Custody Evaluations: The Propriety of Preparation

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02-06-2012

Once upon a time there was a concept that was known as zealous advocacy, which resided in the forest of obligations frequented by the legal community. The concept had been designed to be an integral part of the adversarial process (which had replaced jousting, snakepits, divination and various other imperfect methods for determining guilt, innocence, fault, entitlement and conflicting rights and obligations). Now zealous advocacy seems to be in disrepute and it is being suggested that the knights of the legal establishment venture forth to do battle with blunted spears and plastic shields.

There was once a time when lawyers were supposed to know the rules of civil and criminal procedures, and if they failed to follow them they would suffer the consequences; when lawyers were supposed to know the rules of evidence, and if they failed to follow them they would suffer the consequences; when lawyers were supposed to prepare their trial by working with witnesses to get them ready to be tested in the cauldron of cross-examination, and if they failed to do so they would suffer the consequences. Today is not such a time. Today, it is uncommon if an attorney who misses a deadline, puts in papers that are not authorized or fails to include a necessary exhibit is admonished, let alone sanctioned or otherwise precluded.1 We are fortunate when the trial judge is familiar with the rules of evidence, but likely to be frustrated by the fact that those rules are hardly ever followed. And heaven forbid if an attorney should be caught actually having prepared a client for testimony, cross-examination, depositions or critical interviews that might affect the outcome of a case.

Perhaps I have exaggerated in order to make a point; however, one of the most controversial issues in the area of custody litigation today is whether and to what extent a party seeking custody should be prepared by his or her attorneys and advisers. The determination of a custody dispute is a multi-step process: The decision is made by a judge and influenced by the judge's biases and predilections, the judge's observations of the parties' behavior during the process, the report of the forensic evaluator, the position taken by the attorney for the children and the presentation of evidence in court. All of those aspects are important and, in all of them, the attorney is presumably there to assist the client in presenting his or her case in the best way possible. That is the attorney's job.

In doing the job, an attorney is bound by ethical standards that are in some instances written and in others embedded in one's brain. The representation of some clients should not be undertaken in the first instance. Attorneys should resign from a case if certain events occur or particular relationships exist. Some positions urged by clients should not be asserted. But, if no ethical proscriptions apply, an attorney should assist the client in presenting his or her case in the best way possible. An attorney does that by gaining an understanding of the circumstances, parsing out the favorable facts from the harmful ones, presenting the evidence in a way that

highlights the strengths of the client's case, and arguing the law and facts effectively by showing that the law—coupled with the favorable facts—should yield a decision for the client. Essentially, the attorney's goal is to place the client in the most favorable light possible by assisting the client to be prepared, relevant, focused and free of the constraints that guilt, regret, mistrust and insecurity may have created. Lawyers representing clients in these contexts are seeing their clients at their very worst.

There are certain critical moments in a case for clients, including appearances in court, preparation of motions, meeting with the attorney for the child, meeting with the forensic evaluator, attending depositions and testifying at trial. An attorney would be remiss if everything was left to the client's own devices. Surely, no one would criticize an attorney for advising a client when to arrive at court, what to wear, where to stand, and how to address the court. But what about advising the client what to answer if a court (or evaluator) asks certain questions such as: Do you need an interpreter? Do you wish to waive your right to object to the conflict? Would you give up your desire to relocate if the court denied your request to take the child with you? or Why are you seeking custody?

Attorneys generally prepare the motion papers for the client to sign. Does that not skew the balance? Should a client be required to prepare his or her own affidavit? Shouldn't the attorney tell the client what is known about the judge, attorney for the child, and the forensic evaluator, and the best way to approach them, what subjects might be of interest, what to avoid? And for any deposition or trial, isn't it the attorney's obligation to prepare the client regarding how to answer questions, and in particular, how to address the issues that are at the heart of the case and how to respond to inquiries dealing with it. Is this not the essence of what an attorney is supposed to do, zealous advocacy or not?

Mental Health Professionals

A cottage industry has developed in the legal community to assist lawyers in presenting their cases. There are consultants who have made careers out of helping attorneys select a "good" jury; who teach witnesses particular phrases and non-verbal behaviors to enhance the witness' credibility (or the appearance thereof) for the courtroom; and who critique the presentation of evidence and argument during trial practice runs.

While nobody bats an eye when a lawyer engages the services of any of these consultants, it is often viewed as taboo to have mental health professionals work alongside lawyers to prepare prospective custodial parents to do a better job of parenting and presenting about parenting. This view of mental health consultants is particularly troubling, as such consultants can be of great assistance by calming the client's anxiety through familiarization with the forensic evaluation process.2 The benefits of using mental health consultants spread to all parties—and even the court. Indeed, when a client's apprehension is mitigated, the subsequent report generated by the court-appointed forensic is likely to be more accurate and better informed, paving the way for a better reasoned judicial determination of the children's best interests.3

The Association of Family and Conciliation Courts Child Custody Consultant Task Force has taken on the job of recommending guidelines for mental health professionals who are brought into the process of custody evaluations for the purpose of assisting attorneys. They have, however, recommended that certain practices would be unacceptable and unethical for a mental health professional consultant, those being.4

1) Rehearsing a litigant's response to questions on standard psychological tests;

2) "Coaching" answers to an evaluator's anticipated questions that the litigant would not otherwise give;

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

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

As to items #2 and #3 above, one must wonder whether an attorney (or his or her agents) ought to be bound by these ethical constrictions, now that "zealous advocacy" is a vestigial concept.

