

**REPORTER'S FOREWORD TO THE ASSOCIATION
OF FAMILY AND CONCILIATION COURTS' MODEL
STANDARDS OF PRACTICE FOR CHILD CUSTODY EVALUATION**

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As was suggested in the Introduction, the need for heightened standards has been articulated persuasively and repeatedly, yet many of those involved in the resolution of contested custody disputes have been ignoring the overtures. The time was right for an interdisciplinary group to develop *Model Standards of Practice for Child Custody Evaluation*.

In offering their comments and perspectives to the AFCC Task Force, several evaluators characterized cross-examining attorneys as "the enemy." They expressed concern that, in addition to providing information to evaluators, the *Model Standards* would provide ammunition to families, attorneys, and judges, all of whom were conceptualized as potential adversaries. Sentiments expressed by some evaluators suggest that they may perceive themselves as crusaders, accepting Sisyphean tasks and motivated entirely by concern for the well-being of children. In contrast, cross-examining attorneys were often cast in the role of mercenaries. In discussions of the circumstances under which favorable outcomes for families are most likely to be seen, we are led astray when we bicker with one another concerning the nature of our motives. Outcomes trump motives; in particular, purity of motives guarantees neither objectivity, impartiality, nor competence. If an attorney's scrutiny of evaluator testimony uncovers serious evaluator error, the children's best interests may be better served by the attorney's efforts than by the evaluator's efforts.

WHAT ARE MODEL STANDARDS?

Model standards, as defined by the Task Force Reporter, are, most simply put, ideas for standards. Most professional practice standards evolve from accepted ethical principles and ethical principles are derived from and are, in essence, elucidations of the ethic of reciprocity. Evaluators should treat those with whom they interact as the evaluators would wish to be treated if the roles were reversed. It is incumbent upon evaluators to view the evaluation process from the perspective of the child, the litigants, the family members, the collateral sources, the attorneys, and the judge.

Evaluators exhibit fairness to children when the evaluators provide children with age-appropriate information concerning the process; are fair to litigants when the evaluators provide clear, complete, written information to the litigants concerning the evaluators' policies, procedures, and fees; are fair to family members and to collateral sources when the evaluators make clear the ways in which information gathered will be used and identify those to whom the information is likely to be disclosed; are fair to attorneys when the evaluators provide information reasonably needed by attorneys in order to effectively counsel their clients; and are fair to judges when the evaluators offer advisory input that has been developed

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in a sound manner. The Task Force focused its attention on the needs and rights of those to whom evaluators offer their services and those who are affected by the work done by evaluators. The goal was to outline procedures that are consistent with ethical and effective practice.

EXPERT TESTIMONY: ISSUES OF WEIGHT AND ADMISSIBILITY

Evaluators most effectively serve families in conflict, the court system, and the image of the mental health professions when they are mindful of the defining features of helpful advisory input. The U.S. Supreme Court, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), described Federal Rule of Evidence (FRE) 702 as setting forth a “helpfulness standard” (pp. 591–592). FRE 702, as amended April 17, 2000, declares that expert testimony must be “based upon sufficient facts or data,” must be “the product of reliable principles and methods,” and must be offered by a witness who has “applied the principles and methods reliably to the facts of the case.”

In an article addressing the cross-examination of experts, I observed that “[t]he defining attributes of an expert opinion relate not to the credentials held by the individual whose fingers type the words or from whose mouth the words flow; rather, the requisite characteristics relate to the procedures that were employed in formulating the opinion and the body of knowledge that forms the foundation upon which those procedures were developed” (Martindale, 2001, p. 503).

That admissible expertise is defined not by credentials but by methodology was established by the U.S. Supreme Court in *Kumho Tire Co., v. Carmichael* (1999). Evidence proffered by an expert had been rejected by an Alabama court. In upholding the ruling of the Alabama court, the Supreme Court called attention to the fact that “[t]he District Court did not doubt [the expert’s] qualifications. . . . Rather, it excluded the testimony because, despite those qualifications, it initially doubted, and then found unreliable, ‘the methodology employed by the expert’” (p. 153).

