



# The Who, When, and Why of Using Experts in Contested Custody Cases

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**T**his article serves as a guide on how one can optimally use psychologists in contested custody cases. While using a psychologist as a testifying expert in a litigated case may be the first role that comes to mind, there are valuable roles specialized forensic psychologists can fulfill in custody matters, over and above preparing a custody evaluation and testifying about it. These roles will be touched upon in this article.

Family law practitioners regularly encounter complicated and emotionally driven facts and circumstances in custody cases. Typically, these emotionally driven narratives feature psychologically based themes and concerns about the mental health, psychological stability, and psychological functioning of one or more members of the family. Family lawyers often learn bits and pieces of information about the psychological condition of parents and children and their interrelationships in custody matters, but because lawyers are not trained mental health professionals, the family lawyer probably lacks a depth of understanding of the issues that will allow for a compelling, powerful, yet nuanced presentation of the psychological issues. While most psychologists and lawyers

would agree that settling cases usually presents the family with preferable outcomes and less systemic damage, getting to that place—or failing to get to that place—is a journey that is best for a family lawyer to do with the guidance and assistance of a capable, experienced forensic psychologist with a background in child psychology and family psychology and extensive experience with how the family law courts work.

## What Is a Forensic Psychologist?

It is essential to first understand that forensic psychologists and clinical psychologists are different. They have different methods and different ways of approaching the gathering of data, they use different analytic processes, and the purpose and aim of their work are fundamentally different. It is true that the same psychologist may practice both clinical psychology and forensic psychology. However, the service provided determines whether the psychologist is working clinically or forensically in a particular instance. Broadly speaking, clinical psychologists are concerned with the diagnosis and treatment of psychological disorders. Their focus is psychotherapy and the alleviation of suffering

through applying sound clinical interventions intended to help the patient. A clinician will work with a patient and will intentionally foster a positive alliance between the clinician and the patient. The forensic psychologist is there to assist in a legal process. They are not clinical treatment providers; the individuals or families assessed are not patients because the forensic psychologist focuses neither on the diagnosis and treatment of disorders nor directly on the alleviation of suffering. No doctor-patient relationship is established, nor is there doctor-patient confidentiality because there is no patient and no treatment. The forensic psychologist will

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attempt (and hopefully succeed) to establish rapport with those being assessed, but the concept of a positive treatment alliance is, obviously, not relevant. In many forensic assessment situations, it is not realistic to conceptualize the formation of a positive alliance because the psychologist may be seen by the examinee as powerful, influential, and even an adversary. The American Psychological Association (APA) has promulgated specialty guidelines for forensic psychology, and the Association of Family and Conciliation Courts (AFCC) has promulgated model standards for child custody evaluations. Am. Psych. Ass'n, *Specialty Guidelines in Forensic Psychology* (2011), <https://bit.ly/3tSP2zw>; Ass'n of Fam. & Conciliation Cts., *Model Standards of Practice for Child Custody Evaluations* (2006), <https://bit.ly/3qi2Wco>. The APA *Specialty Guidelines* define forensic psychology as "professional practice by any psychologist working within any sub-discipline of psychology (e.g., clinical, developmental, social, cognitive) when applying the scientific, technical, or specialized knowledge of psychology to the law to assist in addressing legal, contractual and administrative matters." APA, *Specialty Guidelines*, *supra* at 1.

No doubt you're familiar with the forensic psychologist as child custody evaluator. This is the most familiar role for the forensic psychologist in family law cases. This article, however, is not focused on this well-known role. Instead, here we focus on the forensic psychologist as a consultant. Like so many things, consultants come in various shapes and sizes.

### **The Testifying Forensic Psychology Consultant**

In the child custody matter, the forensic psychology consultant can be used in one of two broad roles, but not both. The first role is as a testifying expert. You're probably familiar with this role. In this role, you may ask the forensic psychologist to review the work product of the child custody evaluator, provide you with opinions about the strengths and weaknesses of the child custody evaluator's work product, and give you a sense of whether the weaknesses in the report are of a nature that significantly affects the integrity, reliability, and validity of the work product. In this role, the forensic psychologist is not an advocate for outcome (although you certainly would not put this testifying consultant on the stand if you didn't know what their opinions are and if you didn't think that their opinions would help your case and get you a better outcome).

