# New Jersey Family Lawyer

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CHAIR'S COLUMN:

## Bienvenidos

*by Ivette R. Alvarez*

For the 43rd time there is a changing of the officers of the New Jersey State Bar Association's Family Law Section. This time it is my turn to be the chair of this prestigious group. Having asked the counsel of many of my predecessors in anticipation of this moment, I know that the excitement, enthusiasm and the bit of trepidation I feel is no different than what each of them experienced when they became chair. Each of them, and I thank them for sharing their feelings and thoughts, has counseled me to enjoy my year and do it my way.

What does that mean? Does that mean that once in a while, or perhaps every time, I will use words from my native language to give my flavor to my message? Yes, you may have to bear with this! You will also be exposed to the way I look at things through my culturally different focus, as I have had to do during the 40 years since I arrived in this country. Yes, but this is good!

"Bienvenidos" means a very warm welcome, one not unlike what I have received during my years of involvement with the section. Mentorship and education is what our section is all about. We educate attorneys, judges and legislators.

Family law was not what I went to law school to practice. I stumbled upon my interest in family law, and were it not for this section, I would not have been able to develop that interest. While working at a large commercial litigation firm, I was assigned to a divorce case the partner had taken on as an accommodation to a corporate client. To the surprise of many of my colleagues there, I enjoyed the complexity of the issues the case presented and the direct contact with the client, and asked for more. A few years later, Karol Corbin Walker, a former president of the state bar, pointed out that if my interest was to learn more about family law, I needed to join this section. She was, as is typically the case, absolutely right!

It was with no small amount of anxiety that I attended my first meeting of the Family Law Section Executive Committee. There was Frank Louis, Lynn Newsome, John Paone, Mark Biel, Alan Grosman, Judge Fall, Judge Ross. I wanted to run! What could I possibly say that they did not know? As it turned out once I found my voice, the answer was, quite a bit.

I have benefited and grown personally and professionally from my association with the members of this section. I joined my firm through the contact I developed working on section matters with our immediate past chair, my friend and mentor, Bonnie Frost. It was the incomparable Pat Barbarito, a former chair of the section and Tischler Award recipient, who pushed me to define and express my interest in becoming an officer of this section. My fellow officers John De Bartolo, Madeline Marzano-Lesnevich, Pat Roe (now Your Honor, having joined the dark robe side), Tom Hurley, Lizanne Ceconi, Ed O'Donnell and Charles Vuotto have been, and continue to be, a source of guidance and strength. Yes, strength. This volunteer work is hard work! In fact, all of the members of our executive committee and the young lawyers with their funny and instructive retreat program, mentor me at every turn. I am humbled by all of you, and thank you all.

But it is the camaraderie and the fun we have when we are together that defines us. Others have noticed and commented on this phenomenon. As Bonnie related in her last Chair Column, this past November at the conclusion of the Family Law Section Program at the State Bar Mid-Year Meeting in Aruba, after the piano rendition of a song about alimony by one of our officers, an environmental attorney who had stumbled onto our program blurted out "I am not a family attorney but I want to join this section!" In these last few

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years the presidents of the state bar have joined us at our retreat. Karol Corbin Walker joined us in Las Vegas and Stu Hoberman joined us in Washington. Thank you both for your support of the section.

Our area of practice is quite varied. The family part handles over a dozen different proceedings. Divorce and other family matters are the bread and butter of the largest segment of attorneys in New Jersey, the solo practitioners. The laws and procedures our section endorses or declines to endorse affect many of our fellow practitioners. Our section is large, perhaps the largest in the state bar. Our members are, however, only a small fraction of the attorneys who practice family law in New Jersey. I can only wish that those who are not members have the opportunity that I have had. That will be my focus this year.

To ensure that we reach out and get the view of the family law practitioner at all levels, our officers are instituting regional meet and greets with county Family Law Section chairs and with the officers of the specialty bars. We will incorporate what we learn from these meetings into a long-term plan with an eye to increasing and diversifying our section.

We will also continue the excellent work our previous chairs have instituted. We will have the symposium where developing concepts in family law are discussed; the hot tips where our members, the experts, share practical methods; and we will continue our legislative and *amicus* work. To honor our great educators and leaders, we will have our Tischler Award. For fun and renewal, we will have our holiday party, and from March 28 to April 1, we will have our retreat.

This year, the retreat will be venued in my native country, Puerto Rico. I cannot wait to share with you that tropical paradise! So that we can share our commonalities and learn from our differences, I will invite the specialty bars to join us in our retreat. I know you will extend the warm welcome I have been so fortunate to enjoy from you to our new friends. Inclusiveness recognizes that embracing the differences among us will help us become stronger and more responsive attorneys to our own and our clients' benefit. ■

# Meet the Officers

**IVETTE R. ALVAREZ (CHAIR)**
Ivette R. Alvarez is counsel at Einhorn, Harris, Ascher, Barbarito, Frost & Ironson, concentrating in civil litigation with an emphasis on matrimonial and family law. She is an NJSBA trustee; a member of the Garden State, Morris County and Essex County bar associations; serves as president-elect for the Hispanic Bar Association of New Jersey; is a past chair of the District V-C Fee Arbitration Committee; and was appointed to serve on several Supreme Court committees, including the Family Law Practice Committee, the Skills and Methods *Ad Hoc* Committee, the Family Division Practice Subcommittee on Child Support and the Custody and Parenting Time Subcommittee. Ms. Alvarez served on the Legal Services of New Jersey Executive Committee and Finance Committee, and is currently a board member of the Morris County Organization of Hispanic Affairs and the Resource Center for Women in Summit. She received the NJSBA's 2005 Professional Lawyer of the Year Award.

