

# Family Evaluation in Custody Litigation: Reducing Risks of Ethical Infractions and Malpractice

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**ABSTRACT.** Family Law litigant dissatisfaction with psychological evaluations during high-conflict cases is common and can activate litigants to file ethics complaints or malpractice lawsuits. The most critical aspects of a standardized evaluation protocol that lead to litigants believing that they have been fairly and thoroughly evaluated are discussed specifically. doi:10.1300/J158v07n03\_07 [Article copies available for a fee from *The Haworth Document Delivery Service*: 1-800-HAWORTH. E-mail address: <docdelivery@haworthpress.com> Website: <<http://www.HaworthPress.com>> © 2007 by *The Haworth Press, Inc.* All rights reserved.]

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As the majority of mental health clinicians and researchers recognize, many of the assessment protocols used to evaluate parental capacity in

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custody litigation do not endure the rigors of scientific review. For example, Emery, Otto, and O'Donohue (2005) found that the evaluation process used by most custody evaluators lacked scientific support. Indeed, numerous procedural errors common to custody evaluations stem from faulty clinical judgments. Garb (2005) suggested that the unreliability of clinical judgments arises because of the following processes: (1) The lack of consistent definitions regarding the characteristics of the subjects under observation; (2) The differing contexts in which subjects were observed; (3) The differing perspectives of the individual assessors; and (4) Inherent errors within the various measurement tools used by clinicians.

We agree with Dawes, Faust, and Meehl (1989) that clinical judgment is fallible and, by itself, does not suffice to constitute a reliable approach for conducting parenting evaluations. Further, reliance on protocols derived from poorly established and narrow approaches for measuring parental capacity will collude with the adversarial process of the parties. This paper outlines aspects of a clinical protocol that reduces the type of clinical judgment errors noted above and that which leads the parties involved in high-conflict, family law litigation to believe that they have been evaluated fairly and comprehensively.

Our protocol (Benjamin & Gollan, 2003) does not compel a departure from firmly established legal precedents across jurisdictions for evaluating parental capacity, nor does it compel a divergence from the clearly outlined ethical principles and code of conduct of the American Psychological Association (APA, 2002) and the specialized guidelines outlined for conducting child custody evaluations (APA, 1994). Accordingly, this protocol unambiguously suggests that evaluators be attentive to the practice of ethical principles and credible scientific assessment while applying relevant legal criteria specific to their jurisdiction.

A detailed description of our protocol for evaluating high-conflict families is outlined in Benjamin and Gollan (2003). This evaluation format originated from the work of two forensic psychologists, Stuart Greenberg, PhD and Marcia Hedrick, PhD (Seattle, WA). The protocol was further developed to be used in clinical rotation by the PhD and MD resident trainees of the Department of Psychiatry at the University of Washington Medical School. The evaluation protocol was refined through pilot studies and through discussions with our evaluating teams, supervising experts, and family court judges on more than 600 separate parenting evaluations for court-ordered and self-referred families who were involved in family court proceedings in the State of Washington. Modifications to the protocol occurred when interactions of the evaluation

process appeared to produce feelings of abandonment or expressions about the lack of fairness, or when clinical judgment errors emerged. As a result of the adjustments made during the last 18 years, concrete and standardized procedures exist for six phases of the evaluation process.

This evaluation protocol emerged with a number of components similar to the approved procedures used in clinical research. First, most individuals enter the program through self and professional referrals and with little understanding about the protocol. Just as in clinical research, it seemed important to provide a clear verbal description of procedures through a phone screen. The screening by telephone is followed by written informed consent, which is mailed in advance to prospective participants. Also, a detailed step-by-step outline of the six phases of the process is included in the consent agreement. To ascertain the participant's comprehension of the protocol, a follow-up in-person discussion is held.

Second, an assessment battery is used, which relies on a multiple-method approach that facilitates comparisons with the legal standard used to evaluate parental capacity. These measures represent an effort to balance assessment of key domains with minimal participant burden. The assessment protocol has achieved a good balance in this regard. Similar to psychiatric research approaches, sources of data rely on in-person structured clinical interviews of all caretakers, as well as careful review of questionnaires regarding parental capacity and behaviors, the receipt and review of all related legal and medical records related to family litigation, and collateral data (including interviews) from previously involved professionals (e.g., Child Protective Services, the child's primary care physician). Assessment sessions are videotaped to ensure that the interviews are conducted according to the standardized format, and for reliability review and clinical consultation. The evaluator prepares a report that is reviewed by a group, what has turned out to be similar to a best-estimate team. It is composed of at least two clinical psychologists with expertise in custody evaluations.