EVALUATOR RECORD KEEPING

The section of the *Model Standards* in which record keeping is addressed (section 3) is quite detailed. From the perspective of the AFCC Task Force, the developers of the *Ethical Guidelines for Forensic Psychologists* (Committee on Ethical Guidelines for Forensic Psychologists, 1991) were setting the bar where it belongs when they observed that the standard to be applied to records such as those created by custody evaluators “anticipates that the detail and quality of such documentation will be subject to reasonable judicial scrutiny”; when they emphasized that “this standard is higher than the normative standard for general clinical practice”; and when they explained that when we have “foreknowledge that [our] professional services will be used in an adjudicative forum, [we] incur a special responsibility to provide the best documentation possible under the circumstances” (from section VI. B. of the *Specialty Guidelines*).

Forensic mental health professionals should formulate opinions only on the basis of information that is in their records and is available for inspection. Only in this way can evaluators be cross-examined concerning the manner in which the information was utilized in the formulation of the opinion(s) conveyed to the court. Failure to create and maintain legible and appropriately detailed records, concealment or destruction of records, and/or noncompliance with lawful requests for the production of records serve to circumvent due process.

The definition of spoliation, as it appears in *Black's Law Dictionary* (Nolan & Nolan-Haley, 1990) incorporates the notion that the act of spoliation “constitutes an obstruction of justice” (p. 1401). If obstruction of justice is accepted as a defining feature of spoliation, then it follows that evaluators have an affirmative obligation to preserve their records. It is indisputable that evaluators have foreknowledge that their records are likely to be needed if the cases in which they have been involved proceed to trial. For that reason, it is naïve not to recognize that the destruction by evaluators of their own records is a self-serving act. Such destruction makes effective cross-examination impossible.

When evaluators alter, conceal, or destroy portions of their files, efforts to thoroughly explore their methods and procedures are frustrated and the risk is increased that errors will go undetected. Evaluators—even those who have been appointed by the court—sometimes err. The work product of a court-appointed custody evaluator should be subjected to no less scrutiny than the work product of a retained expert.

The importance of the cross-examination process must be acknowledged and it must be recognized that the failure by an evaluator to retain items (or acceptable copies) presented to the evaluator for consideration jeopardizes the due process rights of the litigant who might wish to challenge the evaluator's findings or opinions. Cross-examining attorneys must be able to present evaluators with items from their files and inquire concerning the ways in which the identified items were utilized by the evaluators in formulating their opinions. It should not be inferred that evaluators must retain only those items that they have used in formulating their opinions. They should also retain items that were presented to them but not utilized by them. Cross-examining attorneys should be able to inquire concerning any/all evaluator decisions—including decisions *not* to utilize certain items in formulating their opinions.

ACKNOWLEDGING LIMITATIONS

By describing known limitations to their data, evaluators provide judges with information that is essential to the judges' consideration of the weight to be assigned to each aspect of the evaluators' advisory input. From a purely tactical perspective, there is no reason for evaluators to believe that voluntarily articulating the limitations of their data renders them less effective as testifying experts (Pfau & Burgoon, 1988; Pfau, Kenski, Nitz, & Sorenson, 1990).

KNOWING THE LAW

Though several posters expressed the view that evaluators should not be expected to “have knowledge of the legal and professional standards, laws, and rules applicable to the jurisdiction in which the evaluation is requested” (from model standard 2.1), it was the view of the Task Force that the forensic nature of the custody evaluator's task demands that the evaluator have this knowledge. When mental health treatment providers joined provider panels so that clients could more easily utilize health insurance to offset the cost of treatment, the providers had to learn a new set of rules. There were record-keeping standards, regulations concerning access to records, and policies affecting practitioner accountability. Those practitioners who wished to join provider panels accepted responsibility for learning the new rules. Mental health practitioners who wish to enter the forensic arena must also learn a new set of rules.