**THOMAS J. HURLEY (CHAIR-ELECT)**
Thomas J. Hurley is an AV-rated solo practitioner in Burlington County. He is a certified matrimonial attorney and a member of the American Academy of Matrimonial Lawyers. He is a frequent lecturer for the Institute of Continuing Legal Education (ICLE) and an annual contributor to the *New Jersey Family Lawyer*. Mr. Hurley served on the District IV Ethics Committee and has served on the Family Law Executive Committee since 1993. He serves on the Board of Cedar Run Wildlife Refuge and Unicorn Handicapped Riding Association.

**LIZANNE J. CECONI (FIRST VICE-CHAIR)**
Lizanne J. Ceconi is a principal and managing partner of Ceconi & Cheifetz, LLC, in Summit, specializing in matrimonial law. She appears in courts throughout the state of New Jersey. Ms. Ceconi is a past president of the Union County Bar Association, and currently serves on the Judicial and Prosecutorial Appointments Committee and the Family Law Committee. She served as president of the Northern New Jersey Inns of Court, and is presently a master and group leader. On behalf of the NJSBA Family Law Executive Committee, she has been instrumental in planning the Annual Family Law Retreats to Charleston, Santa Fe, Las Vegas and New Orleans. Ms. Ceconi has also lectured on family law topics at the ICLE Family Law Symposium and other organized bar events.

**EDWARD J. O'DONNELL (SECOND VICE-CHAIR)**
Edward J. O'Donnell, certified as a matrimonial law attorney by the New Jersey Supreme Court, is a partner in Donahue, Hagan, Klein, Newsome & O'Donnell, P.C., concentrating his practice in family law with an emphasis in divorce litigation. Currently treasurer of the Essex County Bar Association, he is a past chair of that association's Family Law Committee and was the 1998 recipient of the association's Family Law Achievement Award. Mr. O'Donnell is also vice chair of the Family Law Section of the Association of Trial Lawyers of America and president of the Northern New Jersey Family Law Inns of Court. He has lectured on family law issues for ICLE and other law-related organizations, and contributed to *New Jersey Family Law Practice, 12th Ed.,* and the Essex County Bar Association publication *Traps for the Unwary.*

**CHARLES F. VUOTTO JR. (SECRETARY)**
Charles F. Vuotto Jr. is a shareholder with the Woodbridge-based firm of Wilentz, Goldman & Spitzer. He is certified by the New Jersey Supreme Court as a matrimonial attorney, and is a member of the American, New Jersey State, Union and Middlesex County bar associations and a member of each association's Family Law Section. Mr. Vuotto is the co-chair of the Matrimonial Section of the Association of Trial Lawyers of America–New Jersey, an associate managing editor of the *New Jersey Family Lawyer*, and has lectured on family law on behalf of the Institute for Continuing Legal Education and the New Jersey Bar Foundation.

**BONNIE C. FROST (IMMEDIATE PAST CHAIR)**
Bonnie C. Frost is a partner in the law firm of Einhorn, Harris, Ascher, Barbarito, Frost & Ironson in Denville. She is secretary of the American Academy of Matrimonial Lawyers and a certified matrimonial law attorney. Ms. Frost is a member of the Appellate Practice Committee of the New Jersey State Bar Association and a member of the Supreme Court Family Practice Committee. She has been a member and secretary of the District X Ethics Committee from 1991 through 2006, and recently was named to the Disciplinary Review Board. Ms. Frost also has participated in 16 published opinions, including *McGee v. McGee, Reinbold v. Reinbold, Overbay v. Overbay* and *Weishaus v. Weishaus,* where she co-authored the *amicus* brief on behalf of the bar. She also wrote and argued the *amicus* brief on *Mani v. Mani, Fischer v. Fischer*, and represented the ex-wife in *Steneken v. Steneken.* ■

## Evidential Standards of Custody and Timesharing Reports

# Are Reliability and Validity Standards Taking a Back Seat?

*by Charles F. Vuotto Jr. and Lisa B. Steirman*

As New Jersey's family part courts struggle to handle mounting dockets, they continue to place greater weight on the custody/timesharing recommendations of expert mental health professionals. As a result, there is growing concern among the legal community that the legal standards of evidentiary reliability are being eclipsed by the court's deference to the mental health expert's opinion. The result of such deference is a highly disconcerting situation where the best interests of a child is decided not by the court after careful consideration of all relevant law and evidence in a particular case, but rather based on the court's adoption of an expert's opinion that may lack sufficient legal and empirical support. Unfortunately, it is the child who may be harmed under these circumstances.

It is the position of the authors that it is the responsibility of both bench and bar to ensure that mental health experts are held to the same evidentiary standards that apply to all experts pursuant to the law of our state. As will be addressed in detail below, once the appropriate evidentiary standards are applied, it is evident that mental health professionals are not legally authorized to make ultimate recommendations as to what custody/timesharing arrangement is in the best interest of a child. However, mental health professionals can play a critical role in offering a court vital information upon which a court can rely in reaching its final custody/parenting time determination based upon statutory criteria.

This article will attempt to provide the basic evidentiary standards to be applied in the context of child custody litigation, outline how the techniques and tests employed by mental health experts often fail to meet those standards, and ultimately offer recommendations to help guarantee that a mental health expert's testimony is admissible in a custody litigation.

