The provision of psychological (e.g., psychotherapy, coparenting, mediation, collaborative divorce, child custody evaluation) services for families of divorce are growing specialties for many clinical and forensic psychologists. However, practice in domestic relations psychology, such as divorce and custody assessment and testimony, is a high-risk venture for incurring ethics complaints and law suits. The lead article and the three commentaries that follow enumerate the various roles practitioners might play, clarify how each role requires specific skill sets that may be outside one’s particular competence and necessitate additional training, describe how countertransference issues arise, urge meticulous record keeping, discuss some of the subtleties of confidentiality and the releasing of information, describe how transparency in clarifying expectations leads to a lowering of contentiousness, and provide tips for divorce and forensic practice. The special challenges associated with psychologists being tempted to move beyond...
their role on a case and those of particularly high-risk situations (e.g., complaints of child abuse or domestic violence) are also discussed. Suggestions are offered to help psychologists better serve the public while taking steps to better inoculate themselves from complaints.

Keywords: child custody, divorce, ethics, forensic evaluations, psychotherapy

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Navigating Through the Divorce and Child Custody Minefield

Jeffrey Zimmerman and Allen K. Hess

The changing landscape of clinical psychology and the emergence of forensic psychology have provided clinical psychologists with new opportunities (A. K. Hess, 2006a). As the nation’s divorce rate continues to hover about 50% (Kreider & Fields, 2001)—with some 43% of first marriages, 60% of second marriages, and 73% of third marriages estimated as ending in divorce (see www.divorce rate.org)—psychologists are, in addition to serving as psychotherapists, increasingly drawn into serving this population in several different capacities. These include parent coordinator, custody evaluator, coparent counselor, and collaborative divorce mental health professional. Each role brings legal and ethical risks for the unwary professional, as he or she enters the legal arena, especially as the role of the psychologist may be unclear to the parents and the professionals. Divorce and child custody matters provide an arena for augmenting one’s array of skills and scope of practice, but this has become increasingly complex. Indeed, as Kirkland and Kirkland (2001) suggested, “psychologists who accept work in this area are extremely likely to also encounter the anguish of defending a related licensure board complaint at some point” (p. 171). Only sexual misconduct exceeds the number of cases filed against psychologists engaged in forensic work (Montgomery, Cupit, & Wimberly, 1999). This article highlights some of the nodal points that pose risks for psychologists. We first address broad-based general practice issues faced by psychologists who work with families of divorce in varying capacities (e.g., child, individual, and marital therapists) before concentrating on issues more specific to the evolving field of forensic practice. Last, we highlight some ideas for continuing improvement in practice standards and approaches.

General Practice Issues

When working with families of divorce (regardless of one’s specific role as a psychologist), one needs to be keenly sensitive to the opportunities to inadvertently engage in unethical practice. It is far too easy to slip and find oneself mired in a complaint. The following are areas that require particular cognizance.

Basic Knowledge of State Laws

The practitioner must be knowledgeable about state laws concerning divorce and custody (not just confidentiality), or else he or she may unwittingly provide unauthorized treatment, release information, or use terms colloquially that are actually terms-of-art in the law and have meanings and consequences beyond what the practitioner can imagine (K. D. Hess, 2006a, 2006b). Psychologists providing therapy also need to be aware of state law that may require authorizations from both custodial parents before treating a child. Similarly, state laws may require that all present and both custodial parents (not just the identified patient, or one parent) authorize the release confidential information. Moreover, the assessor practitioner has knowledge of the local customs and the particular judge’s predilections, so suggestions can be tailored to optimally meet the needs of the various constituents.

Avoiding Inappropriate Advocacy

Psychologists who treat or consult to families of divorce can easily fall into the role of functioning as advocates for their patients. However, in doing so, they often abdicate a deeper responsibility to protect a child’s right to have as safe and healthy a relationship as possible with both parents. The system often focuses on determining which parent is “better,” as if that should supersede the responsibility to assure a child’s right to a safe relationship with each parent. Psychologists should serve the role of helping the system consider the various options that are appropriate for the child. With appropriate releases of information (for models, see Blau & Albers, 2004), the psychologist can educate lawyers, particularly those charged with advocating for what is in the best interests of the child, about various options and their likely impact on the child (children). Psychologists can brainstorm solutions that are functional remedies and, perhaps, outside the scope of legal remedies typically considered by the court. For example, instead of fighting about who has authority for the decision, parents who are seeking from the court the authority for sole decision making on educational issues can be helped to craft a process for making a more child-centered decision (e.g., utilizing an impartial educational consultant for input about what factors they need to consider and what might make most sense for the child given his or her educational needs and the scope of available services).

Psychologists providing services to families of divorce need to help children have a voice in the adjudication process, yet this does not necessarily mean that we should advocate for what a child wants. Since its promulgation, the legal standard of what is in the best interests of the child (Freud, Goldstein, & Solnit, 1973) has been criticized as being long on theory and short on empirical support. Current standards have evolved that include other interests as well. For example, the Cheeseman (2007) guidelines involve (a) the child’s preferences and needs; (b) the ability of the parent to meet the child’s needs; (c) the ability of the arrangements and the respective parents to provide a stable environment, includ-
ing maintaining community; educational, and social involvements of the child; (d) providing for the other parent to maintain a salutary relationship; and (e) provision for any special needs. Cheeseman allows considerations of options so Hobson’s choices (A or B) can be avoided. Being less an advocate for one party only, the psychologist can offer a more comprehensive plan to the court, with differing weights assigned to the Cheeseman factors depending on the specific case.

