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Introduction to the Role, Ethics, and Professional Responsibility

Child custody evaluations are time intensive, potentially intrusive to the family, expensive, and risk putting the children right into the middle of their parents' conflicts. When ordered by the court to participate in an evaluation, parents are subjected to multiple interviews, perhaps psychological testing, and exposure of their conflicts to teachers, therapists, and other collateral professionals. Children are interviewed and observed in offices and often in their homes. This lengthy process will typically take 3 to 4 months to complete, will typically be expensive, and may yield a report that is both potentially insightful and potentially damaging to the family. With that in mind, a relevant question would be, "Why do courts order families to undergo child custody evaluations?"

In fact, there are numerous commentators in the professional literature who would argue that judges should not be sending families for child custody evaluations (see, e.g., Emery, Otto, & O'Donohue, 2005; R. Kelly & Ramsey, 2009; O'Donohue & Bradley, 1999). Parent groups have used the Internet to complain about child custody evaluators, judges, attorneys for children, Parent Coordinators, and others who work in the family law field. In the past 10 years, there has been a significant increase in licensing board complaints against mental health professionals who perform child custody evaluations and work as Parent Coordinators. This may lead to the relevant question, "Why would a mental health professional participate in and conduct a child custody evaluation?"

Additionally, many parents feel that an evaluation is intrusive and exposes the family to significant airing of the proverbial "dirty laundry." As noted previously, evaluations are costly and can add many months to the court and divorce process. Parents worry about the impact of the evaluation on their children, and often worry that an evaluator will make recommendations that limit their custodial rights and interfere with their relationships with their children. A relevant question for parents would be, "Why would any parent request or participate in a child custody evaluation?"

The answer to these questions lies in understanding how parents and courts benefit from an evaluation.

How the Court Benefits From an Evaluation ---

Typically, a judge will order a child custody evaluation under a range of circumstances. In my experience, this can include those circumstances in which there are significant allegations such as drug and alcohol abuse, family violence, child abuse, significant mental health problems, and parental fitness. Oftentimes, a judge will have two parents in the courtroom who both appear to be good enough at parenting, and at other times, one or both parents appear to have significant problems. Increasingly, judges look to the mental health expert to assist in understanding complex psychological questions of attachment between the child and her parents, sibling relationships, and the developmental needs of children.

In a mobile society, one parent may wish to relocate with the children for a variety of reasons, such as employment, economics, new relationship opportunities, and more. In many jurisdictions, a judge will find it helpful to request a child custody evaluation to address the relevant psychological factors associated with the relocation question. My experience in California is that a judge will quite frequently request the assistance of an evaluator in a relocation case in order to provide information to the court about the relevant psychological issues described in the *LaMusga* decision (*In re Marriage of LaMusga*, 2004).

While judges are guided by the law in making decisions regarding the best interests of children, they may look to the neutrally appointed child custody evaluator to assist in understanding the complexity of the family dynamics and the relevant psychological factors that can lead to a determination of the child's best interests. Ultimately, in many ways, the neutrally appointed child custody evaluator serves as a quasi-consultant to the judge, providing critical data about the family for a better understanding of the family dynamics and the needs of the children.

A key role for the child custody evaluator is to be helpful to judges. Evaluators help judges by providing data and analysis to understand complex family dynamics associated with best-interests factors in the law.

How the Family Benefits From an Evaluation ---

The majority of parents going through a divorce will reach an agreement on their own about the parenting plan. Such low- or medium-conflict parents will agree on important decisions about their child, such as where he will go to school, what extracurricular activities he will participate in, and what nonemergency medical procedures to consider (e.g., orthodontia). They will agree on a parenting plan that will delineate the times that their child is with

his mother and the times that he is with his father. They may have used mediation or resolved these issues on their own. Obviously, these parents do not need an evaluation, nor would the court order one.

On the other hand, some families, perhaps as many as 20%, are high-conflict families. They cannot agree on the parenting plan, how to make decisions for their child, nor are they able to focus on their child's needs because of their mutual differences. As noted earlier, with many of these families there are allegations of family violence, high conflict, significant mental health problems, concerns about the other parent's new romantic partner, substance abuse, and the alienation or estrangement of children. The primary benefit of an evaluation to families in these circumstances is that the evaluation will provide an opportunity for parents to voice their concerns to an expert in child development and mental health so that they are truly heard by someone. Many parents going through the divorce process feel that no one, sometimes not even their attorney, hears them. Many parents believe that no one cares about their child. In court, they may have been given little, if any, time to speak to the judge, who is often overwhelmed with a busy calendar with many cases to be heard. A neutrally appointed child custody evaluator will spend considerable time with each parent trying to understand individual concerns and perceptions of their child's needs. This can be comforting to parents who have a need to be heard about these concerns.

