

## **Psychological and Legal Considerations in Reviewing the Work Product of a Colleague in Child Custody Evaluations**

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*This article has three primary objectives: 1) to examine what the authors believe are some important psycholegal and ethical considerations for work product reviews of a child custody evaluation; 2) to make suggestions to custody evaluators and retained reviewers to incorporate the concept of “helpfulness to the court” as a fundamental, guiding principle; and 3) to offer some suggestions about how and why a custody evaluator might derive some positive value from a competent and ethical review of his or her work product. The role of a reviewer of the work product of the court’s appointed child custody evaluator is becoming more common in custody litigation. The functions and ethics of this evolving role are discussed. The inherent tension between a retained reviewer’s obligation to provide ethical and helpful testimony to the court, while in the role of a retained expert, is examined. The psychological perspectives of both evaluator and reviewer are presented. This article discusses the commonly held, but erroneous, belief that a psychologist (as a retained reviewer) has an ethical duty to discuss his/her concerns with the psychologist whose work was reviewed. The legal and ethical reasons why the APA ethics code (2002) does not apply to review work are presented.*

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## ROLE OF THE REVIEWER IN CHILD CUSTODY CASES

With increasing frequency, forensic mental health professionals are involved in child custody disputes and litigation to provide consultation and expert testimony after the completion of a child custody evaluation. An evolving role is that of a retained reviewer to provide an analysis and opinion of the quality of the child custody evaluation process, including a review of the evaluator's written report and the evaluator's methodology. The custody evaluator's role is to provide a neutral, objective, and impartial evaluation of the parents and children, to address the pertinent referral questions, and to make recommendations to the court based on the psychological best interests of the child. The evaluator is either court-appointed or appointed by a consent order. As a consultant/educator to the court, the child custody evaluator's goal is to address the referral questions in a manner most helpful to the court, while adhering to all applicable forensic, legal, and ethical guidelines.

The reviewer's role is distinctly different from the child custody evaluator's role. The obvious difference is the reviewer is retained by one party to critique/review the work of the court-appointed custody evaluator. Nevertheless, as will be discussed, even though the reviewer is a retained expert whose fees are paid by one party's attorney and whose testimony (if given) is expected to be helpful to that attorney and his or her client, being *helpful* to the court also should be the overriding goal of a reviewer. We are advocating this goal should be foremost on a reviewer's mind, just as it should be on the custody evaluator's mind. Although retained by one party, a reviewer is a specific type of expert consultant to the court, ideally providing information, and reasoning to the court that aids the court's deliberations about the child's best interests. We argue that, once a review has been completed and the reviewer has identified some significant problems with the underlying child custody evaluation, the reviewer has an obligation not only to be helpful to the retaining party but also to the court. As discussed in the following, on rare occasions, a reviewer might be retained by one party to give testimony about the strengths and weaknesses of a custody evaluation. A competently done cross-examination of a retained reviewer should be able to elicit opinions about a custody evaluation's strengths. A reviewer who only presents the "bad" and the "ugly" findings to the retaining attorney and presents the same slanted testimony to the court, accurately, will be viewed as a "hired gun." We argue a reviewer, as a retained expert, should give balanced testimony, based on an ethical and defensible review of a custody evaluation. Once a

retained reviewer is declared as an expert witness for one party, we believe the reviewer has an obligation to be helpful to the court (Austin, Dale, Kirkpatrick, & Flens, 2011). The principle of helpfulness, as we use it here, means the work product and/or testimony of a forensic expert should a) be true to the data and issues in the case and b) present an honest, balanced, objective analysis for the court.

While the experience of reviewers may be that it is not uncommon to encounter poor quality in child custody evaluations, there is an absence of research on general quality. Survey studies have been conducted on the procedures used by evaluators (Ackerman & Ackerman, 1997; Bow & Quinnell, 2001) and how evaluators approach special issues such as domestic violence (Bow & Quinnell, 2003). One of Bow's surveys examined the quality of custody reports (Bow & Quinnell, 2002) and another surveyed the concerns of lawyers and judges about custody evaluations and evaluators (Bow & Quinnell, 2004). Another study, using a small sample of convenience, studied the forensic quality of the reports and evaluations (Horvath, Logan, & Walker, 2002). Kelly and Ramsey (2008) recently called for research on the effectiveness of custody evaluations or a cost/benefit analysis of what evaluations really provide in light of their use of court and financial resources. Austin (2009), in commenting on Kelly and Ramsey, suggested that steps to provide forensic quality control, such as work product reviews, would be a means to increase the benefit to the courts and litigating parents. Kelly and Ramsey's ambitious research proposal would include an assessment of the quality of custody evaluations (Kelly & Ramsey, 2008). The available research indicates there are reasons to be concerned about the general quality of custody evaluations, not surprisingly, given the wide variance in the training and experience of evaluators to conduct what may be the most complex and difficult of all forensic mental health evaluations. There also are no established criteria or dimensions for assessing the quality of custody evaluations. We suggest quality can be assessed in terms of a) methodology, b) knowledge of law and research, c) data collection, d) data interpretation, e) the correspondence between the evaluator's opinions and the underlying data, and f) the evaluator's awareness and use (when appropriate) of the standards, guidelines, and parameters of practice. One of the authors of this article has argued there are certain minimum standards one should consider in conducting a child custody evaluation (Kirkpatrick, 2004). We also believe balanced reviews can provide rich data about the quality of custody evaluations.

