

# **SPECIAL FEATURE: A FOCUS ON MENTAL HEALTH CONSULTANTS IN CHILD CUSTODY DISPUTES**

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## **MENTAL HEALTH CONSULTANTS AND CHILD CUSTODY EVALUATIONS: A DISCUSSION PAPER**

Association of Family and Conciliation Courts  
Child Custody Consultant Task Force

Co-Chairs:

Robin M. Deutsch, Ph.D., Massachusetts General Hospital, Boston, MA  
Hon. William C. Fee, Angola, IN

Reporter:

Andrew Schepard, J.D., Professor of Law and Director, Center for Children, Families and the Law,  
Hofstra University School of Law, Hempstead, NY

Task Force Members:

Hon. Dianna Gould-Saltman, Los Angeles, CA  
S. Margaret Lee, Ph.D., Mill Valley, CA  
Renee Lehr, J.D., Ph.D., Santa Monica, CA  
David Martindale, Ph.D., ABPP, St. Petersburg, FL  
Martha A. McCarthy, LL.B., Martha McCarthy & Company, Toronto, ON, Canada  
David Medoff, Ph.D., Suffolk University, Boston, MA  
Christopher C. Melcher, Esq., Walzer & Melcher, LLP, Woodland Hills, CA  
Pamela C. Ortiz, J.D., Executive Director, Maryland Access to Justice Commission, Annapolis, MD  
Hon. Deborah Paulseth, Ontario Court of Justice, Toronto, ON, Canada  
Jeffrey P. Wittmann, Ph.D., The Center for Forensic Psychology, Albany, NY

Association of Family and Conciliation Courts Staff:

Leslye Hunter, M.A., Associate Director, Madison, WI.

Law Student Research Assistants:

Lauren Barth, Hofstra Law School class of 2011  
Hilary Casper, Hofstra Law School class of 2012

## **INTRODUCTION**

In 2009, then Association of Family and Conciliation Courts (AFCC) President, Emile Kruzick, established the Interdisciplinary Child Custody Consultant Task Force to study and define the role of the mental health professional engaged as a consultant<sup>1</sup> (mental health consultant) in a child custody dispute.<sup>2</sup> The attorney engages the consultant because the attorney's client is either going to be, or has already been, evaluated by a court-appointed mental health professional (forensic mental health evaluator) in a pending divorce or separation case involving a litigant's rights to custody or access to a child.

Correspondence: [Andrew.I.Schepard@hofstra.edu](mailto:Andrew.I.Schepard@hofstra.edu)

This paper (“Discussion Paper”) is the Task Force’s first attempt to promote interdisciplinary dialogue on the emerging but largely unexamined role of a mental health consultant. It first defines its scope, purposes and limitations. This Paper then describes the functions of a mental health consultant and discusses practices and problems with the mental health professional performing those functions.

In preparing this Discussion Paper, the Task Force held numerous meetings, reviewed existing regulations, case law and literature, and relevant ethical guidelines for both lawyers and psychologists. It also conducted several open forums at AFCC conferences in Denver in June 2010 and Cambridge in October 2010 to solicit input from lawyers, practicing forensic mental health evaluators and consultants about the issues addressed in this Discussion Paper.

### SCOPE AND PURPOSES OF THIS DISCUSSION PAPER

The Task Force focuses this Paper on the role of the mental health consultant in the forensic mental health evaluation process. It is also possible to define the role of the mental health consultant in education and support more broadly and beyond the forensic mental health evaluation.<sup>3</sup> In this broader role conception, the mental health consultant assists the parent and attorney with developing parenting plans that are in a child’s best interest, communicating effectively with the other parent, and assisting in settlement negotiations.

The Task Force makes no comment on this broader role in this Paper, other than to state that it potentially offers significant benefits to litigants, yet is also “controversial, expanding rapidly and is relatively unexamined.”<sup>4</sup> This controversy involves the issue of whether the information provided by the mental health professional could be misused by the litigant in the event that the case does not settle and goes into evaluation or trial. Information provided with the intent to further genuine behavioral change can be used, knowingly or unknowingly by the litigant, to enhance their attempts at impression management.<sup>5</sup>

As will be discussed, the Task Force believes that mental health consultants play a valuable role in the forensic mental health evaluation process. The Task Force also believes that consultants must perform their role in a manner consistent with the ethical obligations of their profession and the nature and purposes of the forensic mental health evaluation.

The fundamental aim of this Discussion Paper is to facilitate dialogue between lawyers and mental health professionals about ethical limitations on, and best practices for, mental health consultants. This Paper seeks to identify concerns and “grey areas” of practice and set forth appropriate cautions for professionals.

Lawyers and mental health professionals practice their professions based on ethical rules, principles and guidelines. Lawyers, for example, “shall provide competent representation to a client”<sup>6</sup> and “shall not knowingly . . . offer evidence that the lawyer knows to be false.”<sup>7</sup> Psychologists must “provide services . . . with populations and in areas only within the boundaries of their competence, based on their education, training, supervised experience, consultation, study, or professional experience.”<sup>8</sup> Psychologists’ guidelines specific to the forensic mental health evaluation process emphasize that “[t]he purpose of the [forensic mental health] evaluation is to assist in determining the psychological best interests of the child.”<sup>9</sup>

The Task Force has not been able to identify specific regulations for lawyers or mental health professionals, nor has it identified any case law that provides clear guidance on the role of a mental health consultant. This Discussion Paper does not attempt to fill this regulatory gap. The Task Force believes that the role of a mental health consultant is without enough agreement to create definitive guidelines. This Discussion Paper represents only the views of the members of the Task Force that drafted it. It does not propose standards of practice that a court or regulatory agency should use in evaluating the conduct of lawyers or mental health consultants. Lawyers and mental health professionals are cautioned that the discussion and analysis in this Discussion Paper, while supported by the Task Force, do not bind regulatory authorities.

This Discussion Paper focuses on the role of a mental health consultant engaged by an attorney in cases involving custody of a child during divorce or separation. Although forensic mental health

evaluations of parents may occur in other types of cases, such as those involving domestic violence, child protection, etc., the Task Force believes that attorneys most frequently engage mental health consultants in divorce and separation related disputes. Therefore, this Discussion Paper will focus on the role that mental health consultants play in child custody litigation. Applicability of the following discussion to court ordered evaluations in other legal areas, such as child protection proceedings, should be approached with caution.

