

Bias: Critical Elements to Consider in Forensic Consulting And Expert Testifying¹

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In 2013, my colleague and friend, Dr. Robert Simon, and I wrote in the first edition of our book³ that we believed cognitive biases to be the greatest risk to forensic neutrality and objectivity in child custody and other forensic work. Many parents often feel that the custody evaluator is biased when a report comes in against that parent's wishes. It is common for litigants and their attorneys to believe that the evaluator did not like the client, did not utilize a neutral process, or reached conclusions that are not supported by the data. Because the outcome is unfavorable, and because the process may have been suspect, the belief is that the evaluator must have reached this unfavorable conclusion because of bias. Evaluators also reach conclusions that are displeasing to a litigant based upon a solid and well-integrated piece of work. However, bias is perhaps the greatest threat to the integrity and probative usefulness of forensic work products. Understanding what bias is and is not, understanding various types of bias and understanding how bias can be detected in child custody evaluations is fundamentally important.

¹ This article is written for the interdisciplinary audience typical of AFCC members and will have elements useful to mental health professionals, lawyers, and judges.

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³ Excerpted and modified from Chapter 4, Simon, RA and Stahl, PM (2020). *Forensic Psychology Consultation in Child Custody Litigation: A Handbook for Work Product Review, Case Preparation, and Expert Testimony, 2nd Edition*, Chicago, IL: Section of Family Law of the American Bar Association. For more information on this topic, please see the entire chapter. Portions of this were also published in the CA AFCC newsletter in 2016.

The numerous practice guidelines and Rules of Court that I know of each have an admonition that tells evaluators to avoid the impact of biases in child custody work⁴. Custody evaluators are not advocates for one party, nor are they advocates for a particular outcome. Evaluators are advocates for a thorough and scientifically supported process that gathers comprehensive data of diverse nature, tests various hypotheses, and reaches conclusions that are supported by the data gathered. In order to accomplish this task, evaluators must avoid letting biases of different kinds enter their reasoning. In this article, I will discuss the concept of bias in child custody work, how it surfaces, and the potential impact in different types of cases, ways to spot this bias in child custody evaluations, debiasing strategies, and a recognition of implicit and cultural bias, as well.

Bias can be reflected in something as simple as the language we use. Referring to a parent's time with children as "visitation" conveys a bias that such a parent is less important than the one who has "custody". Similarly, bias may be revealed when discussing families with special needs children, same-sex parents, gender issues, or other of myriad types of families. Although I'm not primarily focusing on biases revealed in language, I would be remiss if I didn't mention the importance of that. It's noted that the American Psychological Association has just published Inclusive Language Guidelines that address this issue⁵.

The rest of this article will focus on other types of biases.

⁴ See e.g., CA Rule of Court 5.220, APA Guidelines, AFCC Model Standards, AACAP Guidelines. *Editors' note:* See Standard 2 of Colorado Chief Justice Directives (CJDs) 21-02 governing Parental Responsibilities Evaluators and 04-08 governing Child and Family Investigators.

⁵ American Psychological Association. (2021). *Inclusive language guidelines*. <https://www.apa.org/about/apa/equity-diversity-inclusion/language-guidelines.pdf>

The Risk of Heuristics and Cognitive Bias in Child Custody Work

Although there are many different forms of bias, such as personal biases, e.g., gender bias, or professional bias, e.g., relocation or overnight bias, I'm going to focus on cognitive bias for this article. In recent years, there has been ongoing research related to judgment suggesting that clinicians and others are prone to distortions based on various cognitive biases, attribution effects, and similar heuristics that lead to speeding up the process of reaching conclusions. These types of bias are more subtle, and I believe they are the type most likely to influence the work of child custody evaluators, especially those who often are seen as doing good work and having proper procedures.

Heuristics are defined as simple, efficient rules that describe how people make decisions or reach conclusions when faced with complex problems. Certainly, the nature of problems that occur in child custody disputes are complex and the factors that must be considered and weighed in making decisions about the custody of children is highly complex. Kahneman⁶ identified that people use a variety of heuristics to solve complex problems, often creating a shortcut in logic and reasoning, observing that people tend to use heuristics that are overly simple because of the difficulty of complex heuristics. Some heuristic shortcuts lead us to solve complex problems by focusing on simple issues, or only part of the problem, and others lead us to ignore some of the information we have to reach our solutions.

