Association of Family and Conciliation Courts
Colorado Chapter

Spring News

Spring 2015
Volume 6, Issue 1

President's Message

From Sarah Quinlan, JD

Welcome to our spring newsletter! Our Board of Directors has been hard at work through the winter working on many exciting projects. Of particular note, is our upcoming conference at Beaver Run Resort in Breckenridge. Our theme is "Brain and Bias" delving into topics relevant to both legal and mental health professionals. Our keynote speakers are Jennifer Kresge, L.M.F.T., from California and John Zervopolous, Ph.D., J.D., ABPP, from Texas.

Ms. Kresge is a mediator in private practice in St. Helena, CA and an adjunct professor at Southern Methodist University in Plano, TX. She has undergraduate and graduate degrees in psychology and provides training in mediation and neuroscience. She is President of the Association for Dispute Resolution of Northern California, and serves on the Napa Valley Leadership Council. She has been involved in post graduate coursework in neuroscience.

Ms. Kresge has presented on the subject of neuroscience, family law and how neurological research correlates with behavioral observations. Her past presentation topics include:

- *Brain Compatible Parenting: Sculpting the Brain, How Children Develop Who They Are and the Way They Become*
- *Hot Minds or Hot Heads? How the Brain Reacts to Conflict and How to Use Strategic, Skill-Based Tools to Help Mediation Clients*
- *Neuroethics: Exploring What We Know What We Choose and How We Decide Right and Wrong*

Dr. Zervopolous, a board certified forensic psychologist and lawyer, is the founder of PsychologyLaw Partners; the author of *Confronting Mental Health Evidence* and *How to Examine Mental Health Experts,* and is based in Dallas, TX. Dr. Zervopolous works as a consulting expert to help lawyers manage mental health materials and evidence in their cases and to guide trial strategy.

Dr. Zervopolous' past presentation topics include:

- *ABPP - DSM-5 and Mental Health Testimony: A Good Match?*
- *How Do You Know? Separating Wheat From Chaff in Mental Health Testimony*.
- *Confronting Mental Health Evidence*

This event will also include local speakers, a silent auction and time to socialize with colleagues. Please mark your calendar for the weekend of October 9th-11th, 2015.

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I would also like the chance to introduce the incoming president, Barbara Pevny. Barbara is a family court therapist for the Southern Ute tribe and is based out of Ignacio, Colorado. Barbara works as a Guardian ad Litem, supervises the juvenile diversion programs, and conducts custody evaluations and mediation as well as providing individual and family counseling services. Barbara has worked tirelessly this year as the vice-president, chair of the Membership Committee and as a member of the Program and Outreach Committees.

Finally, I want to highlight that the AFCC 52nd Annual Conference, *Children in the Court System: Different Doors, Different Responses, Different Outcomes,* will take place on May 27-30, 2015 in New Orleans, LA. Also the AFCC Regional Conference, *Do You Hear What I Hear? Listening to the Voice of the Child,* will take place on November 5-7, 2015, in Columbus, OH. You may register for these programs at afccnet.org.

Sarah Quinlan

If you or a COAFCC member you know has recently received an award, promotion or recognition please let us know so we can share the great news. Email: April Freier at aprilfreier@hotmail.com

COLORADO AFCC

Dedicated to improving the lives of children and families through the resolution of family conflict

Join Today!

Benefits of Membership:

- Be part of a vibrant network of Colorado family law professionals
- The COAFCC semi-annual newsletter is packed with local news, articles, links to resources, and more
- Discounts for COAFCC conferences & training programs
- All the benefits of AFCC membership: Subscription to Family Court Review; discounts for malpractice insurance & publications; access to the Parenting Coordination Listserv
- Access to conference audios
- Support & advocacy for local community networking
- Representation on COAFCC Board of Directors
- Participation on committees, task forces & projects
- Mentoring and consultation from experts around the state

Upcoming AFCC Conferences

AFCC 52nd Annual Conference

Children in the Court System: Different Doors, Different Responses, Different Outcomes

May 27-30, 2015
Hilton New Orleans Riverside
New Orleans, LA

AFCC Regional Conference

Do You Hear What I Hear?
Listening to the Voice of the Child

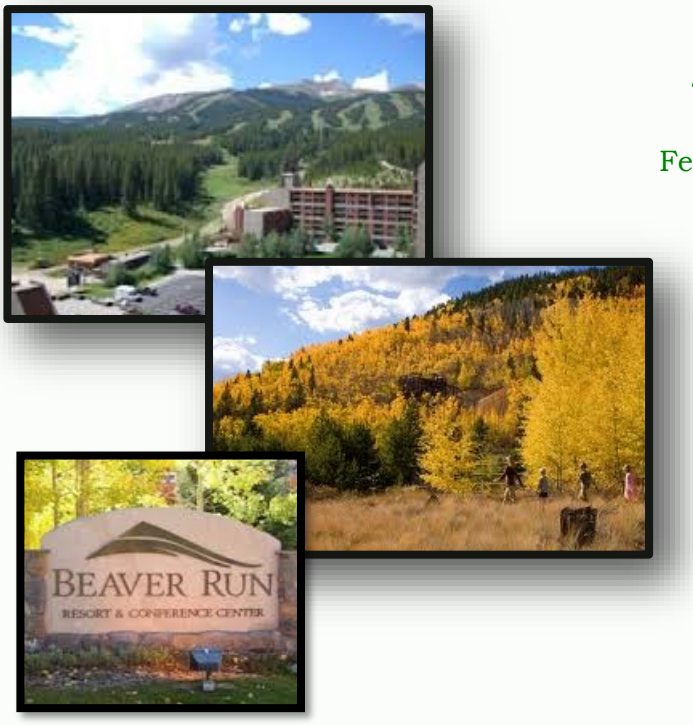
November 5-7, 2015
Columbus, OH

COAFCC 2015 Fall State Conference

The Colorado Chapter of AFCC has been planning a new conference format for the Fall of 2015!!

Save the weekend of October 9 to October 11, 2015 for an extended conference and networking event!

Bring your family and enjoy time in the Colorado mountains!
The conference will be at Beaver Run Resort in Breckenridge, Colorado.



Brain and Bias

Featuring 2 nationally-known speakers:
Jennifer Kresge, MA, LMFT
John Zervopoulos, Ph.D., JD

Who should attend?