Above all, the Task Force hopes that this Discussion Paper facilitates dialogue between and among lawyers and mental health professionals about the appropriate role of mental health consultants in the forensic mental health evaluation process. The Task Force believes that facilitating dialogue is an especially important goal for this emerging role, the practice of which is just beginning to be documented and discussed.

This Discussion Paper highlights areas of disagreement within the Task Force, and the arguments on both sides of the debate in hopes of facilitating further analysis and discussion that leads to consensus and increased understanding. The main tensions in the Task Force's deliberations were between disciplines and among mental health professionals. Lawyers hire consultants to help them represent their clients in the adversary process of custody litigation and conduct themselves in accordance with the lawyer's view of their ethical responsibilities. Nonetheless, while lawyers hire a mental health consultant, the mental health consultant must adhere to their own profession's ethical guidelines, which may differ significantly from the ethics and orientation guiding the attorney. Moreover, as consulting is a new field and guidelines pertaining to the mental health profession have not yet been written, the consultant faces the challenging task of interpreting or extrapolating from the existing guidelines to try to fit the new services and situations.

## **THE EMERGING ROLE OF MENTAL HEALTH CONSULTANTS IN FORENSIC MENTAL HEALTH EVALUATIONS**

### **A. THE NATURE AND IMPORTANCE OF THE FORENSIC MENTAL HEALTH EVALUATION**

A forensic mental health evaluation is an important component in the court's determination of the best interests of the child in a custody dispute.<sup>10</sup> The court typically orders an evaluation when litigants cannot agree on a custodial arrangement either by themselves or with the assistance of their lawyers or a mediator.<sup>11</sup> The aim of the evaluation is to provide the court with important information relevant to the child's best interests from a neutral expert source that will assist the court in making its custody determination.

A forensic mental health evaluation is generally conducted by a mental health professional whose authority is established by court order.<sup>12</sup> The evaluator is responsible to—and is, in effect, an arm of—the appointing court, even if the parties have to pay for the evaluation.<sup>13</sup> In some jurisdictions, evaluators are immune from suit by litigants because they are part of the judicial process.<sup>14</sup>

Model standards of practice recommend that forensic mental health evaluations be performed by a mental health professional with specialized knowledge and formal training in the legal, societal, familial and cultural issues that arise in the context of a child custody dispute.<sup>15</sup> The forensic mental health evaluator typically reviews court pleadings and gathers information from the parties' attorneys to establish ground rules and a timetable for the evaluation.<sup>16</sup> The evaluator may spend substantial time interviewing and observing parents and children.<sup>17</sup> He or she also gathers information from "collaterals" (e.g. the child's teacher and pediatrician).<sup>18</sup>

The evaluation may also include the administration of psychological tests that aid the evaluator in clarifying the psychological state of one or both parents.<sup>19</sup> In addition, such tests assist the evaluator in identifying mental illness or personality traits that may be relevant to potential parenting arrangements.<sup>20</sup> The traditional psychological instruments often utilized by forensic mental health evaluators<sup>21</sup> may also be supplemented by tests developed specifically for use in custody evaluations.<sup>22</sup> The forensic mental health evaluator possesses substantial discretion whether to administer tests, and, if so, which tests to administer.<sup>23</sup>

The evaluator's findings and recommendation (if a specific recommendation is offered) are generally summarized in a written report, and sent to the court and attorneys. Depending on local practice, the content of the report is either shared wholly with the parents or summarized for them by their lawyers.<sup>24</sup> The evaluator is usually available to be called as a witness at trial and be subject to cross-examination by the parties.<sup>25</sup>

Judges find forensic mental health evaluation reports to be a valuable resource in making a more informed custodial award.<sup>26</sup> This is especially true when a custody dispute centers on allegations such as a litigant's mental health, drug abuse, domestic violence or allegations of child neglect or abuse.<sup>27</sup> Courts in different jurisdictions articulate somewhat different standards for the weight they give a forensic mental health evaluation report.<sup>28</sup> Nonetheless, in most jurisdictions the evaluator's findings and recommendations are granted considerable deference by the court when fashioning a custody award.<sup>29</sup> Thus, the potential influence of a comprehensive and analytic evaluation on the court's ultimate custody determination is significant.<sup>30</sup>

## B. THE IMPORTANCE OF THE FORENSIC MENTAL HEALTH EVALUATION TO LITIGANTS

Parents thus have important interests at stake in the outcome of a forensic mental health evaluation. It may be a significant influence on the ultimate judicial determination of their legal rights to control the upbringing of their children and to their interaction with their children after divorce and separation. Generally, in the United States these parental interests are important enough to be recognized as "fundamental rights" protected by the constitutional guarantees of due process.<sup>31</sup>

The forensic mental health evaluation report is significant to the litigant even though most custody disputes in which an evaluation is ordered will ultimately be settled out of court.<sup>32</sup> The forensic mental health evaluator is, in effect, the court's witness in whom the judge has confidence.<sup>33</sup> Litigants and their counsel thus believe that the court starts with a presumption in favor of the findings and recommendations in the forensic mental health evaluation report and will adopt them absent strong reason.<sup>34</sup> A litigant challenging the findings and conclusions of the evaluator at trial thus faces a formidable task, and significant additional emotional stress and expense.<sup>35</sup> Often, with the advice of counsel, the litigant whose claims to custody are disfavored in the evaluation report will forego the option of going to trial and decide to settle the dispute on the basis of the evaluator's report and recommendations.<sup>36</sup>

## C. THE FUNCTIONS OF THE MENTAL HEALTH CONSULTANT

### 1. Overview

Given the importance of the forensic mental health evaluation to the settlement and trial of a child custody dispute, it is not surprising that some attorneys for litigants have engaged mental health consultants—usually experienced evaluators themselves.<sup>37</sup> The Task Force has not attempted to document the extent of the practice of attorneys engaging mental health consultants, but its members believe, based on experience, that the practice is increasing, particularly in divorce and separation disputes in urban, affluent areas.

While the cost of mental health consultants may be paid by the litigant, they are typically retained by, and responsible to, the litigant's attorney.<sup>38</sup> The mental health consultant does not have a psychotherapist-patient relationship<sup>39</sup> with the litigant and does not provide psychotherapy. The consultant's communications with the attorney and the litigant are, however, generally protected from discovery and admission into evidence at trial by the attorney work product doctrine unless the consultant is designated as a witness at trial.<sup>40</sup>

The attorney's goals in engaging the consultant are generally one or more of the following (or some combination thereof):

- (1) support for the litigant participating in the evaluation, including education of the litigant about the nature and purposes of a forensic mental health evaluation (*litigant education and*

- support*). The consultant usually performs this function before the evaluation takes place or while it is being conducted;
- (2) consultation with the attorney about the forensic mental health evaluation, including review of the quality of the forensic mental health evaluation, and aiding the lawyer in preparing for cross-examination of the evaluator (variously called *case analysis and evaluation* by lawyers and *litigation support, assessment and peer review* by the mental health consultants); and
  - (3) testimony by the consultant at trial (*testimony*).