⁶ See e.g., Kahneman, D., (2011). *Thinking Fast and Slow*. New York: Farrar, Straus and Giroux, and Tversky, A. & Kahneman, D. (1974). Judgment under Uncertainty: Heuristics and Biases, *Science*, 185, 1124–1130]

In addition to heuristics, Chabris and Simons⁷ observed that humans tend not to see what we aren't looking for. For example, in communities where pedestrians are more common, there are fewer accidents because drivers are looking out for pedestrians, whereas in communities where pedestrians are less common there are more accidents since drivers are not expecting to see them. In the same way, child custody evaluators who are focused on one element of the family dynamics, e.g., domestic violence or high conflict, might not even look at dynamics associated with other issues, e.g., quality and history of parenting, Gatekeeping, etc.

There are many examples of how these heuristics and cognitive biases, as well as blind spots, might operate in a child custody case. Potential heuristics or cognitive biases that are most common in child custody work can include:

- **Anchoring Heuristic**

With anchoring, the evaluator will overly rely on certain information during the evaluation process at the expense of other information. Once the anchor is “set”, there is a risk that other information is interpreted in a way that is consistent with that anchored information. The “Primacy Effect” is an example of a bias that includes the anchoring heuristic. The primacy effect is observed in situations where the data that we gather first affects the way we interpret and gather later data. The early data anchors our understanding of subsequent data.

- **Availability Heuristic**

The Availability heuristic refers to the tendency to focus on what is most available in memory. Things that may increase this availability include data that is more vivid or

⁷ See e.g., Chabris, C and Simons, D, *The Invisible Gorilla: How our Intuitions Deceive Us*, Harmony, 2011

unusual, or perhaps more emotionally charged. When something is repeated frequently, we tend to remember it more and even believe it more.

- **Confirmatory Bias**

Confirmatory bias is the tendency for a custody evaluator, having formed an opinion or strong impression before completing all the data gathering, to start looking for certain data or evidence that supports the opinion or impression that has formed. Then, data that is collected is seen through the evaluator's pre-conceived beliefs and used to support the preconceived opinion rather than the data being fully and neutrally evaluated. Data should be gathered in a systematic manner. When data is gathered in a selective manner or is perceived through a pre-fashioned lens, there is greater risk of being influenced by confirmatory bias. Confirmation bias leads to increased confidence in one's findings, largely because the process of gathering data and data analysis was not scientifically grounded and undertaken in a forensically neutral manner.

Recency Bias

Recency bias is the cognitive bias that exists by focusing on the most recent data one has heard and reaching conclusions based on that data. The opposite of Primacy bias noted above, there is a tendency with Recency bias to de-emphasize data gathered earlier in the evaluation process and emphasize the data gathered towards the end of the evaluation process.

Stereotyping

With stereotyping, the evaluator is affected by characteristics of the individual being evaluated rather than by the data being collected. For example, when Parent A appears to be histrionic and over-reactive, the evaluator simply assumes Parent A's claims and

allegations are the result of their histrionics and gives little weight to data that appear to support the allegations being made by the parent. This is often consistent with confirmatory bias as well.

- **Data Gathering Bias**

I frequently notice that some evaluators will believe more in some types of data than others and will have greater faith in one part of the process, giving greater weight to information obtained via that procedure. For example, if the evaluator highly believes in his capacity to observe healthy parenting behavior, he may give greater weight to his observations than other collected data. Similarly, some evaluators have great faith in the value of psychological testing to support conclusions about parenting and custody. Finally, other evaluators might believe that they can determine credibility on the basis of their interviews with the parents.

- **Research Bias**

There is a risk that custody evaluators will use research to support a pre-conceived opinion. I often see report narratives in which evaluators generically describe that “research suggests” a particular thing when formulating opinions and recommendations at the conclusion of an evaluation. They do so without providing citations to the research being mentioned or without describing research that might support a different outcome. This regularly occurs in relocation-related evaluations.