To gain a better perspective on the role of a reviewer in the child custody context, it is helpful to be aware of the common use of retained experts, consultants, and rebuttal experts in civil litigation. The "tension in the roles experts are expected to play is fundamental to the way in which experts are used in the legal system" (Shuman & Greenberg, 2003). The tension results from a duality in their role, i.e., who retains them for what purpose

and their ethical duty to appear helpful and objective. For understandable reasons, it would appear the retained expert “starts out in a hole” on the issue of perceived credibility. She must overcome this uphill climb so the court will come to see the expert’s testimony as accurate, unbiased, and helpful and thus be persuaded by the retained expert’s testimony on the issues in dispute. We believe it is optimal for a retained expert to give testimony that is viewed by the court as being true to the data and issues of the case, i.e., perceived as being aligned congruently with the data and providing ethical expert testimony, rather than perceived as singularly aligned with the retaining attorney’s advocacy position (Tippins, 2009; Shuman & Greenberg, 2003).

To state the obvious, a retained expert does not have the same standing as the court’s appointed expert. We see three reasons for this difference in status: 1) the retained expert is hired by one side, and, until declared as a testifying expert witness, her role is cloaked in the attorney-client work privilege; 2) the retained expert’s role and task do not give her access to some of the original data, e.g., the retained expert never interviews the parties, child(ren), or collaterals; 3) the retained/reviewing expert’s task is entirely different from the task of the custody evaluator. A retained review of a custody evaluator’s work is not a “second opinion.” To stay with the metaphor of the uphill climb the retained expert faces, the retained expert will only achieve credibility with the court by adhering to all applicable standards, guidelines and practice parameters, by articulating to the court the limits of the reviewer’s task and findings, and by focusing on the strengths and weaknesses of the custody evaluator’s methodology and written report.

Ethical guidelines in forensic psychology require the retained expert to provide objective analysis and balanced testimony, meaning properly addressing alternative views of the data and alternative hypotheses, no matter who is paying the expert’s fees. The Specialty Guidelines (1991) are usually cited to support this position. We believe presenting balanced and objective testimony is the only tenable position for a reviewer to take if she wants the court to take her seriously:

In providing forensic psychological services, forensic psychologists take special care to avoid undue influence upon their methods, procedures, and products, such as might emanate from the party to a legal proceeding by financial compensation or other gains. As an expert conducting an evaluation, treatment, consultation, or scholarly/empirical investigation, the forensic psychologist maintains professional integrity by examining the issue at hand from all reasonable perspectives, actively seeking information that will differentially test plausible rival hypotheses (Committee on Ethical Guidelines for Forensic Psychologists, 1991, p. 341).

The structure and outline of how to conduct a competent work product review have been previously described (Gould, Kirkpatrick, Austin, &

Martindale, 2004; Stahl, 1996; Martindale & Gould, 2008), but more research needs to be done. At this point, there are no standards of practice or consensus on how to define the role of reviewer.<sup>1</sup> Issues involved in the role of reviewer vs. consultant have recently been discussed (Austin, Dale, Kirkpatrick, & Flens, 2011; Tippins, 2009; Martindale, 2010). The role of reviewer can be thought of as an “emerging forensic role” (Austin et al., in press). Yet, at the same time, courts are becoming more aware that consultants and reviewers are being used with increasing frequency. Second evaluations in custody cases, or a second court-appointed expert, are rare in some jurisdictions (i.e., California), but commonplace in others (i.e., Colorado). Although, as stated above, a work product review is not a “second opinion,” but a review can be obtained in lieu of a second evaluation and can be helpful to the court.

Little has been written about the role of a reviewer in the professional guidelines or standards pertaining to child custody evaluations. The APA child custody guidelines (American Psychological Association, 1994) identified the role of a reviewer as appropriate: “[o]r a psychologist may be asked to critique the assumptions and methodology of the assessment of another mental health professional” (III. 8.). The Model Standards for Child Custody Evaluation (AFCC, 2007) has one small section or rule, on the role of reviewer (Rule 8.5). It addresses the issue of dual roles so the reviewer should not have a prior relationship with or meet with the litigants or members of the litigants’ families. This is a general statement and does not address the issues of how the reviewer’s role is defined or the functions inherent in the role, e.g., reviewing work product, consulting, providing general testimony on research and professional issues.

The Code of Conduct by the American Psychological Association (2002) anticipates that psychologists will sometimes be called upon to review documents and records and issue opinions (Rule 9.01(c)), which is the essential task of the reviewer role when the reviewer becomes a testifying expert based on a review of child custody report and case file. Rule 9.01(c) states:

When psychologists conduct a record review or provide consultation or supervision and an individual examination is not warranted or necessary for the opinion, psychologists explain this and the sources of information on which they based their conclusions and recommendations (p. 1071).

This rule presumably was not designed in 2002 to address the role of reviewer in child custody cases, but it is a generic rule for the many psychological contexts in which psychologists practice where they are asked to review records and issue opinions about the data and issues that were reviewed and interpreted. The rule is not meant to replace evaluations and the opinions based on directly gathering data on the person or persons in question.