By listening to children, evaluators can also help identify when children are truly caught in the middle of a loyalty conflict between their parents and can describe the impact of that exposure to conflict. It is common for children's voices to be absent in the courts in the United States, and participation in a child custody evaluation will help children voice their concerns, share their wishes, and explore their feelings. While the child custody evaluator is not serving in the role of a therapist, the evaluation process may be therapeutic to children going through the evaluation. If the evaluator finds that the child is experiencing significant problems, she can refer the child for therapy and help the parents understand their child's developmental needs. In these ways, not only does the evaluator serve the opportunity to hear the child's voice, but she can also be a child advocate, advocating to the court and to the parents to meet the child's psychological and developmental needs.

A third potential benefit for the family comes from the fact that the same mental health expert is observing all family members. In the midst of a bitter divorce, therapeutic services are often fragmented, with each parent having his or her own therapist, attorney advocate, and sometimes even family friends become fragmented between parents. Many children are seeing their own therapist, as well. Each helping professional has a specific role, that is, to advocate for his or her respective clients' psychological or legal needs. Such professionals do not have critical information about the other family members. While their advice might be helpful and appropriate to their client, it may not be in the children's best interests. By having a neutrally appointed child custody evaluator listen to and observe all family members, talk to the relevant collateral witnesses on both

sides, and consider everyone's input before reaching conclusions about the children's best interests, fragmentation disappears. If the evaluation is done correctly and thoroughly, all data collected and any recommendations offered will be addressed in a comprehensive manner for all concerned.

At the end of the evaluation process, when an evaluator writes a complete and comprehensive report, parents benefit from the report by learning about their child's needs and how the parents can work together to meet those needs. The evaluation report can help parents focus on the child rather than on their conflicts with one another and be a teaching tool to help them learn ways to resolve their conflicts and serve their child's needs. Furthermore, because a good evaluator will be up-to-date on current research in the field, the evaluator can help parents understand relevant issues such as overnights with their young child, the impact of conflict on children, the benefits of shared parenting in some circumstances, and the risks of shared parenting in other circumstances. This will enable the parents to be more effective as parents after the divorce.

Ultimately, an evaluation is most helpful to the family when the evaluator's report and conclusions can help reduce conflict, help parents reach a settlement without litigation, and keep parents focused on their child's needs and best interests. A well done evaluation may help parents recognize the need for solution and compromise and, while mediation was not successful prior to the evaluation, that settlement is much more likely after an evaluation. To the extent that settlement occurs, this will always benefit children, as it

Evaluators help families and children by providing useful information that can help the family settle the custody dispute without court intervention.

will allow for a reduction in conflict and provide an opportunity to move forward in a healthy way on behalf of the children.

When Is an Evaluation Harmful?

Even with the preceding in mind, there are certainly times when an evaluation should not be performed. Certainly, if one or both parents are ambivalent about the divorce, marriage counseling may be much more appropriate. Second, except in those circumstances where the allegations are huge or when controlling domestic violence may preclude it, parents would always benefit from an effort at mediation before jumping into an evaluation. Research is clear (see, e.g., Emery, Sbarra, & Grover, 2005; J. Kelly, 1996) that parents are likely to have a greater sense of satisfaction and follow through positively when they have reached their own solution regarding their children. When mediation services are available, I almost always recommend that a family try mediation first, even in some circumstances in which there has been domestic violence.

Additionally, there may be times when one parent or the other will not cooperate with the evaluation. There may be times when, especially in a rural community with few experts, no one has the skill to provide a comprehensive child custody evaluation. At times, a child's therapist may be asked for input

into the custody and access plan. In my opinion, a child's therapist should never provide input to the court about the parenting plan that is in a child's best interests, though she may discuss with parents her thoughts about various custodial options. In all of those instances, caution must be taken before conducting the evaluation, making sure that ethical boundaries are maintained and that appropriate practice standards have been met. These will be discussed later in this chapter.

Who Is the Client/Consumer?

