noisy environment, or medications, or if there is doubt that the person being tested shares all relevant characteristics with the reference groups on which the norms are based, these factors must be taken into account when interpeting test data and must be included in the formal report.[20]

The reports often times go beyond data into the realm of conclusions and speculation about the future. Psychologists must qualify broad statements by identifying whether the basis for a conclusion is the psychologist's clinical expertise, or an event outside that expertise. Ackerman & Kane, at p. 97, addresses the issue of the validity of psychologists' response to several types of questions from test data as follows:

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[18] Ackerman & Kane, supra, at p. 89.
[19] Berman, *The Expert at Trial: Personality Persuades*, 9 Fam. Advoc. 11-12 (1986), See also Nissenbaum, *The Expert at Trial: Tests Tell All*, 9 Fam. Advoc. 14-19 (1986), as cited by Ackerman & Kane, supra, at pp. 91, 92.
[20] K. Pope & M. Vasquez, *Ethics in Psychotherapy and Counseling*, 99-100 (1991), as cited by Ackerman & Kane, supra, at p. 92.

> If the question is about the individual's current psychological functioning, existing psychological tests permit a number of statements to be made validly and reliably. Examples would include statements regarding an individual's level of intelligence as measured by the Wechsler Adult Intelligence Scale – III (WAIS-III) or personality as described by the Minnesota Multiphasic Personality Inventory (MMPI or MMPI-2). More difficult are questions regarding the presence of a particular state or condition – for example, a formal diagnosis of a mental disorder – because the criteria for making the diagnosis are less explicit than are test results; that is, the psychologist must infer rather than simply report. More difficult yet are responses to questions involving potential dangerousness to self or others or future parenting quality. Here the inference is clouded by the substantial influence that environmental factors can have on the way an individual responds to future situations. The quality of possible predictions is at best equivocal and must be made with a variety of qualifying statements to have any validity at all. In other words, the psychologist should not claim certainty about these tenuous factors.[21]

Confidentiality

From what source do psychologists seek for guidance in resisting disclosure of files?

The Committee on Legal Issues of the American Psychological Association, in 1995, published "Strategies for Private Practitioners Coping With Subpoenas or Compelled Testimony for Client Records or Test Data."[22]

Ackerman & Kane report that the Committee recommended the following approaches to addressing subpoenas:

> It must be determined whether a psychologist has, in fact, received a legally valid demand for disclosure of sensitive test data and client records. If a demand is not legally enforceable for any reason, then the psychologist has no legal obligation to comply with it and may have no legal obligation even to respond. . . .

[21] Weiner, *On Competence and Ethicality in Psychodiagnostic Assessment*, 53 J. Personality Assessment, 827, 828 (1989) as cited by Ackerman & Kane, supra, at p. 97.
[22] Committee on Legal Issues, American Psychological Ass'n., *Strategies for Private Practitioners Coping with Subpoenas or Compelled Testimony for Client Records or Test Data*, 27 Prof. Psychol.: Res. & Prac. 245-51 (1996) as cited by Ackerman & Kane, supra, at pp. 118-120.

[T]he psychologist should discuss the implications of the demand with the client (or his or her legal guardian). When appropriate, the psycholoist may consult with the client's attorney . . . . A legally competent client or the client's legal guardian may choose to consent in writing to production of the data. . . . The client's ties (such as test publishers) and the obligations of psychologists to withhold test data or protocols . . . .

If a client does not consent to release . . . . the psychologist . . . . seek to prevent disclosure through discussions with legal counsel for the requesting party. . . . Such negotiations may explore whether there are ways to achieve the requesting party's objectives without divulging confidential information . . . . [or] as a possible means of avoiding the wholesale release of confidential test or client information. . . .