Judges
Lawyers
Mental Health Professionals
CFI and PRE Evaluators
Mediators
Family Court Facilitators
Parent Educators
Child and Family Researchers
All professionals who are dedicated to resolving family conflict!

More information to come! Mark and save this date on your calendar!

Support COAFCC by Donating to the Silent Auction!

The COAFCC Silent Auction is a fun opportunity to support the association's ongoing efforts to bring national speakers to Colorado at a reasonable cost to attendees and to provide scholarships to members to attend AFCC and COAFCC conferences. The silent auction will be held on Friday evening, October 9th, at the Welcome Reception. Please donate an item and/or attend the auction and bid! You do not need to attend the conference to donate. Wonderful items for the auction include time shares, tickets to special events, gift certificates, jewelry, sports memorabilia, fashion accessories, electronics, collectibles, books, wine, gift baskets, and more! It's a fun time to relax and socialize!

To donate an item to the Silent Auction, please contact Kate McNamara at kathleenmcnamaraphd@gmail.com.
We would GREATLY appreciate your support!

Psychological Testing in Parental Responsibility Evaluations: An Ethically Informed Approach

Robert A. Simon, Ph.D.

Robert A. Simon, Ph.D.

Robert A. Simon is a nationally recognized leader in forensic psychology consulting. Based in San Diego, CA, Dr. Simon is retained by attorneys throughout the county to consult on custody cases and provide expert witness testimony. Dr. Simon is a member of the Board of Directors of the Association of Family & Conciliation Courts and serves on the editorial board of the *Family Court Review*. He is a member of the Committee on Professional Conduct and Responsibility of the California Bar Association, a member of the Executive Committee of the California Bar Court and a senior member of the Ethics Committee of the California Psychological Association. He is the co-author of the book "Forensic Psychology Consultation in Child Custody Litigation: A Handbook for Work Product Review, Case Preparation and Expert Testimony". Dr. Simon has also published articles in scholarly journals and is a regular contributor to the Section of Family Law Newsletter published by the ABA.

Child custody evaluations, known as Parental Responsibility Evaluations (PRE) in Colorado, are complex, multi-modal and multi-factorial investigative forensic assessments. When done well, they can be helpful and useful aids to judicial fact-finding and decision-making. While PRE's are fundamentally designed to assist the Court, when well done, PRE's provide a clear and dynamic presentation of the family, how it functions, what the strengths are, what the weaknesses are and how a child-sharing plan can support the best interests of the children. Therefore, although PRE's are not specifically designed to benefit the family, they can do so when they are well executed and when the report is written in a clear, descriptive, objective and balanced manner. When done poorly, PRE's can mislead the Court and have the potential to play a tragic role in ineffective judicial decision-making, thereby potentially harming families. Further, to the extent that the PRE is not done in a balanced manner, contains bias and is written in a manner that is not objective and balanced, harm to the family is a highly likely outcome. A well-done child custody evaluation depends on the skill of the evaluator with regard to the multiple components of the evaluation process. Given that the conclusions reached by the evaluator should result from the convergence of data gathered in the evaluation process[1], it is important that each component be carried out with skill and care. The purpose of this article is to present an ethically informed approach to the use of psychological testing in PRE's and to present an ethically informed framework for the role of psychological testing in PRE's.

Bow and Quinnell (2001)[2] report the frequency with which child custody evaluators utilize various forms of data gathering. PRE's typically consist of the following major data gathering components:

- Interviews with the parents including personal history and history of the marital relationship
- Interviews with the children (when age appropriate)
- Observations of parent-child interactions
- Completion of questionnaires
- Interview with adults who also live in the parental homes
- Review of case documents (for example: declarations, affidavits, court orders, emails, text messages, voice mails, medical records, educational records)
- Interviews with collateral informants (for example: teachers, physicians, therapists, members of the extended family, child care providers, neighbors, clergy)

Quinnell and Bow (2001)[3] report on the frequency with which testing was used and with which various psychological tests are used in PRE's along with the amount of time spent by evaluators conducting, scoring and interpreting tests. They found that approximately 90% of adults and 60% of children are tested. They learned that an average of three hours was spent in testing with adults and two hours with children. Thus, a substantial amount of time (and therefore money) is spent on psychological testing in custody evaluations according to this research. The authors

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found that the MMPI-2 was the most frequently used test, with 92% of evaluators having used MMPI-2. Next most frequently used was the MCMI II/III, with 52% of evaluators having used this test. These results are not surprising given the ease with which these tests are administered and given the ready availability of machine scoring and computerized interpretation of these tests.[4]

"Psychological tests are not the precise and exact instruments many think they are – the many including some attorneys, some judicial officers and, yes, some mental health professionals."

While the findings of the survey research of Bow and Quinnell are interesting and of importance, these authors do not address how testing is best used in custody evaluations. This topic is the subject of some controversy and has been addressed by Brodzinsky (1993)[5] as well as Otto, Edens and Barcus (2000)[6] who discuss individual tests and their applicability to the custody evaluation process. What follows in this article is an approach to the use of psychological tests that relies on ethical principles and practice standards and guidelines with regard to the use of psychological tests in PRE's.

The Ethical Principles of Psychologists and Code of Conduct of the American Psychological Association (2010)[7] offers crucial guidance in the use of psychological testing. Standard 9.02 reads in pertinent part:

> **9.02 Use of Assessments**
>
> (b) Psychologists use assessment instruments whose validity and reliability have been established for use with members of the population tested. When such validity or reliability has not been established, psychologists describe the strengths and limitations of test results and interpretation.

The Model Standards of the AFCC, Standard 6.4, previously referenced herein, reads in pertinent part:

> **6.4 Proper Use of Assessment Instruments**
>
> (b) Evaluators shall not use instruments for purposes other than those for which they have been previously validated. Evaluators shall be mindful of cultural and language diversity and the impact that these may have on test performance and the resultant data.

The Specialty Guidelines for Forensic Psychologists of the American Psychological Association (2011)[8] states in pertinent part:

> **10.02 Selection and Use of Assessment Procedures**
>
> When the validity of an assessment technique has not been established in the forensic context or setting in which it is being used, the forensic practitioner seeks to describe the strengths and limitations of any test results and explain the extrapolation of these data to the forensic context. Because of the many differences between forensic and therapeutic contexts, forensic practitioners consider and seek to make known that some examination results may warrant substantially different interpretation when administered in forensic contexts.