You may also be familiar with the role of the "didactic expert"—a forensic psychologist who offers educative testimony about a substantive issue in the case (such as relocation, domestic violence, or gatekeeping). Because both are testifying consultants, they maintain neutrality to the case outcome and do not assist you, the retaining attorney, in specific elements of case preparation (because these elements are a part of advocacy). When testifying experts also play advocacy roles or assist you with your advocacy, they cannot properly be viewed as being neutral to the outcome. This harms the credibility of the forensic psychologist's testimony in the eye of the court. In turn, this diminishes the usefulness of their testimony (which, once again, you would not put on if you didn't think it would help your case). Like the testifying consultant who has reviewed a child custody evaluation, the didactic expert is someone whose opinions are known to you and whom you would not designate as a witness if you did not have a strong belief that their testimony would be helpful in your advocacy. Yet, the didactic expert, because they are a testifying expert, is not an advocate for outcome.

### **Addressing the Custody Evaluation and the Legal Framework of Expert Opinions**

What constitutes an expert opinion? Turning to the Federal Rules of Evidence, Rule 702, likely to be followed in verbatim or close to exact language by state rules of evidence, an expert is described as the following:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in an opinion otherwise, if:

- (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine the fact in issue;
- (b) The testimony is based on sufficient facts or data;
- (c) The testimony is the product of reliable principles and methods; and
- (d) The expert has reliably applied the principles and methods to the facts of the case.

For an opinion to be accepted as expert, the opinion and the witness who has developed it and has offered to testify to it must meet the above qualifications. But it would be a sound practice to have your nontestifying consultant ground their psychological opinions and analysis in the requirements articulated at Rule 702(a) and (d).

Generally, in current times, the court appoints one custody evaluator or neutral psychologist to administer psychological testing. In theory, that evaluator is the "court's witness" and is neutral. A good use of your nontestifying forensic psychologist is to assess the evaluator's opinion for a variety of weaknesses. If you are using a testifying forensic psychologist to issue an opinion or challenge a court-appointed evaluator's opinion, you will want to make sure that their opinion has forensic integrity.

An opinion can soundly be assessed by looking for bias represented in the conclusions or failure for the conclusions to be drawn from the data, identifying the nexus (or lack of nexus) between the data and the recommendations of the author of the opinion, assessing the developmental appropriateness of recommendations made by the expert, and assessing how the recommendations are or are not developmentally appropriate given the family dynamics. A forensic psychologist, by training and experience, can detect these issues and help the attorney better understand them. And the forensic psychologist as consultant can help the custody lawyer elicit capable evidence and develop effective questioning to showcase the soundness or lack of discipline in an opinion to be presented to the court.

A testifying forensic psychology expert also can provide an invaluable resource to the court by providing didactic testimony. The expert can provide educational testimony about specific issues such as domestic violence and its effects, relocation, resist/refusal dynamics, the dynamics of high-conflict parents and the impact of their parenting on the children, and parental gatekeeping styles and the impact of parental gatekeeping styles on parenting plans, to name a few. A nontestifying forensic psychology consultant can teach the custody lawyer the social science behind these issues and how they are implicated in the individual case.

### ***The Forensic Psychologist as Nontestifying Consultant***

Retaining a forensic psychologist to work with you and perhaps your client is a powerful role for the forensic psychology consultant, and one that is not fully understood

by many attorneys. This role is broad, and the consultant can carry out many duties and tasks to assist you with your advocacy. Because the consultant will not be designated and will not testify, it is permissible for them to play advocacy roles. Whereas the forensic psychology consultant would not meet with your client or have contact with your client in a testifying role for a variety of reasons, the nontestifying consultant may have contact with your client if you wish and the consultant is agreeable to doing so. Some consultants, regardless of role, choose not to work directly with litigants.

What are some roles and tasks that a nontestifying consultant can play? Perhaps one of the most compelling roles is one where the consultant helps the legal practitioner better understand the psychological elements and themes in their case and can also help them understand their client's psychology and psychological functioning. They can help the attorney to know the social science. This helps the legal professional advocate more accurately and more effectively and assist with client education and decision making. Retaining a forensic psychologist can also help lawyers understand the psychological elements of the case along with the psychological dynamics and underpinnings of the

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conflict. Ultimately, a forensic psychologist can help the attorney's client make good decisions and free the attorney to practice law, rather than attempt to manage client reactivity and emotionality.

