CONSULTANTS and ROLE DELINEATION

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Page breaks are shown between bold brackets **[#]**

[3] In the December, 2005 issue of *The Matrimonial Strategist,* attorney Lynne Gold-Biken, in an article entitled "Two new angles on custody litigation", called attention to a little-known dilemma involving mental health consultants in custody litigation. In her article, Gold-Biken provided extensive information concerning the actions of Dr. Jan Grossman, a Pennsylvania psychologist functioning as a case reviewer, who was disciplined by the Commonwealth's Bureau of Professional Affairs for what mental health professionals would describe as a failure to maintain appropriate role boundaries. The pertinent details concerning the Grossman case can be found at www.aopc.org. Refer to *Grossman v. State Board,* No. 3023 C. D. 2001.

The tactical perspective

Retaining a mental health professional to review the work of an evaluator and possibly to testify concerning deficiencies in the evaluator's methodology only makes tactical and economic sense if the mental health professional has the necessary expertise and, if called upon to testify, will be perceived by the court as credible in spite of the fact that s/he has been retained by one side in an inherently adversarial proceeding. The reviewer's role is to educate the court.

Experts who have been retained by one side are often disparagingly referred to as "hired guns". There is an important distinction between principled hired guns and unprincipled hired guns. Unprincipled hired guns will testify to any opinion that someone pays them to testify to, will cite research that they know to be flawed, and will be unconcerned that they are misleading judges. Principled hired guns are knowledgeable and familiar with applicable research; able to discern the difference between sound methodology and flawed methodology; able to interpret test data without computer-generated interpretive reports; and, have formulated opinions on various issues based upon their studies. Inevitably, there will be times when an opinion held by the practitioner is precisely the opinion that a particular attorney wants a judge to hear. When the principled expert is paid to come to court and explain that opinion to the judge, the expert is being paid for time expended and nothing more. The principled retained expert takes seriously the most basic obligation of an expert witness – the obligation to assist the trier of fact.

Testimony by reviewing experts is most effective when they are perceived by the court as practitioners with a genuine interest in educating judges concerning good methodology, flawed methodology, and the ways in which methodological errors can lead evaluators to make misguided recommendations. If experts who are endeavoring to educate judges regarding methodological flaws in evaluations are asked on cross-examination whether they have met with or discussed the case with any of the interested parties, the usefulness of the experts' testimony is dependent upon their responses. Just as evaluators must employ sound methodology or face the consequences of not having done so when they encounter a skilled cross-examining attorney, so too must reviewers employ sound methodology or face well-deserved jabs at their credibility during cross-examination. Experts who have had contact with litigants, family members, or allies are likely to be perceived as less objective, as less devoted to sound methodology, and, therefore, as less credible.

If persuasive litigants meet with experts who have been retained by the litigants' attorneys, the risk is created that when the experts testify, they will inadvertently deliver their testimony in a way that will make them sound like advocates. When this occurs, expert testimony is rendered less effective.

It is not uncommon for litigants to express a desire to meet with mental health experts who have been retained by the litigants' attorneys. It is understandable that those who are paying for the services of experts will feel that the retained experts should be receptive to meeting with them. The perspective of the litigants has been molded in the crucible of the adversarial system. There is only one advantage to meeting with litigants or with individuals (other than counsel) who are allied with litigants: It makes litigants feel better. The disadvantages of doing so, however, are significant.

The methodological perspective

The scope of a reviewer's task is limited; in particular, the work of a reviewer should not be confused with the work of a practitioner conducting a second evaluation. The task of reviewers is limited to formulating opinions concerning the methodology employed, data analyses performed, and opinions expressed in a previously-conducted evaluation and, subsequently, to assisting counsel or triers of fact. Many services are offered by reviewers. They include preparation of detailed critiques, development of questions for cross-examination, providing assistance at trial, and offering expert testimony. Though reviewer obligations vary with the chosen role*, reasonable steps must be taken to limit subjectivity and increase objectivity.

*** > Refer to "Consultants and Further Role Delineation,** at the conclusion of this article.

Because it is not possible to meet with individuals without forming impressions of them and because such impressions may impair reviewers' objectivity as they endeavor to focus on methodology, reviewers should not meet with litigants, family members, or allies of litigants (other than counsel). It is not my intention to suggest that threats to reviewer objectivity can be completely avoided. We err when we conceptualize objectivity **[4]** as a dichotomous variable. Objectivity is a mental state to be sought, even as we recognize that absolute objectivity is unattainable. We are obligated to strive to reduce subjectivity and increase objectivity and to employ procedures that will make this possible. As more and more evaluators are presented with family videos taken by litigants, reviewers examining evaluators' files will find themselves forming impressions of the litigants as they inspect these videos. I conceptualize this as one of the unavoidable threats to objectivity. My awareness of this threat to objectivity does not alter my perspective on the importance of guarding against those threats to objectivity that *are* avoidable.

When a reviewer identifies deficiencies in an evaluator's work, the task of the reviewer is to articulate those deficiencies and explain why they may have had a significant impact on the process of formulating the opinions that have been communicated to the court by the evaluator in his or her advisory report. A prudent reviewer does not attempt to address the identified deficiencies. Even when a reviewer ascertains that information reasonably needed was not obtained, it is not the job of the reviewer to obtain the missing information; it is the reviewer's job to identify the missing information and opine concerning the likely consequences of formulating an opinion without the identified information.