Third, consistent with evaluation protocols used in child research (e.g., disruptive behavior evaluations of toddlers), a set of standardized challenge tasks is used; this occurs in a structured setting and allows observation of the caretakers' parental behavior with the children. This approach minimizes the children's involvement in the process to only the structured parent-child observation sessions. The protocol is open to the inclusion of child-focused evaluations to evaluate children's developmental status and psychiatric needs (if these issues are part of the presenting complaints). An example would be a separate sexual abuse evaluation conducted by a team of professionals.

Fourth, as mentioned above, the evaluator has regular consultation and supervision throughout the evaluation. All evaluators meet with two licensed clinical psychologists whose own practice specializes in family forensics. The purpose of these meetings is to generate inter-rater consensus regarding the data from the evaluation process, especially the videotaped parent-child observation sessions.

Finally, concrete standardized procedures exist for six phases of the evaluation process:

- Phase 1: Pre-evaluation Procedures
- Phase 2: Clinical Interviews
- Phase 3: Observations of Parents and Child
- Phase 4: Collateral Information
- Phase 5: Closing Interviews with the Parents
- Phase 6: Presentation of the Report to the Attorneys and to the Court

Garb (2005) noted that clinicians frequently did not gather adequate information to make accurate assessments. The evaluation protocol articulated by Benjamin and Gollan (2003) provides data from multiple sources that illuminate the characteristics of parents, children, and the home environment from different perspectives. In cases that fail mediation and settlement, and in which many egregious allegations have been raised by the parties, a comprehensive evaluation can become a form of alternative dispute resolution. Indeed, as the protocol has become more refined, a greater percentage of cases have settled in each successive year. In the first year of the program, less than one half of the cases were settled without litigation. At this point, only one in 10 cases is litigated. Also, since the implementation of this protocol, no ethics complaints or malpractice lawsuits have been filed in any of the more than 600 evaluations conducted through the program.

### ***PHASE 1: PRE-EVALUATION PROCEDURES***

From the start of each case, the evaluator limits communication to e-mail or faxed letter for the parties and their attorneys. Except for the structured meetings of the evaluation process, all of the parties and their attorneys must only use written correspondence to communicate with the evaluator. This approach reduces the likelihood of poor communication. Further, written records from these communications rarely cause

confusion or a sense of being treated unfairly. It also creates a written record that lends itself to corroborating the findings of the evaluation.

All prospective participants receive a standardized agreement and disclosure statements about the evaluation process. Making the evaluation process transparent and describing each step of the evaluation process eases the parties' transition into the evaluation process. These clarifications about the protocol and payment of the evaluation fee occur long before the parties meet the evaluator. The evaluation does not begin until a court order directs both parties into the evaluation process and the process and structure of the evaluation have been clarified. In many jurisdictions, such a court order provides protection from malpractice liability. When conducting all interactions with the parties and their lawyers, objectivity and fairness remain primary considerations (APA, 1994, guideline 4). It appears that the greater the evaluator's effort to behave objectively and with fairness, the more likely it is that the results of the evaluation will lead to a settlement rather than to a trial.

The evaluator asks the judge and the lawyers to delineate the issues that they want to have examined and addressed during the evaluation (APA, 2002, standard 3.07). In addition, the parties provide a wealth of information about the allegations by completing the Parenting History Survey (PHS; Greenberg & Humphreys, 1998). Although the psychometric properties of the PHS have not been determined, this appears to be an effective tool for collecting data regarding each parent's routine, attention to children, complaints of the other parent, and demographic and psychosocial history. Giving the PHS to both parents generates a standardized protocol for evaluators to use to assess the range of allegations from the beginning of the process. These data are reviewed again during the clinical interview for clarity and consistency. By delineating each of the allegations during the evaluation and by providing repeated opportunities to clarify each allegation, the language of the parties can be used to create an idiographic narrative that represents the characteristics of the parties operationally. Using a standardized questionnaire promotes a comprehensive review process that identifies details that may require additional investigation.

## ***PHASE 2: CLINICAL INTERVIEWS***

In preparation for the clinical interview, the evaluator reads the PHS of each party and compares the responses, item for item. Such analyses permit the development of hypotheses about the parental capacity of

each parent, the psychological and developmental needs of the children, and the resulting fit between these two constructs (APA, 1994, guideline 3). These hypotheses, and others that emerge from the data, are tested repeatedly throughout the evaluation process.