It is fair to say that evaluators, even those newer to the field who are less experienced with the rigors and responsibilities of being an evaluator, wish to provide the Court the best guidance possible. It is also fair to say that judicial officers take seriously their responsibility in making findings and orders that impact the lives of children. It is in this context that psychological testing has the potential to be utilized improperly and in a manner that can ultimately be misleading. Psychological tests are not the precise and exact instruments many think they are – the many including some attorneys, some judicial officers and, yes, some mental health professionals.

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PSYCHOLOGICAL TESTING IN PRE'S

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Psychological tests measure psychological constructs or concepts. Before a test can truly be thought of as being fully accurate, experts have to agree as to what the construct is. Such consensus is difficult to come by. For example, there are multiple intelligence tests on the market. This is because the various tests are each built around a different concept or theory of what intelligence is. Experts in intelligence testing are not all in agreement about what intelligence is, what subskills comprise intelligence and whether intelligence is a state, a trait, a process or something else. Another problem with testing is measurement error. One can measure physical quantities such as weight or distance precisely. Measuring less objective and concrete concepts and constructs has a degree of measurement error contained within it. Also, psychological tests are constructed differently and there are different ways that people respond. Some are paper and pencil and are self-administered. Some are administered by an examiner with responses given verbally. Some are true/false. Some are multiple choice. Some are done on a Likert scale and so forth. Different types of tests and different modalities for presenting the stimulus or questions exist. Different ways of responding exist. In other words, not all tests are alike and the differences introduce something psychologists call "noise" or "error".

Psychological tests are probabilistic. They are not absolutely predictive but, instead, suggest the likelihood of something existing or not existing. Psychological tests must be "normed" or "standardized". To do this, the test developer chooses a reference population or populations to standardize the test on. This means that to the extent that the test is valid, it is valid for the reference population only. Tests are also developed for particular purposes. For example, a test might be developed to assess general personality functioning of adults between 18 and 30 who are seeking outpatient psychotherapy. If that is the normative population, then the test results are limited in their validity to that specific population.

In the domain of child custody, there are no tests on the market that are psychometrically valid and reliable, that were designed and intended to be used to assist in making the kinds of distinctions and decisions that are required in a PRE and that were normed on a population of child custody litigants. Looking back at the Standards and Guidelines cited above, what emerges is that the use of psychological testing in a dispositive manner in custody evaluations is ill advised and not supported by the Standards and Guidelines by which we carry out PRE's.

To put it all together, tests are probabilistic in nature, not certain in nature. There is always uncertainty, "noise" and measurement error with psychological tests. Also, tests are best used on populations for which they are normed and for the purposes for which they are developed. So, why are tests so frequently used in custody evaluations? It is my sense that this is done in part because evaluators frequently believe that testing is expected in evaluations even though there are no standards or guidelines that require testing. Also, because evaluators as well as attorneys and judicial officers want as much certainty as possible and because evaluators often lean on the (false) precision of testing to guide their conclusions, tests are included. Psychological tests can create a false impression of precision and certainty. Also, psychological testing and the domain of test development is something "owned" by the profession of psychology. Thus, psychologists use testing, in part, because it is a part of their identity as a profession. That said, psychological testing can and does have a useful place in PRE's. Because of the ways in which testing can be misleading and the ways in which it may lead to a false sense of precision and certainty, it appears wise to use a substantial measure of caution when using psychological testing

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"Tests are probabilistic in nature, not certain in nature. There is always uncertainty, "noise" and measurement error with psychological tests."

PSYCHOLOGICAL TESTING IN PRE'S

CONTINUED FROM PAGE 6

results in custody evaluation. Specifically, it is my position that testing is best used to *generate hypotheses* (Stahl and Simon, 2013)[9]. Remembering that one of the key ways in which forensic psychological assessment proceeds is by hypothesis generation (see, for example, Gould & Martindale (2007)[10] and that hypothesis testing is also a fundamental way of controlling for bias in a custody evaluation (see for example, Stahl and Simon (2013)), the results of psychological testing can be extremely helpful in generating hypotheses to be evaluated and tested using other data gathered during the evaluation process. This line of reasoning means that testing should not be used to reach conclusions or findings and that test results should also not be used as part of converging data that leads to conclusions or findings. Instead, psychological testing results can be wisely, safely and properly used if the use is limited to hypothesis generation..

[1] Martindale, D. A., Martin, L., Austin, W. G., Drozd, L., Gould-Saltman, D., Kirkpatrick, H. D., ... & Stahl, P. M. (2007). Model standards of practice for child custody evaluation. *Family Court Review*, *45*(1), 70-91.

[2] Bow, J. N., & Quinnell, F. A. (2001). Psychologists' current practices and procedures in child custody evaluations: Five years after American Psychological Association guidelines. *Professional Psychology: Research and Practice*, *32*(3), 261.

[3] Quinnell, F. A., & Bow, J. N. (2001). Psychological tests used in child custody evaluations. *Behavioral sciences & the law*, *19*(4), 491-501.

[4] Despite the ready availability of computerized interpretation of tests, the AFCC Model Standards of Practice for Child Custody Evaluation advises great caution in the use of computer generated test interpretations. This author echoes this caution and takes the position that computer generated interpretations are NOT best practice – the reason being that an individual should only use tests that they are competent to interpret themselves.

[5] Brodzinsky, D. M. (1993). On the use and misuse of psychological testing in child custody evaluations. *Professional Psychology: Research and Practice*,*24*(2), 213

[6] Otto, R. K., Edens, J. F., & Barcus, E. H. (2000). The use of psychological testing in child custody evaluations. *Family Court Review*, *38*(3), 312-340.

[7] http://www.apa.org/ethics/code/index.aspx

[8] http://www.apa.org/practice/guidelines/forensic-psychology.aspx

[9] Stahl, Philip M. and Simon, Robert A. *(2013) Forensic Psychology Consulting in Child Custody Litigation. Chicago: American Bar Association.

[10] Gould, J. W., & Martindale, D. A. (2007). *The art and science of child custody evaluations*. Guilford Press.

MEMBERSHIP UPDATES

Welcome New COAFCC Members!