Evaluators err when they formulate opinions on the basis of data that are insufficient, skewed, or inappropriately analyzed. Looking at the reviewing process broadly, the same errors concerning which reviewers intend to testify are being made *by* them when they meet with litigants. A reviewer who meets with a litigant is endeavoring to formulate opinions concerning the merits of the litigant's position in the dispute before the court. The information offered by a litigant to a retained reviewer is, by its very nature, insufficient and skewed and it cannot be appropriately analyzed. Specifically, the weight to be assigned to the information cannot be ascertained in an unbiased manner.

The ethical perspective

In the Grossman case, the State's expert testified that Dr. Grossman had "moved from evaluating existing data to creating to his own data." The State's expert explained that it is the act of meeting with a participant in an evaluation that makes the difference between "critiquing the evaluation of another mental health professional, and performing a version of [one's] own evaluation."

The importance of role delineation and maintaining role boundaries once the necessary delineations have been made varies with the obligations that define the roles. The American Psychological Association's *Guidelines for Child Custody Evaluations in Divorce Proceedings* [American Psychological Association (1994). Guidelines for child custody evaluations in divorce proceedings. *American Psychologist, 49,* 677-680.] admonishes psychologists to avoid multiple relationships and a few states have transformed the guidelines into regulations, enforceable by the states' licensing boards. The Grossman case is interesting in several respects, one of which is the fact that all the examples of multiple relationships that are provided in the APA guidelines involve the mixing of therapeutic and evaluative roles. Nevertheless, it was ruled that Grossman had violated the multiple role prohibition by combining the roles of reviewer and evaluator.

When a reviewer is to focus on methodology, data analyses, and the nexus between data reported and opinions expressed, meeting with participants in the evaluation is a distraction. No reviewer can second-guess an evaluator. No reviewer can opine responsibly on the issues before the court. It is irresponsible to suggest otherwise. Sound methodology increases the probability of formulating a supportable opinion and deficient methodology increases the probability of formulating a flawed opinion. In all fields of endeavor, however, satisfactory solutions to simple and to complex problems have been stumbled upon by individuals who were utilizing substandard methods and unproven problem-solving strategies.

Concluding comments.

Whether they have been court-appointed or retained by one side, experts are invited into courtrooms because it is presumed that their testimony will be helpful to triers of fact. Any ambiguity that may have previously existed concerning the defining features of helpful advisory input to courts was removed by the United States Supreme Court's decision in *Daubert v. Merrell Dow,* 113 S.Ct. 2786 (1993). In *Daubert,* the Supreme Court described Federal Rule of Evidence 702 as setting forth a "helpfulness standard" (at 2796). FRE 702, as amended 4/17/00, declares that expert testimony must be "based upon sufficient facts or data," must be "the product of reliable principles and methods," and must be offered by a witness who has "applied the principles and methods reliably to the facts of the case."

When evaluators have employed methods that are not reliable; have failed to obtain sufficient relevant facts or data; or have offered opinions that are not supported by the facts or data that they themselves have reported, skilled reviewers can call attention to these deficiencies and explain the ways in which they cast a shadow on the work done and opinions expressed by evaluators. Skilled reviewers can point **[8]** to the failure of evaluators to tap the "scientific, technical, or other specialized knowledge" that forms the basis for their involvement in matters before the court. Reviewers cannot responsibly offer alternative opinions. For this reason, reviewers should limit themselves to examining the methodology employed; the relevance, reliability, and sufficiency of information gathered; and, the logical nexus (or lack thereof) between the reported information and the expressed opinions of evaluators.

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CONSULTANTS and FURTHER ROLE DELINEATION

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This brief article appears on page 6 only.

In the April, 2006 issue of *The Matrimonial Strategist,* in an article entitled "Consultants and Role Delineation", I stated that after having conducted a review of an evaluator's work, there are several services that a retained consultant can offer to perform and I noted that "reviewer obligations vary with the chosen role." Notwithstanding my use of the singular ("chosen role"), in the brief period between the publication of my article and the writing of this elucidation, it has become clear that many readers missed a key message: Only one role may appropriately be performed. Though "several services" may be made available, there are only two roles in which a reviewer can function and the retaining attorney must decide in which one of the two clearly conflicting roles the reviewer will be most useful. Once the selection has been made, there is no going back.

Role one: Expert Witness

The attorney can decide that s/he wishes the reviewer to testify at trial, in which case, all reasonable steps must be taken to preserve the expert's image as an educator to the court. If this choice is made, in most (if not all) jurisdictions the expert's file becomes discoverable. Also, in most jurisdictions, the review itself must be filed, along with information concerning the expert's credentials, etc.

Role two: Trial Consultant

The attorney can ask that the expert function as a trial consultant. In the consultant role, the expert often can operate completely behind the scenes. When this is done, the review itself is protected from disclosure by work product privilege. The expert can prepare questions for cross-examination or otherwise assist without even being named. In this role, the expert remains as anonymous as any staff member in the attorney's office would be. The expert can assist at trial (in which case the expert's identity becomes known but the review and other writings remain protected from disclosure).

A closing note: I view it as imprudent for reviewers to conduct second evaluations and, as noted in my earlier article, without having conducted a second evaluation, no reviewer can appropriately opine on the issues before the court. Reviewers must limit their opinions to matters of evaluator methodology, data analyses, and the nexus between information provided and opinions expressed.

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