- **“Truth Lies Somewhere in the Middle” Bias**

Many evaluators and judges, in particular those who are at risk for burnout because they have worked in the system for so long, have a greater tendency to exhibit this bias. There is a tendency to perceive that parents in conflict over the custody of

their children make an equal contribution to that conflict. While that situation is seen in some high conflict situations, there are other instances in which one parent drives most of the conflict and the other parent tends to be more reactive to that conflict. This “truth lies somewhere in the middle” bias prevents evaluators and judges from recognizing the unique contributions of each parent to the conflict. However, these unique contributions to the conflict are likely to be an important and relevant factor to consider in a given case, particularly when determining the specifics of a child-sharing plan. Assigning equal blame to both parents is a mistake when the responsibility for different components of the conflict are more likely caused by one parent rather than the other parent.

“For the Move” or “Against the Move” Bias⁸

From my perspective, many child custody evaluators appear to have one of these two points of view; they either see relocation as something to be avoided at all costs or they tend to be in favor of relocation by a primary custodial parent. Those who tend to be pro-relocation take the position that a custodial parent who wishes to move should generally be allowed to move as long as the custodial parent has a legitimate reason for moving and is not attempting to interfere with the access rights of the other parent. Evaluators might bring a unitary approach and conclude that this parent can move with the child if they determine that one or the other parent is “the psychological parent” or primary custodial parent. They may also conclude that the move should be permissible after determining that there is a legitimate reason for moving or that there is no evidence of interference with the other parent’s access. While the laws relating to parental relocation vary jurisdictionally (there are many states in which case law or

⁸ See Stahl, PM, “Avoiding Bias in Relocation Cases”, *Journal of Child Custody*, 3, 3/4, 109-124.

statutory law supports such a presumption in favor of moving), there is no evidence in the psychological literature to suggest that it is helpful or appropriate for psychologists to have such a presumptive belief in relocation cases. There is no research suggesting that because a parent is happy following a relocation that the children will automatically be happy and adjust to the move.

Conversely, there are many custody evaluators who perceive that it is a parent's responsibility to stay near the other parent in order to preserve the child's access to the other parent and the involvement of both parents in her life. While there is research data to support the belief that children derive a benefit by having both parents' active involvement in their lives⁹, extrapolating that data to support a presumption against moves confounds the issue. There are many circumstances in which a move is both legitimate and justified, whether for academic, economic, or other personal/family reasons. In those cases, a parent is going to move, with or without the child. In those circumstances, it is incumbent on evaluators and judges not to confuse the preference and value for shared co-parenting that exists in some of the research and some statutory laws with a presumption that moves will automatically harm children.

Strategies for Detecting that the Evaluator was Not Impacted by these Biases

When I review the child custody evaluation to look for strengths and weaknesses of the evaluation process, report, and conclusions, among the things I look for is evidence that the evaluator took steps to avoid the risks of such biases from influencing one's process and thinking. These strategies will also help the family law professional

⁹ See e.g., Kelly and Emery, 2003

understand ways to reduce their risks of being influenced. These can include the following:

- **Evidence of Multi-Method, Semi-Formal, Structured Process**

One way to reduce the effects of cognitive and professional biases is to engage in a thorough process. This process includes multiple interviews with each parent, multiple interviews and observations with children and parents in an age-appropriate manner, possibly psychological testing (to generate hypotheses/areas for inquiry), and multiple and appropriate collateral contacts with people who have a range of understanding of the family and family issues¹⁰.

- **Evidence of Sufficient Depth in Questions Being Asked**

One of the bigger problems that I see in my review work is the lack of depth in questions being asked by evaluators. Many evaluators ask the relevant questions to start with, but do so in a relatively superficial manner. They might ask about each area noted above, but in reading the report, it appears that the evaluator does not understand the issues in any substantial depth. For example, in asking questions about relocation, many evaluators focus on one set of questions. The evaluator might ask the parent requesting to move about reasons for wanting to move, but not ask the parent opposing the relocation why he/she is opposing the relocation. Similarly, I've seen evaluators ask the parent hoping to move what he/she might do if the court denies the request to move (a practice prohibited in California by the way) but not ask the parent opposing the move what he/she might do if the court allows the children to move with the other parent.

¹⁰ See e.g., Kirkland, K., McMillan, E., IV, & Kirkland, K. (2004). Use of collateral contacts in child custody evaluation. *Journal of Child Custody*, 2(4), 95—109.

