

## **Preparing Clients for Custody Evaluations: A Call for Critical Examination**

by  
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As advocates, lawyers have the obligation to zealously protect, assert, and pursue the client's legitimate interests within the bounds of the law. In civil and criminal litigation, zealous advocacy requires the preparation of one's case and client for all phases of the litigation. Such preparation routinely includes, among other things, surreptitious video surveillance, online computer research, retention of jury consultants, and witness preparation by experts within the bounds of ethical standards. However, a controversy exists with respect to zealous advocacy in the context of family law custody litigation and, in particular, what is and is not appropriate preparation with parents/litigants involved in the child custody evaluation process. In identifying the issue of whether and to what extent a party seeking custody should be prepared by his or her attorneys as one of the most controversial issues in the area of child custody litigation, lawyer Robert Z. Dobrish wrote: "Now zealous advocacy seems to be in disrepute and it is being suggested that the knights of the legal establishment venture forth to do battle with blunted spears and plastic shields."<sup>1</sup>

Recently, debate also has sharpened among mental health professional about what activities are appropriate when assisting attorneys in their pre-trial preparation of parent/litigants in-

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<sup>1</sup> Robert Z. Dobrish, *Custody Evaluations: The Propriety of Preparation*, N.Y.L.J. (Feb. 6, 2012).

involved in the child custody evaluation process.<sup>2</sup> Robert Kaufman has written that the role of the mental health consultant in family law litigation is highly controversial.<sup>3</sup> David Martindale posits:

Though empirical data are not available, many who work in the family law field have come to a disturbing conclusion: Mental health professionals (MHPs) are engaging in activities, the objective of which is to assist litigants in presenting themselves to evaluators in deceptive ways. Acting as consultants to attorneys, the MHPs are doing this with increasing frequency. Such activities include providing litigants with information that would facilitate efforts on their part to dissimulate either in response to test items or in response to interview questions.<sup>4</sup>

In this article, we describe similarities and differences in how attorneys and mental health professionals may assist parents who are engaged in the child custody evaluation process. We summarize current literature addressing appropriate and inappropriate parent-litigant preparation practices. We discuss many of the unexamined areas involved in parent-litigant preparation. We conclude that there are far more questions than answers about where one can draw the line in identifying appropriate and inappropriate practices.

The purpose of a child custody evaluation is to provide the court with information about each child, each parent, parent-child interactions, and other relevant family factors.<sup>5</sup> Based upon these data, the evaluator formulates opinions about the psycho-

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<sup>2</sup> William G. Austin et al., *Forensic Expert Roles and Services in Child Custody Litigation: Work Product Review and Case Consultation*, 8 J. CHILD CUSTODY 47 (2011); Jonathan W. Gould et al., *Testifying Experts and Non-testifying Trial Consultants: Appreciating the Differences*, 8 J. CHILD CUSTODY 32 (2011); Thomas G. Gutheil, *Reflections on Coaching by Attorneys*, 31 J. AM. ACAD. PSYCHIATRY & L. 6 (2003); Robert L. Kaufman, *Forensic Mental Health Consulting in Family Law: Where Have We Come from? Where Are We Going?*, 8 J. CHILD CUSTODY 5 (2011); S. Margaret Lee & Lorie S. Nachlis, *Consulting with Attorneys: An Alternative Hybrid Model*, 8 J. CHILD CUSTODY 84 (2011).

<sup>3</sup> Kaufman, *supra* note 2, at 23.

<sup>4</sup> David A. Martindale, *Children's Best Interests and Coached Custody Litigants: Instruction in Deception*, 28 MATRIM. STRATEGIST 1, 1 (Feb. 2010).

<sup>5</sup> American Academy of Child and Adolescent Psychiatry, *Practice Parameters for Child Custody Evaluation*, 36 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 57S-68S, 59S (1997); American Psychological Association, *Guidelines for Child Custody Evaluations in Family Law Proceedings*, 65 AM. PSYCHOL. 863-67, 864 (2010); Association of Family and Conciliation Courts, Association of Family and Conciliation Courts Child Custody Task Force

logical best interests of the child that will assist the court in its custody determinations.<sup>6</sup>

## I. Preparing Clients for Child Custody Evaluation

“The adversary system’s working assumption is that the court will make a more accurate determination of the child’s best interests if each litigant has the opportunity to present his or her best case.”<sup>7</sup>

One part of the custody determination process is the use of a forensic psychological evaluation of one or both parents. We focus here on child custody evaluations, but note that many of the questions we raise apply to both psychological evaluations of one parent and parental fitness/competency evaluations of a parent and child(ren).

Obtaining information and expert opinions drawn from a forensic psychological evaluation is only one part of custody litigation and may not be the most important part of the process. Yet, forensic psychological evaluations, in general, and child custody evaluations, in particular, are an important component in the court’s deliberations about the best interests of the child in a custody dispute.<sup>8</sup>

Attorneys often engage mental health consultants to assist the counsel in their preparation for trial. Attorneys may engage a mental health consultant to assist in writing direct and cross

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(Hereafter: Schepard), *Mental Health Consultants and Child Custody Evaluations: A Discussion Paper*, 49 FAM. CT. REV. 723, 724-25 (2011).

<sup>6</sup> MARC J. ACKERMAN, ANDREW W. KANE, JONATHAN W. GOULD & MILFRED DALE, *PSYCHOLOGICAL EXPERTS IN DIVORCE ACTIONS* (6th ed. 2015); JONATHAN W. GOULD, *CONDUCTING SCIENTIFICALLY CRAFTED CHILD CUSTODY EVALUATIONS* (2006); JONATHAN W. GOULD & DAVID A. MARTINDALE, *THE ART AND SCIENCE OF CHILD CUSTODY EVALUATIONS* 3, 18 (2007); PHILLIP M. STAHL, *CONDUCTING CHILD CUSTODY EVALUATIONS: FROM BASIC TO COMPLEX ISSUES* 1, 4 (2010); David A. Martindale & Jonathan W. Gould, *The Forensic Model: Ethics and Scientific Methodology Applied to Child Custody Evaluations*, 1 J. CHILD CUSTODY 1(2004).

<sup>7</sup> Andrew Schepard, *Mental Health Consultants and Child Custody Evaluations: A Discussion Paper*, 49 FAM. CT. REV. 723, 727 (2011).

<sup>8</sup> Martindale & Gould, *supra* note 6; Schepard, *supra* note 7, at 725; Timothy M. Tippins & Jeffrey P. Wittmann, *Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 FAM. CT. REV. 193, 193 (2005).

examination questions to be used at trial. They may engage a mental health consultant to educate their client about current behavioral science literature. They may engage a mental health consultant when a particular client is going to be, or has been, evaluated by a court appointed child custody evaluator.<sup>9</sup> Robert Kaufman observes that “[o]f the many diverse services that trial consultants have provided, working with witnesses in preparation for trial is the most controversial.”<sup>10</sup> We would add that working with parent-litigants involved in the child custody evaluation process is also highly controversial.