If there then develops a common understanding that what is in the child’s best interests is to have a safe and healthy relationship with both parents who also communicate with one another, then divorce (i.e., the legal dissolution of marriage) should not change what is central to the healthy upbringing of a child. Psychologists in all divorce service roles can then help divorcing spouses structure and define their relationship solely as parents in a way that fosters healthy child-centered communication and parental decision making that is not contaminated by spousal anger, conflict, and hostility.

Record Keeping

All practicing psychologists need to have an established policy of record keeping and safeguarding and an awareness of communicating written, electronic, and oral information that conforms to the American Psychological Association (APA) Ethics Code (Standard 6, “Record Keeping and Fees”; APA, 2002) and is responsive to the state statutes, Health Insurance Portability and Accountability Act (HIPAA) regulations, and record-keeping guidelines (APA, 2007). Hamburger (2000) has provided a guide on releasing information. He addressed how to educate a client about the nature of such results and how to understand and use them if the client still chooses to obtain records in such cases as child custody cases.

Avoiding Countertransference Problems

Knowing one’s own unresolved family-of-origin issues, personal biases, and interests, as well as having a stable current family situation, is important in functioning without undue countertransference issues arising. The psychologist’s alliance to his or her respective client and the representations of that client about the spouse and other concerned parties (absent other first-hand information) can cause the clinician to move far beyond one’s usual role and even demonize one parent or the other, especially if one parent has a diagnosable mental disorder. This pejorative communication can be antithetical to our ethic against harassment (Standard 3.03, Other Harassment; APA, 2002). If one’s own situation is tumultuous or if issues arise that resonate with one’s past, they may become court issues—an occurrence that can lead to professionally disastrous results (Pipes, Holstein, & Aguirre, 2005). Knowing one’s blind spots and securing psychotherapy, case consultation, and supervision can help in one’s continuing skill development. Keeping current one’s malpractice insurance and insurance against board complaints also can be invaluable if a complaint is filed.

Forensic Practice Issues

The issues faced by the court-appointed psychologist are, from the point of referral, even thornier.

Accepting the Referral

A. K. Hess (1998) suggested that, on being referred to a case, the psychologist learns (a) the facts of the case to see whether the psychologist has the relevant skills to provide competent help; (b) who the parties are so the psychologist can avoid conflicts of interest and avoid working for attorneys who do not understand or value what a psychologist can offer; (c) who pays what fee at what points during the case; and (d) what is the scope of the psychologist’s involvement. With so many intersecting parties (e.g., parents, grandparents, children, step- and half-children, and all the attorneys for various parties), the psychologist must be clear about who is his or her client and that the client is clear about this too. When the referral involves assessment that is going to be revealed at some point in court proceedings, the psychologist must be clear that all the participants know that what they reveal will not be shielded by privilege and that the client ought not expect the comfort of confidentiality. Questions about confidentiality also arise when parents are seen through alternative dispute resolution frameworks (e.g., with parent counselors). This work may be protected from the purview of the court if it is looked at in a manner similar to that of the work that parents do in mediation (e.g., Connecticut Statutes, 2009, § 52–235d). This is consistent with the sense of good faith embodied in the Federal Rules of Evidence (FRE) Rules 407 and 408, whereby the courts want amicable settlements. Thus, information revealed and attempts at compromise in these conferences are typically shielded from admission as testimony (see applicable state law). This allows the parties to engage in good-faith mediation. However, when the psychologist is engaged as a child or family therapist, the clarity about informed consent is more obscure. The psychologist must be clear about who is protected (e.g., just the identified patient or all who are present in the office) and who (e.g., one or both parents) may authorize the release of information, on the basis of state statutes. When more than one party is present, what is shielded becomes more complicated and the psychologist cannot offer guarantees that third parties, other than the psychologist’s colleagues and employees, will guard others’ revelations.

Securing Appropriate Training

As psychologists venture into new professional roles, they also need to make sure that they have the appropriate knowledge, education, training, experience, and skills (cf. the special section in this journal that reports on the Competencies Conference: Education and Credentialing in Professional Psychology; e.g. Rubin et al., 2005). Although there are many training opportunities to learn collaborative divorce and mediation, there are fewer opportunities to be trained in the art of parent coordination or parent counseling. These different roles each require specific training, and each have different expectations and standards for competent practice. Additionally, one needs to assess whether one’s background and temperament are appropriate for this work, even if one takes a formal training program (which is likely to be only a week or less in duration). That is, if one’s clinical training and experience is primarily with adults, it may be inappropriate to function without supervision as a neutral child specialist, child custody evaluator, parent counselor, or parent coordinator where a good deal of the work will be directly related to the best interests of the child.
(Standard 2.01, Boundaries of Competence; APA, 2002). It is also imperative to take great care to avoid conflicting roles (e.g., parent therapist and custody evaluator) and the perception of self-serving involvement at the expense of the client (Standards 3.05, Multiple Relationships, and 3.06, Conflict of Interest; APA, 2002). Also, if one has little tolerance for ambiguity and conflict, the highly charged area of domestic relations may be one bridge too far for one’s practice.

Providing Useful Information

When informed consent and appropriate releases are in place, the forensic psychologist, as opposed to the treating psychologist who has a high barrier for release (A. K. Hess, 2008), still has an obligation regarding any released information. The information released must be helpful to the process and in a form that is clear and less likely to be misused. For example, simply releasing a diagnosis without explanation or qualifying one’s remarks does not demonstrate responsibility. Custody and access decisions can hinge on the legal system’s interpretation of the implication of a diagnosis (e.g., bipolar disorder, major depression, schizophrenia, narcissistic personality) inferring an inability to parent, when simply, the diagnosis itself may have little objective predictability as to the ability of the parent to have healthy and safe interactions with the child.