- **Evidence that the Evaluator was Sufficiently Curious**

All too often, when reviewing a child custody evaluation, I see a shocking lack of curiosity by the evaluator. Some evaluators believe that, if they ask the critical questions, their job is complete. However, it is very important to get details about the information parents and children (and even collateral witnesses) tell us. It doesn't take much time or thought to ask simple follow up questions, such as "Tell me more about that", "Can you explain what you mean", or "I don't understand, I need to know more about that". Lacking such curiosity, and failing to follow up with such simple and critical questions leaves the family law professional vulnerable to oversimplifying complex issues.

- **Evidence that the Evaluator Managed Common Risks Associated with Known Illusions¹¹**

Using critical psychological research, Chabris and Simons identified six common illusions that influence all humans when engaging in complex tasks. These include the illusions of attention, memory, confidence, knowledge, cause and potential. The evaluator's file needs to have complete interview and observation notes, taken at the time of the interview/observation. This research clearly demonstrates that evaluators are at risk of missing critical information or failing to remember critical information if their notes are not complete. For example, a child custody evaluator may have confidence in his/her ability to remember things that occurred in the home visit, but without a record of what occurred, taken contemporaneously with the home visit – not hours or days later – there may be an illusion of confidence and illusion of memory. The best antidote to these illusions is found in thorough and contemporaneous note-taking. Although it's very

¹¹ See e.g., Chabris, C. and Simons, D., *The Invisible Gorilla and Other Ways Our Intuitions Deceive Us*, New York: Crown Books.

rare for evaluators to have video or audio recordings of their sessions, this may be the best way to reduce such risks.

- **Evidence that the Evaluator Provided Each Parent the Opportunity to Respond to the Allegations Made by the Other Parent**

Along with sufficient depth of understanding, it is important to ensure that the evaluator provided each parent sufficient time to respond to the other parent's allegations. Again, if the evaluator simply believes what Parent A tells him, and doesn't give Parent B sufficient time to respond to the allegations, then there is a significant risk of confirmatory bias or primacy bias, in that the evaluator won't look for data to disconfirm evidence presented by Parent A. We've also seen such evaluators then ignore data that comes in later in the process when formulating conclusions.

- **Evidence that the Evaluator Utilized the Proper Evaluative Mindset and Searched for Data that Might Disconfirm a Hypothesis, not just Confirm It**

Let's look, again, at the appropriate and necessary evaluator mindset. Evaluators need to have a mindset in which they don't believe anything they hear until they check it out. When I meet with parents for the first appointment, I routinely explain to parents the evaluation process and the evaluator's mindset (this is part of the process known as informed consent or informed assent). I explain that I don't believe or disbelieve what I am told until I have a chance to thoroughly evaluate and investigate and until each side has had the opportunity to be heard. When appropriate, I will also check with relevant collateral sources who might be able to provide some information about the allegations. In my mind, this helps reduce the risk of any biases operating.

- **Evidence that the Evaluator Considered Data that Supports the Conclusions as well as Data that Does NOT Support the Conclusions**

From my perspective, one of the best parts of California Rule of Court 5.220 is the admonition that states, “In any presentation of data, the evaluator **must** (emphasis added) ... present all relevant information, including information that does not support the conclusions reached”¹². This is one of the best ways to demonstrate that the evaluator was not subject to confirmatory bias in thinking through and formulating the conclusions.

- **Evidence that the Evaluator Considered Multiple Hypotheses and Explained Why He/She Considered Certain Hypotheses More (or Less) Plausible than Other Hypotheses**

One of the most fundamental ways to reduce the risk of being influenced by these various biases is to consider multiple hypotheses in any given case. Consider a case with allegations of domestic violence and parental alienation (not an uncommon scenario). In such a case, various hypotheses might include:

- Mother is alienating the children against Father
- Father has been a perpetrator of Coercive Controlling Violence
- Though rare and with a lower base rate, Mother has been a perpetrator of Coercive Controlling Violence
- Both parents have engaged in a pattern of either Situational Couples' Violence or Separation Instigated Violence

¹² California Rule of Court 5.220, (e), (3), (A)