Emery, Otto, and O'Donohue (2005) noted that structured interviews do not often occur in custody evaluations. The Benjamin and Gollan (2003) protocol uses a semi-structured diagnostic interview in the first meeting to ascertain contributing factors associated with functional aspects of parental capacity and behaviors, the relative stability of the households, and the projected developmental needs of each child. At the end of the interview, the evaluator gives the participant several copies of the standardized allegation form to fill out, one allegation per form. The evaluator completes three forms about the most injurious type of allegation raised by the participant about the other party. As the participant describes the three worst incidents, the evaluator models how to complete the form and the degree of specificity required. For instance, if the participant has alleged that the other parent emotionally abused the child, the evaluator will learn through the three concrete examples what parenting deficits might exist and how the deficits have produced specific symptoms in the child. When filling out the forms, the evaluator may also want to take the opportunity to learn about how the complaining party would parent the child differently in the same circumstances. As much as possible, the discussion focuses on specific incidents that were observed by an objective witness. Copies of the three completed forms are sent home with the participant to serve as models for completing a thorough set of forms for each allegation. These forms provide a redundant method of collecting information about the allegations and ensure an additional opportunity to clarify data. This step also narrows the focus of the allegations to be evaluated because many of the allegations will lack specificity and first-hand witnesses.

Structured interviews reduce clinical judgment errors because they employ a standard process (Garb, 1989). Building the evaluation report on the day of the interview so that narrative details and the nuances of the party's behavior can be accurately recorded further minimizes clinical judgment errors that involve over-reliance on memory, confirmatory and hindsight bias, and over-reliance on unique data. Subsequently sending each party a copy of their psychosocial and allegations sections of the report for review and to make additions provides an additional check for accuracy of the interview data. This part of the process increases transparency and models treating the parties fairly. The final report incorporates any additions the parties have made.

### **PHASE 3: OBSERVATIONS OF PARENTS AND CHILDREN**

The parent-child observation process also is conducted in a standardized manner. To ensure that the data from the session is a good representation of typical interactions between the parent and the child, the evaluator asks the parent—immediately following the observation—how the observation compares with other periods of play that the parent has experienced with the child. If the parent suggests that the parent-child observation is compromised by any factor, the evaluator clarifies how the observation was compromised. The explanation may (or may not) be noteworthy and can potentially provide independent evidence about a particular allegation. At that point, another parent-child observation is scheduled.

All parties who have obtained a second observation have viewed this procedure as serving the interest of fairness. In each case in which a second observation has occurred, the opposing party also is offered a second observation so that a parallel process can be maintained throughout the phases of the evaluation.

By the end of the parent-child observation phase of the evaluation, hypotheses are developed from the data collected so far. Allegations that remain uncorroborated by psychological test results, interview data, or parent-child observation findings are less likely to be substantiated during the review of legal documentation, past professional evaluations or treatment notes, and collateral interviews. The preliminary report focuses on the consistency of the data across multiple collection points and emphasizes thorough documentation of information and sources. It notes discrepancies and any limitations of the data (e.g., problems with reliability or validity of psychometric testing, which is used sparingly). It provides descriptions of relevant history about the psychological, familial, and individual aspects of the parties to help explain the context of the allegations. The report outlines the parental strengths and weaknesses in enough detail to give sufficient evidence for a court to rule on arrangements that would serve the best interests of the child.

While writing the discussion and recommendations sections, the evaluator identifies and collects evidence from collateral reporters (other professionals who have been involved in the case before the evaluation and nonprofessionals who have observed first-hand evidence of parenting deficits or other behavior that would have a direct impact on parenting). Questions for individual collateral reporters are designed to test the relevant hypotheses.

### **PHASE 4: COLLATERAL INFORMATION**

Writing the preliminary report before reading any of the collateral documentation or talking with collateral reporters lessens one possibility for an attorney's attempting to impugn the evaluator's credibility. Basing impressions on the direct interactions with the parties and the children powerfully negates any inference that the collateral evidence unduly influenced the evaluator and affected the independence of the evaluation. It also provides an opportunity to anticipate the hypotheses that the collateral evidence will support. When the collateral evidence fails to corroborate the hypotheses, inquiry must occur as to why the disparate evidence exists. The report addresses this issue directly. Any discrepancies may be the result of limitations in the manner of collecting the data (e.g., the credibility of a collateral reporter because of limited objectivity or experience) or in the interpreting of the data (e.g., evaluator bias).

