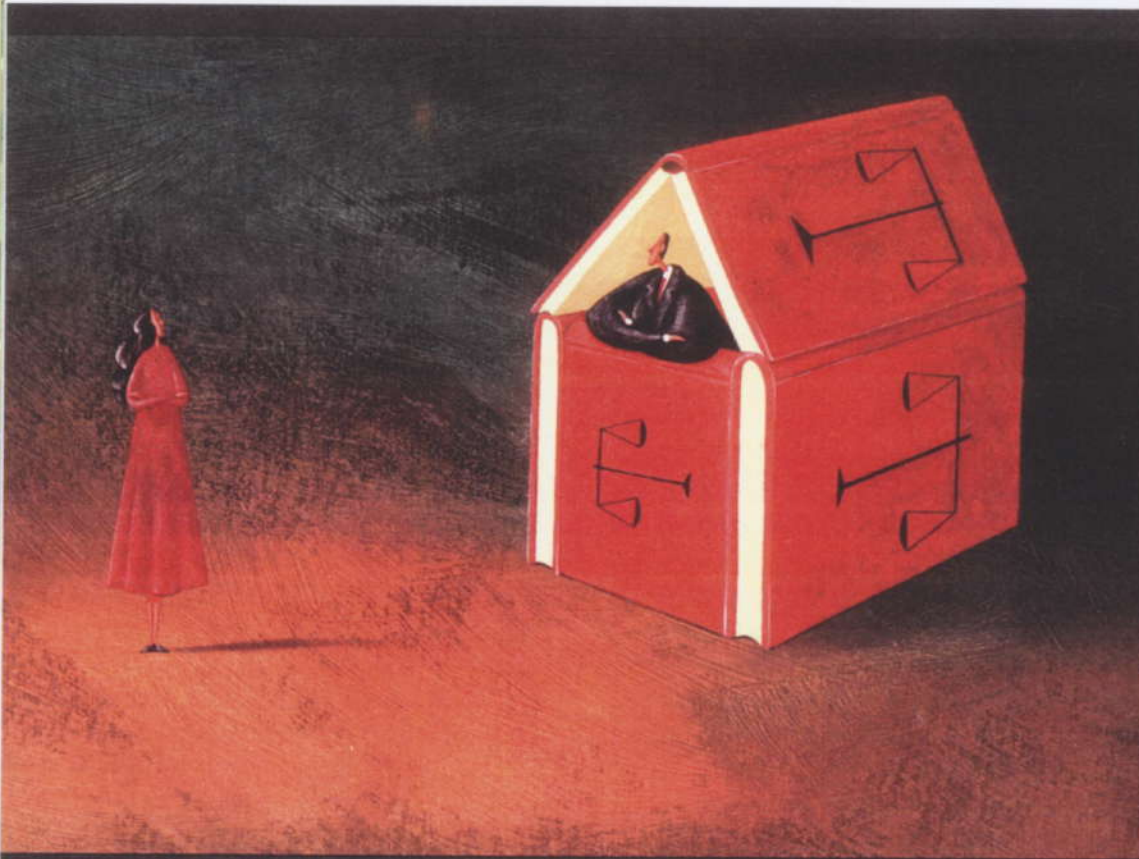


Examining the Mental Health EXPERT

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Preparation for the examination of a mental health expert at trial begins very early, perhaps at the first interview of the client and with a thorough knowledge of the applicable law. At the initial interview, make note of what the issues are for the client and what type of mental health issues might be evaluated. Begin thinking about how best to prepare your client for the evaluation and who best to perform the evaluation, if you have any opportunity for input with the court.

Review the law of the jurisdiction. This may sound too basic, but it is important. It does not matter how many custody cases one has tried. In our experience it is always useful to look at the statutes with the particular case in mind. Statutes change. Something new or useful often jumps out. Read and review the relevant cases from your jurisdiction. You need to have the law fresh in your mind both for planning the examination of the expert or preparing mentally for the other side's examination and themes.

The examination of a mental health expert is always much more effective when the lawyer develops themes of the case. The themes are the issues that are paramount for the particular case. A theme may be alienation of one parent by the other, drug or alcohol abuse, an inability to coparent, physical or sexual abuse, or other issues that may surface after the case begins.

The themes of the case begin to appear at the initial interview. Follow up and develop these themes as the case progresses. Be sure the client knows what the themes are and that he or she is prepared to discuss the ideas behind the themes with the evaluator. The themes give everyone a road map to the testimony. Control of the themes gives the lawyer control of the "story" as told to the court in testimony.