- Father has engaged in behavior that, while not abusive, and while Mother may or may not be engaging in alienating behaviors, is also contributing to the child's alienated responses
- The child is not being alienated but rather is realistically estranged from Father due to Father's history of abuse in the family and insensitivity to the child, her personality dynamics, and her needs
- Neither parent is overtly contributing to the child's alienation, but the child is exposed to conflict that is so overwhelming that the child feels a strong need to be pulled in one direction or the other
- The preferred parent is not actually engaging in overt alienating behavior but instead is psychologically enmeshed or dependent on the child and the child's alienating responses are more likely related to taking care of the preferred parent (i.e., a parentified response)
- Some combination of these contributions

As can be seen, in many child custody evaluations, the issues are quite complex and reflect many possible dynamics. If the evaluator only focuses on the alienation dynamics or only focuses on the domestic violence dynamics in gathering and discussing the data or doesn't gather enough depth to answer the hypotheses in the case, the evaluator is at risk of many potential biases, not the least of which include confirmatory bias, pathology bias, and truth lies somewhere in the middle bias.

- **Evidence that the Evaluator Considered Risks and Benefits of Various Custodial Options**

It is not uncommon for an evaluator to consider the allegations and, after reaching a conclusion that some allegation is more likely true than not, reaches conclusions and recommendations based solely on that data. For example, in the complex case identified above with allegations of domestic violence and alienation, the evaluator who sees evidence of some type of domestic violence may oversimplify the process and determine that significant parenting time should be with the Mother who was seen as the victim of that violence. The evaluator may also opine that the Mother should have legal custody and decision-making authority so that Father cannot undermine her parenting and continue to engage her in coercive and controlling behaviors. While this may be the correct recommendation (and in this scenario is likely to be), especially if the court has made a finding of domestic violence, it is still necessary for the evaluator to consider the risks and benefits of other custodial options, i.e., primary time with Father, relatively equal shared time with both parents, and other forms of decision-making, either joint or with the help of a Parenting Coordinator. Without such an analysis and consideration of other custodial options, it is unclear if the evaluator has considered **all** of the data and it is unclear if the evaluator is at risk of being influenced by heuristics, by one of the illusions noted above, or by this emotionally charged family. A very well-written report also discusses why certain parenting plan options are not being recommended and shows evidence that the evaluator is **not** being influenced inappropriately.

- **If the Statutory or Case Law Requires an Understanding of Certain Factors, Evidence that the Evaluator Considered ALL those Factors**

In my experience, one venue that is primed for the introduction of bias exists in the complex area of relocation. As noted above, two common biases seen in relocation cases, are “for the move” bias or “against the move” bias. In *Avoiding Bias in Relocation Cases*, Stahl¹³ identified ways to reduce the risk of bias in relocation matters. One of the best identified was to make certain to provide data on all relocation factors identified in either statutory or case law¹⁴. I believe that evaluators can evidence their lack of being influenced by one of those biases by addressing each of the relevant statutory or case law factors applicable in their state, as well as any relocation-specific psychological factors that are identified in the relocation-related psychological literature¹⁵. This is a systematic approach and one, when engaged, that helps the evaluator assess and “think through” each of the factors independently and then as a group.

Identifying and Dealing with the Influence of Biases

One benefit of hiring a consultant/expert witness is to help brainstorm the issues in the case in general. Brainstorming is also a very useful tool for identifying bias. Your client’s displeasure with the outcome of the evaluation and that your client believes the evaluator was biased against him/her doesn’t mean that the evaluator was biased, at least necessarily not in the way(s) your client believes. By carefully reviewing the evaluation report, and especially by carefully reviewing the evaluator’s case file, your consultant can spot clues to some of the above-identified biases or to other biases not

¹³ Stahl, *Supra* note 6

¹⁴ See e.g., *Marriage of LaMusga*, *Marriage of Baures*, AZ Rev. Statute § 25-408, and FL 61.13 for relevant legal factors in relocation cases. *Editors’ note*: Colorado’s legal factors in relocation cases are found in C.R.S. 14-10-124(1.5)(a) and 14-10-129(2)(c)(I through IX).