Courtney Alberts
Jeffry Baker
Susan Coleman
Robert Cooper
Nicolett Darling
Theresa Dunn
Janet Jones
Drew Richman
Catherine Roberts

MEMBERSHIP COMMITTEE REPORT

By: Barbara Pevny

COAFCC membership has remained essentially stable through the year 2014-2015. With the upcoming first annual COAFCC weekend conference, the membership committee expects to see a rise in enrollment. The membership committee is in need of additional members. Please contact Barbara Pevny, Membership Committee Chair if you are interested in being a part of this committee.

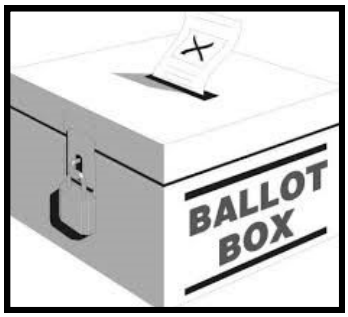
MEMBER SPOTLIGHT

Welcome New COAFCC Board Member!

Laurie Mactavish is a mediator by profession and has a Masters of Science in Management degree from Regis University. She has been an ombudsman (Technical Delegate) in the equestrian disciplines of dressage and eventing with the US Equestrian Federation for the past 30 years and worked both national and international competitions throughout the US. She has held the position as Family Court Facilitator for the past 13 years in the Colorado 5th Judicial District where she handles all domestic cases in the four county district. In August 2014, she implemented a new program entitled Rural Resources for Couples and Families in the Courts, providing no cost services to pro se litigants in Domestic Relation cases structured as half day workshops. She has been a Colorado Chapter member of AFCC since its formation. She has trained and ridden horses as a life-long passion and added crewing four years ago and rows at day break on Lake Dillon, Summit County, when not thinking of the old town of Dillon at rest under her oars! She lives between Vail and Beaver Creek Mountains but her winter sport is Nordic classic skiing enjoyed almost daily when snow is perfect.

2015 Annual Member's Meeting & Elections

This year's annual meeting was held at the Marriott Denver Cherry Creek. In addition to an excellent presentation on The Use and Misuse of Experts by Susan M. Lach, J.D., and Mindy F. Mitnick, Ed.M., M.A., ballots were distributed to COAFCC members for the current Board of Directors election. The slate, as elected, was as follows:



Director Nominees:

Bill Fyfe
Elizabeth Seaboch

Officer Nominees:

Secretary: Frances Fontana
Treasurer: Jack Gardner
Vice President: Beth Lieberman

Barbara Pevny will move from the position of Vice President to the position of President in accordance with our bylaws.

A Special Thank You!

A heart felt thanks to our outgoing board members: **Kathleen McNamara**, **Charlene Slover, Mary Wollard**, and **Kimberly Wood**.

Thank you for your service to COAFCC!

MEMBER NEWS

Cori K. Erickson edited and wrote an introduction for the most recent volume of the *Innovations* series: *Innovations in Court Services.* This volume of the *Innovations* series describes six programs that address the challenge for courts to provide quality services that reduce the level of conflict for parents involved in court proceedings. The practical framework to develop and implement each framework is provided.

COAFCC members--we want to know when you publish a peer-reviewed paper or a book of relevance to family law practitioners so we can highlight your work in our newsletter! Let us know about awards, promotions and other honors. Send an email to April Freier, our administrative assistant: aprilfreier@hotmail.com.

Review: COAFCC SPRING CONFERENCE, April 10, 2015

The Use and Misuse of Experts

Presented by Susan Lach, J.D. and Mindy Mitnick, Ed.M., M.A.

Review by: Daryl James, J.D.

COAFCC's spring conference presented Susan Lach, J.D., and Mindy Mitnick, Ed.M., M.A., on "The Use and Misuse of Experts." They spent the day walking the audience through a thorough treatment of what to look for in an expert in a parenting case, what to expect and not to expect from the expert, and how to effectively and ethically present the expert's opinion to the court.

Of particular interest to this writer was the treatment of what to look for in a mental health expert and the various roles that an expert can play in a parenting case. Qualities most obviously needed in your expert are knowledge of the subject matter and appropriate training and experience. Other, subtle qualities were also named: sincerity, wisdom, and the ability to use common sense. How often has the case or opinion you presented been damaged by the lack of one of these qualities?

Mental health experts are typically hired as therapists, CFIs, or PREs, but there are a number of other roles they can fill. A parenting case can benefit from the input of a consultant to review and critique a PRE, or to explain and help implement the recommendations of the PRE. Each role places specific demands on both the expert and the attorney hiring her. Lach and Mitnick explained the practical needs and ethical boundaries of each role. For instance, coaching a litigant prior to a PRE presents some specific ethical problems, which have been an ongoing topic of discussion here in Colorado. While it can be done ethically, there is an acute need to watch the boundaries of the advice given.

What role does bias play in expert opinion? Lach and Mitnick explored the common kinds of bias and offered strategies to prevent them. Unexplored in the talk was what methods lawyers might use to expose them. Stay tuned on this topic, which will be the subject of COAFCC's fall conference this year. And if you want more specifics on this presentation, contact a COAFCC board member.

Susan Lach

Susan M. Lach is a partner at Tuft, Lach & Jerabek, PLLC, and practices in all areas of family law, including complex property valuation and division, contested child custody matters, spousal maintenance and child support issues, and drafting antenuptial agreements. She is trained in arbitration as well as mediation. Ms. Lach is a Fellow in the American Academy of Matrimonial Lawyers (AAML) and is past Minnesota Delegate to the National Board of Governors. She is past president of the Minnesota Chapter of the AAML and currently sits on its Board of Managers. Ms. Lach is a member of the Association of Family and Conciliation Courts. She is past chair of the Family Law Section of the Trial Lawyers of America. Ms. Lach has been consistently named to the list of the Top 40 Family Law SuperLawyers® in Minnesota by her peers. She has also been named to the list of Top 100 SuperLawyers® in Minnesota as well as the Top 50 Women Attorneys in Minnesota. Ms. Lach has lectured on topics related to family law through state and local bar associations in both Minnesota and Colorado as well as nationally for the American Academy of Matrimonial Lawyers, the American Bar Association, The Association of Family and Conciliation Courts, and the Association of Trial Lawyers of America. She also is an Adjunct Professor at William Mitchell School of Law, teaching family law.