In order that the psychologist explain these limits and boundaries clearly and provide true informed consent (Barnett, Wise, Johnson-Greene, & Bucky, 2008), he or she ought to be clear that there is a difference in kind between a fact and an expert witness. The psychotherapist can appear at legal proceedings to provide evidence (although the threshold for doing so ought to be extraordinarily high; cf. Jaffe v. Redmond, 1996) but is not necessarily an expert witness vis-à-vis the issues in a divorce or a custody case. Consider the following case.

Case 1. The psychologist undertook marital therapy with a highly hostile and conflictual couple, an attorney and his wife, with the proviso that the psychologist would not appear in any legal (divorce) proceeding. He explained to both in each other’s presence that to meet under any other condition would sabotage treatment as one or the other would be constantly assessing how their own and the other’s utterances would play in court. They were unable to resolve any issues and filed for divorce. Then, the husband’s attorney, known for intimidating his opponents, called the psychologist’s home at 6:45 a.m. to warn him that he was going to be subpoenaed to reveal the wife’s diagnosis, in an effort to undermine her grounds for settlement. The lawyer told the psychologist that he had no choice in the matter and that the psychotherapist privilege did not apply. The psychologist told the lawyer that the conditions of the treatment were that nothing would be revealed in any arena outside the treatment room; that the first item the psychologist would reveal was the duplicity of his client; that the wife’s diagnosis is separably privileged and if the psychologist was forced to reveal it, it would pale in comparison to the husband’s diagnosis; and that the attorney ought to know that his worst enemy is most frequently his own client, who is trying to look good in the attorney’s eyes so the client was not revealing facts that made him look bad. The psychologist was not called by either party. Conducting psychotherapy under any other condition would sabotage treatment as one or the other.

Greenberg and colleagues (Greenberg & Gould, 2001; Greenberg & Shuman, 1997) delve further into these questions. When professional services are provided in a system in which both litigants (i.e., the divorcing spouses and their extended families) are likely to be unhappy with the outcome and feel injured by the actions or inactions of the psychologist, one needs to be acutely aware of the risks and potential pitfalls inherent in this work and consider risk management strategies (Kennedy, Vandehey, Norman, & Diekhoff, 2003).

Providing Services Consistent With Common Standards of Care

As this is an ever-emerging field, the question arises as to whether there are common practices and formal standards of care in assessment and service delivery that can guide the practitioner. We suggest that the psychologist involved in custody assessments should be aware that some have stated that there is a standard battery of tests (Ackerman & Ackerman, 1997), whereas others have argued that we are far from a uniform or even commonly used battery (Hagan & Castagna, 2001). In either case, the measures that the psychologist uses ought to be competently mastered, with their strengths and weaknesses (i.e., reliability, validity, and training requirements for mastery of the techniques or instrument) known through a thorough review of the literature. Bow and Quinell (2001) have suggested that, during the 5 years after APA’s 1994 Guidelines for Child Custody Evaluations in Divorce Proceedings, psychological evaluations became more sophisticated and comprehensive. However, Horvath, Logan, and Walker (2002) found “much variety in techniques used and a lack of consistency between guidelines and clinical practice” (p. 557). Perhaps uniformity in technique and practice may be a procrustean solution to highly variegated individual situations, or perhaps we ought to strive for better measures and implementation of a model protocol. Both Bow and Quinell (2001) and Horvath et al. (2002) would agree that the Guidelines provide a sound protocol.

The updated Guidelines for Child Custody Evaluations in Family Law Proceedings (approved by the APA Council of Representatives, February 2009, and available at www.apa.org/practice/childcustody) are grouped into three clusters: (I) understanding the nature of the enterprise, including being clear about the best interests of the child and how the parents can meet these needs; (II) preparation for the evaluation including competence, impartiality, recognition of cultural attributes and recognition of any personal biases, and avoiding multiple relationships; and (III) clarifying fees, disclosure or nonconfidentiality and obtaining informed consent, using multiple measures when possible, gathering information from those who are the subjects of the evaluation, basing opinions on the data without over- or underinterpreting the data, and keeping appropriate records secured. The professional psychologist involved in child custody evaluations is well served by becoming familiar with the most recent Guidelines.

Taking Great Care in Communications

Terms of art that are common for a psychologist might be easily misunderstood by others. The psychologist who is conveying information must be clear in his or her communications and sensitive to any quizzical looks or untoward responses. Thorough understandings of the Daubert-Joiner-Kumho trilogy (Daubert v. Merrill Dow Pharmaceuticals, 1993; General Electric Company v.
Joiner, 1997; Kumho Tire Company v. Carmichael, 1999) and the FRE are essential for the psychologist entering most courtrooms. Daubert presents the four criteria by which judges admit or disallow scientific evidence into court: (a) Is the testimony based on a testable theory? (b) Has the theory been subject to peer review? (c) Is there a known or potentially knowable rate of error in the findings? (d) Is the theory or technique generally accepted in the field? Joiner holds the judge responsible as gatekeeper for determining who qualifies as an expert and whether the expert’s testimony is probative or valued. Kumho holds that technical knowledge, a broader concept than scientific, is the basis for expert testimony. The FRE is the vehicle by which expert testimony is defined and admitted into court in both federal and a plurality of state courts with a majority of the U. S. population (A. K. Hess, 2006b). Knowing these materials might help one understand, anticipate, prepare for, and withstand the opposing attorney’s challenges on his or her testimony (cf. A. K. Hess, 2006a). They inform the psychologist about how the courts are likely to accept the psychologist’s findings.

