

REPRINTED ARTICLE

The article that follows has been reprinted
with the kind permission of
Law Journal Newsletters
and
The Matrimonial Strategist.



**Collaborative Work
Product Reviews**

*A Concept in Search
Of a Method*

By David A. Martindale and
James R. Flens

Cite this article as:

**Martindale, D. A. & Flens, J. R. (2015).
Collaborative work product reviews:
A concept in search of a method.
The Matrimonial Strategist, 32:1, 1ff.**

The page breaks in this article are shown between bold brackets [#].

***Collaborative Work Product Reviews:
A Concept in Search of a Method***

David A. Martindale

James R. Flens

We conceptualize the evaluation process as comprising three elements. They are the gathering of information; the integration of that information in order to formulate opinions; and, the organization and presentation to families, attorneys, and courts, of the information that was gathered, coupled with the expression of expert opinions formulated and recommendations offered.

In some cases, litigants express to their attorneys their disagreement with the findings reported, the opinions expressed, or the recommendations offered. It is our impression that, with increasing frequency, attorneys representing dissatisfied clients are calling upon forensic mental health professionals to perform work product reviews.

After having examined evaluators' files, retained reviewers are ordinarily able to offer commentary on the following:

- (1) Methodology, with respect to (a) the use or lack thereof of appropriate procedural safeguards; (b) the techniques utilized in interviewing the parents; (c) the techniques utilized in interviewing the children; (d) the manner in which parental interactions were observed and recorded; (e) the manner in which [6] parent-child interaction sessions were observed and recorded; (f) the quantity and relevance of documents secured by the evaluator for verification purposes; (g) the manner in which collateral sources were selected; (h) the reliability of the collateral source information obtained; (i) the manner in which collateral source information was corroborated; (j) the selection of assessment instruments; (k) the administration and scoring of assessment instruments; (l) the interpretation of assessment data and the integration of those data with data from other sources; (m) respect for role boundaries; (n) indications that alternative hypotheses were generated and explored; and (o) the creation, maintenance, and production of appropriate records.

- (2) The apparent manner in which opinions were formulated. Specific commentary can be provided regarding (a) whether consideration appears to have been given to non-supporting data; (b) whether consideration appears to have been given to pertinent statutes and case law; and, (c) whether indicators of evaluator bias are present, such as the application of a double standard, the use of insulting terminology in describing the non-favored parent, the use of glowing terminology in describing the favored parent, the assignment of minimal importance to possible parenting deficiencies in the favored parent, the assignment of much importance to reported flaws in the non-favored parent, the apparent wholesale acceptance of the favored parent's perspective and, the apparent rejection of the non-favored parent's perspective.

- (3) The effectiveness with which findings and opinions have been communicated to the intended recipients of the evaluator's report as reflected in (a) the inclusion of all the information reasonably needed by the court; (b) avoidance of personal perspectives presented in the guise of professional opinions; (c) acknowledgements of the known limitations of psychological knowledge, techniques, and data; (d) the inclusion of and discussion of non-supporting data; (e) a reasonably detailed presentation of assessment data; (f) an articulation of the criteria employed in examining the best interests standard; and (g) a cogently articulated nexus between findings reported and opinions expressed.

Even when the only file item initially available for review by a retained consultant is the evaluator's report, it is still possible for a consultant to provide useful information about and preliminary impressions of (a) the procedures and methodology utilized by the evaluator, including but not limited to the evaluator's adherence or lack thereof to generally accepted guidelines, practice parameters, and standards regarding child custody evaluations; (b) any test data analyses described by the evaluator; (c) the evaluator's use of published research literature; and, (d) the logical nexus (or lack thereof) between reported information, observations, and clinical impressions and the opinions expressed by the evaluator.

What happens next?

When retained reviewers cast the work of evaluators in a negative light, the reviewers are frequently asked either to provide litigation support services to the retaining attorney or to testify at trial. The provision by a forensic mental health professional of litigation support services might include assistance in the preparation of a *Motion in Limine* seeking exclusion of the evaluator's report and of testimony based on the report. If the motion is granted, the evaluator's report is jettisoned. Retained reviewers who catalog errors made by evaluators may be asked to testify regarding those errors. If, as testifying experts, they are persuasive in communicating their views of the deficiencies in the work of evaluators, the work done by evaluators may be discarded.

When motions to exclude are granted or when, following the presentation of evidence such as that described above, judges disregard the advisory input contained in evaluators' reports, either judges are [7] left to make their decisions unassisted by evaluator input or the performance of additional evaluations is authorized.

Babies and bathwater

In some cases, errors made by evaluators have occurred primarily either in the integration of data and formulation of opinions, or in the description of findings and articulation of opinions and recommendations. Where much of the information gathered is useful, wholesale rejection of evaluators' work represents the needless removal from the deliberation process of information that, if more effectively analyzed, might be constructively used.

Though the obstacles to be overcome are significant, we wish to propose the development of a collaborative process that would enable consultants to communicate with evaluators whose work has been negatively reviewed and explore ways in which to make constructive use of pertinent information gathered during the evaluative process. As we envision the process, once initiated, experts would become involved in a process in which they would exchange information and perspectives, and would learn from one another. It is reasonable to anticipate that, over time, the quality of the work being done by evaluators would increase.

Litigation is inherently adversarial and, currently, there are remarkably few adversarial proceedings that become transformed into cooperative endeavors. Attorneys with reports favorable to their clients have no interest in having attention called to whatever deficiencies might be identified. Engaging in a collaborative effort aimed at addressing errors, is likely to be viewed as an action inconsistent with the task of assisting clients in achieving lawful objectives. In the context of custody litigation, those objectives include having favorable reports admitted into evidence and convincing courts to be guided by those reports as parenting plans are constructed.

Attorneys holding reports that are unfavorable to their clients are strongly motivated to take whatever actions can reasonably be taken to prevent courts from being guided by those reports. Those actions include filing of motions to exclude and retaining experts who will testify to deficiencies in the work done by evaluators whose guidance, if heeded, will lead courts to construct parenting plans significantly different from those sought by clients.

Even where evaluators appear not to possess basic interviewing skills and do nothing more than write down what litigants tell them, there is always the possibility that some of the information appearing in their records is information that would be useful to courts. Our objective in writing this brief article is to stimulate interest in developing a means by which useful portions of otherwise deficient reports can be saved from the metaphorical shredder.

We have identified this article as the presentation of *a concept in search of a method* because the questions raised are numerous and there is much room for imaginative expansion and revision of the framework that we offer. Those with backgrounds in legal ethics are encouraged to contemplate the problems associated with the transition from adversarial procedures to cooperative procedures. Discomfort linked to the perceived bias of a retained reviewer could be dealt with if the original order specified the circumstances under which a reviewer would be appointed.

David A. Martindale, Ph.D., ABPP (forensic), a member of this newsletter's Board of Editors, is board certified in forensic psychology by the American Board of Professional Psychology, is the Reporter for the Association of Family and Conciliation Courts' Model Standards of Practice for Child Custody Evaluation, and offers forensic psychological consulting services to psychologists, attorneys, and licensing boards. Additional information may be found at www.damartindale.com. <><><> **James R. Flens, Psy.D., ABPP**, is board certified in clinical and forensic psychology and is a Fellow of the Society for Personality Assessment. His private practice is in Brandon, FL, where he specializes in family law-related evaluations, consultation both with attorneys and custody evaluators, and research regarding the use of psychological testing within the context of family law litigation. Reach him at jayflens@aol.com