The consultant usually performs functions (2) and (3) after the evaluation report has been completed. It is important to note that a consultant who performs the litigant education and support or case analysis functions will lose protection for communications with the lawyer under the work product doctrine if the consultant testifies at trial. Thus, the testifying consultant might have to disclose discussions with the lawyer and the litigant to the court.<sup>41</sup>

## 2. The role of the mental health consultant in the adversary system of justice

This Discussion Paper will further define and illustrate these functions and discuss best practices and cautions for each. Before doing so, the Task Force believes it is important to state its belief that mental health consultants have a valuable role to play in the adversary system.

Lawyers have an ethical duty to represent their clients competently.<sup>42</sup> Education and support of a litigant during the process of a forensic mental health evaluation and an evaluation of the quality of a forensic mental health report are key components of fulfilling that duty.

Most mental health consultants must abide by the general ethics principles set out in the *APA Ethical Principles of Psychologists and Code of Conduct*. Consultants should be aware that when working in the arena of family law, their work can impact children, and they should be cognizant of the effects on all parties involved.<sup>43</sup>

*a. Litigant education and support in an adversary system.* The adversary system's working assumption is that the court will make a more accurate determination of the child's best interests if each litigant has the opportunity to present his or her best case. Litigants ordered to participate in a forensic mental health evaluation are often already angry and anxious as a result of the stress of the divorce and separation, the associated custody dispute and, ongoing conflict and legal proceedings. They are ill-informed about what to expect from the evaluation process, which can be intimidating and perceived as intrusive; however, education about what to expect can allay fear and produce more accurate responses to the investigative methods of the forensic evaluation. "Orienting the parent to the custody evaluation process and the importance of providing accurate, well-organized, and comprehensive information to the evaluator is a service that mental health consultants provide in their direct work with parents."<sup>44</sup> Reduced parental apprehension about a custody evaluation achieved through education and support provided by a mental health consultant is likely to result in a better informed report to the court, as well as a better informed judicial determination of the child's best interests.

*b. Case analysis and evaluation in an adversary system.* Mental health consultants also have a valuable role to play in helping lawyers evaluate the quality of a forensic mental health evaluation report for purposes of possible challenge at trial through cross examination or to determine if a favorable report is vulnerable. Lawyers have an obligation to protect a litigant's legal rights and the integrity of the process that affects them. The lawyer for a litigant dissatisfied with the forensic custody evaluation report has a responsibility to investigate credible arguments that might weaken or discredit the report.<sup>45</sup>

Identifying problems and deficiencies in a forensic evaluation report can be facilitated by the help of a knowledgeable expert consultant. Lawyers preparing for cross examination in other complex areas hire consultants to aid them in that task,<sup>46</sup> and there is no reason to treat forensic custody evaluations differently.

The attorney and the litigant both benefit from hearing the mental health consultant's best considered judgment on the quality of a forensic custody evaluation report. One possibility is that the consultant advises that the report is based on sound methodology, comes to appropriate conclusions and cannot be effectively challenged through cross examination. If so, the lawyer can advise the litigant to settle the custody dispute rather than have the litigant and the family incur the additional expense and trauma of a trial.

If, however, the mental health consultant provides sound advice to challenge the analysis and conclusions of the report, the litigant's legal rights are protected by the adversary process of cross examination. Furthermore, the quality of judicial fact-finding on the child's best interests is improved because the court is presented with more and better information.

Additionally, effective cross examination of an evaluator guided by a mental health consultant helps insure the integrity and quality of the forensic mental health evaluation. There are instances when evaluators are biased against litigants, not competent to conduct an evaluation, fail to contact important collateral sources, misinterpret test results, are not aware of the latest research on the needs of children of divorce and separation, or state conclusions and recommendations on tenuous evidence or inapplicable social science research.<sup>47</sup> Effective cross examination exposes and minimizes these objectionable practices and supports judicial and public confidence in the forensic mental health evaluation process.

## LITIGANT EDUCATION AND SUPPORT

Lawyers have a tradition of thorough preparation of litigants through education and support for deposition and trial testimony, pivotal events in general civil litigation.<sup>48</sup> Although lawyers cannot, of course, encourage a litigant to falsify evidence or testify untruthfully,<sup>49</sup> they are ethically required to help a litigant put forward the best possible face on their testimony consistent with the truth.<sup>50</sup> That preparation generally includes familiarizing the litigant with the purposes, setting and process of testifying at a deposition or trial to reduce the litigant's anxiety and encourage more confident presentation.<sup>51</sup> During the course of preparation of a litigant for a deposition or trial, for example, lawyers advise litigants of the legal significance of potential testimony. They suggest wording for testimony and perspectives that clients should consider adopting.<sup>52</sup> Preparation can include a rehearsal of the testimony.<sup>53</sup>

The Task Force believes that the tradition of lawyers thoroughly preparing litigants for deposition and courtroom testimony extends to a key analogous event in child custody litigation—a forensic mental health evaluation.

As previously discussed, the custody evaluation may be a source of great anxiety for parents. Though no studies have been conducted regarding the issue, it is likely that custody-disputing parents are increasingly aware that impressions and recommendations expressed by a custody evaluator may be afforded considerable weight by courts. Notwithstanding the weight assigned to such impressions or recommendations, the unavoidably intrusive nature of the custody evaluation may generate feelings of apprehension for all parties involved. Custody consultants may provide an advantageous service to parents by reducing this anxiety.<sup>54</sup>

### A. CAUTIONS CONCERNING LITIGANT EDUCATION AND SUPPORT

The Task Force believes, however, that mental health consultants can create a serious, material risk of distorting the outcome of the forensic mental health evaluation—and the judicial fact-finding which the evaluation serves—if the consultant does not carefully limit their role in educating and supporting a litigant. The mental health community does not view the forensic custody evaluation report as simply one version of the “truth” to be manipulated for victory in an adversarial confrontation. Rather, it views the forensic custody evaluation report as the product of empirical investigation founded on

sound methodology and best available research and fears the impact of the consultant on it.<sup>55</sup> Some in the mental health community phrase their concern as a fear that the mental health consultant's education and support of a litigant will "coach" the litigant to provide less than "authentic" responses to the evaluator that run the risk of changing the outcome of the evaluation.