In an attempt to “promote interdisciplinary dialogue on the emerging but largely unexamined role of a mental health consultant,”<sup>11</sup> the Association of Family and Conciliation Courts created a task force to examine the “role of the mental health consultant in the forensic mental health evaluation process.”<sup>12</sup> Among the conclusions set forth in the Task Force’s discussion paper were, first, “the role of the mental health consultant is without enough agreement to create definitive guidelines” and, second, neither specific regulations nor case law provide “clear guidance on the role of a mental health consultant.”<sup>13</sup> This conclusion is echoed in other peer-reviewed literature that describes the mental health consultation role as “controversial, expanding rapidly, and . . . relatively unexamined.”<sup>14</sup>

Andrew Schepard notes that “the attorney’s goals in engaging [a mental health] consultant [include] one or more of the following (or some combination thereof):

1. support for the litigant participating in the evaluation, including education of the litigant about the nature and purposes of a forensic mental health evaluation (*litigant education and support*). The consultant usually performs this function before the evaluation takes place or while it is being conducted;

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<sup>9</sup> Schepard, *supra* note 7, at 725.

<sup>10</sup> Kaufman, *supra* note 2, at 23.

<sup>11</sup> Schepard, *supra* note 7, at 724.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Elena Hobbs-Minor & Matthew J. Sullivan, *Mental Health Consultant in Child Custody Cases*, in *INNOVATIONS IN INTERVENTIONS WITH HIGH CONFLICT FAMILIES* 1, 1 (L. Fieldstone & C. Coates eds. 2008).

2. consultation with the attorney about the forensic mental health evaluation, including review of the quality of the forensic mental health evaluation, and aiding the lawyer in preparing for cross-examination of the evaluator (variously called *case analysis and evaluation* by lawyers and *litigation support, assessment and peer review* by the mental health consultants); and

3. testimony by the consultant at trial.”<sup>15</sup>

“The [mental health] consultant usually performs functions (2) and (3) after the [child custody] evaluation . . . has been completed.”<sup>16</sup>

The American Society of Trial Consultants’ (ASTC) ethical standards mirror concerns raised by Martindale. Among the standards articulated in the Professional Code of ASTC relevant for mental health consultants involved in family law litigation is the direction for trial consultants to advocate that a witness tell the truth. Mental health consultants are also directed to provide witness preparation services within the boundaries of their competence based on education, training, or other appropriate professional experience. Mental health consultants do not script specific answers or censor appropriate and relevant answers based solely on the expected harmful effect of the outcome of the case.<sup>17</sup>

Thomas Gutheil also voices concern about coaching of litigants that influences litigants’ behavior and demeanor in an evaluation that has the intent to affect the outcome. He views coaching with the intent to influence the outcome as “an ethical problem,” while also noting that “the exact nature and the occurrence of coaching itself are not always unambiguous.”<sup>18</sup>

Attorneys have an ethical responsibility to present the best case for their clients. One component of preparing the best case is to assist both the parent/litigant and witnesses to be able to clearly explain their testimony. Most often, attorneys will not tell their clients what to say but, rather, only how to say it. It is unclear whether a similar such role is proper for a mental health consultant working with an attorney to assist a parent/litigant.

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<sup>15</sup> Schepard, *supra* note 7, at 726-27.

<sup>16</sup> *Id.*

<sup>17</sup> Kaufman, *supra* note 2, at 24.

<sup>18</sup> Gutheil, *supra* note 2, at 6.

Below, we explore some of the unanswered questions that such a consulting role raises.

## **II. Assumptions and Research Regarding Mental Health Consultants in the Child Custody Evaluation Process**

Although we are concerned about the inappropriate use of mental health consultants in preparing parents involved in the child custody evaluation process, recent empirical data suggests that attorneys engage in the type of client preparation recommended by Schepard.

James Bow, Michael C. Gottlieb, Dianna J. Gould-Saltman, and Lesly Hendershot conducted a survey of attorney and mental health provider (MHP) views on client preparation.<sup>19</sup> The results showed that 74% of the attorneys surveyed answered “yes” to the question: Should a MHP ever prepare clients for child custody evaluations? Only 44% of the MHPs surveyed answered yes to the same question. The most frequently cited reasons for family law attorneys to refer their clients to a mental health professional were to provide support during the evaluation process (47%) and to help the client understand the custody evaluation process. None of the family law attorneys indicated that they referred their clients to mental health professionals to rehearse potential questions and answers. Among those attorneys who referred their clients to mental health professionals to assist with test-taking strategies, the attorneys reported that their referral was intended to reduce their client’s anxiety and help the client to understand the evaluation process.

We note, however, that some of the controversy over attorney or mental health consultant preparation for those involved in the child custody evaluation process stems from a lack of consensus about the meaning of terms such as “coaching” and “client preparation.” We also believe that some of the controversy over “coaching” or “client preparation” is based upon unfounded beliefs about what well-intentioned, ethical attorneys and mental

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<sup>19</sup> James N. Bow et al., *Partners in the Process: How Attorneys Prepare Their Clients for Custody Evaluations and Litigation*, 49 *FAM. CT. REV.* 750-59 (2011).

health consultants engage in when behind closed doors with parents involved in the child custody evaluation process.

When MHPs are hired as consultants by family law attorneys, the confidentiality of the attorney-client privilege and/or attorney work product privilege is extended to the MHP's professional services. This does not however mean that the fact of the MHP's engagement, as well as the time charges and dates of services, is off limits on cross-examination, and those matters can be raised by opposing counsel on the issue of credibility.

Although we agree with the concern expressed by Martindale that "[i]t comes as no surprise that some litigating parents are well aware of their parenting deficiencies and enter the evaluation process hoping to hide or minimize their deficiencies and to claim, convincingly, parenting strengths that may be non-existent or present only to a marginal degree."<sup>20</sup> We also take some comfort in the Bow et al. findings that attorneys (at least those surveyed in the Bow et al. 2011 study) do not support undermining the evaluation process with the intention to present their parent-clients to evaluators "as being that which they are not."<sup>21</sup> In their conclusion, Bow and colleagues confirm that: "In general, results from this survey indicated that family law attorneys function in an ethical and professional manner when preparing clients for child custody evaluations. They appear to be using standard and acceptable procedures and advocate appropriately for their clients."<sup>22</sup>

#### A. *Attorney Assumptions*

Attorneys who work with their parent/litigant in anticipation of his or her involvement in a child custody evaluation or in preparation for deposition or trial testimony make assumptions about the nature of their task.