### A BRIEF SYNOPSIS OF NEW JERSEY LAW GOVERNING THE ADMISSION OF EXPERT TESTIMONY

Rule 702 of the New Jersey Rules of Evidence governs the admissibility of expert testimony, and provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

When determining the admissibility of expert testimony in New Jersey, the evidentiary test established in the 1993 case of *Frye v. United States*[1] (hereinafter referred to as the Frye test) remains the appropriate evidentiary standard in most cases where the admission of scientific evidence is at issue.[2] In *Frye*, the Court established what is commonly referred to as the "general acceptance standard," which requires that scientific testimony is only admissible if it is based on a scientific technique that is generally accepted in the relevant scientific community.[3]

The Supreme Court of New Jersey has declared that general acceptance under the Frye test "entails the strict application of the scientific method, which requires an extraordinarily high level of proof based on prolonged, controlled, consistent, and validated experience."[4] Moreover, the inquiry into general acceptance not only requires a finding that the scientific technique or procedure is generally utilized in the particular scientific profession, but further requires that "the scientific technique or procedure be accepted as scientifically reliable" within the profession.[5]

New Jersey courts have interpreted the Frye test as requiring that the general acceptance of scientific evidence may be demonstrated in three specific ways:

> (1) by expert testimony as to the general acceptance, among those in the profession, of the premises on which the proffered expert witness based his or her analysis; (2) by authoritative scientific and legal writings indicating that the scientific community accepts the premises underlying the proffered testimony; and (3) by judicial opinions that indicate the expert's premises have gained general acceptance.[6]

Subsequent to *Frye*, the Supreme Court of the United States rejected the Frye test as an absolute prereq-

uisite to admissibility.[7] In *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* the Court abandoned the Frye "general acceptance" test in favor of a more relaxed standard. Specifically, the *Daubert* Court held that scientific expert testimony was admissible even in situations where general acceptance could not be proven, so long as the court could determine that the testimony had evidentiary reliability and relevance. In reaching a determination regarding evidentiary reliability, the court may examine such factors as whether the theory or technique has been tested, peer review, error rates, and acceptability in the relevant scientific community.[8]

With limited exceptions,[9] the more relaxed federal evidentiary principles established in *Daubert* have not been adopted by the courts of New Jersey, who continue to apply the Frye test when determining the admissibility of scientific evidence.[10] Indeed the Frye test has been specifically applied by New Jersey courts to expert testimony concerning behavioral science. [11]

## WHY MENTAL HEALTH EXPERTS ARE FAILING TO MEET EVIDENTIARY STANDARDS

The professional discipline of psychology is grounded in the principle that conclusions regarding human behavior can be drawn from scientific evidence and tested via scientific method.[12] Pursuant to the Frye test, the expert opinion of mental health professionals must be derived from scientific data that is generally accepted in the scientific community as reliable and valid in order to be admissible in a courtroom. Unfortunately, child custody/timesharing expert testimony has faced increasing criticism due to the "lack of scientific methodology, empirical grounding, and psychological relevance" employed in reaching conclusions and rendering reports.[13]

### *Predictions Regarding the Best Interests of a Child*

The most glaring overreaching of mental health professionals undoubtedly occurs when a mental health expert gives the court an ultimate recommendation regarding what custodial/timesharing arrangement is in the best interests of a particular child. Such a recommendation cannot possibly pass the scrutiny of the Frye test, as there is a patent absence of empirical data to support that recommendation.[14] Indeed, there exists no validated psychological test that either assesses parenting directly or empirically supports a decisive determination concerning the appropriate custodial arrangement for a particular child.[15]

### *Interviews*

The major concerns surrounding the mental health expert's interviewing of parents or children focus on "problems of reliability and relevance."[16] Specifically, criticisms surrounding a lack of reliability in the interview process cite the mental health expert's gathering of interview data that is "subjective, partial, or unscientific in manner."[17] Frequently raised is the issue of "confirmatory bias," which results when a mental health expert seeks out information that verifies his or her predetermined theory, to the exclusion of all other information that is contrary to that theory.[18] Relevancy problems frequently arise in the context of a mental health expert's interview when the mental health expert "fails to address the pending psycholegal issue of comparative parenting capacity."[19] Indeed, a mental health expert's focus on identifying psychopathology in a particular parent is only relevant if there is reliable empirical data to support a link between the specific pathology identified and parental fitness.[20]

### *Psychological Testing*

**Objective Adult Personality Tests: MMPI and MCMI** The MMPI (Minnesota multiphasic personality inventory) is undoubtedly the most frequently employed objective adult personality test found in custody/timesharing evaluations.[21] The MMPI was not developed to determine parenting abilities, but was rather to screen for severe pathology. The test consists of a lengthy series of true or false questions, and "is based on the assumption that people who answer the test questions in a manner similar to members of a particular group are likely to behave in ways similar to members of that group."[22] The scant research that has been performed relating to the connection between an individual's MMPI result and the behavior and adjustment of that individual's child "suggest a complex and inconsistent association between MMPI profiles of parents and their children's behavior or pathology."[23] There exists no single MMPI profile that is capable of identifying an individual as a *good* or *bad* parent. Although the "MMPI may provide reliable information about parents' psychopathology and emotional functioning," it "contains no scale to predict what custodial arrangements will further the best interest of a child."[24] Given the widespread application of the MMPI in custody/timesharing evaluations, the dearth of case law questioning the reliability and relevance of the test in custody evaluations is disconcerting.[25]