In my experience, child custody evaluations are almost always performed following a stipulation or court order identifying the particular mental health professional appointed to do the evaluation. Some evaluations are conducted by experts in private practice while others are conducted by experts in the public sector. Regardless of where one works, when appointed in this fashion, the child custody evaluator serves as an expert of the court. In California, for example, the evaluator is appointed as the court's expert under Section 730 of the Evidence Code, which defines the role of experts so appointed. As a result of that court appointment, the expert is likely to have quasi-judicial immunity from lawsuits. The court order will typically delineate who is responsible for the evaluator's fees, which are not going to be paid by health insurance because this evaluation is for a legal matter. Sometimes both parents share the cost of the evaluation equally, and at other times, there is a disproportionate sharing of costs, while in some instances, one parent pays the entire fee. The payor is not the client.

In my belief, the client is both the judge and the family. If the case goes to trial, the evaluator's report is designed to be helpful to the judge in reaching a sound decision on behalf of the best interests of the children. However, it is also clear that the majority of cases that go to evaluation are settled after the evaluation. In an overburdened legal system, judges are certainly looking to the parents and their attorneys to resolve their dispute at the conclusion of an evaluation. I believe that the ethical duty of evaluators is to meet the needs of the family first and foremost, always focusing on the best interests of the child. As such, both the family and the judge serve as the consumer of the evaluation, with a focus always being on the best interests of the child. In that regard, no matter who is paying for the evaluation, in what context and for what reasons it is ordered, or whether the end result is a settlement or a trial, the children of divorce become the primary focus of the evaluation and their needs must be served first.

Practice Standards and Ethical Issues

In recent years there has been a shift in the thinking about child custody evaluation guidelines and standards (Kirkpatrick, 2004). The Association of Family and Conciliation Courts (AFCC; 2006) and the American Psychological

Association (2009) have updated their previously published *Model Standards of Practice for Child Custody Evaluation* (AFCC) and *Guidelines for Child Custody Evaluations* (American Psychological Association). As stated in the Introduction to the AFCC *Model Standards*, “These *Model Standards for Child Custody Evaluation* are designed to promote good practice; to provide information to those who utilize the services of custody evaluators; and to increase public confidence in the work done by custody evaluators.” In addition, California Rule of Court 5.220 provides direction and guidance to evaluators in the courts of what to expect in the child custody evaluation process. The rationale for such *Model Standards*, *Guidelines*, and Court Rules is clear: to raise the bar and promote good practice by psychologists and other mental health professionals conducting evaluations, and to increase the likelihood of uniformity within the evaluation process. Kirkpatrick (2004) describes this baseline as the “floor,” not the “ceiling” for our work.

These *Model Standards*, *Guidelines*, and *Rules of Court* address issues such as evaluator qualifications, training and experience, proper procedures, ethical issues, bias, assessment techniques, and other critical issues for evaluators. They may define the scope of the evaluator’s work, discuss issues surrounding confidentiality and the lack thereof, clarify the importance of understanding the law and the court culture in one’s community, address issues in record-keeping and the disclosure of records, address the importance of informed consent, and focus on testimony and report writing. The *Model Standards* and the *Guidelines* are aspirational in nature. The *Rules of Court* in California, on the other hand, are specific and have language that the evaluator “shall” comply with those rules.

For example, while the AFCC *Model Standards* suggest that evaluators have at least a master’s degree in a mental health field that includes formal education and training, and recommend ongoing continuing education in a range of areas relevant to family law, California Rule 5.220 requires an evaluator to have that minimum master’s degree, be licensed by the state, and have an initial minimum 40 hours of general continuing education and 16 hours of domestic violence continuing education before conducting any evaluations, plus an additional 8 hours of general continuing education and 4 hours of domestic violence continuing education annually in order to continue doing child custody evaluations. California Rule of Court 5.225 addresses these training and experience requirements directly. It is a requirement of the California Rule that an evaluator sign a document under penalty of perjury that he or she has met the training and experience requirements of the Rule before conducting an evaluation.

The purpose of the California Rule is to ensure that all evaluators have the requisite training to conduct these evaluations. It is critical to know the education and training requirements in your particular jurisdiction.