The Task Force believes that in his or her efforts to educate and support the litigant, the forensic mental health consultant must take care not to interfere with the crucial fact-finding functions of the court, and must conduct the consultation in a manner that is not inconsistent with the best interest of children.<sup>56</sup> The Task Force believes that the following practices are unacceptable and unethical behaviors for a consultant:<sup>57</sup>

- rehearsing a litigant's responses to questions on standard psychological tests;
- "coaching" answers to an evaluator's anticipated questions that the litigant would not otherwise give;
- encouraging a litigant to make temporary and insincere changes in behavior solely for strategic, positive-impression-management reasons (e.g. telling a litigant to stop negative comments about the other parent in front of the children, suggesting or instructing a litigant to minimize or re-attribute a history of domestic violence, or to become more involved in the child's activities for the purpose of creating a favorable impression on the evaluator); and
- suggesting that a litigant withhold important information to which an evaluator might otherwise not have access, such as prior allegations of maltreatment to child welfare agencies, prior criminal records or prior arrests.

In short, in his/her efforts to educate and support the litigant, the forensic mental health professional must take care not to interfere with the crucial fact-finding functions of the court, and must conduct the consultation in a manner that is not inconsistent with their obligations.<sup>58</sup>

## **B. THE RANGE OF EDUCATION AND SUPPORT PRACTICES OF A MENTAL HEALTH CONSULTANT**

Mental health consultants can help the lawyer prepare a litigant for a forensic mental health evaluation by educating a litigant on a number of important topics, some of which are what might be termed "generic" (general education and information) with others being "case specific" (applying information provided to the specific litigant and his or her case). The Task Force did not reach consensus on what topics a consultant can and should cover with a litigant without running too great a risk of materially altering the outcome of the forensic mental health evaluation.

Most members of the Task Force believe that a mental health consultant may provide litigants with generic education about topics like:

- the child custody evaluation process, such as the role of the evaluator, the procedures typically used to conduct the evaluation, the kind of information that is typically requested, the limits of the evaluation, general information about testing, and how the opinion may be used by the trial court;
- developmental needs of children at different stages, including education about how children at various ages understand the events around them;
- how a child's special needs may affect both parenting and planning for shared parenting;
- effect of parental conflict on children, including different types of conflict and how a child can be buffered;
- children's response to divorce and what factors impact it;
- the pros and cons of different parenting plans and what factors to consider when establishing a plan;
- attachment issues influencing parenting plans and access decisions;
- types of services or interventions that might be helpful for a variety of situations, such as domestic violence, alienation, sexual abuse, or substance abuse;

- the pros and cons of mediation or collaborative divorce;
- factors that may lead a child to resist contact with a parent including the role each parent may play;
- the impact of relocation on children and how potential negative effects can be ameliorated;
- reviewing documents, correspondence or records, including medical, school, employment, and criminal records and discussing what is reviewed with the litigant;
- assisting a litigant in selecting collateral sources of information to be contacted by the forensic mental health evaluator;
- helping the litigant to understand the process of the forensic mental health evaluation to relieve some of the personal stress of going through it;
- making referrals for outside services. For example, the consultant might discuss a litigant's difficulties with emotional regulation (e.g. anger management) or history of trauma and its impact on their heightened emotional arousal in interactions with the other parent or others, and make a referral for treatment;
- consulting with the litigant to manage or create reasonable expectations, to identify and assess real concerns in the other parent, to organize and prioritize concerns, and to link requests logically to their history, prior concerns and to the needs of the child or children in question; and
- assisting the litigant with the development of a parenting plan for proposal to the other parent.

Mental health members of the Task Force viewed case-specific education and support for the litigant by the consultant with the greatest caution, including the following:

- providing treatment or psychotherapy of any type;<sup>59</sup>
- supporting a litigant's strengths as a co-parent and helping him or her to understand the importance of a positive change for purely strategic reasons. This might take the form of discussing the benefits to the child of the litigant, refraining from negative behaviors, or facilitating possible behaviors (e.g. payment of child support, not giving a child support check to the child to deliver to the other parent, attendance at parent-teacher conferences, attendance at the child's activities such as sporting events, dance classes or ice-skating lessons).<sup>60</sup>

### **C. COMBINING LITIGANT EDUCATION AND SUPPORT AND TRIAL TESTIMONY**

In the next section, the Discussion Paper will discuss concerns many of the mental health members of the Task Force raised about a mental health consultant blending the functions of case analysis and evaluation with trial testimony—principally, the danger of loss of objectivity and work product protection for communication between the consultant, the attorney and the litigant. Those concerns apply even more strongly to a consultant who blends the functions of litigant education and support with trial testimony on the litigant's behalf. Such a consultant would have to testify at trial about the interactions he or she had with the litigant in the course of performing the education and support function. As will be discussed, some members of the Task Force, while recognizing the risks of combining roles, feel that litigants should be able to take such risks after they have been given informed consent in the interests of minimizing costs to litigants. The consultant, however, has the ultimate responsibility of whether to accept the risk of performing multiple roles, and determining whether or not it is appropriate.<sup>61</sup>

## **CASE ANALYSIS AND EVALUATION (LITIGATION SUPPORT, ASSESSMENT AND PEER REVIEW)**

### **A. THE FUNCTIONS OF A MENTAL HEALTH CONSULTANT IN CASE ANALYSIS AND EVALUATION**

A mental health consultant provides support to the lawyer in case analysis and evaluation by assisting the lawyer to:



- understand psychological issues central to a case in order to prepare for trial or to effectively counsel a litigant;
- craft litigation strategies and examinations that are consistent with the current psychological literature;
- gather literature necessary for litigation;
- respond effectively to testimony as it unfolds during trial.

The mental health consultant performs these functions through any or all of the following: data review and analysis; consultation about case-strategy; assistance with the development of direct and cross examination questions; library research and document preparation; and the monitoring of testimony and in-court support to the legal team.

## **B. KEY QUESTIONS FOR CONSULTANTS PROVIDING CASE ANALYSIS AND EVALUATION**

Rather than try to catalogue how a consultant should go about performing each of these individual functions, this Discussion Paper seeks to identify general themes and controversies about the consultant's role in case analysis and evaluation for discussion by lawyers and the mental health community. They are:

- the appropriate scope of peer review;
- limitations on the opinions and involvement of a consultant depending on the data available to the consultant;
- whether a consultant who provides case analysis and evaluation can also testify.