Mindy Mitnick,

Mindy Mitnick, EdM, MA is a Licensed Psychologist practicing in Minneapolis. She received a Master of Education from Harvard University and a Master of Arts from the University of Minnesota. She specializes in work with families in the divorce process and with victims of abuse and their families. Ms. Mitnick has trained professionals throughout the country and abroad in identification and treatment of child abuse, the use of expert witnesses in child abuse and divorce cases, effective interviewing techniques with children, interventions in high-conflict divorce and the impact of psychological trauma. She has been a speaker for the National Child protection Training Center, National Center for Prosecution of Child Abuse, National Association of Counsel for Children, the Association of Family and Conciliation Courts, the American Academy of Matrimonial Lawyers and numerous statewide multidisciplinary training programs. Ms. Mitnick has written and taught extensively about the assessment of child sexual abuse allegations during custody disputes. Ms. Mitnick served as a member of the ABA Criminal Justice Section Task Force on Child Witnesses and as a member of the AFCC Task Force on Court-Involved Therapy. She is serving her second term on the Board of Directors of AFCC.

Outreach Committee Report

The Outreach Committee met during the Annual Meeting and several goals were identified:

- Looking into developing a mentoring program for professionals entering the field of family law and those wanting support and consultation
- Consulting with other state chapters to exchange ideas about how things are done, what they have found successful, etc.
- Looking into the possibility of combining the membership and outreach committees
- Contacting the Northern Colorado IDC to see if they might be interested in having a program presented there
- Working with the membership committee to examine possible incentives for joining COAFCC
- Developing ideas for involving young professionals and students

Join a COAFCC Committee!

Membership Committee
Recruits members, tracks incoming and outgoing members, welcomes new members and deactivates non-renewing members

Program Committee
Plans and implements COAFCC conferences and annual meetings, and coordinates with other groups on joint conferences

Outreach Committee
Plans and implements programs in northern, southern and western regions of the state.

Communication and Public Relations Committee
Tends to the many aspects of maintaining our website, publishing our newsletter and program brochures and communicating with our membership

We are especially in need of people to join our Program and CPR committees!

If you are interested in committee work please contact April Freier at aprilfreier@hotmail.com

MEMBERSHIP COMMITTEE
Chair: Barbara Pevny
Phil Hendrix
Charlene Slover
Kim Wood

PROGRAM COMMITTEE
Co-Chair: Sarah Quinlan
Co-Chair: Jennifer Moné
Shelley Bresnick
Frances Fontana
Phillip Hendrix
Daryl James
Armand Lebovits
Beth Lieberman
Kathleen McNamara
Barbara Pevny
Bob Smith

OUTREACH COMMITTEE
Chair: Beth Lieberman
Sunni Ball
Jack Gardner
Lynda Kemp
Kate McNamara
Barbara Pevny

COMMUNICATION AND PUBLIC RELATIONS COMMITTEE
Chair: Lenny Tanis
Marlene Bizub
Lorna Horton
Armand Lebovits

NOMINATION COMMITTEE
Chair: Kate McNamara
Sarah Quinlan
Barbara Pevny

BIDC and MDIC Joint Conference Review:

Emerging Consensus Views on Shared Parenting: AFCC Think Tank Findings and The Latest Thinking on Interventions: A New Approach in Colorado

Presented by: Marsha Kline, Ph.D., M.S.L., and Herbie DiFonzo, Esq.

Review by: Kate McNamara, Ph.D.

On March 13, 2015, the Boulder and Denver Interdisciplinary Committees teamed up to bring in Dr. Marsha Kline Pruett and attorney Herbie DiFonzo to present the findings of the AFCC Think Tank on shared parenting. In addition, attorney Beth Henson spoke about the *Resource Center for Separating and Divorcing Parent*s, a model program that provides cost-effective, multidisciplinary services for parents and children. The conference was well attended, audience participation was quite lively, and the program was highly educational and engaging.

The day was organized into four sessions. In session one, Herbie Difonzo presented a stimulating history of the "best interests" standard, explaining that the "Rule of One"—meaning one primary caretaker for the child—has reigned historically as being in the best interest of children. The "Rule of One" originated with the presumption that fathers should be the custodial parent. This was later replaced with the "tender years" doctrine, shifting the presumption in favor of mothers. Historically, the notion of shared parenting was considered a fairly radical idea due to the belief that it divides the child. Today, broadly defined shared parenting arrangements have become common for a variety of reasons. The issues related to imposing legislative presumptions in favor of shared parenting in disputed cases was discussed a great deal throughout the conference.

Mr. Difonzo described various presumptions that appear in state statutes across the country and discussed the issues that arise when specific time-shares are legally prescribed. For example, he noted that presumptions in favor of preserving the role of the primary caregiver serve to "freeze" the family at the time of the divorce, essentially creating a rebirth of the "tender years" doctrine. He made it clear that no state endorses a presumption of equal parenting time, although many states have proposed such legislation. He noted that many state statutes include language that encourage shared parenting, but all stop short of a presumption for equal time.

Following the presentation of these historical and legislative perspectives, Dr. Pruett discussed the emerging consensus viewpoints of the AFCC Think Tank on shared parenting and young children. She discussed early childhood development as well as attachment research. She pointed out the important and nuanced interactions between quantity and quality of parenting time, and how both are necessary to foster healthy parent-child attachments. She noted that when fathers are involved early on in the caregiving of their infants, they become increasingly sensitive to their infants' needs. Dr. Pruett spoke of the predictive value of secure parent-child attachments in early childhood for healthy global functioning of children as they mature, but noted the limitations to defining secure and insecure attachments. She also discussed the research that clearly indicates that fathers' involvement in their children's lives also predicts positive outcomes for children and is an equally important consideration.

Dr. Pruett described the special risks for very young children (ages 0-3) when their parents separate. To name a few, she mentioned that parents often underestimate the impact of their behavior on very young children, there is an increased risk of father non-involvement, parents are more likely to disagree on parenting, and young children are unable to express their needs directly or act on their own behalf. She discussed the issues that need to be considered when crafting parenting time for infants and young children, such as determining how much time is needed to ensure that both parents will be invested in their child's early development, how much time is needed for a child to remain behaviorally secure in each parent-child attachment, and how much time away from each parent is harmful to the parent-child attachment. Dr. Pruett provided a detailed chart with a list of rank ordered factors to consider when determining overnight care of children ages 0-3. This chart can be found in *McIntosh, J., Pruett, M., & Kelly, J. (2014). Parental separation and overnight care of young children, Part II: Putting theory into practice, Family Court Review, 52, No.2, 241-256.*

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BIDC & MDIC CONFERENCE REVIEW
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After lunch there was a lively discussion about the Think Tank findings as it relates to currently pending Colorado legislation (SB 15-129) calling for a presumption of substantially equal parenting time. A range of viewpoints were expressed by attendees; however, the dominant opinion of the audience, and that of the speakers, was that legal presumptions of substantially equal timesharing fail to recognize the variations in children's needs, and are parent-focused rather than child-focused. There was a strong sentiment that the pending legislation would result in increased litigation if passed.