¹⁵ These psychological factors might include Social Capital or Gatekeeping. For more information, see e.g., Stahl, PM, *Emerging Issues in Relocation Cases*, J. Amer Assn of Matrimonial Law, 2013, or Austin, W., [FCR, 2008]

discussed here. Some features of custody evaluation work products which can clue you and your consultant to look carefully and systematically for the presence of one or more forms of bias in a work product are:

- Sloppy evaluations where enough interviews were not done or where the evaluator spends significantly more time with one parent as opposed to the other
- Evaluations that appear to give one parent a pass for negative behaviors while being highly critical of the other parent's negative behaviors
- Evaluations that appear to over-emphasize one data source over another
- Evaluations that ignore some data while emphasizing data that support the recommended outcome(s)
- Evaluations that use psychological testing inappropriately
- Evaluations that bring clinical methodology rather than forensic methodology to their work
- Evaluations in which it appears that "fixing" the family or directly "helping" the family is seen as the central task
- Evaluations that feature preconceived ideas about how research findings apply to the facts of the case or that allow research findings to drive the outcome of a case.

If your case goes to trial, your consultant can assist you in your cross examination of the court-appointed expert which can help you to demonstrate the presence of various biases and to demonstrate how the biases have inappropriately impacted the conclusions and recommendations in the evaluation report. You can also

have your own testifying expert testify about evidence that bias is present in the work product and inappropriately impacted the analysis, conclusions and/or recommendations in the written report.

Implicit Bias

Starting in the late 1990s there has been a focus on and research into the concept of implicit bias¹⁶. Implicit bias is defined as the unconscious attributions of particular qualities to persons according to their social group. Because the attitudes and attributions represent the presence of implicit bias are unconscious, our human reactions to people are likely to be quickly associated with easy and stereotypical aspects of a person such as their ethnicity, race, gender, height, weight, mode of dress, hair style, tattoos and other easily observable characteristics. We do this while excluding other more subtle, difficult to know and nuanced elements of who a person is – elements that more fully reveal the person than the stereotypical attributes such as those above. Essentially, if the person we are evaluating has any of several characteristics and is part of a social group, such as gender, race, country or origin, religion, body size, or some other group, we are likely to unconsciously and immediately react based on those characteristics.

Although implicit bias is likely to affect us in many ways, the relevance for this chapter is the consideration of whether the litigant's characteristics or group has biased a child custody evaluator. For example, if a parent is of a certain religion and culture

¹⁶ See, e.g., Greenwald, A. G.; Banaji, M. R. (1995). "Implicit social cognition: Attitudes, self-esteem, and stereotypes". *Psychological Review*. **102** (1): 4–27; Greenwald, A. G., & Krieger, L. H. (2006). Implicit Bias: Scientific Foundations. *California Law Review*, 94(4), 945–967; and [Understanding Implicit Bias](http://kirwaninstitute.osu.edu)". *kirwaninstitute.osu.edu*. Retrieved 2018-04-06.

and the evaluator has instant reactions to that religion and culture, it's potentially going to affect how the evaluator approaches the data and interviews in the case. Similarly, if the parent is part of a group with certain obvious interests, it might influence the evaluation process. I was involved in a case where the father was an avid surfer, similar to the evaluator. When looking at the interview notes, it was obvious that the evaluator spent considerable time talking about surfing and spent very little time talking about the allegations of drug use, and almost no time talking about parenting. This might reflect an impact on the evaluator's unconscious immediate implicit bias.

Over the last several years, I have seen a growing number of continuing legal education and other workshops for professionals designed to increase the understanding of and control for implicit bias. You can certainly find out more about implicit bias by taking the Harvard Implicit Association Test¹⁷. You will learn much more about how implicit bias creeps into our personal and professional work. I urge you to consider the potential effect of implicit bias in family law work, with yourself, with your experts, and even with the court.

Cultural Influences and Bias

Also in recent years, there has been an increased focus on the importance of cultural sensitivity and cultural competence in psychology. An example of the emergence of cultural sensitivity as a key professional development issue is reflected by

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<https://implicit.harvard.edu/implicit/takeatest.html>

the American Psychological Association publishing guidelines on cultural competency¹⁸. In order to suggest ways to consider these Guidelines in child custody work, I will discuss them in this section.