### **1. Peer review and the nature of the adversary process**

In this role, a mental health consultant, in effect, performs a peer-review of a forensic work product prepared by another mental health professional. The consultant works with the attorney for the litigant to evaluate the degree to which that forensic mental health evaluator adhered to generally accepted guidelines, practice parameters, and standards regarding forensic assessment, used appropriate and generally accepted methods, interpreted data, and offered opinions congruent with relevant research findings and logically consistent with the data gathered in the assessment.

Areas of peer review may include:

- the methods and procedures used by the evaluator, including the evaluator's adherence (or lack thereof) to generally accepted guidelines, practice parameters, and standards regarding child custody evaluations;
- test data analyses performed by the evaluator or reported by the evaluator;
- published research relied upon by the evaluator;
- the logical nexus (or lack thereof) between information gathered, observations made, clinical impressions articulated and the opinions expressed by the evaluator; and
- the evaluator's competence in the critical areas pertinent to the specific parents and children (such as domestic violence, child abuse, alienation, very young children, and parent-child relationships).

Many in the mental health community are concerned that a mental health consultant will suggest or emphasize factors or theories that are superficial, irrelevant or minor, in an effort to distort the overall impact of the report and which do not have a basis in empirical research and sound practice. The Task Force believes, however, that so long as the evaluation report is a major factor in determining the legal rights of parents, child custody evaluators must run the risk of such cross examination. The other side will have every incentive to rehabilitate the evaluator's testimony after such cross examination to the extent possible.

Moreover, the Task Force believes that concerns about consultants encouraging meritless challenges to forensic mental health evaluation reports, in essence, reflects distrust of the adversary process of vetting information presented to the court through cross examination. Mental health consultants will not generally suggest marginal and frivolous challenges to forensic mental health evaluation reports for several reasons. First, they will recognize that it is unethical conduct on their part to do so.<sup>62</sup> Next, they will be aware of the lawyer's ethical obligation not to "assert or controvert an issue . . . unless there is a basis in law and fact for doing so that is not frivolous,"<sup>63</sup> and would not want to aid the lawyer in breach of the lawyer's ethical obligations. Moreover, on a more practical level, the Task Force believes judges understand the quality of cross examination questions and theories.<sup>64</sup> Consultants who encourage less than merited challenges to a mental health evaluation report will soon find themselves not being engaged by lawyers because judges will reject the theories that the consultant proposes.

If a consultant has reason to believe that the attorney is attempting to utilize the services of the consultant in an effort to distort the fact finding process, the consultant may want to consider withdrawing from the case. This possible condition on the consultant's engagement could be spelled out in the original letter of agreement with the attorney.

## **2. Limiting the scope of the consultation to the data available to the consultant**

The Task Force believes that mental health consultants should take care not to provide advice to the attorney for a litigant that is outside of the data reviewed by the consultant. For example, consultants:

- should make it clear to the attorney for the litigant that only limited opinions can be offered about a specific person who has not been directly evaluated;
- cannot render an opinion about preferred custody/access plans for a child when both the child and potential custodial parents have not been directly assessed (although a general discussion of parenting plans and the factors to consider in choosing an appropriate plan may be provided and be useful);
- who only have access to records or transcripts available to them should limit their commentary on whether certain behavioral test findings or symptom-patterns evident in the record are consistent with a certain psychological condition as manifested in the general population and not make comments about particular individuals.

## **3. Mixing consultation and testimony**

A lawyer may ask a consultant to testify in court in addition to providing a behind-the-scenes critique of a forensic evaluation report or consultation on case strategy. There is controversy about whether the same consultant should be able to play both roles. The Task Force was unable to come to a consensus about whether the same mental health consultant could and should perform both a case analysis and evaluation function and testify, or whether the attorney for a litigant had to engage two different mental health professionals for these purposes. The Task Force did not attempt to resolve this debate, but believes the questions it raises should be widely discussed in the legal and mental health communities as the role of a consultant develops further.

All sides in this debate agree that if a mental health consultant does accept a case with a hybrid role, it is critical that he or she maintain vigilance regarding the heightened risk of entering into a multiple relationship that "could reasonably be expected to impair the psychologist's objectivity, competence, or effectiveness in performing his or her functions as a psychologist, or otherwise risks exploitation or harm to the person with whom the professional relationship exists."<sup>65</sup>

Some Task Force members who are mental health professionals are opposed to a consultant performing hybrid roles. They believe that the simultaneous assumption of both case analysis and evaluation and testimonial roles raises ethical concerns. They base their argument against hybrid roles

on the fact that when the consultant testifies at trial, all information obtained in the course of the consultation becomes discoverable and open to questioning at trial by the adverse litigant. They believe that the consultant risks being seen as (or being) biased and lacking objectivity in court because they have chosen to help one side in their efforts to prevail.

Other Task Force members who are mental health professionals support the consultant assuming hybrid roles. They recognize the risks that motivate those who would generally bar hybrid roles. They believe, however, that the lawyers and litigants who engage the consultant should be able to make an informed decision whether to take those risks. They believe that those mental health consultants who perform purely testimonial roles can also be biased and that consultants who perform hybrid roles are especially attentive to the risks of loss of objectivity. They note the significant added expense of requiring a litigant to pay for two consultants—one to help prepare the case and one to testify. That added expense, they believe, will mean that consultant services are less available and the rights of litigants will thus not be as well protected.

### TRIAL TESTIMONY

Sometimes, consultants are asked to testify at trial on behalf of a litigant as an expert witness. The standards and procedures for such testimony are heavily regulated by rules of evidence and precedent,<sup>66</sup> and the Task Force did not focus its attention on that aspect of a consultant's role in depth.

The Task Force believes, however, that if the consultant does in fact communicate with the court via a written report or testimony, the consultant should limit his or her statements to those that conform to the admonitions that appear in Standards 2.04 and 9.01 (a) of the *Psychologists' Ethics Code*.<sup>67</sup> Standard 12.3 of the AFCC's *Model Standards for Child Custody Evaluation*, and Guideline VI. H. of the *Specialty Guidelines for Forensic Psychology* also provide useful guidance to the expert in framing their testimony.<sup>68</sup> The consultant's communications with the court should recognize that information gathered by a consultant retained by one side in an adversarial proceeding has limitations. For this reason, any opinion expressed must include an articulation of its limitations. Caution should be exercised regarding what types of opinions can be supported by the data reviewed.