We present a list of assumptions that attorneys bring to their parent/litigant relationships.

1. The parent/litigant comes into the attorney relationship without preparation. Without preparation, the parent/litigant often cannot properly answer a question, or at

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<sup>20</sup> Martindale, *supra* note 4, at 1.

<sup>21</sup> *Id.* at 1.

<sup>22</sup> Bow et al., *supra* note 19, at 758.

least cannot answer in a manner that places her in the best possible light.

2. The parent/litigant often comes into the attorney relationship unable or unwilling to listen to their attorney (or anyone else);
3. The parent/litigant will have anxiety about any of the evaluation-related or courtroom-related processes;
4. The parent/litigant has hired the attorney to represent them to the best of the attorney's ability;
5. The parent/litigant wants to be successful in litigation;
6. The parent/litigant is participating in an unknown universe, and their only exposure to courtroom processes and procedure is through the overdramatized lens of the media, e.g., television, movies;
7. The parent/litigant has received lots of incorrect information about the child custody and litigation process. This situation is reminiscent of the adage, "When you have a cold, everyone is a doctor; when you have a lawsuit, everyone is a lawyer";
8. The parent/litigant has certain expectations and attorneys are in the business of reformulating those expectations to fit the reality of the litigation context;
9. Some parent/litigants will help the attorney's case because they are good witnesses. Some may not be and the attorney will want to keep them off the witness stand, no matter how much preparation is provided;
10. Parent/litigants exaggerate or dramatize their positive conduct and role in the child's life and exaggerate and dramatize the negative conduct of the opposing party's actions;
11. Attorneys have a professional and ethical duty to represent their client, not necessarily to advocate what would be in the best interests of the children.

We recognize that this is not an exhaustive list and we do not claim to have identified a consensus of the most important reasons attorneys prepare their clients. We believe, however, that many of the core ideas about why attorneys work with their clients to prepare them to put forth their best case are captured in these assumptions. Empirical examination of attorney assumptions about parent/litigant preparation is encouraged.



### *B. Mental Health Consultant Assumptions*

Mental health consultants also bring to their work a set of assumptions that guide their behavior.

1. The attorney seeks out assistance from the mental health consultant to calm the anxieties of the parent/litigant about the custody and litigation processes;
2. The attorney and mental health consultant will experience tension over their different approaches to providing assistance to the parent/litigant;
3. The attorney and mental health consultant must develop ways to communicate about their differences regarding how best to assist the parent/litigant;
4. The assistance offered by the mental health consultant to the parent/litigant is more restrictive than the assistance offered by the attorney;
5. The mental health consultant cannot assist in presenting false information to the evaluator or court;
6. The mental health consultant cannot assist in working with the parent/litigant about what to say to the evaluator/court;
7. The mental health consultant can assist in working with the parent/litigant to anticipate how to accurately present him- or herself to the evaluator and court;
8. The mental health consultant can assist in challenging the parent/litigant on biases and/or distorted views of the other parent;
9. The mental health consultant can assist in bringing to the parent/litigant's attention research findings and scholarly articles relevant to crafting developmentally appropriate parenting plans;
10. The consultant will assist the parent/litigant to better cope with anxieties and stress around the evaluation/litigation;
11. The consultant wants the parent/litigant to better understand the strengths and weaknesses of his or her parenting;
12. The consultant wants the parent/litigant to accurately describe his or her parenting.

*C. Assumptions About the Parent/Litigant*

It is likely that the attorney's client brings into his/her relationship with the attorney and mental health consultant a set of assumptions about which he/she is unaware.

1. The parent/litigant is often locked into his or her static view of the goodness of their parenting and the badness of the other parent's parenting;
2. The parent/litigant has a story to tell and will often insist on it being told (to almost anyone who will listen);
3. The parent/litigant is unaware of the biases and distortions embedded in his or her view of each parent's parenting abilities;
4. The parent/litigant will have anxiety about any of the evaluation-related or courtroom-related processes;
5. The parent/litigant is participating in an unknown universe, their primary exposure to courtroom processes and procedure is through the media, e.g., television, movies;
6. The parent/litigant may have received lots of incorrect information about the child custody and litigation process;
7. The parents/litigants have certain expectations about their attorneys, and mental health consultants are in the business of reformulating those expectations to fit the reality of the litigation context;
8. Some parent/litigants will help the attorney's case because they are good witnesses. Some parent/litigants the attorney will want to keep off the witness stand, no matter how much preparation is provided;
9. Parent/litigants exaggerate or dramatize their positive conduct and role in the child's life and exaggerate and dramatize the negative conduct of the opposing party's actions;
10. Parent/litigants often need to understand that attorneys have a professional and ethical duty to represent their client, not necessarily to advocate what would be in the best interests of the children.

#### *D. Assumptions About the Preparation Process*

We discern an assumption among some scholars who have discussed aspects of preparation when the parent/litigant is involved in the child custody process that the evaluation is best conducted when parents and their parenting has been relatively untouched by guidance from others. Putting aside the ethically untenable position of guiding a parent to intentionally present false information before the evaluator or court, we argue that parents involved in custody litigation are affected by several sources. They are influenced by their attorney and his staff. Parents are influenced by therapists, parenting coaches, friends, neighbors, extended family members, clergy, and other people in their lives. Parents may be influenced by support groups in which they are involved or by movies, books, and other social media to which they are exposed.

The notion that the evaluator is able to take a picture of a family's functioning free of influence seems virtually impossible. We cannot freeze-frame a family unit. The family is dynamic. It is evolving from a two-parent family to two single parent families. Parents and their children are influenced by their surroundings and some of those influences may affect how each presents to others within the family, presents to others outside of the family, presents to the evaluator, and/or presents to the court.

It is precisely because of the changing nature of the family—from two-parent to two single-parent families—that makes reliance on self-reported data presented in face to face interviews so untrustworthy. Some of the untrustworthy information comes from a parent presenting him- or herself as she wants the evaluator to see. Research informs that both male and female custody litigants tend to present themselves in a highly favorable light.

Separating parents tend to overvalue their contribution to child-care and undervalue their spouse's contribution to child-care. Divorced couples who showed large discrepancies in their perception of involvement in child-care were far more likely to show relatively high levels of conflict during the divorce process. Empirical research indicates that parent self-reports of the nature and quality of their parenting are less reliable than third party or children's reports of their parent's parenting.