The MCMI (Millon clinical multiaxial inventory) is the second most popular adult personality test utilized in custody/parenting time evaluations. Containing a series of true or false questions, the MCMI is intended to evaluate personality disorders based on Theodore Millon's theory of personality, "which posits three polarities to explain behavior: pain-pleasure, self-other, and active-passive."[26] Those who criticize the use of the test stress that since the MCMI was developed on clinical populations, the test is skewed toward findings of pathology in the subject individual. "Accordingly, it is not surprising that [the MCMI's] critics claim that it is inaccurate in child custody disputes and makes parents appear

more pathological then they likely are."[27] Also, just as with the MMPI, there is widespread criticism that the MCMI lacks the scientific validity necessary to defend its use in a custody evaluation.[28]

It is crucial to be aware that "no personality tests measure parenting competency, nor has any constellation of personality traits been linked to skill as caregiver."[29] Therefore, "[i]t is impossible to determine from test results alone if a parent's measured response patterns are related, either directly or indirectly, to parenting competencies."[30] If this is true, then how can custody and parenting time conclusions premised on these tests pass the Frey test?

**Projective Techniques: Rorschach Inkblot and Thematic Apperception Test.** The Rorschach is the most frequently employed projective technique found in custody/timesharing evaluations. The Rorschach technique involves ambiguously shaped inkblot drawings that are shown to the subject individual, who is then asked what he or she sees. Based on the individual's answer, a projection of the subject's psychopathology and personality is determined.[31] There is much debate surrounding the general reliability of the Rorschach technique within the scientific community. These general concerns of reliability are further compounded when the test is used in the setting of custody litigation, since "[n]o studies correlate personality attributes identified by Rorschach with good parenting…"[32] Despite this lack of empirical support, there is an absence of case law questioning the admissibility of the Rorschach test in custody litigation.

> In contrast with the vigorous debate about the relevance and reliability of the Rorschach in child custody evaluations that has taken place in the scientific community, the legal system has largely ignored these criticisms in admitting the Rorschach in child custody evaluations.[33]

The thematic apperception test (TAT) is another projective technique that involves 31 cards reflecting drawings of people in ambiguous situations. The subject individual is asked to tell a story concerning what is happening in each of the drawings. The most common method of interpreting the individual's response is "informal and relies on the examiner's subjective impressions."[34] Common criticism of the test include "inadequate and empirically unsupported norms for scoring and unimpressive incremental validity."[35] With specific regard to use of the TAT in custodial litigation, "[p]rojective measures have not been shown to have the requisite psychometric properties to render them reliable or valid for predicting custodial functioning."[36]

Succinctly stated, "no empirical behavioral science literature exists demonstrating that projective drawings are related to any specific element of a parent-child relationship, or are predictive of any particular parenting practices or developmental outcomes."[37] Therefore, commentators have noted that it "constitutes poor professional practice for an evaluator to render psycholegal conclusions about adult personality structure and psychological functioning on the basis of projective drawings."[38]

As one commentator eloquently noted:

> It is difficult to reconcile the legal system's largely unquestioned acceptance of the Rorschach and the TAT with the fervor of the scientific community's criticisms of the tests' reliability and their reliability in custody evaluations. How can the law be a critical consumer of mental health practitioner expertise if it ignores the scientific community's critiques of proffered expert testimony and fails to apply discriminating threshold standards for the admissibility of expert evidence derived from these tests?[39]

**Custody-Specific Tests: Bricklin and Ackerman Schoendorf Scales.** Recently, tests have been created that are specifically designed to assess children during custody evaluations.[40] Three distinct types of Bricklin tests include the Bricklin perceptual scales (BPS), the perception of relationships test (PORT) and the parent awareness skills survey (PASS).

The BPS test contains 64 questions, which ask for a subject child's rating of his or her parents' functioning.[41] Based on the child's answers, a score is created that reflects the child's "perception of their parents' competence, supportiveness, consistency, admirableness."[42] The parent who receives the highest scores is regarded as the parent of choice for custody.

The PORT is a projective test where a child is asked to perform specific tasks that include drawing each parent, drawing him or herself, drawing a family, and completing stories concerning the family's conflict. The results of the tasks are then scored to determine which parent is the primary caretaker of the subject child.[43]

The PASS measures the parents' "awareness of social issues, ability to explore solutions, and acknowledgment of children's behavior."[44] The PASS "consists of 18 typical child care situations or dilemmas and represents a sampling of relevant parenting behaviors that can be applied to children of various ages."[45] Parents are asked how they would respond to each situation. The test "appears to be rooted in the commonsense notion that strengths and weaknesses in parents' child-rearing abilities can be assessed, in part, by querying parents about how they would respond to various child care scenarios."[46]

The amount of criticism surrounding the Bricklin tests is impressive; nonetheless, family courts place no limits on the admissibility of these tests. Critics of the Bricklin tests note "test developers do not provide validity data and that the scales are conceptually flawed and seek to measure constructs that are not empirically testable…"[47] Critics emphasize that the method-

ology behind the test is flawed, asserting that "[t]he measures contain unrealistic or untested assumptions…developed on inappropriately small, inadequately described, or inappropriate clinical samples, lack adequate reliability and validity…"[48] Moreover, there is a blatant absence of published studies that confirm the validity of these tests.[49]