### THE DESIRABILITY OF A WRITTEN ENGAGEMENT AGREEMENT

Given the complexities of the mental health consultant's role, the Task Force believes it is essential that the consultant insist on a written agreement with the attorney for the litigant that clarifies the roles that the consultant will play. The agreement should set forth the purpose of the consultation, its boundaries and conduct that is required or prohibited by the laws and ethics governing professional practice. The consultant should not begin work without a signed written agreement. The agreement should make clear that the consultant works for the lawyer, even if paid by the lawyer's client. It should address the consequences of a consultant performing education and support functions, or reviewing a forensic mental health report and subsequently being asked to testify, including possible waiver of work product protections for consultant-attorney communications. It is advisable that the retainer agreement be clear that the lawyer who retains the consultant understands that the consultant is not performing any therapeutic function and does not assume a therapist-patient relationship with the litigant. The attorney and the consultant should also convey the limitations of the consultant's role to the litigant.

### AVAILABILITY OF CONSULTANT SERVICES TO PERSONS OF MODEST MEANS

The Task Force notes that its discussion of the role of a mental health consultant in child custody disputes is limited to the litigants who can afford to engage a consultant. Only a small percentage of the overall population of divorcing and separating parents in custody disputes who may be ordered to

participate in a forensic mental health evaluation, can even afford a lawyer,<sup>69</sup> much less a mental health consultant to the lawyer. The Task Force believes child custody evaluations are equally important and stressful events in the legal lives of the poor and the rich. The Task Force hopes that the legal and mental health professions will give some thought to the availability of consultant services to those who cannot otherwise afford them in their discussion of the continuing evolution of the consultant's role.<sup>70</sup>

## CONCLUSION

The Task Force appreciates the opportunity it has been given to identify key issues in the new and evolving role of the mental health consultant in child custody disputes. It hopes that this Discussion Paper will inspire a robust dialogue between the legal and mental health professions on that role, leading to consensus on key issues and, eventually, codified best practices and ethical standards.

## NOTES

1. The Task Force's mental health professional members included only psychologists and that branch of the mental health profession seems to be the one from which most mental health consultants are drawn. Citations in this Discussion Paper about the mental health professions are thus to the standards, guidelines and codes which regulate or guide psychologists. The Task Force uses the more inclusive term "mental health consultant," however, because it believes that the underlying principles and dilemmas described in this Discussion Paper are applicable to any mental health professional (psychiatrist, social worker, family therapist) functioning as a consultant.

2. Litigants in custody disputes subject to forensic mental health evaluations are usually parents. A litigant can, however, also be a grandparent or another party seeking custody or parenting rights to a child. *See e.g.*, *Troxel v. Granville*, 530 U.S. 57, 59 (2000); *Sui v. Law*, [2009] O.R. 61 (Can.). This paper uses the more general term "litigant" to describe those subject to a forensic mental health evaluation but sometimes uses the term "parent" where particularly appropriate. As used in this Discussion Paper, furthermore, the term "litigant" or "parent" refers to persons who are clients of the lawyer who engage the mental health consultant.

3. Elena Hobbs-Minor & Matthew J. Sullivan, *Mental Health Consultant in Child Custody Cases*, in *INNOVATIONS IN INTERVENTIONS WITH HIGH CONFLICT FAMILIES* 163 (Linda B. Fieldstone & Christine A. Coates eds., 2006).

4. *Id.* at 160. *See* Robert L. Kaufman & S. Margaret Lee, *Introduction to the Special Issue on Forensic Mental Health Consulting in Family Law: Part of the Problem or Part of the Solution*, 8 J. OF CHILD CUSTODY 1-8 (2001); S. Margaret Lee & Lorie S. Nachlis, *Consulting with Attorneys: An Alternative Hybrid Model*, 8 J. OF CHILD CUSTODY 84, 87 (2011).

5. SPECIALTY GUIDELINES FOR FORENSIC PSYCHOLOGY R 1.01, 1.02 (Comm. On the Revision of the Specialty Guidelines for Forensic Psychology, Working Paper Mar. 18, 2011); AM. PSYCHOL. ASS'N (APA) ETHICAL PRINCIPLES FOR PSYCHOLOGISTS AND CODE OF CONDUCT R 3.05 (2010).

6. MODEL RULES OF PROF. CONDUCT R. 1.1 (2007); LAW SOC'Y OF UPPER CANADA, RULES OF PROF. CONDUCT R. 2.01 (2) (2000).

7. MODEL RULES OF PROF. CONDUCT R. 3.3 (a) (3) (2007); LAW SOC'Y OF UPPER CANADA, RULES OF PROF. CONDUCT R. 2.02 (5) (2000).

8. AM. PSYCHOL. ASS'N (APA) ETHICAL PRINCIPLES FOR PSYCHOLOGISTS AND CODE OF CONDUCT R. 2.01(a) (2002 revision, effective June 1, 2003).

9. AM. PSYCHOL. ASS'N (APA) GUIDELINES FOR CHILD CUSTODY EVALUATIONS IN FAMILY LAW PROCEEDINGS.

10. Timothy M. Tippins & Jeffrey P. Wittmann, *Empirical and Ethical Problems and Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 FAM. CT. REV. 193, 193 (2005); Nicholas Bala, *Assessments for Postseparation Parenting Disputes in Canada*, 42 FAM. CT. REV. 485, 485 (2004).

11. *See* LINDA D. ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE § 11:1 (2009).

12. Robert F. Kelly & Sarah H. Ramsey, *Child Custody Evaluations: The Need for Systems-Level Outcome Assessments*, 47 FAM. CT. REV. 286, 287 (2009).

13. *Id.* *See also* Noel Semple, *The Settlement Mission in Custody and Access Cases*, (October 1, 2010) at 7, available at <http://ssrn.com/abstract=1687268>.

14. *Colombo v. Schwartz*, 789 N.Y.S.2d 744, 744 (N.Y. App. Div. 2005); *Hom v. Reubins*, 702 N.Y.S.2d 603, 605 (N.Y. App. Div. 2000); *Parker v. Dodgion*, 971 P.2d 496 (Utah 1998). *See also* Nat Stern & Karen Oehmen, *Toward A Coherent Approach to Tort Immunity in Judicially Mandated Family Court Services*, 92 KY. L.J. 373, 373-74 (2004).