If one is following or recommending a particular procedure, custody award, or custody arrangement, the professional ought to know the extant literature concerning outcomes. Knowledge of outcome studies is essential in helping the families and the courts. For example, Hetherington’s (Hetherington & Kelly, 2002) monumental work followed over 400 families for up to 30 years to see the impact on the family members of various living arrangements. Testimony based on current peer-reviewed empirical findings (e.g., Lansford, 2009) is more compelling in advising the court and demonstrating a level of practice that is consistent with current research and standards of practice (Standard 2.04, Bases for Scientific and Professional Judgments; APA, 2002). Psychologists have a responsibility to offer (parents, lawyers, and the court) useful recommendations and opinions based on our knowledge of child development and parenting and the impact of parental conflict, poor communication, and parental psychiatric diagnoses on children. This knowledge must be based on an impartial and informed reading of the relevant literature.

Avoiding the Unauthorized Practice of Law

Psychologists must know enough law to function competently but not practice law or give legal advice, even if holding a law degree, because that is not the role in which he or she is engaged. Additionally, psychologists who are writing parenting plans or practicing mediation need to be careful to avoid the unauthorized practice of law, as they do not have the authority to draft legal agreements. Instead, understandings and joint parenting decisions can be documented so that the lawyer(s) can memorialize them in a legal separation agreement.

Summary and Future Directions

Many serious ethical risks are involved in working with families of divorce. The systemic issues, compounded with the emotionality of this family crisis and the psychologist’s need to make a positive difference, unite to create a challenging practice arena. Collectively, a great deal more discussion is needed to sort out the ethical landscape of divorce practice. As a profession, we need to build standards of care and practice that can be applied nationally and that are simultaneously consistent with state law and federal statutes (including the HIPAA). Some additional suggestions to address the issues discussed in this article are as follows:

- Organized psychology needs to build upon previous interdisciplinary contacts and summits by creating a joint meeting with the American Bar Association (ABA), the APA, scholars, and practitioners to develop consistent expectations, materials, and standards of training and practice for the varying roles of psychologists working with families of divorce. This information can then be widely disseminated to psychologists and family attorneys as the recommendations of this joint body. This meeting might well follow the ABA (Criminal Law Section)–APA Conference on Psychological Expertise and Criminal Justice (APA, 1999), teaming with the Family Law Section of the ABA, as it currently does in offering continuing legal education (CLE), but expanding this collaboration to produce guidance for practitioners.

- Training opportunities should be made widely available to educate psychologists about the ethical dilemmas of working with families of divorce and to offer model agreements for psychologists to use when in different roles. Organized psychology could ideally sponsor or help underwrite these training opportunities, perhaps through the Practice Directorate and Science Directorate teaming up to fund scholarly conferences.

- Practicing psychologists need to maintain high levels of situational awareness about their role, boundaries, behavior, and even their office policies and procedures. Supervision, training, and consultation can help keep skills and awareness up to date. Well-thought-out and carefully designed office and administrative policies and procedures can help avoid the pitfalls of inappropriately releasing information and/or accidentally billing insurance when not directly diagnosing or treating their clients for a mental disorder, as this could be viewed as insurance fraud. Similarly, one can assure that records are appropriate and complete and that client agreements are clear and comprehensive, indicating whether testimony may be offered while also clearly delineating fees and billing policies. When psychologists have the responsibility to make binding decisions for children (e.g., in some states as parent coordinators or binding arbiters), “hold-harmless” agreements can help indemnify the psychologists from the unintended and unpredictable outcomes of their decisions (North Carolina General Statutes § 50–100, Parenting Coordinator Immunity).

- Organized psychology and psychologists in practice need to continue to educate the legal profession about the value and use of our expertise (e.g., at times in nonpsychotherapist roles). This can be done by offering continuing education programs for attorneys through local, state, and regional associations.

In summary, the emerging roles for psychologists working with families of divorce are many, and they require unique training and explicit delineation of the demands and expectations of the psychologist when functioning in each role. Psychologists should be vigilant in making sure they are aware of relevant federal and state

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1 More than a third of state courts and federal courts use the D-J-K trilogy, encompassing a majority of the U.S. population. The balance uses the Frye test or general acceptance criterion, one of the four Daubert standards. The psychologist ought to clarify which test the court uses in the particular case and the way in which that trial judge views scientific evidence.
laws, their own limits of competence, their role in each specific case, and the impact of the highly emotionally charged arena on both their clients and themselves. When helping families cope with the pain, turmoil, and uncertainties of divorce, and despite the ambiguities and difficulties therein, psychologists need to actively assure that they are offering useful recommendations, the highest standards of care and ethical practice.

The three invited expert commentaries that follow further address these complex issues of service delivery, practice, and role definition as they pertain to the psychologist who is working with families of divorce.