The final session of the program focused on an innovative program, currently located on the University of Denver campus, known as the *Resource Center for Separating and Divorcing Parents*. The program offers a wide range of multidisciplinary services aimed at meeting the legal and relational needs of separating and divorcing families in a cost effective manner. The center is a "one-stop shop," designed to provide conflict resolution services and post-separation support for families by employing practices based on the most current research and recommendations in the field. Law students and mental health graduate students work together, under supervision, to provide out-of-court solutions to parent disputes and family problems. The goal of the program is to minimize discord and promote stability for children, parents, and communities. For more information, go to http://www.du.edu/rcsdf/services/index.html or call 303-871-3700.

The speakers at this conference provided a wealth of information, there was lively discussion about current issues, and ample networking among the attendees. Well done, BIDC and MDIC!

Communicating with an Expert

Lorna H Horton, Esq.

Experts are often a part of our cases. Sometimes it is in the context of a Parental Responsibilities Evaluator or a Child and Family Investigator. Sometimes it is a financial expert. In Colorado, experts can be either retained, non-retained, or consulting experts. These experts communicate regularly with the parties. However, the experts also communicate with counsel. The communication that we as attorneys have with the expert requires a careful examination of which type of expert you are communicating with as it is likely to be discoverable.

Experts in domestic relations case are governed by C.R.C.P. 16.2 and C.R.C.P. 26. Family law cases are unique with respect to experts as C.R.C.P. 16.2(g) requires the parties to attempt to share a joint expert: "[I]f the matter before the court requires the use of an expert or more than one expert, the parties shall attempt to select one expert per issue." There is no similar requirement in other civil cases, and parties in other civil cases rarely, if ever, have a joint expert.

A joint expert is also a retained expert. With the joint expert we are more likely to be aware that their file will be available to both parties and that the expert is communicating with both parties. In other words, we are sensitive to the fact that the communication we have with that expert is likely to be discovered by the other party. However, because of the nature of the issues in a domestic relations case and the types of issues that are involved with a PRE or CFI, we may at times find ourselves communicating with these experts without consideration as to the discovery of the communication. As attorneys, we need to always be mindful that we do not have privileged or protected communication with any retained or non-retained expert.

Colorado has adopted a bright-line rule with respect to communication with a retained and non-retained expert. "Perhaps most importantly, a bright-line disclosure rule advances the truth seeking function of the discovery rules. " Gall ex rel. Gall v. Jamison, 44 P.3d 233, 239-240 (Colo. En Banc 2002). Attorney work product shared with a testifying expert is discoverable if it was provided to the expert and if the expert merely considers the work

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Therapist-Client Privilege in Family Law Cases

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The issue of therapist-client privilege is often raised in family law cases. For example, daughter tells dad about negative parenting at mom's home. Although confirmed by the therapist, it doesn't rise to the level requiring mandatory disclosure, but it is negatively impacting her emotional wellbeing. Limited by hearsay rules from testifying about it, dad asks the therapist to testify about the child's emotional state. Now the therapist, retained to help the daughter with her inner emotional world, is thrust into the middle of the parents' judicial conflict.

Another example is when mom wants to know post-session about her son's therapy and asks the therapist what happened. Therapists often feel compelled to disclose privileged communications, or give an abridged version of the sessions. When that happens, are those communications privileged? If the therapist discusses what occurred in therapy, is the privilege breached? Does a release help maintain the privilege? The answers to these questions are briefly addressed below.

The therapist-patient privilege statute in Colorado provides that a licensed or registered therapist shall not be examined without the consent of the client about any communication made by the client to the therapist or the therapist's advice given in the course of professional employment.[1] There are three components of the privileged communication: it must be made either (a) by the client to the therapist, or (b) by the therapist to the client, and (c) it must be in the course of employment. The purpose of the statute is to protect the container a client needs for effective therapy. Without it, many people would not bare their inner emotional world and obtain the help they need.

The person claiming the privilege must establish its applicability.[2] The privilege needs to be asserted when the issue is first raised and belongs to the patient, not the therapist. Once the privilege attaches, "the psychologist-patient privilege protects testimonial disclosures as well as pretrial discovery of files or records derived or created in the course of the treatment."[3]

It is the law in Colorado that the privilege can be waived expressly or impliedly.[4] A finding of waiver must be based on "a deliberate disclosure of the specifics of the privileged communication."[5] A waiver is not always implied by raising a mental health issue in legal proceedings. For example, the Colorado Supreme Court held that seeking damages for mental suffering did not necessarily mean the person placed their mental health in issue and thereby waived the privilege.[6] The mental health issue must be central to the decision to be made, not ancillary to it. The most common sort of implied waiver in family law cases is where someone's mental health is in issue.[7] The question is whether someone's mental health issues are placed at issue by the filing of a divorce or APR case.

The Allocation of Parental Responsibilities statutory factors, applicable in divorce and "custody" cases, provide that the Court must consider the mental health of all "individuals."[8] This opens the door for a parent's mental health records. But does it also place a child's mental health at issue? It is unclear, but in a Dependency and Neglect ("D&N") case, the Colorado Court of Appeals addressed whether a child's mental condition is at issue in every such case.[9] The Court first stated that the filing of a D&N case does not automatically trigger a waiver of a child's mental health records - each case needs to be addressed on its own merits. However, since the Court in family law cases must consider both the mental health of ***all*** individuals and the child's adjustment to his or her home[10], a child's mental health may be at issue every time. Still, Courts seem to want to protect children's therapeutic relationships and are often very protective of their mental health records.