For example, an insurance company may retain a clinician to review hospital records to determine if there was sufficient basis for the diagnosis being used for billing for services. This rule follows and is an exception to the rule (9.01(b)) that opinions should not be expressed about persons who have not been personally evaluated and about whom there is not an adequate basis for the opinions expressed:

Except as noted in 9.01(b), psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements or conclusions (p. 1071).

Both of the above rules are part of, or follow from the initial rule or standard (Rule 9.01(a)), there should be the necessary and sufficient data before expressing opinions or recommendations:

Psychologists base the opinions contained in their recommendations, reports, and diagnostic or evaluative statements, including forensic testimony, on information and techniques, sufficient to substantiate their findings (p. 1071).

When a retained forensic expert reviews the work product of the court's appointed child custody evaluator, the purpose is to conduct an objective assessment of the forensic quality without any preconception that the purpose is to find only weaknesses or deficiencies in the evaluation. Our profession requires that the review should be a fair, balanced, and accurate assessment of the overall quality—meaning, identifying the strengths as well as weaknesses. An objective assessment is the *sine qua non* of review work, as noted by the few published articles on the structure and issues in a competently conducted work product review (Gould et al., 2004; Austin et al., in press) and forensic ethical guidelines (Specialty Guidelines, 1991). Shuman and Greenberg (2003) point out that the same issue and pressure on the retained expert exists in other types of forensic mental health cases. These authorities warn that retained experts “may perceive they must choose between integrity and advocacy,” but this is a “false choice” (p. 219), because it is possible to define the retained expert role in a way “that permits experts to be concurrently ethical, persuasive, impartial, and helpful” (p. 219) to the court and the retaining attorney. Shuman and Greenberg (2003) also point out that retained experts may be permitted by courts to give testimony in such a way that compromises their professional ethics, so the testifying expert has the responsibility of alerting the court to any conflict between law and ethics. They go on to propose an “alternative, integrated approach” to providing ethical testimony in the role of a retained expert based on (1) attending to the need to be competent or well trained; (2) providing

relevant testimony; (3) developing a perspective on maintaining neutrality in the midst of adversarial advocacy; (4) guarding against bias and providing a balanced analysis including the consideration of alternative hypotheses; and (5) being candid and forthright about the basis for one's opinions and the limitations of the data and method. Shuman and Greenberg (2003) remind us that the system of civil litigation depends on and routinely uses multiple retained experts to educate and inform courts. This view of experts applies to the role of a reviewer in custody cases.

The following sequence of steps outlines the process and stages of the ethical work product review of a child custody evaluation:

1. The expert is contacted by the retaining attorney, who requests the expert review a child custody report and provide candid feedback on the quality of the evaluation and report. Typically, the expert is asked specifically to address whether the recommendations and ultimate issue opinions are supported by the data in the report. The prospective reviewer anticipates the legitimate advocacy position of the retaining attorney.
2. If the expert agrees to accept the task, the expert sends the retaining attorney a "retainer contract" (or "letter of understanding") spelling out the nature of the services to be provided, the expert's understanding of what she is being retained to do, and emphasizing the work product review will be an objective, but limited, assessment. The contract or letter of understanding stresses that any future consultation or testimony services will be discussed only after the objective review is completed. It is prudent to obtain an appropriate non-refundable retainer in full prior to providing any review work. The contract or letter of understanding articulates the expert's recognition of the two distinct phases of expert consultation: 1) the role and tasks of a non-testifying reviewer, whose consultation and findings are confidential and protected by the attorney work-product privilege; and 2) the role and tasks of an expert witness, whose consultation and findings (including any written material) are not protected, are not confidential, and are discoverable, under the rules of evidence.
3. The expert conducts an ethical and objective review, analysis, and assessment of the child custody report without succumbing to any expectations or agenda that only weaknesses of the report will be addressed. A balanced analysis of the strengths and weaknesses is conducted on the procedures, data collection, data analysis, and formulation of opinions as articulated in the written report. The reviewer examines whether the opinions formulated seem to correspond with the underlying data based just upon a critical reading and analysis of the custody report.
4. There appears to be consensus that experts should not engage in consultation on a case and then shift to the role of trying to conduct an objective work product review (Heilbrun, 2001). The expert would then

already be aligned with the advocacy position and probably would not be viewed as credible by the court. This is the central reason we emphasize that the retained expert tell the retaining counsel—upfront and in writing—that the review will be conducted in an ethical and objective manner.