The Ackerman-Schoendorf scales (ASPECT) were designed to determine parental fitness. The ASPECT includes interviews of parents and children, a parent questionnaire, and numerous projective and objective tests. Based on the cumulative data from these sources, three standardized scales are developed, namely the "(1) observational scale: quality of parents' appearance in the evaluation; (2) social scale: social and intra-familial relationships, and (3) cognitive emotional scale: emotional and cognitive parenting abilities."[50] These three scales are then applied to determine a "parental custody index" that measures parental fitness.[51]

Just as with the Bricklin scales, there is much criticism surrounding the ASPECT test that focuses on a lack of validity and methodologically sound published research.[52] Critics note that "The ASPECT needs more normative, reliability, and validity data before one can conclude that it fulfills its promise of being a practical, objective, and standardized approach to child custody evaluations."[53]

## PROPOSED GUIDELINES TO ENSURE EVIDENTIARY ADMISSIBILITY

Although adherence to the evidentiary standards of our state renders the ultimate custody/timesharing recommendations of a mental health expert inadmissible, the mental health expert can be crucial in providing the court with empirically sound data concerning individual and family functioning that will assist the court in reaching a decision regarding what custodial/timesharing arrangement is in the best interests of a child.[54] It is when the expert's conclusion exceeds that which can be gleaned from a scientific technique generally accepted in the relevant scientific community that evidential standards are violated. The following are suggestions offered by the authors and intended to aid in ensuring that the expert testimony of the mental health expert meets the required evidentiary standards:

1. **The mental health expert must acknowledge the limitations of his or her expert opinion as they relate to the ultimate question of what custodial arrangement is in the best interests of a child.** In order for a mental health expert's testimony to be admissible in the context of a child custody/parenting time dispute, it is crucial that the mental health expert acknowledge the limitations of the scientific data employed. The mental health expert must acknowledge that his or her ultimate recommendation regarding what custody/timesharing arrangement is in the best interests of a particular child cannot withstand a Frye test application. Especially in the area of psychological testing, it is crucial to emphasize that frequent utilization of a test is not sufficient to demonstrate general acceptance under the Frey test. The inquiry into general acceptance further requires that "the scientific technique or procedure be accepted as scientifically reliable" within the profession.[55] Therefore, as demonstrated above, although certain scientific methods and tests are commonly employed in child custody/timesharing evaluations, these tests cannot withstand a Frye test application since these tests have not proven themselves *scientifically reliable* in the context of determining ultimate custody/timesharing recommendations for a particular child.
2. **The mental health expert's testimony must meet the standards of the Frye test.** Although empirically insufficient to support an ultimate finding concerning what custodial relationship is in the best interests of a child, mental health experts can offer invaluable information to the court concerning child development and family dynamics. Such information can play a critical role in aiding the court in reaching its determination regarding what custodial arrangement is in the best interests of a child.[56] However, it is critical that all information provided by the mental health expert withstand a Frye test inquiry.

In order to meet the evidentiary requirements of the Frye test, admissibility must be demonstrated:

> (1) by expert testimony as to the general acceptance, among those in the profession, of the premises on which the proffered expert witness based his or her analysis; (2) by authoritative scientific and legal writings indicating that the scientific community accepts the premises underlying the proffered testimony; and (3) by judicial opinions that indicate the expert's premises have gained general acceptance.[57]

Since case law is devoid of any judicial findings regarding the general acceptance of the psychological methods and tests at issue in a custody evaluation, it is crucial for the mental health expert to address whether the scientific technique or procedure is accepted as scientifically reliable within the profession for the exact purpose that it is being employed by the expert. Moreover, the mental health expert should be prepared to demonstrate that the particular method or procedure is the subject of "authoritative scientific and legal writings indicating that the scientific community accepts the premises underlying the proffered testimony."[58]

3. **The information proffered by the mental health expert must**

**be relevant to the specific issue raised in a particular litigation.** In order for any expert testimony to be admissible, it must be directly relevant to the issue presented to the court.[59] Rather than simply requesting that a mental health expert perform a general custody evaluation, the court and respective counsel in a given case should construct case-specific issues to be addressed by the mental health expert (*i.e.*, drug abuse, overly harsh discipline, etc.).[60] Adherence to these specific areas of concern will help diminish the mental health expert's use of irrelevant findings and diagnosis that serve to unduly complicate and even prejudice the expert's testimony.[61]

## CONCLUSION

The testimony of mental health experts must be held to the strict standards of evidence that have become the hallmark of our legal system. Without strict adherence to these evidentiary standards, the critical question concerning what is in the best interests of a child will continue to be decided by a mental health expert's testimony that may be plagued with personal value judgments and non-scientific speculations, rather than by a court after careful consideration of the law (*i.e.*, statutory custody factors and decisional law) and empirically sound data. If the foregoing suggestions are employed by the mental health expert, bench and bar, we can ensure that the mental health expert is available to offer invaluable data to the court, while simultaneously limiting such information to "empirically-based psychological testimony that represents and reflects the highest standards of the scientific study of human behavior."[62] ■