In the introduction to the Guidelines, the task force that developed them explained “presented with an opportunity to participate directly, as professional psychologists, in engaging a fuller understanding of diversity and its considerations within practice, research, consultation, and education (including supervision) to directly address how development unfolds across time and intersectional experiences and identities; and to recognize the highly diverse nature of individuals and communities in their defining characteristics, despite also sharing many similarities by virtue of being human. Our conscious awareness of what it means to think, feel, regulate, behave, and create meaning has been enhanced by advances in research and clinical scholarship affording us a contemporary consideration of psychology that incorporates human differences across their varied elements”¹⁹. The Guidelines demand that psychologists not only develop an understanding of the diversity of our client population and integrate awareness and sensitivity of characteristics of various peoples, but that they recognize they themselves are cultural beings and “*hold attitudes and beliefs that can influence their perceptions of and interactions with others as well as their clinical and empirical conceptualizations*”.

I encourage readers to review the guidelines on the APA website. These guidelines are important for many reasons. Obviously, it is good practice to be sensitive to the cultural diversity of our clients and to realize that one’s world view and approach

¹⁸ American Psychological Association, 2017. Multicultural Guidelines: An Ecological Approach to Context, Identity, and Intersectionality. Retrieved from: <http://www.apa.org/about/policy/multicultural-guidelines.pdf>

¹⁹ Ibid., pg. 6-7.

to life is partly determined by cultural norms and societal expectations. Thus, based on the globalization of our world, we need to examine our professional assumptions and view differences in how family relationships are structured, for example, from a wider lens that includes the intersecting factors. Child custody evaluators may be psychologists, as well as social workers, marriage and family therapists, and counselors, and it is important that they recognize the value of these guidelines.

The Guidelines can help you in your own work with your diverse clientele. Awareness of the Guidelines can assist custody evaluators and all family law professionals to be more sensitive to and curious and respectful about differences rather than hostile and judgmental about them. Such sensitivity will reduce the risk of some types of cognitive, implicit, or other bias interfering with judgment. Conversely, a lack of that sensitivity may increase the risks of such bias. Finally, understanding these Guidelines can help when working on a family law case involving international issues or with people from other countries, a very important subset of family law work.

Retention Bias

One final potential source of bias is specific to our work when hired by lawyers to act as a consultant in a case. This potential form of bias is known as “retention bias”. Custody evaluators can be influenced due to a desire to please a referral source or the judge. However, retention bias is a bias to which retained experts are particularly vulnerable. Let’s be honest -- expert witnesses are well paid. If a retained expert believes that the opinions they’ve developed in a case are opinions that will not please the retaining attorney, they may consciously or unconsciously morph

their opinions so that they please the attorney. Presumably, this increases the likelihood that they'll be hired again by that attorney.

Why does being influenced by retention bias matter? Like all biases, to the extent that retention bias is operating, the opinions of the expert are subject to the influence of things that decrease objectivity. However, the risks of being influenced, for whatever reason(s), by retention bias are many. As an attorney, one of the most important is that your expert witness will be exposed as a hired gun, losing credibility with the court. Judges expect expert witnesses to testify to the truth, the whole truth, and nothing but the truth. Your expert witness cannot be an advocate for your client. That's your job. Your expert witness is expected to assist the court and be truthful²⁰. If your expert witness fudges data, research, or opinions to support what she thinks you want her to say, she will lose that credibility and it will hurt your case. Another risk is that your expert is likely to be embarrassed when opposing counsel calls him out on the obvious retention bias. He might present his theories with no basis, or he might go down a slippery slope and make recommendations about the case which are beyond the scope of his role. Your client may like that, but I guarantee that the judge won't. I will call that type of expert witness as an expert advocate, and that is something to be avoided. Having an expert advocate instead of an expert neutral will hurt your case.

I have testified and been present in court or at a deposition where I have seen this take place. I have seen expert advocates describe that a parent has been abusive

²⁰ In one jurisdiction I have worked, there is a written rule that states, "It is the duty of an expert witness to assist the Court and not to be an advocate for any party" If writing a report, the expert is expected to add, "this report has been made in conformity with this duty, and if called to give testimony, I will do so, also in conformity with this duty". That jurisdiction adds the expectation that "Opinions and recommendations are based on information available at the time of the report and are subject to change with the presentation of additional information".