The Colorado Supreme Court has addressed who holds a child's privilege. "When the patient is a child who is too young or otherwise

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"The therapist-patient privilege statute in Colorado provides that a licensed or registered therapist shall not be examined without the consent of the client …"

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incompetent to hold the privilege, the child's parent typically assumes the role of the privilege holder." Unfortunately, the Court did not address the age at which a child could waive a privilege. There are two statutes that somewhat address the age issue. One provides that an evaluator must get consent of a child 15 years or older if they want to review the child's professional or educational records and the other authorizes 15 year olds to consent to therapeutic treatment and admission to a psychiatric facility. But neither the privilege statute nor the Colorado courts have directly addressed it, so it remains unclear.

A child's best interests trump a parent's right to claim or waive a child's privilege. The Colorado Supreme Court stated unequivocally that **"[t]he parent, however, cannot hold the child's psychotherapist-patient privilege when the parent's interests as a party in a proceeding involving the child might give the parent incentive to strategically assert or waive the child's privilege in a way that could contravene the child's interest in maintaining the confidentiality of the patient-therapist relationship."**

Another issue is whether waiving the privilege waives it forever. There are no Colorado cases that directly address that issue. However, a case contesting a will in New York held that "[o]nce waived, the privilege is waived for 'all time,' the statutory seal of secrecy having been broken."

Once a Court determines that an implied waiver of privilege occurred, a party may still seek protection and request limited disclosure. If this occurs, a party asks the Court to review the records "*in camera,*" or behind closed doors. When providing records to the Court, the privilege holder serves a "privilege log" on the other party, setting forth a general description of the claimed privileged communication. The other party can then comment on why the information should be provided. The records requested need to be directly relevant to the issues before the Court. As stated by the Colorado Supreme Court: "courts attempt to balance the right to confidentiality in communication and the need to ascertain the truth to serve justice."

While this certainly doesn't answer all the questions about privilege, we hope that it gives some guidance as to the current state of the law. For instance, one question that remains unanswered in Colorado is whether once the privilege is waived, is it waived forever? Future cases will likely determine that and other unanswered questions.

[1] **§ 13–90–107(1)(g), C.R.S.**

[2] ***People v. Pressley,* 804 P.2d 226, 227 (Colo.App.1990).**

[3] ***Sisneros,* 55 P.3d at 800.**

[4] ***Clark v. District Court*, 668 P.2d 3, 8 (Colo. 1983).**

[5] ***People v. Bryant*, (Colo. Dist. Ct., Apr. 21, 2004, 03CR204) 2004 WL 869618.**

[6] ***Hoffman v. Brookfield Republic, Inc.,* 87 P.3d 858 (Colo. 2004).**

[7] ***Bond v. District Court*, 682 P.2d 33 (Colo. 1984).**

[8] **§ 14-10-124(1.5)(a)(V), C.R.S.**

[9] ***People ex. rel. L.A.N.,* 296 P. 3d 126 (Colo. App. 2011).**

[10] **§ 14-10-124(1.5)(a)(IV) & (V), C.R.S.**

[11] ***See L.A.N.,* 296 P. 3d at 134.**

[12] ***L.A.N. v. L.M.B.*, 292 P.3d 942 (Colo. 2013)**

[13] ***Id.* at 948.**

[14] **§ 14-10-127, C.R.S.**

[15] **§ 27-65-103, C.R.S.**

[16] ***L.A.N.*, 292 P.3d at 948 (citing *People v. Marsh*, --- P.3d ---, 2011 WL 6425492 (Colo. App. 2011) ("the nature of a conflict between the interests of a parent and of his or her child may preclude the parent from waiving the child's psychologist-patient privilege").**

[17] ***Will of Clarence Sterling Postley, Deceased*, 125 Misc.2d 416, 479 N.Y.S.2d 464 (Sur. Ct, Nassau Cty, N.Y. 1984).**

[18] ***Alcon v. Spicer*, 113 P.3d 735, 739 (Colo. 2005). *See also LAM v. LMB*, 292 P.3d 942 (Colo. 2013).**

COAFCC is a statewide interdisciplinary association of professionals dedicated to improving the lives of children and families through the resolution of family conflict.

COAFCC promotes a collaborative approach to serving the needs of children among those who work in and with family law systems, encouraging education, research and innovation and identifying best practices.

The Problem with Equal Parenting Time Presumptions

Kate McNamara, Ph.D.

There has been a great deal of interest in Colorado lately about equal parenting time presumptions. The recently defeated Senate Bill 15-129 would have created a presumption that parents are entitled to substantially equal time with their children after separation or divorce unless it was found by the Court to not be in a child's best interest. Similar legislation is currently pending in other states. While no state currently has a presumption of equal parenting time, there is language in some state statutes that approximates such a presumption—Arizona and Alaska, for instance. The issue of equal parenting time is a topic that is garnering a great deal of national interest. This article summarizes the key points against equal parenting time presumptions, including the concerns voiced by the many professionals in Colorado who spoke out against Senate Bill 15-129. COAFCC does not take stances on legislative matters, and this article does not reflect the views of COAFCC. This article presents solely the view of this author and the points that were made by those who opposed the bill.

Despite its alluring simplicity, presumptions in favor of equal parenting time fail to consider the unique circumstances of individual families and children, and instead, apply a "one size fits all" template to all families. Such presumptions establish the mistaken belief that equal parenting time is the best arrangement in most cases. The existing social science research does not support this view. There is *no* research to show that *any* parenting plan is better than another. There *is* research to show that the significant involvement of both parents post-separation is associated with positive outcomes for children. That research, however, defines "significant involvement" as at least 30-35% time, not 50/50 time shares per se. The current state of the research does not lead to a presumption in favor of equal time shares.

Of note, Dr. Richard Warshak recently published a consensus paper, endorsed by 110 child development experts, which argued that the literature to date supports the value of significant involvement of fathers in the lives of their young children. However, that paper also clearly states "These findings do not necessarily translate into a preference for parenting plans that divide young children's time exactly evenly between homes." (Warshak, 2014, pg 50). Later in the same paper, Dr. Warshak states: "The optimal frequency and duration of children's time with each parent will differ among children, depending on several factors such as their age and their parents' circumstances, motivations, and abilities to care for the children. Other important considerations include children's unique relationship histories with each parent and their experience of each parent's care and involvement. In each case where it is desirable to foster the parent–child relationship, the parenting plan needs to be sensitive to the child's needs, titrating the frequency, duration, and structure of contact." (Warshak, 2014, pg. 60). The general consensus among experts at this time is that there is no "one size fits all" parenting plan that can be presumed to be best for most children, although the continued involvement of both parents is considered to be an aim that should be strived for whenever possible.