## ENDNOTES

1. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).
2. Richard J. Biunno, *New Jersey Rules of Evidence*, 2005 Ed., Comment to Rule 702[3], p. 847.
3. *Frye,* 293 F. at 1014.
4. *Rubanick v. Witco Chemical Corp.*, 125 N.J. 421, 436 (1991).
5. *Magaw v. Middletown Bd. of Educ.*, 323 N.J. Super. 1, 14-15 (App. Div. 1999), *certif. den.* 162 N.J. 485 (1999).
6. *State v. Harvey*, 151 N.J. 117, 170 (1997) (*quoting State v. Kelly*, 97 N.J. 178, 210 (1984)).
7. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
8. *Id.* at 589-94.
9. Two exceptions to the Court's application of the Frye rule include tort cases involving injuries caused by a drug or toxic substance (*see Kemp ex rel. v. Wright v. State*, 174 N.J. 412 (2002)), and death penalty hearings wherein the defense offers scientific evidence (*see State v. Davis*, 96 N.J. 611 (1984)).
10. *In Re Commitment of R.S.*, 339 N.J. Super. 507, 536 (App. Div. 2001) (noting that "New Jersey has long recognized that in order to be admitted into evidence, a novel scientific test must meet the standard articulated in *Frye v. United States*…," and further recognizing, "Although Frye has been replaced in the federal court system by the more lenient standards of Federal Rule of Evidence 702 as set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* in New Jersey, with the exception of toxic tort litigation, Frye remains the standard.") (citations omitted).
11. *Id.* at 535 ("Although the expert testimony at issue involves behavioral science, which is concededly subjective and less tangible than the techniques of physical science, our Court has applied the same test as to its admissibility.") (citations omitted).
12. Timothy M. Tippins, "Part IX: Babies, Bathwater and '*Daubert*'," *New York law Journal*, Nov. 5, 2004. ("The most notorious species of overreaching testimony is the utterance of a specific conclusion about what is or is not in the best interests of a given child within a particular family, a conclusion for which there is simply insufficient empirical support.").
13. Dana Royce Baerger; Robert Galatzer-Levy, Jonathan W. Gould, Sandra G. Nye, "A Methodology For Reviewing The Reliability and Relevance of Child Custody Evaluations," 18 *J. Am. Acad. Matrim. Law,* 35, 26 (2002) ("Unfortunately, CCEs frequently fall below professional forensic practice standards. Commentators have criticized the quality, reliability, and utility of CCEs by noting the lack of scientific methodology, empirical grounding, and psycholegal relevance common among these reports.").
14. Daniel W. Shuman, "What Should We Permit Mental Health Professionals to Say About 'The Best Interests of the Child'?: An Essay on Common Sense, *Daubert*, and the Rules of Evidence," 31 *Fam. L.Q.* 551, 567 (1997) ("To assess the ability of mental health professionals to make accurate predictions requires the outcome (*i.e.,* the best interests of the child) be 'operationalized,' or described in a fashion capable of measurement to test the validity and reliability of these predictions. Since the best interests standard is by definition indeterminate, it is incapable of measuring a mental health professional's ability to predict outcomes. Apart from the problem of defining best interests so that predicted outcomes can be operationalized and tested, research on the predictive abilities of mental health professionals does not support claims of omnipotence about the best interests of the child.').
15. Daniel W. Shuman, "The Role of Mental Health Experts In Custody Decisions: Science, Psychological Tests, and Clinical Judgment," 36 *Fam. L.Q.* 135, 144 (2002) ("Accordingly, those who have reviewed literature conclude that there are no psychological tests that have been validated to assess parenting directly. Given the advances of science, this finding may seem counterintuitive.")
16. Dona Royce Baerger, Robert Galatzer-Levy; Jonathon W. Gould; Sandra G. Nye, *supra* note 13, at 55.
17. *Id.* at 55-56.
18. *Id.* at 55. ("Confirmatory bias can significantly distort the reliability and utility ('validity') of interview data, and can lead the evaluator to inaccurate or one-sided conclusions unsupported by other evidence.").
19. *Id.* at 57 ("One example of a relevance problem is the use of a traditional 'clinical interview' in the context of a [child custody evaluation]. The primary purpose of a clinical or diagnostic interview is the

identification of intervention or treatment methods most likely to facilitate the subject's recovery. Unless the court will evaluate an issue regarding a parent's diagnostic status or psychological well-being, clinical data regarding psychopathology is not relevant to the pending legal issue. Child custody evaluators who engage in traditional clinical interviewing are not only likely to fail to adequately address the pending legal issue, but are also on a 'fishing expedition' for psychopathology that can lead them astray from the court's need for reliable and relevant information.").