There are some parents who enter the evaluation process having spent years talking with their therapist about becoming a

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better parent while other parents have worked more recently with their attorney or mental health consultant to learn to present the best picture of their parenting. Still others are influenced to present a false picture of their parenting. To make matters more difficult, within this group of parents who present a false picture, some are intentional in their deception while others are not. The point is that it is folly to believe that a family system undergoing transition from a two-parent family to two single-family homes while engaged in divorce and custody litigation is static. It is a moving target.

The scholarship on client preparation reveals at least two mutually exclusive underlying assumptions that may guide consultants' work with a parent/litigant. One assumption is that among the important responsibilities for the mental health consultant is to preserve the existing data base about parenting behavior so that the evaluator is able to examine *de novo* this untouched data base of parenting behavior, parenting ideas, co-parenting cooperation, and other similar parent-related factors. That is, the assumption is that there is a static set of parenting and parent-related information that should be untouched prior to the completion of the evaluator's child custody report.

A contrasting assumption is that there is a set of parenting and parenting-related information that is dynamic. "The best interests of the child is a moving target, not a static set of data that remains frozen in time. The best interests of the child is a prediction and includes the potential for people to change their behavior."<sup>23</sup>

The separation processes change how each parent parents. The litigation process influences how each parent parents and may affect how they present themselves as parents to others. There are changes in how children respond differentially to mothers compared to fathers in recently separated and divorced homes. There are changes in how some fathers and mothers engage the task of parenting. There are changes in how the siblings get along. There are changes in how extended family may become involved in helping parents to take care of their children.

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<sup>23</sup> Milfred "Bud" Dale, Ph.D., J.D. Personal Communication, Aug. 13, 2013. Used with his permission.

Parents often become involved in counseling and therapy during separation and divorce leading to non-family influences that affect parenting. Children may become involved in school-based divorce programs that alter their behavior within the family, requiring adjustments to parenting by each caretaker. There is also the influence of each parent's attorney on his or her parenting, as well as influence brought about by children's work with minor's counsel or guardian *ad litem*.

Families are dynamic and the process of parenting is dynamic. Courts cannot preserve a static, untouched data set of parenting because each family lives within an ever-changing, dynamic, evolving environment. Therefore, the issue of attorney and mental health consultant preparation of parent/litigants should revolve around *intent*.

An alternative to the static-dynamic view of parenting vis a vis evaluation is to think about parenting along a continuum.<sup>24</sup> At one end of the continuum is the pre-separation parenting that is characterized as relatively predictable patterns of behavior. Mother and father have been engaged in parenting their child for months or years. Their respective parenting roles are fairly well-defined and predictable.

Separation and divorce changes the predictable patterns of parenting behavior, in part, because the parents are no longer parenting the child together under the same roof. Each parent learns how to parent the child without the other parent physically present. The child learns how to accept parenting from each parent rather than from both parents at the same time.

There are other changes that come with the separation and divorce transitions. The result is a higher degree of variability in each parent's parenting and a lowered ability of each parent to anticipate and predict the other parent's parenting of the child. Children also have an increasingly more difficult time predicting how each parent parents because of the changing family circumstances. The separation and divorce transitions contribute to a time of maximum variability in parenting abilities. The respective parenting abilities and roles of each parent are changing, resulting in distortions of the other parent's behaviors and blurring

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<sup>24</sup> We wish to thank Jay Flens, Psy.D., ABPP for his ideas about this section of the paper.

of what had previously been clearly defined lines of parental authority.

After the divorce takes hold and the marital conflict subsides, most parenting becomes more predictable. There are fewer changes for the parent and for the child. There is an increase in the predictability of each parent's single parenting.

What we called above the "dynamic" view of parent could also be described as the period of parenting when there is the most variability and least amount of predictability. This increase in unpredictable parenting behavior due to emotional, physical, and geographical changes is the time when a child custody evaluation mostly is ordered to be conducted.

The evaluator is observing the family system at a time of greatest variability in parenting and family relationships. Rather than place much weight on what the parent says about how she parents, the child custody evaluator should focus attention on gathering information from historical collateral sources to inform about the nature and quality of parenting prior to the onset of marital difficulties.

### **III. Appropriate and Inappropriate Practices**

#### *A. Identifying the Unacceptable*

There appears to be general consensus among attorneys and mental health consultants about what ought *not* be done under the guise of client preparation. It is inappropriate preparation when the intent is to purposefully mislead the evaluator and/or the court.

In an attempt to better define what a mental health consultant can and cannot do when brought into the child custody evaluation process for the purpose of assisting attorneys, the Association of Family and Conciliation Courts (AFCC) Child Custody Consultant Task Force recommended that four specific practices would be unacceptable and unethical for a mental health professional consultant. They were:

- 1) Rehearsing a litigant's response to questions on standard psychological tests;
- 2) "Coaching" answers to an evaluator's anticipated questions that the litigant would not otherwise give;

3) Encouraging a litigant to make temporary and insincere changes in behavior solely for strategic, positive-impression-management reasons (e.g., telling a litigant to stop negative comments about the other parent in front of the children, suggesting or instructing a litigant to minimize or re-attribute a history of domestic violence, or suggesting a litigant become more involved in the child's activities for the purpose of creating a favorable impression on the evaluator); and

4) Suggesting that a litigant withhold important information to which an evaluator might otherwise not have access, such as prior allegations of maltreatment to child welfare agencies, prior criminal records or prior arrests.<sup>25</sup>

Although not considered among the unacceptable practices identified by the AFCC Task Force, we believe it unacceptable for a mental health consultant to support a change in a litigant's behavior when such a change is intended only for "purely strategic reasons."<sup>26</sup> Below we talk further about these practices and discuss some of Dobrish's challenges about the appropriateness of encouraging positive change.

Hobbs-Minor and Sullivan agree with the Task Force concerns, stating, "Inappropriate and potentially unethical 'coaching' practices may include providing specific strategies to prepare for interviews and observations, psychological tests, custody evaluator questionnaires, home visits, and other procedures."<sup>27</sup> The term "coaching," they argue, refers to "unprofessional practices that specifically prepare parents to present themselves favorably in child custody evaluations."<sup>28</sup>

Martindale, too, has raised concerns about mental health consultants whose aim is to recommend change for strategic reasons aimed at preparing parents to present a false picture of themselves and their parenting. He wrote:

When testifying custody litigants describe themselves, their spouses, their children, or the family interactions and dynamics in ways that the litigants know to be false; when the intention of the litigants in knowingly offering the false statements is to deceive the court; and, when the offering of the false statements has been encouraged by mental

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<sup>25</sup> Schepard, *supra* note 5, at 729.

<sup>26</sup> *Id.* at 730.

<sup>27</sup> Hobbs-Minor & Sullivan, *supra* note 14, at 3.