and controlling, even though they have not evaluated that parent. I have seen expert advocates testify that a child should move with her mother because Mother was emotionally abused by the father, even though the court-appointed evaluator did not make a finding about that emotional abuse. In that case, the expert advocate substituted her judgment, despite her lack of first-hand observation and data to back up that claim. I have seen an expert advocate take a position in a case, where there has been no evaluation, that an older adolescent should be sent to live with Parent A, whom she is angry at because of Parent A's behavior, citing that Parent B has "alienated" the child against Parent A. I have also seen expert advocates minimize and/or make excuses for negative things that their client's litigant parent has done which are harmful to the child. I could write a separate book of all the examples I have seen of expert advocates testifying beyond their role. In almost every situation, it appears that retention bias, hubris, or wanting to promote a pet theory has created the situation in which the expert advocate testifies as he has. In all those cases, the expert advocate lost credibility with the court, and in all those cases, it negatively impacted the lawyer's case.

The first step in avoiding retention bias starts when getting hired. I suggest several things, such as:

- That your hired experts include a clause in the retainer agreement such as, "In any testimony before the court, my duty is to the court, I will address all questions, whether put forth by you or opposing counsel, honestly and forthrightly, whether or not it helps or hurts your client's case";

- That your hired experts have an attitude of exploring multiple hypotheses and point out facts that are likely to help your client as well as facts that are likely to harm your client and be willing to testify objectively about all of them;
- That your hired experts **never** formulate and discuss conclusions about the psychological characteristics of people they did not evaluate and **never** make recommendations about any issues associated with the ultimate issue, i.e., the best interests of the child in the case;
- That, if reviewing a child custody evaluation, your hired experts testify to the strengths and weaknesses of the custody evaluation report and the custody evaluator's process. She can explore risks and benefits of different custodial options hypothetically given the facts of your case;
- That, if your hired expert is a didactic expert on some psychological issue or theory, she will testify to all the known research on the topic, exploring both sides equally, without being an advocate for your client;
- That, when confronted with hypothetical questions on cross examination about damaging things your client has done that she truthfully answer how such behaviors would potentially be harmful to the children;
- That your experts avoid testifying about pet theories that are not generally accepted in the field;
- That your experts avoid hubris and arrogance; and
- That your experts show humility, kindness, and respect toward both sides of the case, respect for the process, and provide answers to all questions the same as if they would have been hired by the other side of the case

Remember, it is to your advantage and the betterment of your client's case to have your hired expert witness testify neutrally, honestly, and truthfully and let you be the advocate. That will allow the judge to believe in your hired expert's credibility and be helpful both to the court and to your case.

Conclusions

Most child custody evaluators do a comprehensive job trying to gather data and reach conclusions associated with the psycho-legal issues in a case. However, because the evaluator is human, even well-meaning evaluators may not recognize the potential for cognitive biases, implicit bias, and may not recognize various professional biases that operate sometimes. When your client expresses concern that their evaluator was biased, it may be true. However, it may not be because the evaluator did not like your client or consider your client's information. Rather, it may be because one or more biases identified in this article affected the evaluator. The more complex the matter, the greater the risk that some type of bias will have influenced the process, the findings, the analysis, and/or the conclusions related to the child custody evaluation.

When you have one of these comprehensive and complex cases, using a consultant who understands such biases and ways to recognize them can help develop strategies for addressing them, either in your cross examination of the evaluator or in your use of a testifying expert to explain these issues to the court. As discussed, by focusing on the evidence of bias, you can expect the evaluator to explain the basis for his/her conclusions and recommendations, hopefully strengthening your efforts on behalf of your client.

Finally, I suggest that you consider the importance of avoiding an expert advocate and work with expert witnesses who will ensure credibility and neutrality through their testimony. Ensure that your testifying expert avoids the risks of retention bias, stays within the scope of her role, and avoids hubris and arrogance in her testimony.

The purpose of this article is to raise awareness: awareness that all family law professionals, because we are human, are at risk of oversimplifying complex tasks, and there is little in family law more complex than the issues associated with child custody litigation; awareness that all family law professionals, because we are human, are at risk of everyday illusions, in particular the illusions of attention, memory, and confidence; and awareness that all family law professionals, because we are human, can reduce the risks of being influenced by thorough procedures, including thorough note-taking, by remaining forever curious, and by considering multiple hypotheses and custodial options before reaching our conclusions. Most custody evaluators strive to do their highest quality work when advising and guiding families and courts, and following these practices increases the likelihood of bringing our “A” game to the evaluation of each family.