20. Timothy M. Tippins, *supra* note 12.
21. Randy K. Otto; John F. Edens; Elizabeth H. Barcus, "The Use of Psychological Testing in Child Custody Evaluations," 38 *Fam. & Conciliation Courts Rev.* 312, 315 (2000).
22. Daniel W. Shuman, *supra* note 15, at 144-45.
23. *Id.* at 145 (*citing* Randy K. Otto, Robert P Collins, "Use of the MMPI-2/MMPI-A in Child Custody Evaluations," *Forensic Applications of the MMPI-2,* 233, 234 (Yoseef-Ben Porath *et. al.* ed. 1995).
24. Daniel W. Shuman, *supra* note 15, at 145.
25. *Id.* at 146 (*citing Tipton v. Marion Co. Dept. of Pub. Welfare*, 629 N.E.2d 1262, 1268 (Ind. Ct. App. 1994) (use of MMPI to support termination of parent-child relationship reversed in the absence of attempt to validate the test results by examining the behavior of the person tested but test affirmed as to findings concerning depression, anxiety, and poor impulse control to suggest an inability to parent); *In re Marriage of Luckey*, 868 P.2d. 189 (Wash. Ct. App. 1994) (use of MMPI to determine that father was a child molester questioned.)).
26. Daniel W. Shuman, *supra* note 15, at 146.
27. *Id.* at 147.
28. *Id.*
29. Dana Royce Baerger, Robert Galatzer-Levy; Jonathon W. Gould; Sandra G. Nye, *supra* note 13, at 60.
30. *Id.*
31. Daniel W. Shuman, *supra* note 15, at 147.
32. *Id.* at 147.
33. *Id.* at 148.
34. *Id.* at 145.
35. *Id.* at 148.
36. *Id.* at 149 (*citing* Lois A. Weithorn & Thomas Grisso, "Psychological Evaluations in Divorce Custody: Problems, Principles, and Procedures, *Psychology and Child Custody Determinations: Knowledge, Roles and Expertise* (Lois A. Weithorn ed. 1987)).
37. Dana Royce Baerger; Robert Galatzer-Levy, Jonathan W. Gould, Sandra G. Nye, Robert Galatzer-Levy; Jonathon W. Gould, *supra* note 13, at 62-63, 2002.
38. Dana Royce Baerger; Robert Galatzer-Levy, Jonathan W. Gould, Sandra G. Nye, Robert Galatzer-Levy; Jonathon W. Gould, *supra* note 13, at 63, 2002.
39. Daniel W. Shuman, *supra* note 15, at 150.
40. Randy K. Otto; John F. Edens; Elizabeth H. Barcus, *supra* note 21, at 314.
41. Daniel W. Shuman, *supra* note 15, at 150.
42. *Id.* at 150.
43. *Id.*
44. *Id.*
45. Randy K. Otto; John F. Edens; Elizabeth H. Barcus, *supra* note 21, at 329.
46. *Id.*
47. Daniel W. Shuman, *supra* note 15, at 151.
48. *Id.*
49. *Id.*
50. Daniel W. Shuman, *supra* note 15 at 152.
51. *Id.*
52. Randy K. Otto; John F. Edens; Elizabeth H. Barcus, *supra* note 21, at 330 ("No research regarding the ASPECT has been published in peer-reviewed journals."). Several commentators have emphasized the fact that designers of both the ASPECT and the BPS attempt to validate these tests by demonstrating a direct correlation between the test results and judicial decisions. *Id.* at 331. Of course, use of such a connection in determining the validity of these tests is somewhat absurd. As one commentator noted, "If the measure of good expert opinion is the ability to replicate judicial decision-making, what justifies the use of experts? If mental health experts are needed because the legal system is solely inadequate to decide custody cases correctly, what does the ability of a test to predict a judge's decision say about what is in the best interests of a child?" Daniel W. Shuman, *supra*, note 15, at 152.
53. Daniel W. Shuman, *supra* note 15, at 152 (quoting Michaela C. Heinze & Thomas Grisso, "Review of Instruments Assessing Parenting Competencies Used in Child Custody Evaluations," 14 *Behav. Sci. & L.,* 294, 296 (1999)).
54. Timothy M. Tippins, *supra* note 12 ("Empirical studies elucidating relevant aspects of parent-child relationships as they relate to child developmental outcomes do exist, even if they can't support an opinion on the final question of best interest. Empirical data relative to family dynamics, such as the impact of parental substance abuse and domestic violence on children, as well as the 'bi-directional nature of the parent-child relationship,' can assist the court in assessing the custodial question, even though stopping short of suggesting a prescriptive conclusion.").
55. Magaw v. Middletown Bd. of Educ., 323 N.J. Super. 1, 14-15 (App. Div. 1999), *certif. den.* 162 N.J. 485 (1999).
56. Timothy M. Tippins, *supra* note 12 ("To summarily exclude all forensic testimony because the psychology discipline lacks an empirically derived answer to the best interests question would ignore the growing body of empirical data that sheds light on important aspects of child development and family dynamics, a body of knowledge that is still in its infancy and still emerging.").
57. *State v. Harvey*, 151 N.J. 117, 170 (1997) (*quoting State v. Kelly*, 97 N.J. 178, 210 (1984)).
58. With specific regard to psychological testing in the context of a custody evaluation, one commentator sets forth the following questions that mental health professionals should ask themselves before employing a test: "Is the test commercially published?...Is a comprehensive test manual available?…Are adequate levels of reliability demonstrated?…Have adequate levels of validity been demonstrated?…Is the test valid for the purpose in which it will be used?…Has the instrument been peer reviewed?…What are the qualifications necessary to use this instrument?" Randy K. Otto; John F. Edens; Elizabeth H. Barcus, *supra* note 21, at 333-35.
59. Richard J. Biunno, *New Jersey Rules of Evidence*, 2005 Ed., comment 702[1], p.

**Continued on Page 14**

# What Forensic Psychologists Can and Cannot Say in Child Custody Evaluations

*by Andrew P. Musetto*

The word forensic derives from the Latin, forensis, which means forum, or the place where Romans conducted their trials. Current use denotes the relationship between a specific mental health or behavioral science field, such as psychology, and the legal system.[1] In child custody cases and other forensic areas, the Federal Rules of Evidence define how forensic psychologists[2] can be qualified as experts in court. Rule 702 provides the framework for expert testimony:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may otherwise testify thereto in the form of an opinion or otherwise.

Before exploring how forensic psychologists as experts can assist the courts in deciding contested child custody cases, this article will attempt to lay a sufficient foundation. From that foundation flows, the author trusts, a rationale for what forensic psychologists can and cannot say in a custody report. This article is intended to be preliminary and investigatory, and not definitive, an invitation to dialogue with other mental health professionals and the legal system and not the final word. The foundation begins with explaining how forensic experts differ from fact witnesses and clinical or treating experts; how the forensic methodology differs from the legal methodology; and what elements comprise a valid and reliable child custody report.