DELINEATING ROLES

From the perspective of the Task Force, objectivity is impaired when an evaluator currently has, has had, or anticipates having a relationship with those being evaluated. Relationships cannot be time delimited; specifically, prior relationships or the anticipation of future relationships can have the same deleterious effects upon evaluator objectivity as current relationships would have. It was the position of the Task Force that the harmful dynamics that characterize concurrent relationships also operate in sequential relationships.

PROVIDING INFORMATION IN WRITTEN FORM

It is likely that anyone in the field of law or in one of the mental health fields who reflects upon the advantages and disadvantages of a written document and compares these with the advantages and disadvantages of orally given information would agree that information provided in written form is superior to information provided orally.

TRANSPARENCY

Evaluators' policies, procedures, and fees become a matter of record, thereby making them available for scrutiny, when they are outlined in a written document.

CONSISTENCY

Our human frailties include carelessness, forgetfulness, and distractibility. Any of these can cause deviations in the manner in which orally provided information is given from one person to the next. When explanations are distributed in written form, the clarity and detail with which the explanations are offered is consistent.

CLARITY

The clarity of information provided in writing far exceeds the clarity of information provided orally. We reflect upon what we have written. We get feedback from colleagues concerning the clarity with which we have expressed ourselves. We ensure that documents prepared by us for use in custody work will be clear to those for whom they are intended.

ACCESSIBILITY

Unless it is misplaced or deliberately discarded, a written document presented to a litigant or to anyone else involved in the evaluative process remains available for review by the person to whom it has been given. It is often helpful to reread a document presented to you earlier. In stressful situations, important information imparted orally is often not accurately recalled.

FAIRNESS

Providing litigants, participants, and collateral sources with written information reasonably needed by them is likely to increase the probability that those involved will feel that they have been treated fairly and have been told what they needed to know.

PRACTITIONER PROTECTION

The same memory-distorting dynamics that often hinder the settlement of disputes between two parents embroiled in custody litigation can impede the resolution of complaints registered against evaluators by litigants. A written document, signed by those to whom it has been presented, often facilitates the adjudication of complaints. Notations appearing in evaluators' records are not likely to be as useful. Discussions of policies, procedures, and fees preserved on audiotape would also be helpful, yet many evaluators reject the suggestion that they tape record their contacts with litigants and others.

ACCOUNTABILITY

In disputes between court-appointed evaluators and litigants, nonparty participants, or collateral sources concerning orally communicated ground rules, the evaluators, as agents of the court, hold an indisputably unfair advantage. When evaluators have deviated from their own stated policies and procedures, the ability of litigants to demonstrate that this has occurred is dependent upon their having in their possession written documents in which evaluators' policies and procedures have been outlined.

SAYING "NO" TO JUDGES

During the discussion that followed the posting of drafts, many evaluators informed the Task Force that judges frequently ask evaluators to do things that the *Model Standards* were telling evaluators not to do. The Task Force's awareness that judges sometimes make inappropriate requests did not alter our perspective on those requests. Responsible professional behavior sometimes requires that we take positions that place us in conflict with colleagues or with authority figures. It is hoped that information and perspectives appearing in the *Model Standards* will enable evaluators to more cogently explain why compliance with certain requests is ill-advised.

INTERIM RECOMMENDATIONS

Offering interim recommendations creates a substantial risk that the dynamics of confirmatory bias will impair evaluator objectivity, increases the risk that the litigant whose position before the court has been weakened by the evaluator's interim recommendation will question the evaluator's receptivity to new information, and, as a result, makes it more difficult for the evaluator to fulfill the primary obligation of a court-appointed expert—providing assistance to the court if the dispute proceeds to trial. Evaluators should always be mindful of the fact that their ability to effectively assist in the resolution of disputes concerning custody and access is strongly dependent upon both actual and perceived impartiality.