15. ASS'N OF FAMILY AND CONCILIATION COURTS, MODEL STANDARDS OF PRACTICE FOR CHILD CUSTODY EVALUATION R. 1.1., 1.2 & 1.3 (2006) J.W. GOULD, CONDUCTING SCIENTIFICALLY CRAFTED CHILD CUSTODY EVALUATIONS (2d ed. 2006). *See also* Barbara Jo Fidler and Rachel Birnbaum, *Child Custody Disputes: Private and Public Assessments*, 25 C.F.L.Q. 137, 150 (2006); Bala, *supra* note 10, at 504; *Richardson v. Gardner* (1995), 11 R.F.L. (4th) 292 (Ont. S.C.J.) (holding that "every assessment is as good as the assessor").

16. Barbara Jo Fidler & Rachel Birnbaum, *supra* note 15 at, 142–150 (2006).
17. *Id.* at 142.
18. *Id.* at 145, 148.
19. Randy K. Otto, John F. Edens & Elizabeth H. Barcus, *The Use of Psychological Testing in Child Custody Evaluations*, 38 FAM. CT. REV. 312, 315 (2000). *See also* Lawrence Jay Braunstein, *Children As Pawns: Who Determines Custody?* (THE MATRIMONIAL STRATEGIST), Oct. 2003, at 2.
20. Otto, Edens & Barcus, *supra* note 19, at 315.
21. David Medoff, *The Scientific Basis for Psychological Testing*, 41 FAM. CT. REV. 199 (2003).
22. Otto, Edens & Barcus, *supra* note 19, at 316.
23. *Id.*
24. Stephen P. Herman, *Child Custody Evaluations and the Need for Standards of Care and Peer Review*, 1 J. CENTER CHILD & RTS. 139, 139 (1999).
25. *Id.* *See also* Kelly & Ramsey, *supra* note 12, at 287.
26. *See* Andrew I. Schepard, *Editorial Notes, Mental Health Evaluations in Child Custody Disputes*, 43 FAM. CT. REV. 187, 188 (2005). *See also* Noel Semple, *The “Eye of the Beholder”: Professional Opinions about the Best Interests of a Child*, 50 FAM. CT. REV. (forthcoming Oct. 2011) (finding that recommendations made by social workers were followed by judges in approximately 52% of reported cases between 2003 and 2008. He contrasts these findings to several research studies which indicate that judges accept recommendations from mental health professionals, such as psychologists and psychiatrists, over 90% of the time); Bala, *supra* note 10, at 489.
27. *Id.*
28. *People v. Scala*, 491 N.Y.S.2d 555 (N.Y. Sup. Ct. 1985) (“The weight to be accorded to the testimony of any forensic mental health expert is within the province of the trier of fact . . . It depends upon the assessment of the training and professional experience of the expert, the nature, extent and thoroughness of the examination and evaluation, the reasonableness and persuasiveness of the conclusion or opinion, the logic with which it is derived and the demeanor of the expert as a witness”); *Hastings v. Rigsbee*, 875 So. 2d 772 (Fla. Dist. Ct. App. 2004); *Richardson v. Gardner* (1995), 11 R.F.L. (4th) 292 (Ont. S.C.J.) (“every assessment is as good as the assessor”); *cf.* *Woodhouse v. Woodhouse* (1996), 20 R.F.L. (4th) 337 (Ont. C.A.), leave to appeal refused by [1997] 1 S.C.R. xii (note) and *Imamura v. Remus* (2004), 12 R.F.L. (6th) 346 (Ont. S.C.J.).
29. Kelly & Ramsey, *supra* note 12, at 288.
30. Leslie Eaton, *For Arbiters in Custody Battles, Wide Power and Little Scrutiny*, N.Y. TIMES, May 23, 2004, at 1.
31. Schepard, *supra* note 26, at 188. *See also* *Troxel v. Granville*, 530 U.S. 57, 59 (2000); *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972); *Stanley v. Illinois*, 405 U.S. 645, 648 (1972).
32. *Id.*
33. Eaton, *supra* note 30, at 2.
34. *Id.*
35. *Id.*
36. *Id.* *See also* Schepard, *supra* note 26, at 188; Rachel Birnbaum, *Examining Court Outcomes in Child Custody Disputes: Child Legal Representation and Clinical Investigations*, 24 C.F.L.Q. 167 (2005); Bala, *supra* note 10, at 501–502.
37. James N. Bow, Michael C. Gottlieb, Hon. Dianna Gould-Saltman & Lesley Hendershot, *Partners in the Process: How Attorney Prepare their Clients for Custody Evaluations*, 50 FAM. CT. REV. (forthcoming Oct. 2011). *See also* James N. Bow, Michael C. Gottlieb & Hon. Dianna Gould-Saltman, *Attorneys’ Beliefs and Opinions About Child Custody Evaluations*, 49 FAM. CT. REV. 301, 304 (2011).
38. Bow et al., *Attorneys’ Beliefs and Opinions About Child Custody Evaluations*, *supra* note 37.
39. For the purposes of this Discussion Paper, the term “psychotherapist-patient relationship” is used to mean the relationship established between a licensed mental health professional and an identified patient for the purposes of providing treatment in the form of a therapeutic clinical intervention to address previously established target symptoms, mental health problems or emotional “patient.” MASS. GEN. LAWS ANN. CH. 233, § 20B (West 2001).
40. FED. R. CIV. P. 26(b)(2); N.Y. CPLR § 3101 (McKinney 2009). *See also* *B.C.F. Oil Refining Inc. v. Consol. Edison Co. of N.Y., Inc.*, 171 F.R.D. 57 (S.D.N.Y. 1997) (Documents dealing either with documents requests or preparations for depositions, which relate to expert’s role as consultant rather than as expert, are privileged for discovery purposes under attorney work-product doctrine). There are potential jurisdictional variations, and local laws should be consulted.
41. FED. R. CIV. P. 26(b)(4).
42. MODEL RULES PROF. CONDUCT, Preamble: A Lawyer’s Responsibilities (2002) (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”); LAW SOC’Y OF UPPER CANADA, RULES PROF. CONDUCT R. 4.01(1) (2000) (“When acting as an advocate, a lawyer shall represent the client resolutely and honorably within the limits of the law while treating the tribunal with candor, fairness, courtesy, and respect.”).
43. AM. PSYCHOL. ASS’N (APA) ETHICAL PRINCIPLES FOR PSYCHOLOGISTS AND CODE OF CONDUCT R. 3.05, Preamble, Principles A, B, C & D.
44. Elena Hobbs-Minor & Matthew J. Sullivan, *Mental Health Consultant in Child Custody Cases*, in *INNOVATIONS IN INTERVENTIONS WITH HIGH CONFLICT FAMILIES* 163 (Linda B. Fieldstone & Christine A. Coates eds., 2006).
45. *See* Eaton, *supra* note 30, at 6.
46. *Beller v. William Penn Life Ins. Co. of N.Y.*, 828 N.Y.S.2d 869 (N.Y. Sup. Ct. 2007).