<sup>28</sup> *Id.*

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health professionals who are functioning as consultants to attorneys, the mental health professionals are subverting justice. . . . Mental health professionals who encourage custody litigants knowingly to offer false information are offering this advice precisely because, acting as consultants to the litigants' attorneys, the mental health professionals have set "victory" (however that might be defined by the litigants and their attorneys) as the goal and have concluded that the probability of securing victory will be increased if the litigants offer false information instead of factually accurate information.<sup>29</sup>

Looking only at the evaluation process, we believe that Martindale places far too much weight on information provided by a parent to an evaluator during in-office interviews. Perhaps a concern is that too many forensic examiners continue to place undue weight on the forensic interview process. That is a training issue for custody evaluators and an area ripe for cross-examination by attorneys during trial.

Proper forensic procedures involve gathering information from multiple independent sources. Forensic procedures also include gathering data from past and current sources of independent information. There is considerable evidence that parents involved in child custody evaluations present themselves in face-to-face interviews in an inaccurate and overly favorable manner. This means that the evaluator needs to take appropriate steps to gather information from independent data sources about the parent's assertions presented during interviews.

There is also considerable evidence that parents involved in child custody evaluations increase the amount of time they spend with their children and attempt to engage their children in more expansive activities in an attempt to present a more favorable picture of themselves as involved parents. Again, the evaluator needs to move beyond the parent's assertions presented during the forensic interview and seek information from independent third parties that will support or not support the parent's assertions.

Given the significant research evidence that parents actively work to present themselves to evaluators in a favorable light, actively engage in more expansive activities with their children, and attempt to present themselves as more involved with their children than the other spouse, it is critical that evaluators place little

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<sup>29</sup> Martindale, *supra* note 4, at 3.



weight on the forensic interview and greater weight on information obtained from independent third party observers and historical records.

As Daniel Hynan has recently argued:

one of the main tasks for evaluators is to distinguish the reality from the sales pitch. Just as a sales or marketing effort may provide a highly convincingly positive presentation about a poor or mediocre product, or alternatively a great demonstration about a truly terrific product, the parental report of reality may have nothing or everything to do with the actual parenting functioning and the parent-child relationship. The evaluator's job is to cut through the smokescreen and shed light on what has taken place in real life, and what is likely to be best for the children in the future.<sup>30</sup>

A consultant to an attorney who knows the above referenced literature and who also engages in attempting to teach the parent/litigant to falsely present to the evaluator is engaged in a dangerous and unethical game. The false information presented by the parent/litigant to the evaluator should be easily revealed as without a factual basis once the evaluator conducts a proper forensic examination. The false presentation should be uncovered through proper forensic investigative methods and the parent/litigant who provided the false assertions would be placed in the troubling position of being viewed by the evaluator as intentionally presenting false information, being out of touch with reality because the false assertions reveal a lack of knowledge and/or understanding of events in the parent's real world, or viewed as believing the false information presented to the evaluator. None of these perceptions by the evaluator would serve the parent/litigant's case well.

Finally, attorneys have an ethical responsibility to insure that their consultants are working in a manner that reflects the ethical standards for attorneys. Acting as the attorney's agent when working with the parent/litigant, the consultant must follow the ethical standards of his profession and be informed by and directed to follow the ethical standards for attorneys.

The purpose of litigation support (including the role of the mental health consultant) is to assist the attorney in preparation for trial. Conducting therapy with the parent-litigant under the

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<sup>30</sup> DANIEL J. HYNAN, CHILD CUSTODY EVALUATION: NEW THEORETICAL APPLICATIONS AND RESEARCH 36 (2014).

guise of a consulting relationship is an inappropriate use of attorney work product doctrine. Therapy is intended to assist the parent to change behaviors or improve the quality of life. It is not intended to assist the attorney in trial preparation.

Attorneys' goal, however, is to be able to present their clients and their clients' cases in as favorable a manner as possible to the child custody evaluator within ethical professional practice limits. What appears clear from the current state of the literature is a consensus about not intentionally deceiving the evaluator or the court. What is unclear is any consensus about what defines other types of coaching or parent/litigant preparation that undermines the integrity of the evaluator's investigation process or the court's function. How would "strategic reasons" be defined?

#### *B. Identifying the Acceptable*

Little has been written about what is acceptable and ethical practice when assisting a parent-litigant involved in the child custody evaluation process. The few who have written about acceptable and ethical preparation practice paint with broad strokes, providing little guidance about how best to handle specific situations.

There is a difference between telling a parent/litigant what words to use to answer a question compared to assisting them to figure out how what questions are likely to be asked by an evaluator or by a cross examining attorney and how they can best present the true facts. It has been our experience that most parent/litigants have given little thought to what are their parenting strengths and weaknesses and even less thought to how best to describe these strengths and weaknesses. They have, however, given much thought to the other parent's parenting weaknesses and have likely left a long trail of oral and written examples of how those weaknesses are described.

It seems far more difficult to identify what is acceptable in preparing parents who are involved in the child custody evaluation process. Defining what is and what is not acceptable behavior on the part of attorneys has been addressed by Dobrish. He argued that it is the attorney's job to assist the client in presenting his or her case in the best way possible.<sup>31</sup>

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<sup>31</sup> Dobrish, *supra* note 1.

An attorney does that by gaining an understanding of the circumstances, parsing out the favorable facts from the harmful ones, presenting the evidence in a way that highlights the strengths of the client's case, and arguing the law and facts effectively by showing that the law—coupled with the favorable facts—should yield a decision for the client. Essentially, the attorney's goal is to place the client in the most favorable light possible by assisting the client to be prepared, relevant, focused and free of the constraints that guilt, regret, mistrust and insecurity may have created. Lawyers representing clients in these contexts are seeing their clients at their very worst.<sup>32</sup>

Mental health consultants must take a more nuanced approach to assisting the attorney's client.

Hobbs-Minor and Sullivan paint with a broad brush when they describe mental health consultation to include “parent education and/or psychological support as the parent deals with the challenges and stresses of the divorce transition or child custody dispute[ ].<sup>33</sup> The forensic services include sharing specialized child custody knowledge relevant to the various dispute resolution processes with the parent and the attorney.”<sup>34</sup>

Martindale (2010) wrote persuasively:

There are litigants for whom the evaluative context generates a form of anxiety that interferes with their ability to be themselves and to respond in a reasonably articulate manner to questions. Mental health professionals who assist such litigants in dealing more effectively with their anxiety make it easier for evaluators to obtain accurate information and to witness more natural behavior when parent-child interactions are observed. Mental health professionals who help litigants to be themselves are not the problem.<sup>35</sup>

At least two important areas are left unexamined in the literature reviewed for this article about the role of mental health consultants in assisting attorneys whose clients are involved in the child custody evaluation process.<sup>36</sup> One is *how* to assist parent-litigants to better manage their anxiety, apprehension, tension, or uncertainty, and the second is how to determine the line between appropriate client preparation and inappropriate coaching intended to create a false picture of the parent.