Changes in custody and/or access resulting from temporary orders transform previously level playing fields into precarious slopes. Evaluators who have all the information needed in order to responsibly offer recommendations concerning custodial placement and/or access should conclude their evaluations and prepare their reports. Evaluators who have not yet obtained all the information needed in order to responsibly offer recommendations should not offer recommendations. Imparting information should not be confused with offering a recommendation. In response to a request from the court, an evaluator can responsibly share

whatever pertinent information has been gathered. By providing information but offering no recommendation, the evaluator assists the court by supplementing the information available to the court as it deliberates concerning whatever matter is under consideration.

“EXPERT SPECULATION” IS AN OXYMORON

Some judges apparently believe that any input from a mental health professional is helpful, even if that input comes in the form of pure speculation. Standards requiring that evaluators operate within “the narrower boundaries of empirically-based practice are good for practitioners in that they preserve the integrity of the profession, thereby strengthening its credibility” (Grisso, 2005, p. 224). With empirically based practice evaluators earn credibility; with credibility, evaluators earn respect. One poster opined that “an educated guess from an expert is better than nothing.” It was the view of the Task Force that, while carefully developed inferences may be useful when appropriate emphasis is placed upon the limits of such inferences, speculation is more harmful than helpful. Statements and opinions uttered by experts in the course of offering testimony are often assigned more weight than is warranted.

Experts are often reluctant to say “I don’t know,” but when it is the truth and when one has taken an oath to tell the truth, it is what must be said. The admonition to do no harm applies not only to the families with whom evaluators work but to the justice system as well. Evaluators do harm to the operation of the justice system when they deliberately or unintentionally lead courts to believe that they know more than they do, that their assessment devices are more reliable and precise than those instruments are known to be, that clinical intuition is a suitable substitute for opinions based upon empirical data, or that speculation offered by an expert is better than nothing.

THE ROLE OF FORMAL PSYCHOLOGICAL TESTING

It was the goal of the Task Force to create a document that would remain useful for at least a decade and we were mindful of professional perspectives that have changed between 1996 and 2006. As this document was being developed, the Task Force was aware that questions concerning the usefulness of formal psychological testing are being raised with increasing frequency. In a concurring opinion in *People v. Wesley* (1994), New York’s Chief Judge, Judith Kaye, observed that an absence of controversy may reflect nothing more than the fact that criticism does not emerge overnight. It is reasonable to anticipate that, in the years between 2006 and 2016, research will reveal flaws in currently accepted instruments or that improvements will be made in instruments currently deemed unacceptable. With this in mind, the Task Force elected to focus on basic principles of test use and test selection.

Evaluators and the courts seeking their advisory input are (or should be) interested in data that provide information concerning enduring characteristics that relate to parenting in general and, more specifically, to the parenting of the specific children who are the focus of the custody dispute. The performance of test takers on some of the more established instruments is strongly influenced by situational factors, leaving unresolved many pertinent questions concerning dispositional factors.

Our more established tests are self-report inventories (SRIs). Theodore Millon, certainly no critic of SRIs, observed that “there are distinct boundaries to the accuracy of the self-report format; by no means is it a perfect data source. Inherent psychometric limits, the tendency of similar patients to interpret questions differently, the effect of current affective

states on trait measures, and the effort of patients to affect certain false appearances and impressions all lower the upper boundaries of this method's potential accuracy" (Millon, Davis, & Millon, 1997, p. 7).

Deciding whether or not to administer formal psychological assessment instruments must be left to evaluators. The applicable model standard (6.1) simply calls attention to the fact that, like any decision made by an evaluator, a decision *not* to test made by an evaluator who is licensed to administer and interpret psychological tests is a decision the basis for which may need to be articulated by the evaluator.