In Connecticut, for many years we have had a designated custody court that adjudicates only contested custody cases. The judges who sit in this court are presumed to have experience hearing custody cases. Part of the court is a well-designed program in which a lawyer and mental health professional team up and donate a full day to meeting with the parties, the parties' lawyers, and the guardian *ad litem* and/or attorney for the children. This team is given the case history a week or two before the meeting, including the evaluation of a mental health expert or experts.

What is painfully clear in many of these team sessions at the custody court is the degree to which the attorneys for the parties are not properly prepared for the trial because they have not thought out what is really relevant or important in this particular custody case. In the case of the evaluator, frequently he or she has not been told what is required for this particular judge or case with specificity. Regardless of whether the mental health evaluator was appointed by the court from its own list of evaluators or was appointed at the recommendation and agreement of the attorneys, the evaluator often is unprepared or underprepared for the task by the attorneys and the court.

Know your expert

Not all mental health evaluators are equal in experience, training, forensic skill, ability to articulate findings on the witness stand, or diagnostic competence. Therefore, it is very important to know your expert's strengths and weaknesses. Experts should not stretch beyond their competency or abilities. Yet, the "hired gun types" do it all the time. Knowing your expert includes finding out whether the judge has experience with the expert and whether the expert knows the judge from testimony in previous cases, as well as finding out how experienced the expert is in performing evaluations in custody cases.

Only after you know the evaluator's strengths and weaknesses can you begin to formulate your approach to direct or cross-examination. For example, if the expert is well known to the court, spending a great deal of time on her experience or his training may not be useful and, in fact,

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might risk putting the judge to sleep. On the other hand, even if the expert is well known to the court and has particular and pertinent expertise, such as in diagnosing and treating of substance abuse or sexual abuse, the lawyer's qualifying of the expert should emphasize this expertise. In contrast, if the evaluator is not known to the court and perhaps is new to this line of work, careful planning as to how to best showcase (or discredit) the experts' education or experience is equally important. Look for relevant articles or residencies and do not forget other life experiences, such as having been a teacher or parent or having other related degrees, etc.

Knowledge of the judge cannot be overestimated. How sophisticated or unsophisticated about psychological issues is the court? Research all reported cases, looking not just for results, but also for the complexity of issues relating to

mental health. Call colleagues and discuss their experiences with the judge. If the judge is unsophisticated, you may need to do much more education and instruction through the witness. Although judges sometimes think that having children or grandchildren qualifies them to make custody decisions, helping the court to understand certain developmental issues will no doubt assist your expert. For example, where one or both parties have a diagnosis, walk the witness through at least the basics of the DSM IV-TR before allowing the witness to testify about the specifics of the diagnosis. On cross, the same exercise is useful to show that the expert did not correctly consider various criteria of the statistical manual, or that he or she left out important clinical information, or that results of psychological testing are completely at odds with the DSM IV-R criteria or clinical interviews.

To thine own self be true

What are your strengths and weaknesses? There is absolutely no downside to hiring a mental health consultant to educate and advise you on issues relevant to your case that you may not understand. Such a consultant can direct you to articles and/or other experts in a specific specialty and thus give you great insight. A consultant should also be able to inform you about the background, strengths, and perhaps even biases of the testifying evaluator.

Be clear about the reasons or issues for the evaluation. As pointed out at the outset, both the attorneys and the evaluator need to understand what the court expects from the evaluation. If the court at the *pendente lite* stage is simply appointing an expert and the issues of the case are ill defined, it is the obligation of both the attorney and the expert to know what is necessary in this particular case.

One of the most painful realities about custody cases is that many judges and lawyers and some mental health evaluators believe that all custody cases and evaluations are like hotel robes—*one size fits all*. Anyone who has done this work for many years knows this is simply not true. For example, most evaluators believe that the most important part of the evaluation—even more than testing—is the clinical interview. Certainly it is the most difficult part of cross-examination. Not all parties in a custody case are the same, nor are their children. Questions of nature versus nurture abound, for example. Therefore, at the outset establish what kind of custody case it is.

1] Is this a case of joint physical versus primary residence between two people who have an established track record of parenting time predivorce and one is now trying to pressure or punish the other by claiming joint physical custody?

2] Is joint legal versus sole legal custody the issue? Is one parent trying to punish the other by claiming to be the “decider”? Most families have always shared this role, so

why now suddenly is there a fight?