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<sup>32</sup> *Id.*

<sup>33</sup> Hobbs-Minor & Sullivan, *supra* note 14, at 3.

<sup>34</sup> *Id.*

<sup>35</sup> Martindale, *supra* note 4, at 4.

<sup>36</sup> Hobbs-Minor & Sullivan, *supra* note 14, at 2; Schepard, *supra* note 7, at 724.

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Some parent-litigants come unprepared to attorney meetings. They may need structure to help create a narrative about who they are as a parent and how they interact with their children. Does assisting a parent to create an accurate narrative of their parenting behavior constitute appropriate or inappropriate influence? We believe that if the attorney or mental health consultant is able to guide the parent to develop a narrative using his or her own words, citing her examples of parenting behavior, and describing a true parent-child interaction, this would be an appropriate form of preparation. The purpose is to teach the parent how to better describe his/her actions in a clear and concise manner. Neither the attorney nor the mental health consultant is engaged in changing the facts of the parent's experience as a parent. Rather the goal is to help assemble the raw materials brought to the meeting by the parent and assisting in painting a clear and concise picture of how this person parents a particular child or children.

The custody evaluation process should not be a contest to determine who is the better storyteller, with the person who delivers the better narrative winning the custody prize. Instead, the custody evaluation process should be based, in part, upon independent, third party support for the parenting descriptions discussed during the interview process. When an attorney or mental health consultant assists a parent to more clearly and concisely explain parenting behavior or parent-child interactions and that interview-based narrative is supported by information obtained from independent, third party sources, such assistance makes it easier for evaluators to obtain accurate information.

Some parent-litigants come to their attorney's office with stacks and stacks of papers filled with examples of everything their children have ever done, everything their former spouse has done wrong, and everything they have ever done correctly. When they talk about their parenting behavior, they provide multiple examples of everyday parenting behavior that takes ten to twenty minutes per example. Listening to these parents talk about the excitement of their child discovering a butterfly for an hour and then follow that discussion with an iPad full of pictures screams for editing by the attorney or mental health consultant.

Assisting this parent to pare down the stacks of pages containing multiple examples of parent-child interaction he or she

wants the evaluator to review into a set of representative examples seems to be an appropriate preparation task. Or is it? Does the involvement of the attorney or mental health professional in assisting in the paring down process constitute inappropriate coaching? If the parent choses one set of examples and the attorney or consultant believes another set of examples are more appropriate for presentation to the evaluation, does that constitute inappropriate coaching?

If one takes the Dobrish position, attorneys who assist their clients in choosing the best stories to tell the evaluator are acting in their clients' best interests and acting in an ethical manner. If one takes the Martindale position, the mental health consultant may be engaged in deception because the parent's choice of what is and what is not relevant for the evaluator may be revealing.

It has been our experience as an attorney and a custody evaluator, work-product reviewer, and consultant to attorneys that evaluators do not have unlimited time to conduct their child custody evaluations and courts do not have unlimited time to hear testimony in a child custody dispute. Assisting the parent/litigant to pare down examples of parenting and stories about parent-child interactions is, from the perspective of the attorney, absolutely necessary to properly represent the parent/litigant.

No professional consensus exists to guide attorneys and mental health professionals when these types of situations arise. Attorneys use their professional judgment to determine how best to present the parent's story in an honest, clear, and concise manner. Mental health consultants use their clinical judgment to determine how best to assist the attorney while also respecting the line between appropriate and inappropriate preparation.

It is our position that there are no definitive lines between acceptable and unacceptable client preparation practices that reflect a consensus across law and mental health, yet many attorneys and mental health practitioners believe that they know it when they see it.<sup>37</sup> Context often contributes to the blurring of lines. In a custody context, parents are encouraged to be open and honest with the evaluator. In a criminal context, the defendant has the right not to disclose information that may be self-incriminating. Attorneys and mental health consultants may en-

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<sup>37</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

gage in client-preparation for an evaluation, but the goals of the preparation are very different.

Some colleagues have bright-line rules about preparation of parents involved in the child custody evaluation process. Those who advocate for bright-line rules, however, have yet to define the line. The AFCC Child Custody Consultant Task Force identified four specific, unacceptable and unethical practices. These four practices seem to be fairly easy to identify in day-to-day work. They do not define the universe of inappropriate preparation behaviors. Further research needs to be conducted to identify additional areas of preparation that define other unacceptable and unethical practices.

Most members of the AFCC Task Force also identified seventeen acceptable practices. They included:

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

11. the impact of relocation on children and how potential negative effects can be ameliorated;
12. reviewing documents, correspondence or records, including medical, school, employment, and criminal records, and discussing what is reviewed with the litigant;
13. assisting a litigant in selecting collateral sources of information to be contacted by the forensic mental health evaluator;
14. helping the litigant to understand the process of the forensic mental health evaluation to relieve some of the personal stress of going through it;
15. making referrals for outside services. For example, the consultant might discuss a litigant's difficulties with emotional regulation (e.g. anger management) or history of trauma and its impact on their heightened emotional arousal in interactions with the other parent or others, and make a referral for treatment;
16. consulting with the litigant to manage or create reasonable expectations, to identify and assess real concerns in the other parent, to organize and prioritize concerns, and to link requests logically to their history, prior concerns, and to the needs of the child or children in question; and
17. assisting the litigant with the development of a parenting plan for proposal to the other parent.<sup>38</sup>

The more challenging issues are also more nuanced. Is it appropriate for an attorney to help his client prepare answers for an upcoming interview session with a custody evaluator by developing a working framework for how to show that parent is the better custodial choice? Is it appropriate for the mental health consultant to even engage in such a discussion?

If it is okay for the attorney or mental health consultant to participate in such a discussion with the parent about who is the better custodial choice, is it appropriate for the attorney to suggest a phrase to be learned by the parent with the expectation that the phrase be used during the evaluation interview in describing her parenting? Is it appropriate for the attorney to

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<sup>38</sup> Schepard, *supra* note 7, at 729-30.

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suggest two complete paragraphs that the parent uses during the evaluation interview in describing her parenting? Where is the line between acceptable and unacceptable attorney influence?

Now enter the mental health consultant. Is it appropriate for the mental health consultant to suggest to the parent a phrase to be learned with the expectation that the phrase be used during the evaluation interview in describing her parenting? Is it appropriate for the mental health consultant to suggest to the parent two complete paragraphs that that the parent uses during the evaluation interview in describing her parenting? Where is the line between acceptable and unacceptable mental health consultant influence?