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North Carolina General Statutes § 50–100. Parenting coordinator immuni


Walking With Care Through Minefields: The Roles of Training, Competence, Collaboration, and Support

Nancy A. McGarrah

Zimmerman and Hess have written an excellent article describing ethical and clinical issues relevant to custody work. Psychologists work in the area of custody in a variety of roles. I have worked in the custody area for over 25 years, and during that time I have taken the roles of custody evaluator, child psychotherapist, family psychotherapist, parent coordinator, expert witness, and consultant to attorneys (in separate cases, of course). Each of these roles can include ethical pitfalls, and it is important to understand what psychologists in each role can and cannot do and say in affidavits, depositions, and court testimony. A thorough under-
standing of this will go far to keep practice in the custody realm within ethical boundaries. The newly revised Guidelines for Child Custody Evaluations in Family Law Proceedings (American Psychological Association [APA], Practice Directorate, 2009), along with the APA Ethical Principles of Psychologists and Code of Conduct (APA, 2002) are important tools for the practicing clinician.

A common pitfall when working with divorce and custody is making a recommendation regarding custody or visitation without having evaluated all relevant parties. Sometimes psychologists willingly go out on this limb (or into this minefield) and make statements that are beyond the scope of their role. For example, a psychotherapist is treating a woman who is going through a divorce. Her attorney asks for an affidavit stating that this woman is not suffering from any psychological disorders and that she is an excellent parent. The woman has never been evaluated with her child and has never been evaluated specifically relating to parenting strengths and weaknesses. The psychotherapist wants to be helpful and writes the affidavit. He is later subpoenaed to court to testify about his opinions. At that time, he is asked to go even further and state what type of parenting schedule would be best, given what he knows about this woman. It is very easy to get pulled down this dangerous path. This same difficulty can be encountered by the child’s psychotherapist, the father’s psychotherapist, the marriage counselor, the coparenting therapist, and even the expert witness. The most important principle to remember is to keep within one’s role and not be tempted (or pushed by a client, attorney, or judge) to make statements beyond the confines of that role. Standards 3.05 (a) and (c), Multiple Relationships, of the APA Ethics Code (APA, 2002) are pertinent to this issue. Standard 3.05 (a) applies to a psychologist taking one professional role with a person (e.g., custody evaluator) and at the same time, or in the future, entering into another role with that person (e.g., individual psychotherapist). Standard 3.05 (c) relates to a requirement by law (e.g., a judge who asks for a custody recommendation from a parent’s psychotherapist) that asks the psychologist to serve in more than one role in a judicial proceeding.

When working in the area of child custody, one of the most important pieces of risk management for the psychologist is to have iron clad procedures relating to this area of practice. These written procedures should include information about informed consent, fees, scope of practice, working with attorneys, attending depositions and court hearings, release of information, and any other specific details which relate to the practice. My private practice uses a quite involved, lengthy procedure (“Provisions for Accepting an Invitation to Serve as an Impartial Examiner for a Forensic Evaluation”; Cliff Valley Psychologists, 2008), which has been revised and updated several times over the years, and is available on the web at www.apait.org/apait/applications/FINE.doc. Procedures should be reviewed by an attorney and an experienced colleague, and once they are complete, they should be applied routinely and consistently with all families. As Zimmerman and Hess accurately state, custody evaluators and psychotherapists are often the targets of licensing board complaints, ethics committee complaints, and lawsuits. If any of these occur, having a well-thought-out procedure that is followed will go far toward resolving the case. Examples of procedures in custody cases are also available from malpractice carriers as well (e.g., www.apait.org).

Another issue raised by Zimmerman and Hess is the significant range of competencies necessary when working in the custody field. Particularly when conducting custody evaluations, the evaluator must be an expert (or have consultations in these areas to assist with the evaluation) in at least the following areas:

1. Substance use and abuse
2. Child abuse and neglect
3. Domestic abuse
4. Alienation and remediation plans
5. Child development
6. Family dynamics
7. Parenting plans and types of legal and physical custody
8. Types of parent communication including Web sites facilitating this
9. Phone call guidelines for children and parents
10. Psychological assessment of adults, adolescents, and children
11. When to recommend individual therapy, coparenting therapy, educational services, and so forth.

Obviously, it takes ongoing training in all these areas for the custody evaluator to stay current and competent to make recommendations that will be most helpful to families. One specific recommendation that is often given for families going through divorce is coparenting therapy. This is a specialized form of psychotherapy in which the mother and father work with a clinician on parenting, communication, and practical issues with transferring children. Excellent resources exist for coparenting information (e.g. Thayer & Zimmerman, 2001). Although this sounds like a perfect solution for all divorcing parents, in reality it often takes some time and distance from the divorce before coparenting therapy can be successful. Once some of the anger and animosity have resolved, the couple is more likely to hear each other during the sessions and rely on the counsel of the coparenting therapist. If a couple falls into this category of needing to wait before working in a coparenting framework, the evaluator should understand this dynamic and make alternative recommendations. For example, the custody evaluator would want to be very specific in recommending parenting time, holiday schedules, transitions, phone calling, methods of parental communication, and educational and other recommendations as appropriate. This is just one example of the “fine tuning” necessary to have in one’s skill set when working with child custody.

Zimmerman and Hess end their article by looking forward to new areas and opportunities for collaboration. One organization that already brings different professionals together in the custody field is the Association of Family and Conciliation Courts (www.afccnet.org). Working with attorneys, guardians ad litem, judges, and mental health professionals from fields other than psychology offers won-
derful opportunities for expanding the knowledge base of all. The
Georgia Psychological Association (GPA) has cosponsored annual
conferences with the Family Law Section of the Georgia Bar. The
attorneys actually brought this idea to the GPA, and it took time for
some psychologists to see that this “thinking outside the box”
would be worthwhile. In fact, the family attorneys were thrilled to
network with psychologists of all specialties. They already knew
the custody evaluators but needed to know child psychotherapists,
adult psychotherapists, marriage psychotherapists, assessment spe-
cialists, drug and alcohol specialists, and other specialists to have
in their referral base. This type of collaboration has somewhat
demystified the legal arena for psychologists as well.