Another critical issue often referred to in these practice standards has to do with the issue of confidentiality and informed consent. For example, the California Rule states that all evaluations must include “a written explanation

of the process that clearly describes” a number of things, including the purpose of the evaluation, the scope and distribution of the evaluation report, limitations on the confidentiality of the process, and cost and payment responsibility for the evaluation. This is akin to informed consent. There is also a requirement for the evaluator to “include in the initial meeting with each child an age-appropriate explanation of the evaluation process, including limitations on the confidentiality of the process.” While there is no informed consent with children, this would be akin to an informed assent process. Additionally, recognizing that collateral witnesses also need to be informed about the process and their role in the custody evaluation process, the AFCC *Model Standards* suggest that evaluators take steps to ensure that collaterals know and understand the potential uses of the information that they are providing. These Standards recommended that this disclosure to collaterals be made in writing. In my opinion, these requirements regarding informed consent and assent are appropriate regardless of where you practice.

Another critical issue is *ex parte* communication within the evaluation process. *Ex parte* communication is communication with only one side and is generally prohibited in child custody work. The *Model Standards* state that “child custody evaluators shall not have substantive *ex parte* communications about a case with the Court or with the attorneys representing the parties.” The California Rule requires counties to address *ex parte* communication in their orders, and court orders typically will prohibit such communication between one side and the evaluator. In most orders appointing me as an evaluator, it is required that any materials sent to the evaluator be copied to the other side, thus prohibiting one-sided communication with me. In Solano County, California, the standard court order requires permission by both sides before any documents can be sent to the evaluator. In the event of a dispute about what the evaluator should receive, the court will make a determination of what documents the evaluator should get. Finally, a different California Rule—Rule of Court 5.235—prohibits the custody evaluator from having *ex parte* communication with someone appointed as minor’s counsel without the court’s prior authorization, though in other jurisdictions it is acceptable to have *ex parte* communication with an attorney for the child, considering that professional to be a collateral witness. Again, it is important to know the standard regarding *ex parte* communication in your jurisdiction.

Another critical issue addressed in the Rules of Court and the *Model Standards* is the child custody evaluation report. Among other things, the Rule requires the evaluator to discuss with parents the relevant distribution of the report. I make it clear to all participants that the report will be sent to the judge, to the attorneys, and, in some counties, to the parents themselves. If a parent is self-represented and does not have an attorney, local county rules typically determine how that parent gets to read the report and whether or not parents, in general, have access to the report and receive a copy of the report.

In addition to the distribution of the report, the *Model Standards* and the Rule discuss the nature of the evaluator's findings and how to present them. For example, the California Rule states,

In any presentation of findings, the evaluator must . . . Summarize data gathering procedures, information sources, and time spent, and present all relevant information, *including information that does not support the conclusions reached* (emphasis added) . . . describe any limitations in the evaluation that result from unobtainable information, failure of a party to cooperate, or the circumstances of particular interviews . . . only make a custody or visitation recommendation for a party who has been evaluated [and] . . . provide clear, detailed recommendations that are consistent with the health, safety, welfare, and best interests of the child if making any recommendations to the court regarding a parenting plan. (Rule of Court 5.220, (e) 3 A–D)

The *Model Standards* (2006) state, “[C]hild custody evaluators shall strive to be accurate, objective, fair and independent in their work and are strongly encouraged to utilize peer-reviewed published research in their reports.” In my opinion, these requirements are appropriate regardless of where you practice.

Another area in which both the *Model Standards* and the California Rule provide direction is that the evaluator needs to maintain objectivity, use multiple methods of data gathering, and maintain relatively balanced procedures. In a typical child custody evaluation, the evaluator will have several interviews with each parent; several interviews with the child; observations of children and parents together, possibly including home visits, the use of psychological testing and other parenting-related instruments; collateral record review; and collateral phone calls to a variety of relevant people. These procedures will be discussed in Part II. Rule of Court 5.220 and the *Model Standards* recognize that procedures cannot always be balanced. For example, in a recent international relocation evaluation, I spent several days in the international country and several hours with the family to see where the parent wanted the child to live. I did not spend the same amount of time in the local city because I already knew about that city, as did the court. However, I made it clear that, while the procedures might not have looked balanced (and they were not) there was a reason for the unbalanced time spent on each side and focused on the importance of maintaining my neutrality in the case. I urge evaluators to explain themselves when an evaluation lacks balance. This will allow the court and other readers of the report to recognize the legitimacy of unbalanced procedures so that the report remains objective and does not appear biased. It is always critical for the evaluator to be neutral in data gathering as well as data reporting.