Finally, is it okay for the attorney to ask the mental health consultant to provide a phrase or several paragraphs about parenting that the attorney intends to pass along to the parent with the direction to memorize these ideas before meeting with the evaluator?

Is it inappropriate for the attorney to engage in discussion with the parent-litigant about what kind of parenting access schedule would be best for her children? Is it appropriate for an attorney to bring in a mental health consultant who educates the parent about current child development research and parenting access plans to assist the parent in understanding that her proposed parenting access plan is not consistent with current research or the best interests of children in the age group (s) of her children? If it is okay to assist in educating the parent about current research with the intention to help the parent consider a more developmentally appropriate parenting plan, is it appropriate for that discussion to occur prior to the parent meeting with the evaluator?

Dobrish asked:

[W]hy is it not acceptable for an attorney or adviser to encourage more or better involvement with a child in order to develop and maintain a better relationship merely because it would also make the parent look better in the eyes of the evaluator? There is no question but that many parents who were relatively uninvolved with their children become more involved after divorce proceedings begin. Greater involvement is a good thing. Greater involvement solely for the sake of impressing a judge or evaluator is postulated to be a bad thing—unless (perhaps) it results in greater involvement of a more permanent nature, which is always possible. . . . Would it not be appropriate for an attorney to recommend to a client that he or she attend parenting clas-



ses, meet with child development experts, become more interested in the child's school, interests, friends, hobbies, talents, etc.; attend child-related events, speak to the child's health care providers and, in general, become more involved in a child's life and more knowledgeable about child rearing and development? If this advice were taken six months before the institution of custody proceedings or six days after, would it make a difference?<sup>39</sup>

Among the many controversial issues surrounding the use of mental health consultants are who provides the information to the parent-litigant and when is that information presented? If a parent who has worked with a therapist prior to the onset of litigation and now is involved in custody litigation, is it appropriate for the therapist to recommend the parent participate in a parenting class? If the same parent is working with an attorney prior to the initiation of litigation, is it appropriate for the attorney to recommend the parent participate in a parenting class? If the parent is working with the attorney's retained mental health consultant, is it appropriate for the mental health consultant to recommend the parent participate in a parenting class?

It is likely that we can agree that it is a good thing for a parent to participate in a parent class to improve parenting skills. By itself and independent of the litigation context, a recommendation to attend parenting classes is a good thing.

Enter the litigation context. Looking solely at the timing of the referral to a parenting class, is it appropriate for an attorney to recommend the parent attending a parenting class six months before the attorney asks the court to order a child custody evaluation? Three months before? Simultaneous with the evaluation process? Prior to trial? Six months after trial?

Is it appropriate for a mental health consultant to recommend the parent attending a parenting class six months before the attorney asks the court to order a child custody evaluation? Three months before? Simultaneous with the evaluation process? Prior to trial? Six months after trial? Where do we draw the line between being helpful to the parent and being manipulative of the evaluation process? And, when do we draw that line – if such a line can be drawn in the first place?

Some may believe that it is the job of the attorney to indirectly try to manipulate the evaluation process. Others may

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<sup>39</sup> Dobrish, *supra* note 1.

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think that attorneys have a duty to prepare their clients as thoroughly as possible so that they will present themselves in the best parental role they can under the circumstances. This is especially true if the parent/litigant has been the less involved parent with the children. What is unclear in day-to-day practice is how to identify the line between dressing up a client and trying to put lipstick on a pig.

Let us examine where the line may be drawn among some of the practices that were endorsed as acceptable by most on the AFCC Task Force. The Task Force identified as an acceptable practice for the mental health consultant to talk with the parent about “factors that may lead a child to resist contact with a parent including the role each parent may play.”<sup>40</sup> Does the mental health consultant provide only information about what the literature says? Does the mental health consultant apply the empirical literature to case specific factors in the parent-litigant’s family system? What if the parent takes the literature-based information and applies it to her parenting resulting in changed parenting behavior?

Is it appropriate influence when the mental health consultant applies the empirical literature to the parent-litigant’s case-specific family system resulting in the parent-litigant changing her parenting behavior? Is it appropriate for the mental health consultant to teach the attorney who then has a discussion with his client about the application of child development literature to the parent-litigant’s case-specific family system resulting in the parent-litigant changing her parenting behavior?

Another acceptable practice identified by the AFCC Task Force is to discuss “the impact of relocation on children and how potential negative effects can be ameliorated.”<sup>41</sup> Again, we are faced with similar questions as posed above. Is it inappropriate influence when the discussion about the impact of divorce on children is applied to the specific facts of the current case and results in the parent-litigant changing her behavior? Is it inappropriate influence when a parent-litigant takes from such discussions an understanding of the need to take immediate steps to

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<sup>40</sup> Schepard, *supra* note 7, at 730.

<sup>41</sup> *Id.* at 730.

better protect the children from the potential negative effects of a relocation?

The reviewed literature speaks in one voice about the inappropriate and likely unethical practice of influencing the evaluation process for strategic purpose. It is viewed as inappropriate practice when the question “*Why* engage in parent-litigant preparation?” is answered by indicating an intention to present false information to the evaluator (or court) or to strategically misrepresent who the parent is and how the parent parents to the evaluator (or court).

As discussed above, however, is “*Who* delivers the message to the parent-litigant?” important (i.e., attorney, consultant, therapist)? Is “*When* is the message delivered to the parent-litigant?” important (i.e., prior to considering an evaluation, just before an evaluation begins, during an evaluation, prior to trial, during trial)?

### *C. Murky Models with Honorable Intentions*

There are some scholars who describe acceptable practices that we believe are inappropriate when placed under the umbrella of a mental health consultant working under work-product doctrine. One such example is the model offered by Hobbs-Minor and Sullivan who describe a role in which the mental health consultant

becomes an ally and part of the matrimonial ‘home team’ when hired by the attorney. The mental health consultant partners with the parent and teaches practical tools and strategies to manage conflict and prioritize children’s needs. As an ally, the mental health consultant is better able to access the parent’s defenses and teach him or her to become a more effective parent and co-parent. This ‘home team’ approach creates safety for parents to reveal vulnerabilities, let down defenses, confront unrealistic expectations, and learn to make more effective choices for their children. “Ultimately, the goal of mental health consultation is to assist the parent to learn to make emotionally intelligent and well-informed decisions that are in the best interest of their children.”<sup>42</sup>

Federal Rule of Civil Procedure 26(b)(3)(A) makes it clear that documents produced by non-attorneys may enjoy the protection of work product privilege:

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<sup>42</sup> Hobbs-Minor & Sullivan, *supra* note 14, at 5.