Psychologists are also skilled and trained in methods of persuasion, methods of inquiry, and strategies for layering questions for maximum efficacy at soliciting information. Therefore, nontestifying forensic psychology consultants can also be very helpful to attorneys in drafting questions for trial and for deposition. In line with this, consultants can, if desired, be present during trial and deposition to adjust the line of inquiry in real time, assisting the attorney on the fly as events unfold and evolve in the courtroom or deposition room. Because the writing of questions is an advocacy behavior, this should never be undertaken by a testifying consultant.

The proper inquiry and standard for child custody decisions are always the determination of the best interests of the child. Presumably, when assessing your case, you are attempting to present to the court evidence that informs how factors underlying the determination of the best interests of a child are met or not met in your matter. In some states, there are statutory factors to be considered in concluding what is in a child's best interests. In some states, the guidance is more amorphous. In either case, however, how the facts bear on the best interests standard is the information that must be presented to the trier of fact. A forensic psychologist can help you determine how to best address the relevant factors in your particular case, how to present them to the court, and how to tie them to the statutes and case law underlying a finding of the best interests of a child in your jurisdiction. The capable forensic psychologist can also reference social science literature that may support how the data in a case relate to the best interest factors in a case.

While a consulting nontestifying expert may interact with the practitioner and the client without turning over his or her file to the other side, in most jurisdictions, if one decides later on that the consultant will be a testifying expert, his or her entire file will be discoverable, effective as of the date of retention, not the date of designation. If you are uncertain whether you will convert the forensic into a testifying expert, act accordingly in terms of what you write and provide to the consulting forensic expert from the outset.

Remember that your consulting forensic expert should not meet with a child even when the consultant is not a testifying expert—and even when your client has sole custody of the child and can unilaterally consent to the consultant having contact with the child. Doing so directly draws the child into the litigation and into the adult issues and is therefore to be avoided. Meeting with and interviewing children belongs to an agreed-upon and/or court-appointed psychological tester or custody evaluator in a case. Customarily, such roles are filled by individuals appointed by the court as neutral resources to it. In many states, a party is permitted by the rules of evidence, to call an expert to rebut the conclusions of the court-appointed expert. Keep the lines of authority clear and make sure that you and your forensic psychologist agree on and specifically state the forensic's role from the outset of your and their involvement in the case

By way of summary, you might use nontestimonial consultants for various purposes, such as:

- Helping formulate case strategy.
- Reviewing another expert's work without testifying.
- Assisting in formulating direct and cross-examination questions (for either deposition or hearings).
- Identifying and assisting in retaining testimonial experts.
- Helping prepare witnesses.
- Providing expert information about a particular area, such as domestic violence, relocation, and gatekeeping.

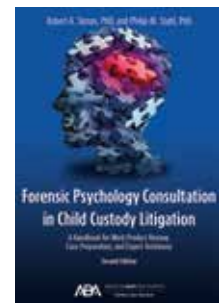
- Reviewing the relevant social science literature on factors at issue in a case.
- Assisting with client education and client management.
- Being present in depositions and trial as a "second chair" or to caucus and discuss matters during breaks and recesses.

In certain jurisdictions, a nontestifying or undisclosed "expert" will not be permitted to attend depositions and could be excluded from a courtroom, particularly if the court determines that the courtroom should be sealed to protect the child's interests.

While good lawyers try to keep abreast of developments in law and literature relating to their cases, obtaining the assistance of a qualified forensic psychologist with expertise in family law will aid you in more fully understanding the psychological issues and dynamics in your particular case. Those issues can range from a specific adjustment or psychological disorder to general pressures often present in divorce—particularly custody matters—such as distrust and blame, anger, self-reproach, and feelings of abandonment and resentment.

This article should provide you with a solid overview of the essential issues when working with forensic psychology consultants. When you can do so, bringing a consultant onto your team can add power and expertise to the team. This enhances the quality and efficacy of your legal advocacy. **FA**

*Adapted from Robert A. Simon & Philip M. Stahl, Forensic Psychology Consultation in Child Custody Litigation: A Handbook for Work Product Review, Case Preparation, and Expert Testimony (2d ed. 2020) (www.ShopABA.org or www.ambar.org/flbooks) by Dr. Simon and Livia Barndollar, a member of the Family Advocate editorial board and a member of Pullman & Comley LLP's Family Law Practice in Westport, Connecticut.*



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