5. The reviewer provides candid, cogent feedback to the attorney on the strengths and weaknesses of the written report. If an analysis of the report suggests there are serious deficiencies and what appear to be fatal flaws, which far outweigh the evaluation's strengths, e.g., the evaluation may not be helpful to the court or might be misleading or biased, then this opinion is communicated to the retaining counsel at this time, after which the attorney and reviewing expert discuss her future involvement in the case.
6. Decisions are made about the expert's future role and forensic function, or services to be provided. The pros and cons of the reviewer's opinions being used in testimony are discussed. If the reviewer opines that the custody evaluation report was of significantly poor quality and possibly inaccurate in its opinions and recommendations, then the attorney likely will want the reviewer to become a testifying expert and to provide some degree of trial consultation services. This decision point puts the reviewer at the threshold of stage two of the expert reviewer role.
7. Next, if the attorney wants the expert to conduct a comprehensive work product review, the attorney (through discovery) will arrange to obtain the evaluator's case file so the reviewer can conduct a thorough review of the file and relate it to the custody report.
8. The attorney and expert will define the consultation part of the role and services to be provided. This may include assistance in preparing questions for the custody evaluator's cross-examination and the reviewer's direct examination. The attorney may view this consultation as helpful to his advocacy for the client's position. The ethical expert will have the perspective that assistance in addressing issues in the case and eliciting testimony will facilitate better quality of evidence being made available to the court. Therefore, the retained expert concurrently is being helpful to the court and to the retaining counsel.
9. The attorney and expert will decide if a written report, based on the review, is necessary and helpful. The attorney will be focused on legal strategy and it will be his or her call to ask the expert to prepare a rebuttal report to buttress the expected testimony, or decide not to prepare a report. In some jurisdictions, a report would be required.
10. The attorney and expert will discuss if the testimony will only consist of a review of the quality of the evaluation and report, or if instructional testimony on the research and professional literature relevant to issues in the case will be combined with the review testimony. This would be a hybrid role of a work product review and professionally relevant

education on the issues, or more accurately a combination of forensic services. All expert testimony has an educational component for the court to some degree (Mnookin & Gross, 2003). Many child custody evaluators discuss the literature and research on salient issues as part of their testimony and in their reports. Reviewers should be prepared to discuss the relevant literature and research, if requested to do so by the retaining attorney, and if appropriate, while offering testimony to the court. A reviewer should foresee she will be asked to discuss relevant literature and research under cross-examination.

## PSYCHOLOGICAL PERSPECTIVES OF THE REVIEWER

As the reviewer heads toward becoming a testifying expert (and identified as such), there should be psychological sensitivity on her part to anticipate how the child custody evaluator likely will respond to being reviewed. The evaluator will probably view the process as a "critique," highlighting potential flaws in the evaluation because the reviewer probably would not be testifying if he or she did not feel there were serious deficiencies questioning the accuracy of the evaluator's opinions and recommendations. The reviewer should also anticipate some evaluators will view the review as an "attack." Occasionally, though, the reviewer may be asked to supplement or reinforce the evaluator's opinions and, basically, give testimony that the evaluation was sound and the data supported the evaluator's interpretations and opinions.

The ethical and competent reviewer will approach her task with the mindset that expressed opinions critical of a colleague's work product will be constructive criticism of the evaluation, not of the evaluator, with the overall objective of being helpful to the court. The ethical reviewer who takes a balanced approach to his or her role will want the testimony and/or report to be persuasive, unbiased, candid, and educational to the evaluator as well as the court.

As stated above, conducting child custody evaluations arguably may be the most stressful forensic role for a mental health professional. There are many reasons for this perspective. To name but a few: a) the child(ren)'s welfare and well-being are at stake, hinging on decisions about the care, custody, and control of them; b) the fact that a custody evaluation was necessary puts the specific case in a special category, because it means the parties, for probably a myriad of reasons, could not reach a consensus on the custody and child access matters; c) it may mean there are conflicting agendas and goals operating that can consume the litigants, the children, the lawyers, the evaluator, other involved professionals, and the court; d) many of the issues a custody evaluator is asked to address require specialized knowledge, training, and experience; and e) mental health professionals who enter the forensic world of child custody evaluations may do so without fully

understanding the nature of the potential adversarial process and what the heat of a litigated custody case may entail.

Striving towards best practices in conducting child custody and child access evaluations is a continual learning process. The reviewer should hope her review testimony and work product, i.e., report, will be a positive learning experience for the evaluator. Unfortunately, our experience is that most evaluators are very defensive in how they respond to the whole idea of being reviewed and sometimes seem to take the review experience as a personal affront. They often tenaciously defend their evaluation and sometimes with charged affect in their testimony under cross-examination. Martindale (2010) made a similar observation and cautioned reviewers to be mindful of the risk management issues involved in doing review work:

Though many evaluators respond to criticism of their work in a professionally appropriate manner, many others react quite poorly. Of those who react poorly, some appear to have decided that they may be able to intimidate potential critics by filing complaints against those who offer criticism. For that reason, when a forensic psychological consultant comments on the work of a colleague, exposure to risk commences the moment that the reviewer offers the first critical comment . . . Even when complaints are without basis and are quickly dismissed, responding to complaints requires the expenditure of time, energy, and funds (p. 6).