The search for pertinent information is impeded when we look in the wrong places. In 1971, in deciding a case unrelated to child custody matters (*Griggs v. Duke Power Co.*), the U.S. Supreme Court ruled that testing procedures must be demonstrably reasonable measures of (or predictors of) job performance. Discussions of the implications of the *Griggs* decision led, ultimately, to the development of the concept of *functional abilities* (Grisso, 2002).

Endeavors to assess the characteristics that bear directly upon parenting are more likely to meet with success if evaluators conceptualize parenting as a job and focus attention on those attributes, behaviors, attitudes, and skills that are reliably related to the demands of the job. Evaluations must, therefore, critically examine the role of testing in custody evaluations. In particular, evaluators must consider what type of information is being sought, how tests may (or may not) assist the evaluator in gathering pertinent information, and the ways in which tests of *every* type are deficient.

EVALUATOR OBLIGATIONS TO UNSPECIFIED OTHERS

In contemplating courses of action, intent is important, but so, too, are reasonably foreseeable consequences. In the preface to the *Model Standards*, the Task Force has endeavored to disabuse evaluators and others of the notion that evaluators' only obligations are to the courts that appoint them, to the adults whom they evaluate, or to the children whose best interests are the focus of custody/access evaluations. The preface reminds evaluators that they have obligations to consumers of their services, to participants in their evaluations, and to affected others.

OBTAINING THE INFORMED CONSENT OF COLLATERALS

Evaluators are taking advantage of the cooperative nature of collateral sources when the evaluators fail to tell potential collateral sources what they need to know in order to make informed decisions concerning whether or not to assist. Evaluators cannot presume that those who are contacted for information will realize that information provided by them is ordinarily discoverable. Many collaterals are likely to assume that information shared with a mental health professional is confidential.

TAPPING THE KNOWLEDGE BASE

Following much discussion, the Task Force concluded that evaluators should be "strongly encouraged to utilize and make reference to pertinent peer-reviewed published research in the preparation of their reports" (from model standard 4.6 (b)). In its analysis of the meaning of "scientific knowledge" the U.S. Supreme Court, in *Daubert*, citing

Webster's, stated that *knowledge* refers to a "body of known facts or to any body of ideas inferred from such facts. . . ." (*Daubert*, p. 590). Tippins and Wittmann (2005) have called attention to the fact that no matter how well qualified an expert may be, credentials are of little consequence if the information needed by the court is not contained within the knowledge base of the field in which the expert's credentials have been earned. It is the view of the Task Force that custody evaluators most effectively demonstrate that their opinions rest upon a "body of known facts or . . . any body of ideas inferred from such facts" when references to relevant peer-reviewed publications are included in advisory reports.

"With only rare exceptions, the information imparted by custody experts in their reports and in their testimony is not information that they themselves have uncovered in their own research. Experts are, in reality, perpetual students. Good experts devour the professional literature, critically examine published research, and draw upon the knowledge base of an entire profession each time they conduct an evaluation. The task of the skilled evaluator is to decide what research is applicable to the specific family that is the focus of the court's attention, to apply the research, and to explain how the cited research sheds light on the particular issues in dispute" (Martindale & Gould, in press).

APPLYING THE *MODEL STANDARDS*

When the American Psychological Association released its *Guidelines for Child Custody Evaluations in Divorce Proceedings* (APA, 1994), some psychologists objected to that portion of the document in which the APA declared that "[t]he psychologist avoids multiple relationships." They felt that this restriction might "unduly restrict the ability of experienced psychologists to make appropriate clinical decisions" (Saunders, Gindes, Bray, Shellenberger, & Nurse, 1996, p. 34). When the *Ethical Guidelines for Forensic Psychologists* (Committee on Ethical Guidelines for Forensic Psychologists, 1991) were undergoing revision, a listserv was created for the purpose of obtaining input from interested professionals and sentiments such as that conveyed by Saunders et al. were again expressed.