47. See *Kaye v. Kaye*, 11 A.D.3d 392, 393 (N.Y. App. Div. 2004). See also *Eaton*, *supra* note 30, at 1; *Schepard*, *supra* note 26, at 2.

48. James M. Altman, *Witness Preparation Conflicts*, 22 No. 1 LITIG. 38, at 42 (Fall 1995).

49. MODEL RULES PROF'L CONDUCT R. 1.2 (2007) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent."); MODEL RULES PROF'L CONDUCT R. 3.3 (2007) ("A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer"); LAW SOC'Y OF UPPER CANADA RULES PROF'L CONDUCT R. 2.02(5) (2000) ("When advising a client, a lawyer shall not knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct, or instruct the client on how to violate the law and avoid punishment."); LAW SOC'Y OF UPPER CANADA, RULES PROF'L CONDUCT R. 4.01(2)(e) (2000) ("When acting as an advocate, a lawyer shall not knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime, or illegal conduct").

50. See MODEL RULES PROF'L CONDUCT R. 1.1 (2007) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation").

51. MODEL RULES PROF'L CONDUCT R. 3.3 (2007).

52. Altman, *supra* note 48, at 42. See also DAVID M. MALONE, PETER T. HOFFMAN & ANTHONY J. BOCCHINO, *THE EFFECTIVE DEPOSITION: TECHNIQUES AND STRATEGIES THAT WORK* 211 (National Institute for Trial Advocacy, rev. 3d ed. 2007) ("The heart of witness preparation is having the witness actually practice answering questions").

53. Altman, *supra* note 48, at 42.

54. Lauren Barth, *Consultant Conduct in Anticipation of a Child Custody Evaluation: Ethical and Social Dilemmas and the Need for Neutral Parent Education*, 49 FAM. CT. REV. 155, 160 (2011).

55. See Kelly, *supra* note 12, at 286.

56. SPECIALTY GUIDELINES FOR FORENSIC PSYCHOLOGY R 3.04 (Comm. On the Revision of the Specialty Guidelines for Forensic Psychology, Working Paper Mar. 18, 2011); AM. PSYCHOL. ASS'N (APA) ETHICAL PRINCIPLES FOR PSYCHOLOGISTS AND CODE OF CONDUCT, Preamble, Principle A, *supra* note 43. ("Psychologists strive to be aware of the possible effect of their own physical and mental health on their ability to help those with whom they work").

57. SPECIALTY GUIDELINES FOR FORENSIC PSYCHOLOGY R 1.01, 1.02 (Comm. On the Revision of the Specialty Guidelines for Forensic Psychology, Working Paper Mar. 18, 2011).

58. *Id.* at 3.04; AMERICAN PSYCHOL. ASS'N (APA) ETHICAL PRINCIPLES FOR PSYCHOLOGISTS AND CODE OF CONDUCT, Preamble, Principle A, *supra* note 43. ("Psychologists strive to be aware of the possible effect of their own physical and mental health on their ability to help those with whom they work"). See also MODEL STANDARDS OF PRACTICE FOR CHILD CUSTODY EVALUATION, Preamble P.3 (2006) ("Evaluators are responsible to all consumers of their services; namely, the courts, the participants in the evaluation process, and affected others").

59. SPECIALTY GUIDELINES FOR FORENSIC PSYCHOLOGY R 4.02 (Comm. On the Revision of the Specialty Guidelines for Forensic Psychology, Working Paper Mar. 18, 2011).

60. *Id.* at R. 1.01, R. 1.02.

61. *Id.* at R. 1.01, R. 1.02, R. 1.03, R. 4.02; AM. PSYCHOL. ASS'N (APA) ETHICAL PRINCIPLES FOR PSYCHOLOGISTS AND CODE OF CONDUCT R. 3.05 ("psychologists strive to be aware of the possible effect of their own physical and mental health on their ability to help those with whom they work").

62. SPECIALTY GUIDELINES FOR FORENSIC PSYCHOLOGY R 1.01, 1.02, 11.01 (Comm. On the Revision of the Specialty Guidelines for Forensic Psychology, Working Paper Mar. 18, 2011).

63. MODEL RULES OF PROF'L CONDUCT RULE 3.1 (2007); LAW SOC'Y OF UPPER CANADA, RULES PROF'L CONDUCT R. 4.01(2)(g) (2002) ("When acting as an advocate, a lawyer shall not knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal").

64. *Bernier v. Bernier*, [2010] B.C.W.L.D. 3455 (BCCA) (Can.); *Greenough v. Greenough* [2003] 46 R.F.L. (5th) 414 (Ont. S.C.J.) (Can.); *Sordi v. Sordi*, [2010] W.D.F.L. 2273 (Ont. S.C.J.) (Can.).

65. AM. PSYCHOL. ASS'N (APA) ETHICAL PRINCIPLES FOR PSYCHOLOGISTS AND CODE OF CONDUCT R. 3.05; SPECIALTY GUIDELINES FOR FORENSIC PSYCHOLOGY R 1.02 4.02 (Comm. On the Revision of the Specialty Guidelines for Forensic Psychology, Working Paper Mar. 18, 2011).

66. FED. R. EVID. 702. ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case"); *R. v. Mohan*, [1994] 2 S.C.R. 9 (Can.).

67. AM. PSYCHOL. ASS'N (APA) ETHICAL PRINCIPLES FOR PSYCHOLOGISTS AND CODE OF CONDUCT R. 2.04, R. 9.01.

68. SPECIALTY GUIDELINES FOR FORENSIC PSYCHOLOGY R 2.05 (Comm. On the Revision of the Specialty Guidelines for Forensic Psychology, Working Paper Mar. 18, 2011).

69. Barth, *supra* note 54, at 157 (proposing a mandatory court affiliated education program for parents, many of whom cannot afford a lawyer, but are preparing to undergo a custody evaluation).

70. *Id.* at 156.