(A) *Documents and Tangible Things*. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent).<sup>43</sup>

The party claiming the work product privilege must prove that the materials are:

1. Documents and tangible things;
2. Prepared in anticipation of litigation or trial; and
3. By or for the party or by or for the party's representative.<sup>44</sup>

When a mental health consultant works directly with a parent with the intent of helping the parent to improve her parenting, we contend that such preparation is not intended to be used in anticipation of litigation. Such preparation is intended to assist the parent, not assist the attorney. Since the Hobbs-Minor and Sullivan model's ultimate goal "is to assist the parent to learn to make emotionally intelligent and well-informed decisions that are in the best interest of their children,"<sup>45</sup> such assistance is not intended to assist the attorney in preparation for litigation.

One of us (JN) believes that what Hobbs-Minor and Sullivan advocate would be of great assistance to attorneys who are charged with representing their client to the best of their ability and to strenuously advocate their client's case. The Hobbs-Minor and Sullivan model would likely serve the best interests of the children because it helps the parent to become a better parent.

This is not to say that such collaboration between parent and mental health professional may not provide useful information to the parent about becoming a better and more effective parent or to engage in more constructive co-parenting communication. The concern of the other author of this paper is that it is outside the scope of work product for a mental health professional to work with a parent involved in litigation to "assist the parent to

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<sup>43</sup> FED. R. CIV. P. 26(b)(3)(A).

<sup>44</sup> *Id.*

<sup>45</sup> Hobbs-Minor & Sullivan, *supra* note 14, at 5.

learn to make emotionally intelligent and well-informed decisions” about parenting and co-parenting.<sup>46</sup>

Another murky area may be reflected in the consultant’s loyalty to two masters: the attorney by whom they are retained and the best interests of the child. Kaufman discusses the need for mental health consultants to “strive to understand the best interests of the child.”<sup>47</sup> He emphasizes that mental health consultants “always bear responsibility to the best interests of children. . . . What is more difficult is for the FMHP consultant to not get so swept up in meeting the needs of the attorney and the parent that some understanding of what is best for children is lost in the mix.”<sup>48</sup>

We agree with Kaufman’s view about keeping focus on the best interests of children, yet Kaufman does not provide examples of how to implement such focus. For example, a mother is unaware of her significant contribution to undermining the relationship her child has with the biological father. The consultant identifies how the mother is undermining the child’s relationship with the father. Does the consultant raise these concerns with the mother? If so, how specifically should these observed concerns be articulated? If the mother’s parenting behavior changes as a result of this discussion, does this constitute the type of “coaching” about which there is such controversy?

Should the consultant wait until after the mother completes her child custody evaluation before sharing concerns about the mother’s behavior? Waiting until after the evaluation is over helps to insure that the mother’s behavior is unchanged by consultant-influence. On the other hand, the child continues to be exposed to parenting behavior that is contrary to her best interests.

The attorney is ethically bound to advocate the client’s best interests and that would likely include informing the mother about the consultant’s observed concerns about the parent’s undermining behavior. Does the sharing of this information consti-

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<sup>46</sup> The Hobbs-Minor and Sullivan model raises other questions about the role of mental health professionals in assisting parents engaged in custody litigation, however, those questions and exploration of their answers are beyond the scope of this paper.

<sup>47</sup> Kaufman, *supra* note 2, at 27.

<sup>48</sup> *Id.*

tute inappropriate client preparation practice? If the mother changes her parenting behavior as a result of the discussion with the attorney, is this an example of inappropriate preparation practice?

We agree with Kaufman's conclusion about the importance of thoughtful consideration. There is no one "right way" to address many of the challenges faced by mental health consultants involved in family law litigation. Mental health consultants should "take the time needed to understand the case in depth that it warrants, tease out the separate needs of the attorney and the parent, and delineate how the consultant can and cannot be helpful."<sup>49</sup> Yet, there are no clear cut rules about how best to implement actions *after* thoughtful consideration.

Defining the line between appropriate and inappropriate parent/litigant preparation involved in the child custody evaluation process is like a projective technique. Some people tend to see lines where others do not; some people tend to hold expectations for assistance where others do not. Given the complexities and nuances of parent/litigant preparation needs, it may be that we – the attorneys and mental health consultants involved in the actual work – are guided by our individual sense of right and wrong and the professional guidance provided by our respective national and state associations and organizations.

#### D. *Red Line/Green Line Challenges*

Although the AFCC Task Force identified "[R]ehearsing a litigant's response to questions on standard psychological tests" as an unacceptable practice,<sup>50</sup> there are some data to suggest that attorneys view preparing their clients to take a psychological test as an appropriate practice. According to a recent study, attorneys believe they have a responsibility to discuss what is involved in psychological testing before they refer their clients for such testing.<sup>51</sup>

Tara Victor and Norman Abeles reported that over 33% of the law students and almost 50% of the practicing attorneys sur-

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<sup>49</sup> *Id.*

<sup>50</sup> Shepard, *supra* note 7, at 729.

<sup>51</sup> Tara L. Victor & Norman Abeles, *Coaching Clients to Take Psychological and Neuropsychological Tests: A Clash of Ethical Obligations*, 35 *PROF. PSYCHOL.: RES. & PRAC.* 373, 373 (2004).

veyed believed that clients referred for testing always or usually should be informed of validity scales on tests.<sup>52</sup> This finding is of great concern in light of studies demonstrating that validity scale information helps malingerers avoid detection and informing test takers about the existence of validity scales on a test changes test taker behavior.

In contrast to the attorney data about the appropriateness of preparing clients to take psychological tests, talking to parent-litigants about how to take a test or informing them about validity scales on tests should be a bright red line for psychologists. Providing test takers with information about validity scales is in violation of the ethical principles that guide psychologists regarding test security.

#### **IV. Summary and Conclusions**

As of the writing of this article, there is little, if any, empirical information available about what attorneys and mental health consultants do to help prepare parents who are engaged in the child custody evaluation process. Courts are unable to discover the nature of the client preparation because such preparation is shielded by work-product doctrine. We believe it is important that research focus attention on the specific methods and procedures of client preparation employed by attorneys and mental health professionals.

We have attempted to raise awareness of the ambiguous and unanswered questions about the role of attorney and mental health consultants engaged in assisting parent/litigants who are involved in the child custody evaluation process. Our conclusion after reviewing the literature and discussing these interesting and complex issues with colleagues is that the state of the art addressing parent/litigant preparation has many more questions than answers. We hope that as a result of the questions that we raised in this paper some attorneys and mental health professionals will be motivated to conduct additional research and to examine more deeply in scholarly debate within the peer-reviewed literature the complexities of these issues.

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<sup>52</sup> *Id.*