What we do know from social science literature is that children benefit from parenting plans that maximize the positive influences and available resources within their family systems, while minimizing the negative influences and risks that may be present. Parenting plans that are based upon the child's unique needs, the capacities of each parent to meet those needs, and the resulting best fit, are considered to be the gold standard. Parenting plans that take into account the practical realities of the family, such as the parents' work schedules, the availability of each parent, the distance between the two homes, and the distance between each home and the child's school are also important considerations. Additionally, plans that are sensitive to children's ages and developmental stages, and evolve as the child grows and matures, make good sense. For example, what might be best when a child is six months old may change when the child is

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six years old and again when the child is sixteen years old, depending on many factors Appropriate parenting plans take into consideration the parents' history of involvement in parenting, the quality of the parent-child relationships, the parents' ability to communicate, cooperate, and shield their children from their conflicts, and the parents' ability to support each other's relationship with the children. In sum, in order to meet the best interests of children, careful consideration of these many issues and dynamics is necessary to craft the appropriate parenting plan for individual children.

Over 75% of divorcing parents work out their own parenting plans, with or without the help of professional assistance, by negotiating "within the shadow of the law." This means they think about the factors that the court will consider if they litigate. When a presumption of equal parenting time becomes the law, parents' assumptions about what the court will do will shift from the "best interest of the child analysis" to an expectation that equal parenting time will be ordered in most cases. By establishing equal parenting time as the presumptive norm, there is likely to be a chilling effect on these non-litigating parents' willingness to carefully consider the factors that should be weighed to meet their child's needs. Insted, they are more likely to focus on their "right" to equal time, a perspective endorsed by public policy when equal time presumptions are adopted. Such shifts in perspective put the children for whom equal parenting time is inappropriate at risk for adverse impacts.

Another likely unintended consequence of equal parenting time presumptions is that parents who are victims of coercively controlling relationships or marriages will be even more unlikely to leave those abusive relationships than is already the case. Victim parents will be more likely to stay in an unhealthy relationship based on fear that they may be unable to prove they have been abused—a common problem in domestic violence cases—and hence, the abusive parent will be granted 50% time based on the presumption. The potentially chilling effect on victims' willingness to leave abusive relationships places their children, and them, at increased risk of harm.

Some argue that litigation will be reduced by instituting equal parenting time presumptions because "it removes the fight"—each parent can expect equal time. However, the opposite is likely to be true. When one parent believes a 50/50 plan is not in the child's best interests, that parent has to overcome the burden of the presumption. Rather than each parent having equal footing before the court, the parent who opposes equal time will have a steeper legal hill to climb, even though that parent's position is as likely to be in the child's best interests as the parent who has the presumption in his or her favor. That unequal footing is likely to promote nastier and more expensive court battles be-

cause it will take a more aggressive legal approach to litigate the case. Additionally, those parents who have mutually agreed to a parenting plan that was not substantially equal, based on the belief that it was best for their children, will likely surmise that equal parenting time has been determined to be best for children. While there currently is no scientific basis for this conclusion, public policy would convey that message. Thus, these parents would likely return to court to seek a modification of parenting time. Indeed, many attorneys would likely feel compelled to notify former clients who previously settled for less than 50% time that a new presumption in favor of 50/50 time now exists. For these reasons, litigation would most likely increase rather than decrease with an equal parenting time presumption.

In sum, there is a general consensus in the field, and among Colorado professionals, that an equal parenting time presumption is not good policy although maximizing children's healthy relationships with both parents is to be encouraged. Colorado's current statute explicitly promotes "the frequent and continuing contact between each parent and the minor children of the marriage after the parents have separated or dissolved their marriage…" Our current statute balances well the best interests of children and the rights of parents, and avoids the problems with presumptions.

REFERENCES

Warshak, R.A. (2014). Social Science and Parenting Plans for Young Children: A Consensus Report. *Psychology, Public Policy, and Law*. Vol. 20, No. 1, 46–67.

COMMUNICATING WITH AN EXPERT

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product in forming an opinion. *Id*. at 240. "We emphasize that a communication is discoverable even if the expert did not rely on it in forming her opinion; she needs only consider the communication in developing her opinion." *Id*. The court goes on to note that "considered" is a broader spectrum than "relied upon" and documents were "considered" where testifying experts reviewed them even if the experts did not rely on the materials in forming their opinions. *Id*.

A party may also wish to retain their own expert at their own expense and pursuant to C.R.C.P. 16.2(g)(3), a party may do that, if they can afford it.

A party is required to disclose to the other party the identity of any person who may present evidence at trial, including retained experts (a witness who is retained or specially employed to provide expert testimony) and non-retained experts (an expert who is not retained or specially employed to provide expert testimony). *See* C.R.C.P. 26(a)(2)(B).

For an expert retained by our client, we provide information and documents to them, communicate with them via email or correspondence, and often times we simply communicate with an expert in a conversation. All of this communication is likely to be discoverable by the other party. If you are communicating with a retained or non-retained expert, and that expert merely considers that communication in developing his or her opinion, it is discoverable. There is no privilege that protects the communication between an attorney and a retained or non-retained expert from discovery, including the work product doctrine.

Conversely, if you are working with a consulting expert, one who is *not* expected to testify at trial, C.R.C.P. 26 allows an attorney to communicate with this type of expert on a confidential basis and without discovery or disclosure of this communication. *Id*. Thus, if you retain an expert to review a report of a joint expert, or an expert retained by the other party, and you do not expect to call this expert to testify, you may speak as candidly and creatively about the law and evidence and strategy with the consulting expert and without concern that this communication will be subject to discovery. However, should you wish to have the "consulting expert" testify to rebut an opinion, that expert is no longer a consulting expert and the communication then becomes discoverable.

Although our cases typically involve issues that relate to children, we must remain mindful of our roles as attorneys and any communication we have with any retained or non-retained expert should be carefully considered as it is likely to be discoverable. Our clients rely on us to represent their interests and to maintain their confidentiality – and it is our duty to do so.

"If you are communicating with a retained or non-retained expert, and that expert merely considers that communication in developing his or her opinion, it is discoverable. There is no privilege that protects the communication between an attorney and a retained or non-retained expert from discovery, including the work product doctrine."

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