In order to avoid the appearance of bias, it is always important to disclose any potential conflicts of interest. In my experience, there are obvious potential conflicts of interest, such as when one of the attorneys, the judge, or a

family member is a friend of yours or has been a therapy client of yours. However, there can also be more subtle potential conflicts of interest. A conflict could be perceived when I have published an article or spoken on a panel at a conference with one of the attorneys, if I have been a consultant to the attorney on one side of the case, or even if one of the therapists involved in the case is a close friend of mine. Because I serve as a consultant to many attorneys in my community, my appointment is rarely a problem when both attorneys have previously been in that role. In another example, my wife used to work as an occupational therapist in the schools, and I have been referred cases where one of the children is a special education student at my wife's school. I disclose this potential conflict of interest. In a recent potential case, I was asked to do an evaluation in a city where I do not have an office. I had planned to use the office of a colleague, and one of the parents was concerned that I would be biased because the colleague had done a previous evaluation that was critical of that parent. As a result, I declined acceptance of the referral. Regardless of the potential source of conflict, I believe it is critical to inform parents and attorneys of potential conflicts of interest in any case, preferably before work on the case has begun. However, there could be times when you do not even recognize the connection until receiving the list of collateral witnesses, one of whom might be a friend or close colleague. It is always important to disclose the potential conflict so as to avoid the appearance of bias later in the process. Remember, your licensing board may consider the appearance of your potential conflict a serious offense if one parent files a complaint and you had not taken steps to disclose or rectify the potential conflict as soon as you became aware of it.

In a similar vein, it is not uncommon, especially in small communities, for someone who has had a prior professional role (e.g., mediator, couple's therapist, child therapist, etc.) with one or more family members to conduct the evaluation. In my opinion, and typically in the opinion of licensing boards, it is always wise to turn down a child custody evaluation referral when one has been in a prior role with any family member. In the rare event that you are in such a small community that you are the only person who could do the custody evaluation, it is critical to inform all participants of the risks inherent in switching roles and in becoming the court-appointed child custody evaluator. If you were a therapist for the child or one of the parents, it is difficult to remain neutral and objective because you have been given generally one-sided information. If you were a mediator, you have been provided information that was meant to be confidential and used for settlement purposes and will now potentially be used against a parent in a custody evaluation. Even if you are a child's therapist, your role was a therapeutic one to the child and you gathered information while engaged in that role. Changing to the evaluator role would preclude returning to the therapeutic one. Furthermore, because you gained information that is confidential when you were a therapist, you would now need to disclose that information in your report as the evaluator. For these reasons, I believe it is never wise to change roles, even though the

American Psychological Association's *Ethical Principles for Psychologists* (2002) do allow for dual relationships if they are not being performed at the same time. More on the issue of dual roles and multiple relationships will be discussed in Chapter 2.

It may be appropriate if you have done the original evaluation to be the expert appointed to do an updated evaluation. In that circumstance, the evaluator is not switching roles but has the knowledge gained from the original evaluation to help in the update. At times, it is preferable to recuse yourself from performing the update if one or the other parent might believe that your prior role and conclusions would make you subject to bias. As always, the appearance of bias is just as important as the bias itself.

As noted previously, California Rule 5.220 states that the evaluator must include information in her report that "does not support the conclusions" even while including information that "does support the conclusions." In a similar vein, the *Model Standards* state, "[O]pinions expressed by child custody evaluators shall be based on information and data obtained through the application of reliable principles and methods. Evaluators shall differentiate among the information gathered, observations made, data collected, inferences made, and opinions formulated." The *Model Standards* go on to state, "[T]here shall be a clear correspondence between the opinions offered and the data contained in both the forensic report and the case file." In my opinion, one of the most glaring deficiencies in many child custody evaluation reports is the lack of clarity about the source of conclusions and inferences made by the evaluator. This will be discussed in greater detail in Chapter 10, focusing on the evaluation report.

Finally, in addition to items noted already, California Rule 5.220 has a lengthy section on ethics, stating that the evaluator must

maintain objectivity, provide and gather balanced information for both parties, and control for bias . . . protect that confidentiality of the parties and children in collateral contacts and not release any information about the case to any individual except as authorized by the court or statute . . . not offer any recommendation about a party unless that party has been evaluated directly or in consultation with another qualified neutral professional . . . strive to maintain a confidential relationship between the child who is the subject of an evaluation and his or her treating psychotherapist . . . operate within the limits of the evaluator's training and experience and disclose any limitations or bias that would affect the evaluator's ability to conduct the evaluation . . . not pressure children to state a custodial preference . . . not disclose any recommendation to the parties, their attorneys, or the attorney for the child before having gathered the information necessary to support the conclusion . . . [and] disclose to the court, parties, attorney for a party and attorney for the child conflicts of interest or dual relationships, and not accept any appointments except by court order or the parties' stipulation. (Rule of Court 5.220, (h) 1–10)

In my opinion, these ethical principles for child custody evaluations are stated well by the California Rule and should be followed by all child custody evaluators.