"Coaching" a litigant, which involves working with that person to improve the presentation, can be done by having the witness re-read his or her affidavits (prepared by the lawyer), as well as advising a litigant what to expect during an evaluation and how to properly respond to questions that might be posed by the judge/attorney for the child/forensic evaluator. Yet, there appears to be a question about the propriety of having a mental health professional (or perhaps an attorney) preparing a litigant for the questions that may be asked by a forensic examiner. There also appears to be debate over the propriety of encouraging a litigant to become more involved in a child's activities in order to make a favorable impression on the evaluator.

It is well known that various Internet sites "educate" readers about custody evaluations, the nature of tests that are given during the evaluation process and even offer services to prepare someone for the tests themselves.5 Despite the existence and availability of these resources, those who administer the tests, as well as those who are trained in making clinical observations, opine that one cannot prepare for the tests or the interviews and that at the very worst, test results might be invalidated because of excessive posturing and efforts to appear to be something one is not, but clinical observations will not be affected by dissembling.

On the other hand, clients are nervous and often at their worst when they are trying so hard to appear to be better than they are, and it is important to work with a client on answers as to why that parent believes he or she is the better custodial parent, what kind of access schedule would be acceptable, and what problems the other parent has demonstrated regarding parenting responsibilities. And why is it not acceptable for an attorney or adviser to encourage more or better involvement with a child in order to develop and maintain a better relationship merely because it would also make the parent look better in the eyes of the evaluator? There is no question but that many parents who were relatively uninvolved with their children become more involved after divorce proceedings begin. Greater involvement is a good thing. Greater involvement solely for the sake of impressing a judge or evaluator is postulated to be a bad thing—unless (perhaps) it results in greater involvement of a more permanent nature, which is always possible.

Would it not be appropriate for an attorney to recommend to a client that he or she attend parenting classes, meet with child development experts, become more interested in the child's school, interests, friends, hobbies, talents, etc; attend child-related events, speak to the child's health care providers and, in general, become more involved in a child's life and more knowledgeable about child rearing and development? If this advice were taken six months before the institution of custody proceedings or six days after, would it make a difference?

The designers of the psychological tests, as well as everyone else in the system know that custody litigants are on their best behavior during the evaluation process and take that into consideration in their evaluations and determinations. Whether that behavior modification is assisted by a neighbor, a therapist, an instruction manual, an Internet site, a spiritual adviser, an attorney or a mental health professional is something that cannot be effectively regulated any more than prostitution, drugs or jaywalking. And, indeed, if the process of evaluation could be manipulated so easily one would certainly have to question its validity.

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Endnotes:

1. See, e.g.,De Socio v 136 East 56th Street Owners Inc., 74 A.D.3d 606, 903 N.Y.S.2d 45 (1st Dept. 2010) (Numerous times defendant was directed by the court to comply with plaintiff's discovery demands. Having failed to do so, plaintiff wrote several reminder letters. Defendant assured plaintiff he would provide a complete response by a certain date, but failed to provide same. As this chase had been ongoing for over a year, plaintiff filed a motion seeking to strike defendant's answer for failure to comply with discovery demands. In opposition, defendant claimed—for the first time—that he is unable to locate the requested documents. In deciding plaintiff's motion, the court held that "[w]hile the conduct of defendants here was unsupportable, we cannot find that it rose to the level that would justify striking the answer."

2. James N. Bow, Michael C. Gottlieb, Dianna J. Gould-Saltman and Lesly Hendershot, "Partners in the Process: How Attorneys Prepare Their Clients for Custody Evaluations and Litigation," Fam. Ct. Rev., Vol. 49 (#4), October 2011, 750-759 at 753. (Of the 113 family law attorneys surveyed, 55 percent reported referring their clients to mental health professionals to provide guidance during the child custody evaluation. The most frequently cited reasons for referral were to provide support during the process (47 percent) and to prepare the client for the custody evaluation (27 percent). Of the minority of attorneys surveyed who referred clients to mental health professionals to assist with test-taking strategies, these attorneys claimed the referral was to reduce the client's anxiety and help the client understand why the evaluation was being conducted. None of these attorneys reported referring clients to mental health professionals to rehearse potential questions and answers.)

3. See, Association of Family and Conciliation Courts Child Custody Task Force, Mental Health Consultants and Child Custody Evaluations: A Discussion Paper, Fam. Ct. Rev., Vol. 49 (#4), October 2011, 723-736 at 727.

4. Id. at 729.

5. One need only Google "how to prepare for a custody evaluation" to see some of these.