When providing a written report based on a review of a child custody evaluation, we recommend the reviewer include in a section in the report labeled a “caveat on reviewing a colleague’s work product.” In this section, the reviewer should describe the purpose of a work product review, its limitations, and that the primary goal is to be helpful (“educational”) to the court and to the evaluator. As professionals who conduct retained reviews, we genuinely want to educate the evaluator so the evaluator can avoid making similar mistakes in the next custody evaluation. While one of the authors has had the experience of an evaluator deciding never to do another custody evaluation after experiencing a review and hearing rebuttal testimony about the evaluation, this will be the exception. If done well—meaning, in an objective and ethical manner—the reviewer role can be viewed as part of the process of forensic quality control and an important vehicle to assist the court. The reality is that the court often is not sufficiently aware of or educated about forensic subtleties and specialized knowledge to recognize when the court’s appointed expert testimony is inaccurate or misleading. In an ideal sense, reviewers can be viewed as a type of function in the legal process to monitor quality and assess if custody evaluations meet the standards of practice. The reviewer’s function may enhance the court’s ability to make a thoughtful and educated determination on the issues presented by the custody evaluator’s findings and recommendations.

## PSYCHOLOGICAL PERSPECTIVE OF THE EVALUATOR BEING REVIEWED

As noted above, evaluators are often defensive and take opinions in a review as personal criticisms. This may be an understandable human response, but the appropriate professional response is to recognize that retained experts are part of the forensic territory and not uncommon anymore in custody litigation. As mental health professionals who conduct child custody evaluations, we believe we can take some lessons from our legal colleagues, who endure, but (most often) do not personalize criticisms of their reasoning, interpretations, writing, or advocacy. The reviewer is doing his or her job in a legitimate forensic role. Under cross-examination, defensive evaluators may come across as arrogant and cling to flawed data or insufficient methods. Sometimes a reviewer and evaluator will have legitimate differences in professional opinion on a particular issue – methodological preferences for given procedures such as psychological testing, how to interpret or weigh research findings, what is an appropriate parenting time plan for a given age, or how alternative hypotheses were considered. We think it is helpful to the court to hear and weigh these differences.

When significant deficiencies are revealed by a reviewer, and become obvious to the court, then defensiveness by the evaluator will appear to be more ego-protective, or face-saving, rather than the expert evaluator being aligned with the data to be helpful to the court. Sometimes a child custody evaluator who has been reviewed will ask to prepare a rebuttal report to the reviewer's report. Although there is no consensus about whether or not this is an appropriate response, we do think responding to a review via a rebuttal written report runs the risk of the evaluator appearing that he is caught up in a personalized, adversarial stance with the reviewer or with the retaining attorney. As with any expert witness, the evaluator should be mindful of trying to avoid giving "testy" testimony during cross-examination. We strongly recommend the evaluator not write an *ex parte* communication or rebuttal letter to the other counsel (i.e., the one who did not retain the reviewer) or, worse yet, to the court, defending her evaluation.

We recommend that evaluators in every child custody case foresee the possibility of a review and organize her approach to the case with that possibility in mind. This anticipation for the competent evaluator really should not affect the choice of procedures or how thorough the investigation and data collection components are, because those issues should be consistent in each evaluation and conform to practice standards. This anticipation can be helpful to remind evaluators of the importance of keeping a well-organized and legible record or case file that lends itself to an efficient review. The need for keeping a high quality and easy-to-read-and-review file is addressed by

Austin et al. (in press). Our experience is the variance in the quality of record keeping by child custody evaluators is a widespread problem in the field. In most case files that we encounter as reviewers, the handwritten notes are not legible. In such situations the evaluator probably can be required to dictate and have the notes transcribed at his or her own expense. The notes are the core data and if they are not discernible, there is the risk the court may become convinced there are no interview data. Practice guidelines stipulate the need for evaluators to keep a high quality record (APA, 2007) and especially when it is expected there will be a legal proceeding (Specialty Guidelines, 1991).

The psychological posture of the evaluator in response to a review will be enhanced in the eyes of the court if she does not appear defensive and recognizes that the reviewing expert has a legitimate role as part of the legal process. If the evaluator appears to respond to the reviewer's critique and opinions as if they were constructive criticisms, motivated by intended helpfulness, then the evaluator's overall evaluation and opinions may be looked upon more favorably by the court. The court wants to see the evaluator and the reviewer acting in a professional way by being true to the data and issues and providing a thoughtful, thorough, and balanced analysis the court can use in its best interests' analysis.

## WORK PRODUCT PRIVILEGE VS. DUTY TO INFORM EVALUATOR

When an individual retains or is appointed an attorney to represent him/her in a legal proceeding, certain privilege rights attach to the attorney-client relationship. If an attorney retains a forensic expert to consult with him or her about the client's case, the privilege extends to the retained psychologist, and the psychologist is prohibited, by law, from contacting anyone or revealing his or her role to anyone, without the attorney's written consent. In contrast, the APA ethics code (APA, 2002) encourages psychologists to informally resolve situations when it is felt a psychologist may be in violation of the ethics code. The legal and Constitutional protection that is embedded in the attorney-client privilege (*Hickman v. Taylor*, 1947) prevents forensic psychologists from adhering to "informal resolutions" in the APA Ethics Code (APA, 2002, 1.04). This prohibition is clearly stated in 1.05 (APA, 2002): "This standard does not apply when an intervention would violate confidentiality rights or when psychologists *have been retained to review the work of another psychologist whose professional conduct is questioned*" [our emphasis]. This prohibition from making an informal resolution is a professional obligation that applies to the forensic psychologist, as a consulting expert to an attorney, is governed by law and by the rights of the privilege of the attorney's client. Thus, psychologists who expect or demand contact from a colleague when a reviewer finds deficiencies in the custody evaluation

are exhibiting a lack of knowledge of the laws of confidentiality and privilege, especially that of attorney-client privilege, and a lack of knowledge of the mandatory limitations on informal attempts at contact between psychologists as spelled out in our Ethics Code (APA, 2002). Unfortunately, our experience is that custody evaluators who have been the subject of a review of their evaluations have made ethical complaints to the American Psychological Association or a state licensing board based on their lack of understanding of the law and a misinterpretation of the ethics code. These ethical complaints against reviewers run the risk of being, in part or whole, perceived as part of the defensive mindset of evaluators when they are reviewed.