Though providing fewer specific practice guidelines or standards, the 2009 American Psychological Association (APA) *Guidelines* provide some very good Orienting Guidelines, such as “the purpose of the evaluation is to assist in determining the psychological best interests of the child,” “the child’s welfare is paramount,” and that the evaluation “focuses upon parental attributes, the child’s psychological needs, and the resulting fit.” Like the AFCC *Model Standards*, the APA *Guidelines* encourage evaluators to strive to “gain and maintain specialized competence,” “function as impartial evaluators,” “engage in culturally informed, nondiscriminatory evaluation practices,” and “avoid conflicts of interest and multiple relationships in conducting evaluations.” Additionally, the *Guidelines* provide certain procedural direction, suggesting that psychologists strive to “obtain appropriately informed consent,” “employ multiple methods of data gathering,” “interpret assessment data in a manner consistent with the context of the evaluation,” “complement the evaluation with the appropriate combination of examinations,” “base their recommendations, if any, upon the psychological best interests of the child,” and “create and maintain professional records in accordance with ethical and legal obligations.”

Following *Ethical Principles, Model Standards, Evaluation Guidelines*, and Rules of Court can help ensure that the evaluation procedures are appropriate.

Evaluator Biases

Much has been written about the potential for bias in child custody evaluations (see, e.g., Gutheil & Simon, 2004; Martindale, 2005; P. Stahl, 2006). While it is beyond the scope of this chapter to go into depth about potential evaluator biases, I will focus on a handful of potential biases and ways to avoid them. The material presented here was adapted from an article I wrote on avoiding bias in relocation cases (P. Stahl, 2006).

Gutheil and Simon (2004) list several types of bias that may affect an expert’s work as a way of helping to avoid the impact of those sources of bias. While all sources of bias are relevant in any family law or forensic matter, I will focus on some potential sources of bias and the risk that each has in deciding a particular relocation case.

Gender Bias

Gender bias is one of the more classic biases in family law, as custody evaluators, family mediators, and judges are frequently accused of gender bias and of treating women and men differently in the system. Politically, there are

mother's-rights advocates and father's-rights advocates who, by their very nature, take advocacy positions on a variety of issues. I believe that the research that focuses on "the psychological parent" (see, e.g., Goldstein, Freud, & Solnit, 1984) tends to support and favor mothers over fathers. Other observers interpret the growing research data on fathers and their involvement with children (see, e.g., Lamb, Sternberg, & Thompson, 1997) as supporting a father's-rights bias. It is critical for judges and evaluators to avoid gender bias in their work.

Cultural Bias

This refers to the potential for a judge or custody evaluator to make decisions based on aspects of the culture of one or both of the parties being served. One way this may surface in relocation cases is when one of the parents wants to move children to a country that has very different cultural experiences or to a country that has not adopted the Hague Convention on the Civil Aspects of International Child Abduction. While the cultural issues may be important, especially in a long-distance relocation, it is only one factor and might not be the only relevant issue to be considered. I have seen a situation in which an evaluator highlighted the distance to a South American country and the need for the child to adjust to a new culture as being more important than all of the other issues in a particular case, including the child's special education needs and the relative attachment differences, when making a recommendation against the move.

Primacy or Recency Bias

Primacy bias refers to the tendency to rely on the first pieces of information that an evaluator hears, whereas recency bias refers to an evaluator relying on the last pieces of information that the evaluator hears (Gutheil & Simon, 2004). These potential biases are a significant risk in all child custody evaluations. For example, if the evaluator hears early in the evaluation from one parent that the other parent who wants to move has often interfered with access, the hypothesis of the interference may take precedent over conducting a complete evaluation focusing on many factors. A similar risk occurs when an evaluator hears from a collateral witness toward the end of an evaluation that one parent has not attended any parent-teacher conferences. While this might be important data, the risk of bias occurs when the evaluator stops gathering more data because she believes that this last piece of data puts the proverbial nail in the coffin and stops gathering data that might be critical in reaching a conclusion.