3] Is this a removal or relocation case? In our experience, these are the most difficult of all cases. Are you likely to have a judge who is known to be biased in favor of women in a relocation case? Or is the judge blindly opposed to relocation in all circumstances? Is your law “best interests of the children” or “best interests of the mother”?

4] What are the ages of the children? Do the children have strong preferences, and what does your state law say or the judge feel about that? Are hearsay statements of the children permitted? Is there a concern that one or both parents are alienating the other parent or abusing the children?

5] Does either party have a history of mental illness? Do one or more of the children have special needs? Can the parties afford a full-blown custody evaluation and, if not, what will the court order?

6] Does this family have a history of dysfunctional behavior? To what degree are the children already exhibiting dysfunctional behavior?

7] Is there a history of alcohol or substance abuse? Most mental health professionals believe that an active alcoholic is more difficult to evaluate because drugs or alcohol mask underlying mental health disorders.

8] Are there allegations of sexual abuse or misconduct? Is there a history of sexual abuse in either parent’s childhood, and is it being replicated in adulthood?

There is absolutely no downside to hiring a mental health consultant to educate you on issues relevant to your case

Some evaluations set forth details about each parent’s psychological make-up without ever relating the individual traits to the issues in the case. While it may make for interesting reading for some, this is not helpful to the court or your client. Once you have analyzed what kinds of issues are relevant to your case, the mental health evaluator must understand them from your point of view. How do you accomplish this? Sometimes you can talk directly with the

evaluator, either by agreement of the parties or at the request of the evaluator. If you cannot, then prepare your client. Most evaluators, in their first and subsequent sessions, will ask the parent why he or she is there and what issues they want the evaluator to explore. Prepare your client to discuss this, even if it is never asked.

If you know the issues before the evaluation starts, consider asking the court to order the mental health evaluator to be guided by a list of questions. Here are two lists of questions from two actual cases. The first list, agreed to by the parties and ordered by the court in advance, resulted in the court-appointed psychiatrist issuing two reports totaling 100 pages.

The evaluator is instructed to focus on the parties' parenting capacity, the psychological and developmental needs of the children, and the resulting fit. The evaluator should employ a psychologist to do psychological testing, as he deems appropriate, make collateral contacts, and answer the following questions:

1] Does either party present a physical or emotional danger to himself, herself, or the children? (In this case, allegations of this nature were being made.)

2] Does either party require ongoing psychological or psychiatric treatment? (In this case, both parties were in treatment, and one party was making serious allegations about the other's mental health.)

3] Does either party present any issues that may interfere with his or her ability to effectively parent the children? (Both sides were making allegations of alcohol and drug abuse.)

4] Is each party capable of parenting the children?

5] Is each party capable of coparenting? (This is a major component of every case in our courts.)

6] Does either party present any significant issues relevant to the determination of legal and physical custody? (There were significant issues, including one party caught on tape coaching a child to lie to his therapist.)

7] Does either party have a mental disorder and, if so, what is your diagnosis of that disorder? (This was a major issue in this case.)

8] Is there a true basis in fact for allegations that a child has been sexually abused? (One party was making allegations of sexual abuse, which meant tests and interviews had to include this.)

9] Does either party have a substance use disorder, including dependence, abuse, intoxication, or withdrawal? (This was a major issue in the case. The evaluator hired a separate alcohol and drug abuse expert.)

10] Has either party attempted to alienate any of the children from the other party and, if so, to what extent? (A major issue in the case.)

The evaluator in question wrote a comprehensive initial report of some 70 pages, including about 10 pages at the end answering the specific 10 questions. A later update of

the findings was requested by the court, resulting in about 30 pages of findings by the court. After six days of depositions taken by the attorney for the mother and twelve days on the witness stand in court, coupled with contemptuous behavior by the mother, the court made numerous findings based on the testimony of the evaluator, awarded full custody, legal and custodial, to the father of four children under the age of 10, and gave the mother one hour a week of supervised visitation, which could increase if the mother followed steps related to her sobriety. We are familiar with this case because we were co-counsel for the father and we handled all seven medical and mental health witnesses, plus five hospitals and treatment facilities at deposition and trial.

The second list of questions was sent to a psychologist in a postjudgment modification of physical and legal custody, which was the third time back for these parents. Those questions were:

1] Does the child suffer from any psychological disorder?

2] Do any of the adults need therapy as a condition to continued contact with the minor child?

3] Is anyone attempting to manipulate the child in order to obtain an advantageous position in the current legal action?