Even with increased exposure between law and psychology,
many psychologists are very hesitant to enter the custody field.
Malpractice risk managers regularly advise psychologists that cus-
tody work is high risk for lawsuits or licensing complaints. The
result of this is fewer psychologists, especially emerging profes-
sionals, entering this field. Training and mentoring by seasoned
custody evaluators and psychotherapists can help. A group of very
experienced custody evaluators in Georgia are currently collaborat-
ing with the Volunteers Lawyers Association to provide a
year-long training experience for those interested in pursuing this
practice area. This includes a series of trainings on the various
components of custody work and culminates with supervised
experiences with families provided by the Volunteer Lawyers
Association. We hope that this will be a win-win situation, with
the outcome being a new group of well-trained custody experts
and a group of families benefiting from this expertise. A large
component of the training targets an understanding of the
ethical issues surrounding this work. The “minefields” must be
located and carefully avoided to produce a good outcome. For
details about this training, please contact me or at
cvp2@bellsouth.net.

Another area of opportunity is advocacy on the state legislative
level to acquire limited immunity for court-appointed custody
evaluators. In some states, this has been accomplished by adding
psychologists to bills that give other professionals, such as guard-
ians ad litem, limited immunity. This limited immunity usually
means that the psychologist is immune from civil liability unless
the psychologist acts in bad faith. This type of advocacy is helpful
to the field because more psychologists are likely to enter the
“minefield” if they have some body armor!

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Navigating Through the Minefield with Positive
Practices to Prevent Complaints
G. Andrew H. Benjamin, Glenn Ally, and Jackie Gollan

Zimmerman and Hess have presented a series of ethical consid-
erations involved in divorce and custody cases. In our comment,
we focus on discussing practical procedures that are consistent
with their suggestions. These procedures appear to reduce the
likelihood of ethics complaints being filed against psychologists
who are conducting evaluations in high-conflict family law cases.
The practical procedures discussed here were developed during the
training of PhD and MD resident trainees at the University of
Washington. The procedures are part of an evaluation protocol that
was refined through pilot studies and discussions with our evalu-
ating teams, consulting experts, and family court judges during
more than 800 separate videotaped parenting evaluations for court-
ordered and self-referred referrals. A description of the protocol for
evaluating high-conflict families is delineated very specifically by

Modifications to the protocol occurred and continue to occur when
interactions in the evaluation process appear to produce
feelings of abandonment or surprise, expressions about lack of
fairness, or when clinical judgment errors emerged. During the
past 20 years, the concrete and standardized procedures of the
protocol have resulted in no ethics complaints being filed against
G. A. H. Benjamin, the supervising psychologist, in more than 800
cases.

Avoiding Inappropriate Advocacy

Practice Tip 1

The appearance of inappropriate advocacy is diminished when
the evaluation process is made as transparent as possible from the
beginning to the end of contact with the parties (American Psy-
chological Association [APA], 2002, Standard 3.05, “Multiple
Relationships”; APA, Practice Directorate, 2009, Guideline 5,
“Psychologists strive to function as impartial evaluators”).

All prospective participants (lawyers and parties) receive a
standardized agreement and disclosure statements about the eval-
uation that emphasize that a parallel process will occur throughout
the evaluation. Among many disclosures, all participants are ad-
vised that lawyer contact with the evaluator must occur in writing
or in conference with the other lawyer(s). All documentation
provided by any lawyer must be noted to the other lawyer(s). The
evaluation process is made transparent by describing each step of
the process in advance. This step eases the parties’ transition into
the evaluation process and promotes their perceptions of fair
treatment during the evaluation. Following up with parallel process
during each phase of the evaluation process and not moving
forward until all parties have completed the particular phase also
diminishes the perception of inappropriate advocacy.

Practice Tip 2

Initially ask the judge, the lawyers, and the parties to charac-
terize the concerns they want addressed by evaluation (APA, 2002,
Standard 3.07, “Third-Party Requests for Services”; APA, Practice
Psychologists strive to establish the scope of the evaluation in a timely fashion, consistent with the nature of the referral question.

The judge and lawyers are asked to submit concerns that the evaluation should address. In addition, parties submit answers to a standardized questionnaire that promote a comprehensive review process about the details of every party allegation. Each allegation is addressed during the evaluation so that no party believes that any concern is overlooked because of some prejudicial judgment of the evaluator.

Garb (1989, 2005) noted that clinicians, in general, frequently did not gather adequate information to make accurate psychological assessments. Emery, Otto, and O’Donoghue (2005) found that the evaluation process used by most custody evaluators lacked scientific support. The evaluation protocol articulated by Benjamin and Gollan (2003) provides data from multiple sources that illuminate the characteristics of parents, the child(ren), and the home environment from different perspectives. By evaluating each of the allegations and providing repeated opportunities to clarify each allegation, the language of the parties can be used to create an idiographic narrative that operationally represents the characteristics of the parties. Parties typically emerge from such a process feeling that their concerns were understood.

**Practice Tip 3**

Inform the parties about the details of the findings that emerge during the course of the evaluation (APA, 2002, Standard 9.10, “Explaining Assessment Results”).