Confirmatory Bias

Like the bias associated with primacy or recency effects, confirmatory bias is the tendency for a custody evaluator to look for certain data or evidence that supports a particular position and then try to make all of the other data

fit that position. This is also called anchoring bias: The evaluator anchors herself to particular data and does not consider other data that might support a different conclusion. Hence, the evaluator is looking for data to support the position that the evaluator holds or believes. This is a significant risk in many types of evaluations. For example, it is a risk in relocation cases if the evaluator believes that moves are either generally a good thing or generally a bad thing. Confirmatory bias is a risk when considering different parenting plans if the evaluator believes that children need a 50–50 arrangement, or that such an arrangement is harmful to children. Confirmatory bias interferes with the evaluator's ability to look for data or evidence that does not support the conclusion reached. In order to reduce the risk of confirmatory bias, the evaluator must consider multiple hypotheses and continue gathering all relevant data before reaching any conclusions on the case.

Bias From Psychological Test Data

Psychologists who are prone to view cases a certain way are at risk for interpreting psychological test data to support a particular position rather than using it to generate hypotheses. While there is significant risk for the misapplication of psychological test data in any child custody evaluation (see Chapter 8 for more on psychological testing), it is my opinion that there is great risk for this misapplication of test data to support a particular conclusion in a relocation case. For example, if a parent in a relocation case tests as defensive and presents herself in a favorable light on an Minnesota Multiphasic Personality Inventory (MMPI-2), as many custody litigants do (see, e.g., Bathurst, Gottfried, & Gottfried, 1997), a psychologist who is reluctant to recommend in favor of a move might use that data, and that data alone, to suggest that she cannot be trusted to support the child's relationship with the other parent after she moves. Similarly, a psychologist might suggest that a parent who scores as narcissistic on the Millon Clinical Multiaxial Inventory-III (MCMI-III) and the Rorschach Inkblot Test might not be sufficiently child-focused to be the primary parent and recommend that the other parent be able to move with the child. The problem with both of these situations is that psychological tests should be used only to generate hypotheses about people's personality traits and should never be used to generate recommendations (Gould, 1998; P. Stahl, 1999).

“Truth Lies Somewhere in the Middle” Bias

I have identified a few potential sources of bias that are not mentioned elsewhere in the literature. One example is what I call the “truth lies somewhere in the middle” bias. Many evaluators, in particular those who are at risk for burnout because they have worked in the system for a long time, are at risk for exhibiting this bias. There is a tendency to perceive that a couple engaged in conflict contributes equally to this conflict. While that is potentially true in any divorce, there are other instances in which one parent drives

most of the conflict and the other parent tends to be more reactive to that conflict. This “truth lies somewhere in the middle” bias prevents evaluators from recognizing the unique contributions of each parent to the conflict. However, these unique contributions to the conflict are likely to be an important and relevant factor to consider. Assigning equal blame to both parents when the responsibility for different levels and components of the conflict are more likely caused by one parent rather than the other parent is a mistake.

“Attila the Hun Doesn’t Marry Mother Theresa” Bias

Another potential bias that is not described elsewhere is what Rotman called the “Attila the Hun doesn’t marry Mother Theresa” bias (A. Rotman, personal communication, 2000). Many experienced evaluators have long recognized that, in most families, parents are relatively equal in their parenting ability. Like the “truth lies somewhere in the middle” bias, this bias presupposes that a healthy parent is not likely to marry a non-functional parent. While that frequently may be the case, it is not necessarily the case. When looking at individual family members, there are many instances in which one parent or the other is clearly psychologically healthier than the other, has a healthier attachment with the child, and/or has a parenting style that is more consistent with a particular child’s temperament and needs.

“For the Move” or “Against the Move” Bias

All of this leads to my concern that many evaluators have a bias that moves are either a good thing or a bad thing for children. Those who tend to be pro-move take the position that a custodial parent who wishes to move should generally be allowed to move as long as the custodial parent has a legitimate reason for moving and/or is not attempting to interfere with the access rights of the other parent. They might bring a unitary approach to relocation cases in which, once they determine that one or the other parent is “the psychological parent,” and once they determine that there is a legitimate reason for moving or that there is no evidence of interference with the other parent’s access, the expected outcome is that this parent can move with the child. Jurisdictionally, there are many states in which case or statutory law supports such a presumption in favor of moving, but there is no evidence in the literature to suggest that psychologists should have such a presumptive belief in relocation cases.