4] Do you recommend any changes to the current custody and/or access orders and, if so, why?

5] Do any of the adults put their welfare, wants, and/or desires before that of the child?

6] Do any of the adults attempt to undermine the child's relationship with the other parent, stepmother, or significant other? (A major issue in this case.)

7] Does either parent provide a more consistent and nurturing environment?

8] Does either party present any mental health issues that may interfere with his or her ability to parent the child effectively?

9] Is each party capable of parenting the child in an effective way?

10] Is each party capable of coparenting?

11] Do any of the adults have a mental disorder and, if so, what is that disorder?

If these types of questions have not been given to the evaluator before the evaluation, they can be used and adapted to the direct or cross of the expert, depending on the facts of each case *and* the statutes and case law of your state. An evaluator's opinion must be presented in the context of the law of your state to give the court a concrete footing for its findings and orders.

A custody evaluator is not a witness you should handle by the seat of your pants. Remember, even though the expert is on your turf in court, he or she has probably forgotten more than you will ever know about this field. Be well prepared. If you are doing the direct examination of

the expert, insist on sitting down with the evaluator in person to prepare for trial. Obviously, your expert should not let you direct his or her testimony, but rather be receptive to the list of questions you prepare for the expert to answer.

It does not matter how experienced the evaluator is; each case is different. The facts are different, and the personalities of the attorneys are different. It will help the witness to have some idea of what to expect on cross-examination. A skilled expert can help you anticipate questions on cross. You need to know ahead of time what the expert thinks and how to handle particular issues or questions. Most experts appreciate the time and effort required to "get it right" in court and will cooperate, provided there is no court order prohibiting the contact.

Unfortunately, courts sometimes force mental health experts to testify without the preparation awarded to any other witness. An ethical evaluator will try to aide you in the search for the truth and the best interests of the children. The hired gun will try to outwit you, which a sophisticated judge will quickly identify. Organize your themes for the case in accordance with the evaluator's testimony and report and the contents of his or her file. (See Harmon, page 34.)

In summary, direct examination should include establishing the evaluator's credentials, going through the evaluator's process and protocol, what he or she has done, and how much time was spent. Then hit the highlights of the report before eliciting the opinion. Do not rush. Let the evaluator answer each question or even the ultimate question, if requested by the court or allowed. Keep your themes in mind and clarify the opinion as to those topics, such as alcoholism, alienation, etc. In short, lay it out for the judge and do not make the judge guess or assume. You might consider using some hypothetical questions based on facts established at trial, which the expert did not know at the time of the evaluation. The expert can be asked to apply the new information to any of the relevant questions on the list.

On cross-examination expose the weaknesses of the expert by way of experience, qualifications, or training, using what you learned through depositions. Avoid doing discovery at trial as we have all been taught. Decide ahead of time whether you want to (or can, based on the facts) wholly discredit the expert or just develop holes in his/her work on the case to reduce the judge's confidence in the opinion. Have specific goals for cross-examination. Make sure you do not simply follow the notes you took during the direct examination. This will only let the evaluator repeat all of the damaging testimony. Do not ask questions simply because you can and it is your turn. Therefore, do not cross on every topic. Choose your areas of focus for

cross-examination, make your point, and move on.

Finally, in some cases, lawyers will hire an evaluator because the court-appointed evaluator's report was biased, unprofessional, incomplete, or because the client or the lawyer did not like or agree with the opinions. At times, hiring a different expert, who probably will not get to meet and interview both sides, is necessary. However, this decision is fraught with danger. The court will automatically be suspicious unless the new expert is a well-known and ethical professional who would not be doing this but for a genuine difference of opinion. Going out of state to find someone is usually a bad idea. Your direct examination of such an evaluator should be theme-sensitive, concise, and to the point. Cross should be based on whether and how much you really need to do it. Remember, this is where the rule is especially important about not asking questions just because it is your turn. On the other hand, do not hesitate to point out to the court the biased or limited knowledge of this witness.

One last note: This article is not intended to be a comprehensive treatise on direct and cross-examination. Rather it explores how to prepare yourself and your expert for trial—from the first interview of the client in some cases. As you prepare for the trial testimony, sit down and actually write out the questions you plan to ask, think about the themes, the facts of the case, the evaluator's report, and the law. You may not use these exact questions in the courtroom, but the exercise of writing them out will highlight problems and inconsistencies you must address. Preparing the questions ahead of time will give you a chance to get it right. **FA**



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