The APA Ethics Code (2002) has two primary sections—its General Principles and its Ethical Standards. The five General Principles (Principles A-E) are aspirational in nature. Their goal is “to guide and inspire psychologists towards the very highest ideals of the profession.” They are not written as obligations and should not be used to impose sanctions. Pertinent to our discussion here, “[psychologists] are concerned about the ethical compliance of their colleagues’ scientific and professional conduct” (APA, 2002, Principle B, Fidelity and Responsibility). Also, “Psychologists exercise reasonable judgment and take precautions to ensure that their potential biases, the boundaries of their competence, and the limitations of their expertise do not lead to or condone unjust practices (APA, 2002, Principle D: Justice). These Principles should guide evaluators and reviewers alike.

The Ethical Standards are not aspirational (APA, 2002). Psychologists who are members of APA are obliged to follow them. These standards are mandatory. Many state licensing boards have adopted in part or whole the APA Ethics Code (CA, FL, NC, PA, SC), so even if a psychologist is not a member of APA, the professional behavior of the licensed psychologist may be governed by the current APA ethics code as it is written into his/her state’s licensure law and regulations. In terms of our discussion here, one of the sections of the APA code—Resolving Ethical Complaints—reads “if the conflict between ethics and law, regulations or other governing legal authority” brings the psychologist into a conflict with any of these, the psychologist makes known his/her commitment to the Ethics Code, but if it is unresolvable, after they take steps to resolve it, psychologists “may adhere to the requirements of law, regulations, or other governing legal authority.”

Most psychologists learn during their graduate training, that if and when they obtained information that a colleague possibly was exercising questionable ethical judgment or questionable professional behavior, the common ethical rule to consider, if conditions permitted it, was to approach their colleague informally. APA published its first Code of Ethics in 1953 (APA, 1953). The APA has revised its Ethics Code nine times to the current edition adopted by APA in 2002. Consideration of an informal resolution was well established by the eighth revision, Ethical Principles and Code of Conduct

by the American Psychological Association (1992): “Psychologists are concerned about the ethical compliance of their colleagues’ scientific and professional conduct. When appropriate, they consult with colleagues in order to prevent or avoid unethical conduct” (Principle C: Professional and Scientific Responsibility). Such an informal and diplomatic approach made a lot of sense.

The previous edition of the APA Ethics Code (1992) also had a provision (8.02 Confronting Ethical Issues) encouraging psychologists to consult with other psychologists who are knowledgeable about ethical issues when a psychologist “is uncertain whether a particular situation or course of action would violate this Ethics Code.” Further, the previous Code (APA, 1992) had a section (8.04 Informal Resolution of Ethical Violations) that stated, “When psychologists believe that there may have been an ethical violation by another psychologist, they attempt to resolve the issue by bringing it to the attention of that individual *if an informal resolution appears appropriate and the intervention does not violate any confidentiality rights that may be involved*” [emphasis added]. Another section of the 1992 Code (8.05 Reporting Ethical Violations) stated that when an informal resolution intervention did not properly resolve the perceived ethical violation, psychologists were instructed by this Code (APA, 1992) to “take further action appropriate to the situation, *unless such action conflicts with confidentiality rights in ways that cannot be resolved*” [emphasis added]. Such action might include referral to state or national committees on professional ethics or to state licensing boards” (p. 1611). As the reader can see, the operant construct—confidentiality—was what psychologists needed to consider prior to initiating an informal intervention. The over-arching concern, it seemed, was psychologists needed to be concerned about what, if any, untoward effects an informal intervention might have on someone’s confidentiality rights.

In forensic psychology, as a specialization that attempts to define the intersection between psychology and law, forensic practitioners learn not only what was being alluded to by the term “confidentiality rights,” but also whose confidentiality rights needed to be considered. There are often multiple layers of privilege and confidentiality.

There are times (alluded to in the phrase noted above, *if conditions permitted it*), when, in the role of a reviewer, contacting a colleague about his/her questionable professional judgment or behavior, might seem to be desirable, but such contact is not only, itself, unethical, such contact might be illegal and prohibited by law. We have found there is much confusion and disagreement among psychologists about this standard. The previous edition of the APA Ethics Code (1992) alluded to these situations, as noted above, but did not offer much guidance or specificity about informal resolution. The current revision of APA’s Ethical Principle and Code of Conduct (2002, 1.04, Informal Resolution of Ethical Violations) more specifically recognizes this limitation, particularly with regard to reviewing the work

product of another expert: “When psychologists believe that there may have been an ethical violation by another psychologist, they attempt to resolve the issue by bringing it to the attention of that individual, *if an informal resolution appears appropriate and the intervention does not violate any confidentiality rights that may be involved*” [emphasis added]. The current Ethics Code (APA, 2002, 1.05, Reporting Ethical Violations) states further: “Such action might include referral to state or national committees on professional ethics, to state licensing boards, or to the appropriate institutional authorities. *This standard does not apply when an intervention would violate confidentiality rights or when psychologists have been retained to review the work of another psychologist whose professional conduct is in question*” [emphasis added].