Similarly, there are many custody evaluators who perceive that it is a parent’s responsibility to stay near the other parent in order to preserve the child’s access to the other parent and the involvement of both parents in her life. I believe that, while there is research data to support the belief that children benefit from both parents’ active involvement in their life (J. Kelly & Emery, 2003), extrapolating that data to support a presumption against moves confounds the issue. Clearly, there are many circumstances in which a move is

both legitimate and justified, whether for academic, economic, or other personal/family reasons. In those cases, one parent or the other is going to move. It is incumbent on evaluators and judges not to confuse the preference for shared co-parenting that may exist in some of the research and some statutory laws with a presumption that moves will harm children. Rather than having a presumption against the move, it is my view that evaluators and judges must consider and weigh the relative risks and benefits of having the child move with one parent as opposed to having the child not move and remain primarily with the other parent. Those observers who encourage “conditional change of custody orders” to try to prevent some parents from moving (e.g., Braver, Ellman, & Fabricius, 2003) run the risk of using an “against the move” bias as a way to keep both parents in the same geographic location.

Biases are potentially insidious and can interfere with a neutral analysis of data. Ethics require awareness of biases to reduce their impact.

Reducing the Risk of Bias

One of the ways to reduce the risk of bias affecting a person’s conclusions is to recognize clearly that biases exist and that we are all at risk of being affected by our biases. Once they consider this fact, evaluators can examine their conclusions and decisions and look for trends or evidence of such bias. For example, some evaluators have rarely recommended in favor of a move. Other evaluators typically recommend joint physical custody. Still others might never recommend shared parenting with the belief that children feel like Ping-Pong balls going back and forth between their parents’ homes. Some have taken the position that overnights with the noncustodial parent are never a good idea until a child reaches at least 3 years of age, while others posit that infants can adjust well with any schedule that encourages both parents’ active involvement. All of this is based on bias and not the particulars of the case. If these evaluators do not examine the reasons for their beliefs, they can never determine whether they are based on some type of bias or not.

Suppose you have discovered that you are at risk of letting your bias contribute to your decision-making. Once you recognize that bias exists, the next step you can take is to participate in peer consultation. Discuss your challenging cases (and most relocation cases and infant cases are challenging) with several peers, especially those whom you know to be more experienced in these matters. I suggest that you use that consultation to challenge your thinking, so it is helpful to choose colleagues who might not always see things the same way as you. Encourage your colleague to play devil’s advocate with you, to force you to make a less biased analysis.

Along the same lines, play devil’s advocate for yourself. Challenge your reasoning. Ask yourself if you have considered all of your data or if you have

showed evidence of confirmatory, recency, primacy, or anchoring bias in your report. If you have used multiple methods to gather data (which is expected) and maintained multiple hypotheses at each stage of the case, and if you have considered and integrated all data before reaching conclusions, you will be at less risk of having a bias affect the outcome of a particular case.

Another excellent way to reduce the risk of bias is to take, and teach, continuing education courses in all areas of assessment and family law. Evaluators need to stay up to date on all of the relevant research in the areas of family law, including relocation, domestic violence, issues of abuse, child development and attachment theory, alienation, the effects of divorce and high conflict on children, and ways to ameliorate the negative effects of divorce. In so doing, they can reduce the likelihood that biases like the ones discussed in this chapter will contribute to their conclusions.

THE BOTTOM LINE

- The AFCC *Model Standards*, the American Psychological Association *Guidelines*, and the Rules of Court exist to help guide evaluators toward optimal practice. Even if you do not live and work in a jurisdiction with Rules of Court guiding your practice, or even if you are not a psychologist or AFCC member, these *Model Standards*, *Guidelines*, and Rules of Court provide sound guidance to any child custody evaluator.
- Important tips include:
 - Always get a court order before conducting the evaluation
 - Obtain informed consent before conducting your evaluation and disclose the limits of confidentiality of the process to all participants (parents, children, and collateral witnesses)
 - Avoid ex parte communication with the judge or an attorney for one side
 - Use multiple methods of data gathering in conducting your evaluation
 - In your report and your testimony, present all of your data, including data that do not support your conclusions
- Child custody evaluations are for the court and the family, with the focus being on the best interests of the child. Reports should always be written with that in mind.
- The potential for bias exists for all of us. Examine your practice and look for sources of bias. Maintain peer consultation and take (and teach) continuing education in many child custody and divorce areas.