Not all mental health professionals who prepare reports, affidavits, or declarations or who appear in court to offer recommendations in custody and access disputes are evaluators. Most of those who are not evaluators make that fact known. Of these, some might assert that, because they have not conducted evaluations and have not held themselves out to the court as evaluators, the *Model Standards* do not and should not be used as a basis upon which to reject the utility or appropriateness of their proffered testimony or to examine their professional behaviors. It was an awareness of the "judge-me-by-what-I-call-myself-not-by-what-I-do" position that led the Task Force to insert a reminder that the applicability of the *Model Standards* is to be determined by the nature of the services performed and not by a practitioner's declared professional affiliation, stated areas of expertise, or customary area(s) of practice. Whatever one's feelings may be concerning where the bar has been placed by the *Model Standards*, it would make no sense to lower the bar for individuals who, with foreknowledge that custody and/or access issues are being adjudicated, offer opinions on the issues in dispute while reminding the court that they are not to be viewed as evaluators.

Borrowing from the APA Ethics Code (APA, 2002), mental health professionals should "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" and should "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.” Whether professionals have conducted evaluations, have provided therapy, or have involved themselves in custody/access disputes in some other manner, it is the offering of opinions concerning the issues in dispute that makes the *Model Standards* applicable.

CONCLUSION

With an acknowledgment that the Task Force’s perspective on the impact of the *Model Standards* is irremediably subjective, we anticipate that the *Model Standards* will be viewed as an important instructional tool for evaluators, attorneys, and judges. If evaluators are guided by the information and perspectives contained in the *Model Standards* and if judges and attorneys know what can reasonably be expected from evaluators, the document will contribute significantly to an improvement in the quality of custody evaluations.

REFERENCES

- American Psychological Association. (1994). Guidelines for child custody evaluations in divorce proceedings. *American Psychologist, 49*, 677–680.
- American Psychological Association. (2002). Ethical principles of psychologists and code of conduct. *American Psychologist, 57*, 1060–1073.
- Committee on Ethical Guidelines for Forensic Psychologists. (1991). Specialty guidelines for forensic psychologists. *Law and Human Behavior, 15*(6), 655–665.
- Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).
- Griggs v. Duke Power Co., 401 U.S. 424 (1971).
- Grisso, T. (2002). *Evaluating competencies: Forensic assessments and instruments*, 2nd ed. New York: Kluwer Academic/Plenum Publishers.
- Grisso, T. (2005). Commentary on “empirical and ethical problems with custody recommendations:” What now? *Family Court Review, 43*, 223–228.
- Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999).
- Martindale, D. A. (2001). Cross-examining mental health experts in child custody litigation. *Journal of Psychiatry and Law, 29*, 483–511.
- Martindale, D. A., & Gould, J. W. (in press). Custody evaluation reports: The case for empirically-derived information. *Journal of Forensic Psychology Practice*.
- Millon, T., Millon, C., Davis, R., & Grossman, S. (1997). *MCMI-III: manual*, 2nd ed. Minneapolis, MN: NCS Pearson, Inc.
- Nolan, J. R., & Nolan-Haley, J. M. (1990). *Black’s law dictionary: With pronunciations* (6th ed.). St. Paul, MN: West Group.
- People v. Wesley, 633 N.E.2d 451 (N.Y. Ct. App. 1994).
- Pfau, M., & Burgoon, M. (1988). Inoculation in political campaign communication. *Human Communication Research, 15*, 91–111.
- Pfau, M., Kenski, H., Nitz, M., & Sorenson, J. (1990). Efficacy of inoculation strategies in promoting resistance to political attack messages: Application to direct mail. *Communication Monographs, 57*, 25–43.
- Saunders, T. R., Gindes, M., Bray, J. H., Shellenberger, S., & Nurse, A. R. (1996). Should psychotherapists be concerned about the new APA child custody guidelines? *Psychotherapy Bulletin, 31*(3), 28–35.
- Tippins, T. M., & Wittmann, J. P. (2005). Empirical and ethical problems with custody recommendations: A call for clinical humility and judicial vigilance. *Family Court Review, 43*, 193–222.

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