If . . . . the requesting party insists that confidential information or test data be produced, the safest course for the psychologist may be to seek a ruling from the court on whether disclosure is required. The simplest way of proceeding . . . . may be for the psychologist (or his or her attorney) to write a letter to the court, with a copy to the attorney's for both parties, stating that the psychologist wishes to comply with the law but that he or she is ethically obligated not to produce the confidential records or test data or to testify about them unless compelled to do so by the court or with the consent of the client . . . . [T]he psychologist . . . . may request that the court consider the psychologist's obligations to protect the interests of the client, the interests of third parties (e.g., test publishers or others), and the interests of the public in preserving the integrity and continued validity of the tests themselves . . . . The letter might also attempt to provide suggestions such as the following, to the court on ways to minimize the adverse consequences of disclosure if the court is inclined to require production at all:

1. Suggest that, at most, the court direct the psychologist to provide test data only to another appropriately qualified psychologist . . . .
2. Suggest that the court limit the use of client records or test data to prevent wide dissemination . . .
3. Suggest that the court limit the categories of information that must be produced. For example, client records may contain confidential information about a third party, such as a spouse, who may have independent interests in maintaining confidentiality, and such data may be of minimal or no relevance to the issues before the court . . . .

4. Suggest that the court determine for itself, through <u>in</u> <u>camera</u> proceedings . . . . whether the use of the client records or test data is relevant to the issues before the court or whether it might be insulated from disclosure, in whole or in part, by the therapist-client privilege or another privilege.

If . . . . guidance cannot be sought though the informal means of a letter to the court, it may be necessary to file a motion seeking to be relieved of the obligations imposed by the demand for production of the confidential records . . . . [T]he possible motions include a motion to quash the subpoena, in whole or in part, or a motion for a protective order . . . . Courts are generally more receptive to a motion to quash or a motion for a protective order if it is filed by the client about whom information is sought (who would be defending his or her own interests) . . . . If the client has refused to consent to disclosure of the information, his or her attorney may be willing to take the lead in opposing the subpoena . . . . Grounds may exist for asserting that the subpoena or request for testimony should be quashed, in whole or in part . . . .

Possible grounds for opposing or limiting production of client records or test data [include]:

1. The court does not have jurisdiction over the psychologist, the client records, or the test data, or the psychologist did not receive a legally sufficient demand . . . . for production of records or test data testimony.
2. The psychologist does not have custody or control of the records or test data that are sought . . . .
3. The therapist-client privilege insulates the records or test data from disclosure . . . . The psychologist is under an ethical obligation to protect the client's reasonable expectations of confidentiality . . . .
4. The information sought is not relevant to the issues before the court, or the scope of the demand for information is over-broad. . . .
5. Public dissemination of test information such as manuals, protocols, and so forth may harm the public interest because it may affect responses of future test populations. This effect could result in the loss of valuable assessment tools to the detriment of both the public and the profession of psychology.
6. Test publishers have an interest in the protection of test information, and the psychologist may have a contractual or other legal obligation (e.g., copyright law) not to disclose such information . . . .

7. Psychologists have an ethical obligation to protect the integrity and security of test information and data and to avoid misuse of assessment techniques and data. Psychologists are also ethically obligated to take reasonable steps to prevent others from misusing such information. In particular, psychologists are ethically obligated to refrain from releasing raw test results or raw data to persons other than the client . . . . who are not qualified to use such information . . . . This prohibition has the force of law in many jurisdictions where state boards of psychology or boards with similar responsibilities have either adopted the APA Ethics Code or a code of ethics with similar provisions.
8. Refer to ethical and legal obligations of psychologists as provided for under ethics codes; professional standards; state, federal, or local laws; or regulatory agencies.[23]

The APA Code revisions eliminate the prohibition set forth in the 1992 Code which prevents psychologists from releasing test data to "individuals who are not qualified to use them."[24]

Under the 2002 APA Code, a psychologist must release test data to clients and their designees when clients provide a written release. Absent a release, psychologists still must provide such data if required by law or Court Order:

> Test data includes by definition "raw and scaled scores, client/patient responses to test questions or stimuli, and psychologists notes and recordings concerning client/patient statements and behavior during examinations" and "portions of test materials that include client/patient responses." Test materials are "manuals, instruments, protocols, and test questions or stimuli" but do not include test data.[25]

[23] Id., at pp. 118-120.
[24] Smith, APA Online, *Monitor on Psychology*, "What You Need To Know About the New Code," Vol 34, No. 1, January, 2003, at p. 2
[25] Id., at p. 1.

Conclusion

Rather than routinely concede that a psychologist's prediction is truly in the best interest of the child, it is useful to know that according to Ackerman & Kane there is a "lack of any mythological sound imperial evidence" allowing psychological predictions as to the efforts of various types of custodial placements on children, or whether joint custody, in general, is a better option than single-parent custody.[26]

[26] Ackerman & Kane, supra, at pp. 98-99.