By the time that collateral documentation is reviewed, the parties have provided declarations or affidavits from first-hand nonprofessional witnesses about behavior that could affect parenting. Each jurisdiction has a declaration or affidavit form that subjects the person to the laws of perjury if facts alleged within the form lack veracity. Such a process helps prevent nonprofessionals from changing their stories as the evaluation process unfolds and the parties exert pressure for support. Collateral reporters willing to report their first-hand observations through this process usually provide rich details about the facts that they have observed. They also are less likely to change their reports about the observations under cross examination at trial.

As soon as the collateral interview is completed, the evaluator informs the collateral reporter that, later in the day, a written summary of the interview will be faxed or electronically mailed. By asking the collateral to review the summary of the interview and to supplement the summary with additions, the evaluator may gain further clarification of the facts that may not have arisen during the interview. In addition, such a review deters a party's complaining later that the evaluator misrepresented or failed to insert a detail that allegedly might have affected the outcome of the evaluation. Not only does this approach help to ensure that both parties will believe that they have been fairly and thoroughly evaluated, it also produces a contemporaneous record of collateral reporters' satisfaction with the results of the interview. Such a practice reduces the risk that a lawyer will attempt to obfuscate testimony by highlighting



differences that may have arisen because miscommunications occurred at the time of the interview.

### ***PHASE 5: CLOSING INTERVIEWS WITH THE PARENTS***

During this phase of the process, each party receives a report from the evaluator that contains the structured statements about the various findings regarding that party. Parties often make admissions in response to statements about the facts that support the findings. The evaluator gently challenges any inconsistencies or discrepancies that arise from the party's explanations. This type of Socratic questioning is commonly used in empirically-supported psychotherapy (e.g., cognitive-behavioral treatment); and similar procedures are effective in eliciting information in this therapeutic jurisprudential setting. Readers can observe this process being conducted at [www.apa.org/videos](http://www.apa.org/videos) (Benjamin, 2006).

By testing the party in this manner, it appears that the party becomes more realistic about the case. Rather than further litigation, settlements seem to occur more often with the infusion of reality about the facts that have emerged from the evaluation. This final interview prepares the parties for the worst of outcomes, provides an opportunity for them to express their dissatisfaction with the evaluation process, and permits an expression of their feelings. This step appears to lessen the anger of the parties and may be integral in diminishing the likelihood of an ethical complaint being filed. After this step, the parties usually believe they have had a full and fair opportunity to dispute any evidence that emerged from the evaluation process.

### ***PHASE 6: PRESENTATION OF THE REPORT TO THE ATTORNEYS AND THE COURT***

The evaluator discusses the final report with the lawyers in a meeting scheduled within a week after the last closing interview with the parties. Before the meeting, the evaluator continues the gentle discipline of working on the evaluation report immediately upon completion of each closing interview. The final evaluation report incorporates all of the admissions of the parties and other independent evidence that corroborates each of the findings.

Throughout the evaluation and until completion of the final report, the evaluator remains skeptical about hypotheses that are generated. The report includes: (1) Allegations that lack independent corroborating evidence; (2) Hypotheses that have failed to be corroborated by at least two independent measures; and (3) Statements made earlier by the parties about who would provide first-hand evidence about contemporaneous reports concerning an alleged incident that are not substantiated by declarations from nonprofessionals, later collateral documentation, or interviews. Instead of using diagnostic terms, the evaluator delineates parenting behaviors that might affect current and future parenting competencies. Such descriptive examples of behavior help the fact-finder understand the complexities of the case. If the data corroborate allegations about impaired parental skills, the report provides recommendations for protecting a child from harmful parental involvement (APA, 1994, guidelines 3 and 14).

Most of the meeting with the lawyers is dedicated to answering their questions. At the end of the questions, the evaluator suggests that if further questions arise after complete review of the report and initial settlement negotiations, one conference call that includes both of the lawyers (and the guardian ad litem, if one has been appointed) can occur to clarify these additional questions. Such a call encourages further settlement discussions by addressing issues that the attorneys have been unable to resolve. Throughout the meeting, the evaluator serves as an educator (not as a mediator) to the attorneys.

### *CONCLUSION*

Research suggests that a perceived inequitable process rather than a 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, 2005), forensic evaluators would do well to assess their own evaluation protocols to identify processes that may not employ parallel processes, encourage hypothesis testing and participant feedback, or rely on ethical principles and credible scientific assessment. We urge readers of this article to consider the parts of the evaluation protocol discussed above and to incorporate into their evaluation protocols those processes that they believe will lead to less party dissatisfaction.

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