Until completion of the final report, the evaluator remains skeptical about hypotheses generated throughout consideration of evidence that has emerged during the evaluation. Hypotheses that have failed to be corroborated by at least two independent measures (psychological test results, party documentation and interviews, parent child observations, and collateral documentation and interviews) are rejected. At the end of the evaluation, the findings are presented in person to each party. This final interview prepares the parties for the worst of outcomes, provides an opportunity for them to express their dissatisfaction with any aspect of the evaluation process, and permits an expression of their feelings. This phase of the evaluation process appears to lessen any lasting anger of the parties and provides a final opportunity to provide additional data that may not have come to light. Readers can observe this process being conducted at www.apa.org/videos/4310753v.html. Parties often become more realistic about the case during such a discussion. Settlements, rather than further litigation, occur more often with the infusion of reality from a direct discussion about the facts that have emerged from the evidence of the evaluation.

In conclusion, research strongly suggests that a perceived inequitable process rather than perceived inequitable outcome most likely influences party dissatisfaction with the final divorce decree (Sheets & Braver, 1996). With the likelihood of party dissatisfaction linked to the unreliability of clinical judgment and poor data collection (Garb, 1989, 2005), evaluators would be well advised to assess their own evaluation protocols to avoid any impression of inappropriate advocacy. Evaluators should identify processes that may not use parallel processes throughout the phases of their evaluations, discourage hypothesis testing throughout the process, or rush judgment about the findings.

**Record Keeping**

Inform the parties and collateral informants about the details they have provided during the course of the evaluation so that accurate documentation of professional work occurs (APA, 2002, Standard 6.01, “Documentation of Professional . . . Work”; APA, Practice Directorate, 2009, Guideline 14, “Psychologists create and maintain professional records in accordance with ethical and legal obligations”).

The documentation about the clinical interviews of the parties and collaterals is created contemporaneously and saved in original form. Structured party and collateral interviews reduce clinical judgment errors by using a standardized process (Garb, 1989, 2005). In addition, building the evaluation report on the day of each interview will more accurately reflect the narrative details and nuances of the behavior being observed and further minimize clinical judgment errors that involve overreliance on memory, confirmatory bias, and hindsight bias, as well as overreliance on unique data (Garb, 1989, 2005). The integration of the material into the report is confirmed for accuracy by subsequently sending each party a copy of their psychosocial and allegations sections of the report for review. Collaterals also review the summaries of their interviews that are inserted into the report. Such a process provides for additional transparency and likely contributes to the parties feeling more fairly treated. The final report incorporates any relevant additions of the parties or collaterals. As a result, later complaints about the accuracy of facts relied upon by the evaluator are virtually absent.

**Summary and Future Directions**

The process of custody evaluations can be emotionally charged for all parties involved. Parents often feel “coerced” by courts to participate in custody evaluations with the risk, as perceived by the parents, of the losing of their child (children). In addition, custody evaluations often represent a sort of “competition” between attorneys. In this atmosphere psychologists must assist the courts in determining the best interests of the child (children). In this sometimes volatile environment, complaints against psychologists often arise.

Zimmerman and Hess suggest that clarity regarding the role of the psychologist may be the most important factor in avoiding complaints against psychologists in divorce and custody evaluations. They present several points that pose increased risk for psychologists providing these services and make recommendations to minimize those risks.

In our commentary, we offer practical procedures, consistent with Zimmerman and Hess, to significantly reduce the likelihood of ethics complaints. These procedures involve: making the process of evaluations as transparent as possible; clarifying the concerns to be addressed by the evaluation; keeping the parties informed during the evaluation process; and ensuring accurate documentation by keeping the parties informed and involved during the entire process.

We tend to agree with the main assertion of Zimmerman and Hess with respect to clarity. We feel that the procedures offered in this commentary go a long way toward enhancing that clarity. As we continue providing such services to the court, it is our firm
belief that making the process transparent and involving the parties as not only participants in the evaluation but also participants in the process can reduce many of the concerns of the parties involved and the frequency of ethical complaints.

References


Child Abuse and Domestic Violence in Divorce and Child Custody: Ethical Issues

Nancy Kaser-Boyd

Zimmerman and Hess earlier highlighted the risk of inadvertently engaging in unethical practice in the sensitive arena of divorce and child custody. They remind us that there are bodies of knowledge and competence beyond that for clinical practice (e.g., knowledge of state law and standards of forensic record keeping), as well as issues about objectivity (e.g., advocacy, countertransference) and special issues surrounding confidentiality that may arise in divorce and child custody work. There is a consensus about the high-risk nature of divorce and child custody cases. Bennett, Bricklin, Harris, Knapp, VandeCreek, and Younggren (2006) noted that child custody evaluations are the number-one context in which people complain to licensing boards, although a very high percentage of these are dismissed. They commented that, if one parent perceives that the psychologist is more favorable to the other parent, that parent may vilify the psychologist and have no hesitation about reporting him or her to a licensing board. Complaints have been made against psychologists for failing to report child abuse, for reporting child abuse, for making factual errors in the background statements about the child or family members, for interpretation errors, for selecting tests irrelevant to the conclusion, for misinterpreting the psychological tests, and for failing to identify the risk for a violent act. Allegations of physical or sexual abuse of children and those of domestic violence in the relationship require special consideration when they occur and also may cause unanticipated ethical issues.