As reviewers, forensic psychologists are engaged ethically and legally as consulting experts to review and critique the work of their colleagues. As stated above, the review work—in its initial phase—comes under the retaining attorney’s work product privilege. The review is thus privileged and confidential.

When retained to review someone else’s work, under these conditions, as a consulting expert to an attorney, the reviewer is prohibited by law and by her professional ethics from contacting the custody evaluator. The reviewer simply cannot make contact. An informal resolution is prohibited. In the role as a retained reviewer, the reviewer cannot exercise the time-honored practice noted above and memorialized in the Ethical Principles and Code of Conduct (APA, 2002).

It appears that many psychologists still hold the erroneous opinion that contacting a colleague and attempting an informal resolution is a higher ethical standard than adhering to the conduct required of psychologists who are retained as consulting experts by attorneys in civil and criminal law (see Introduction and Applicability, pg. 2, APA, 2002). We believe and understand that it is this misperception among our colleagues about what is *higher* on the legal-moral-ethical continuum that leads to additional conflict and animosity within our profession—most especially when there is a conflict between psychologists in a child custody case who are functioning in a clinical or therapeutic role and those who are functioning in a forensic role.

We are of the opinion that a psychologist cannot and should not expect or demand another psychologist, who has been retained as a confidential consulting expert, and whose work product for that attorney is protected by law under the attorney-client and work product privilege, to agree that the APA Ethics Code (2002) trumps the law and the retained psychologist has an ethical obligation to contact the psychologist to attempt an informal resolution, over and above the legal prohibitions against such contact. The APA (2002, 1.04) ethical code continues to express that a psychologist who believes another psychologist may have violated some professional ethics should consider if a “reasonable resolution appears appropriate,” but it also

adds that any such intervention must also consider whether or not it violates any confidentiality rights that may be involved” (p. 1063).

In the role of a reviewer, the retained expert has an obligation not to disclose any information until the reviewer-expert is disclosed and identified to be a testifying expert. This prohibition would include even revealing to the evaluator (or anyone, for that matter) the reviewer was a retained expert and was involved in the case at all. There needs to be a shroud of total secrecy until the attorney discloses the existence of the reviewing expert. For the psychologist-reviewer to discuss concerns about the work product with a colleague in an informal way would invite a lawsuit from the attorney or her client, and a legitimate complaint to the reviewer’s licensing board and professional organizations for violating confidentiality and privilege.

The ethical tension that exists for psychologists involved in child custody litigation appears (in part) to be caused by friction between the ethical rule on informing colleagues about concerns about their professional conduct versus the preeminent ethical concern for protecting a client’s privilege and right of confidentiality. Since the U.S. Supreme Court has addressed and endorsed the sanctity of the confidentiality in the psychologist-client privilege (*Jaffee v. Redmond*, 1996; Shuman & Foote, 1999)—albeit in the context of psychotherapist-client privilege—just as it has regarding the attorney-client privilege (*Hickman v. Taylor*, 1947), it would appear that the ethical and legal duty of privilege and confidentiality trumps the need to inform a colleague about a potential ethical breach. It does not seem like an ethical close call.

The issue of competing demands between professional ethics and law seems to us to be largely a nonissue for several reasons:

1. First, our professional standards direct mental health professionals in the field of child custody evaluation to attempt to resolve such conflicts, but ultimately the professional must make sure his or her behavior comports foremost with the law (AFCC, 2007, Rules P.3, 2.2). The APA Ethics Code (2002) states in Ethical Standard 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 make known their commitment to the Ethics Code and take steps to resolve it. If the conflict cannot be resolved via such means, psychologists may adhere to the requirements of the law, regulations, or other governing legal authority” (p. 1063).
2. The reviewer and the child custody evaluator need to be mindful of who is the consumer of his or her forensic services. For the evaluator, it is the court. For the reviewer, we would argue, it is the retaining attorney and the court. The retaining attorney is also the advocate for the rights and privileges of his/her client. Thus, the retained consulting expert, when acting in the role of a reviewer, must understand there are two layers of privilege