Allegations of physical or sexual abuse are not at all uncommon in divorce and custody evaluation, and the accuser is not from one specific gender (Kaser-Boyd, 1988). Sometimes these come from an overanxious parent who may himself have been abused by a parent. The feelings of loss and threat engendered by divorce reawaken fears from childhood and result in hypervigilance to signs that the loved child is at risk. On the other hand, allegations may derive from a variety of motives, such as a desire for revenge; the drive to win at any cost; an attempt to get, or keep from paying, child support; or panic that the child will form a quality relationship with the other parent. Although false allegations are not common, they do occur and the truth can be very difficult to discern. Custody evaluators are mandated child abuse reporters and should not believe that another health care professional has reported an allegation (Bennett et al., 2006). The threshold for reporting does not require certainty. State and county agencies are responsible for investigating the report. Although family court evaluators may want to protect children and parents from involvement in the child protective system, these are the professionals trained to conduct such investigations. If jurisdiction is taken by the dependency court system, the case will travel through that system before returning to family court. After the investigation, the adjudication of the allegations, and a test of the offending parent’s ability to address the issues, the case will be returned to family court, often with a court order for custody with the nonoffending parent. The process is time consuming and anxiety arousing for children and parents, and there is a potential for children to be removed from both parents and placed with relatives, or even foster care, to get them out from between warring parents. This means that the psychologists involved must use extra care to protect the rights of children and parents in conducting evaluations, making reports, record keeping, and giving testimony.

A clear proportion of divorce and child custody cases will involve families who have experienced domestic violence. Some states (e.g., California) now make ongoing training in domestic violence mandatory for child custody evaluators, a requirement that attempts to minimize the stereotyping and misconceptions about the individuals in these families. Fear of losing custody of children is one of the primary reasons battered women give for not reporting abuse to authorities (Kaser-Boyd, 2004). A battered woman has reason for fear. First, when the custody evaluation and psychological testing is conducted within the first year of leaving a violent partner, or during a time when she still feels threatened (e.g., by stalking or other ongoing threats), her test profile may reflect the psychological effects of violence. Like other trauma survivors, battered women have significant elevations on Scales 2, 4, 6, and 8 of the Minnesota Multiphasic Personality Inventory–2 (Kahn, Welch, & Zillmer, 1993; Rhodes, 1992; Rosewater & Walker, 1985). Their Rorschach scores resemble those of individuals with posttraumatic stress disorder (Kaser-Boyd, 2004). Their test protocols show distinct improvements once they have found safety. Efforts to understand the unique stress of divorce for this population are consistent with the Principle 11 of the Guidelines for Child Custody Evaluations in Family Law Proceedings (approved by the American Psychological Association [APA] Council of Representatives in February 2009; APA, Practice Directorate, 2009): “Psychologists strive to interpret assessment data in a manner consistent with the context of the evaluation.”

A second threat to a battered woman’s custody of her children can come from an accusation of “failure to protect” if children are present during violent altercations. Child Protective Services will become involved in such cases, and the family will also be diverted
from family court until the dependency court creates interventions that minimize the danger to children.

Separation and divorce is an especially dangerous time for these families; many battered women are killed when they are already separated from a batterer (Kaser-Boyd, 2008). Filicide as an act of revenge over a custody dispute and kidnapping the children are potential dangers, although more rare. Custody evaluations in families with domestic violence therefore necessitate an assessment of violence risk and a knowledge of community resources for safety and therapeutic intervention.

The use and misuse of psychological tests have been wisely discussed earlier by Zimmerman and Hess. Bennett et al. (2006) noted that most complaints about psychological assessments occur when the evaluation is ordered by a third party (i.e., the court) and has external consequences (e.g., child custody). They noted that, in such situations, one should be able to defend why each test was selected and was appropriate for the referral question, as well as whether it was appropriate for the patient’s language skills or cultural background. Ackerman and Ackerman (1997) surveyed the assessment practices of experienced custody evaluators and found that 91.5% used the Minnesota Multiphasic Personality Inventory, 47.8% used the Rorschach, and 34.3% used the Millon Clinical Multiaxial Inventory. Although none of these has been created or validated to evaluate parental fitness, each has the potential to measure personality traits that are relevant to parenting (e.g., judgment, impulse control, insight, empathy, stress management). Erard (2005) discussed the benefit of adding the Rorschach to the more “objective” self-report measures and reviewed the challenges to the use of the Rorschach in custody cases. For each of these psychological tests, there are published studies about how custody litigants score (Bathurst, Gottfried, & Gottfried, 1997; Halon, 2001; Singer, Hoppe, Lee, Olesen, & Walters, 2008), which helps to minimize misinterpretation for the custody population and addresses Principle 11 of the Guidelines for Child Custody Evaluations in Family Law Proceedings (APA, Practice Directorate, 2009). There are special issues surrounding the use of computer-generated interpretive reports. Although psychologists are universally taught that computer-generated statements are only hypotheses; once in print, to the nonpsychologist they seem to carry authority. Protecting the welfare of the custody litigant calls for a more individualized interpretation of test profiles. Psychological testing, of course, provides only one source of data about the capacities of parents and the needs of children. Principle 10 of the Guidelines for Child Custody Evaluations in Family Law Proceedings (APA, Practice Directorate, 2009) states that “psychologists strive to employ multiple methods of data gathering.”

Zimmerman and Hess have made an important contribution by addressing the issues of potential bias and countertransference in divorce and child custody evaluations, where emotions often run high. Emotions are still higher in cases of abuse, and here the custody evaluator may have to confront their fear of a litigant or other strong feelings engendered by stories of abuse, or the transference reactions of a survivor who mistrusts all people of the abuser’s gender or who has a high level of anger or despair (Kaser-Boyd, 2008). Zimmerman and Hess remind us that, in conducting evaluations for child custody, we are walking in a minefield and must use caution, and this is underscored when there are allegations of abuse.

References


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