- rights: the one between the attorney and his/her retained expert, and two, the paramount one between the attorney and his/her client.
3. If the psychologist-reviewer finds deficiencies in the methodology and quality of the child custody work product, these deficiencies will not usually rise to a level where there would be an ethical duty to make a report to the APA or to the state licensing board. There is a fundamental distinction between poor quality in the design and implementation of a forensic evaluation and an ethical violation of the APA Ethics Code (2002) or state or provincial licensure regulations, even if the deficiency was sufficient to be considered a fatal flaw so as not to be helpful to the court. If the deficiency was egregious and also an ethical breach of the Code (APA, 2002), then the reviewer would not be free to discuss the matter with the evaluator unless permitted to do so (or released from the privilege of work product privilege) by the retaining attorney. To interpret the APA Ethics Code (2002) as requiring the psychologist-reviewer to discuss the matter with the psychologist-evaluator prior to preparing a review report for the court and testimony is a misinterpretation and misunderstanding of the APA Ethics Code (2002) and pertinent laws regarding confidentiality and privilege.
  4. The requirement is to discuss the matter with the psychologist before making an ethical complaint to APA, not before offering a critique, such as an affidavit, or giving testimony in a deposition or in court as an expert witness. Even if a reviewer thinks a complaint should be made to a colleague's ethics board or licensing board, the reviewer cannot do so without permission of the retaining attorney, as the privilege still attaches. For this reason, we think this tension between law and ethics is a nonissue, and does not create an ethical double bind. Courts would not tolerate a requirement by a professional organization to dictate to psychologists that they need to breach attorney-client work product privilege. APA learned long ago that the regulatory power of the federal government supersedes that of a private professional organization (or guild) (APA, 1993).

#### PRACTICE TIPS: MAKING A CUSTODY EVALUATION REVIEW-PROOF

There is no guarantee a child custody evaluation and written report will not be subject to a work product review. It sometimes will be a favorable review with the expectation that testimony by the reviewer will buttress the evaluator's opinions by attesting to the quality of the work product and that data support the opinions. This favorable testimony by a reviewer might be expected when there were other retained experts (on the other side) who were expected to be critical of the evaluation. There are, however, some basic steps or safeguards for the custody evaluator who wants to have his

work product favorably reviewed and received by the court. Every expert wants to be persuasive with the court. Evaluators are advised to consider the following:

1. Conduct self-examination on the depth and breadth of their training in child custody evaluation methodology and knowledge of substantive issues and research, especially on complex and special issues such as domestic violence, intimate partner violence, relocation, child sexual abuse, attachment theory and quality of parent-child relationships, psychological testing, substance abuse, child alienation and estrangement, and cultural issues that might exist.
2. Identify areas of weakness in one's training and experience and be prepared to seek professional consultation in cases for problematic issues.
3. Be fully knowledgeable about professional guidelines and standards for child custody, especially recent publications by AFCC (2007) and APA (2010).
4. Receive training on the literature and research on cognitive biases that often affect custody evaluators.
5. Be vigilant on the consideration of alternative hypotheses that need to be developed and investigated in all custody cases. Confirmatory bias often stems from not considering alternative hypotheses or showing an imbalance in gathering data on important hypotheses on the salient issues.
6. Be knowledgeable about the relevant scientific research literature on issues relevant to each case. Be prepared to "freshen up" on relevant literature when a case begins. Do not make generalized assertions about "the research says," unless you know the research and can cite it. Be sensitive to bias created by a one-sided view of the research literature, e.g., primary caregiver bias, anti-relocation bias, etc.
7. Be knowledgeable about the applicable law for the case. This is one of the greatest weaknesses of custody evaluators. We are not lawyers; but mental health professionals, who are venturing forth into the forensic arena, and need to know the law. To not be adequately informed usually means the correct psycholegal questions will not be asked and data will not be gathered on important factors. Knowing the law is necessary to formulating opinions for the court based on the data.
8. Acknowledge the limitations of the report. Do not avoid concluding that it is not possible to have an opinion for the court in light of the circumstances of the case and the extent of the data. This is a common issue in cases concerning allegations of parental misconduct, e.g., partner violence, child sexual abuse.
9. Make sure all expressed opinions are adequately supported by the data.
10. Be knowledgeable about the principles, research, and application of risk assessment methodology when there are issues of harm involved in the case.

## SUMMARY

In this article, we described the evolving role of the reviewer of a colleague's work product in a child custody evaluation context. The standard of practice of the role of a reviewer is developing, as demonstrated by the articles in this special issue of this journal. Ethical and legal issues were discussed, especially the necessary sequence of conducting an objective review of the work product/report before moving towards being designated as a testifying expert or providing forensic consultation services. The article emphasizes that the primary function of the testifying expert/reviewer is to be helpful, not only to the retaining attorney, but to the court. We discussed the challenge for the reviewer to establish credibility with the court in the role of a retained expert. We described the psychological perspective of both reviewer and evaluator and the problem of evaluators being defensive when they are undergoing a review of their professional work product. We examined the issue of the APA ethics code and tradition of psychologists trying to informally resolve ethical concerns. We pointed out that work product and attorney-client privileges would not permit a retained expert to approach a colleague. Colleagues who believe the reviewer should approach them and discuss differences in opinion on the quality of an evaluator's work product are mistaken. There is a clash between law and professional ethics on this issue, but most of the time the deficiencies in the evaluation will not constitute an ethical violation. We discussed how the common practice of reviewers is to combine review work and forensic consultation and how this is compatible with ethical guidelines if there is first an objective review conducted and the reviewer is mindful of giving a balanced and accurate analysis of the evaluator's data and issues, or "impartiality is the best advocacy" (Shuman & Greenberg, 2003, p. 221).

## NOTE

1. The Association of Family and Conciliation Courts (AFCC) currently has a task force developing model guidelines for the forensic roles and services of case consultation and work product review.

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