## FORENSIC PSYCHOLOGICAL EXPERTS/FACT WITNESSES/CLINICAL EXPERTS

Federal Rule of Evidence 701 restricts a fact witness "to those opinions or inferences which are (a) rationally based on the perception of the witness; and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." Fact witnesses testify to facts about which they have direct observational knowledge, but not to opinions or inferences. Clinicians who treat patients, such as clinical psychologists, mental health counselors, social workers, and psychiatrists, can serve as fact witnesses or as treating experts. In the latter case, the court restricts them to observations derived from the therapeutic treatment process, *i.e.,* what the professional has observed in and can infer from treatment. When qualified as treating experts, they provide diagnosis, prognosis, and opinions about the effectiveness of therapy and the patient's mental health, testimony that goes beyond direct observation. In most cases, treating experts may not offer opinions reserved for forensic experts, that is information that exceeds the clinical situation. For example, which custody plan may serve a child's best interest or the quality of a child's attachment to a parent not involved in treatment. Thus, a fact witness can comment on facts and observations only.

A treating expert will go beyond facts and offer opinions and inferences based upon therapeutic work. And a forensic expert can go beyond facts, beyond clinical observations and opinions, and make inferences and offer opinions about specific child custody issues, the topic that lies at the center of this article.

## FORENSIC ASSESSMENT DIFFERS FROM CLINICAL ASSESSMENT

The difference between a forensic assessment and a clinical assessment, also part of the foundation for this article, may help clarify the legitimate domain of forensic psychologists in child custody areas. As experts[3] have stated, an irreconcilable conflict exists between therapeutic and forensic roles. As advisors, forensic psychologists provide information intended to help educate the court about issues beyond the ken of ordinary people; clinicians provide treatment for their clients or patients. Usually, forensic psychologists replace diagnosis with an analysis of functional abilities—what parents know about their children and how well they parent them—as experts attempt to apply psychological concepts to legal terms such as "best interests." In contrast, diagnosis plays a pivotal role in treatment[4] strategy. Whereas forensic psychologists understand human behavior in gradients so that a litigant may be more or less competent as a parent, clinicians classify behavior categorically and related to a specific diagnosis or diagnoses—the patient is or is not bipolar, is or is not dependent on alcohol.

Since forensic psychologists know that litigants' motivations can

be and often are distorted, that litigants have conscious and unconscious reasons to offer certain facts and withhold others, that commonly they try to present a most favorable self-image, forensic psychologists look to corroborate all information provided by searching for a consistency across multiple sources, and by using multiple methods of data gathering. Clinicians typically accept what their patients tell them at face value, knowing that patients may distort what they say through unconscious filters but usually not to gain an advantage in a legal dispute; ulterior motives arise from psychodynamic factors and self-deception and not from legal maneuvering.

In the treatment setting, patients form an alliance with their treating clinicians and not one in which the professionals scrutinize their every word and possibly discredit them in court. Forensic psychologists, unaligned with the interests of any litigant, treat with skepticism everything litigants claim.

Forensic psychologists look to predict the future functioning of parents and how specific parenting plans may affect the children. Clinicians treat patients' emotional pain and symptomatology in the present, although they may refer to history and look forward to a future when their patients will show improvement in their lives. Since forensic child custody evaluations intend to help the court, forensic psychologists advocate not for the litigants (except perhaps the children) but for the trustworthiness of their results and the validity of their opinions. Professional duty binds clinicians to help their patients and to do nothing to jeopardize the therapeutic relationship, including perhaps making critical comments about them in court. If a clinician takes the side of the other parent in court, the treatment alliance falls apart.

Privilege, which is so important in treatment and must be safeguarded by clinicians, does not exist in the same manner in a forensic assessment. Litigants can claim no privilege in forensic reports,[5] as anything and everything they say to the psychologist or that the psychologist discovers could end up in the report, disclosed in discovery, and examined in court. In treatment, the patient owns the privilege and usually does not waive it before receiving services. Forensic psychologists must inform litigants that they are not patients and should not expect the evaluation will help them emotionally or in court; in treatment patients have every right to expect they will benefit from the procedures. Competence for forensic psychologists entails skill at investigative interviewing, discerning a litigant's motivation, thinking scientifically, conducting an evaluation and using techniques relevant to the legal claim—detective-like work. In therapy, clinicians use techniques to treat impairment, to resolve emotional conflicts, and to improve their patients' overall functioning.

## FORENSIC METHODOLOGY VERSUS JUDICIAL METHODOLOGY

Forensic psychologists use a specific methodology—a standard set of procedures that insure the information gathered about each parent and each child is obtained validly and reliably. Experts assess each litigant and all their claims and allegations thoroughly and similarly, and in light of empirically valid knowledge derived from the social sciences. Based on systemic observation and analysis, experts attempt to explain human behavior probabilistically. By raising and considering alternative hypotheses or explanations, experts help to avoid what psychologists call confirmatory bias—the tendency to seek out data that only supports the expert's expectations. Instead, experts also look for data that disconfirms their bias or initial impressions. By confining inferences to data grounded in research and well-established clinical literature, experts honor the canons of good science and the court's demand for expert and not just personal opinion.

As experts refer their analysis about psychological constructs to the legal questions (best interests), they insure that their work relates to what the judge has to decide, and not to extraneous or irrelevant matters. By respecting the procedures of a scientific methodology and the court's evidentiary demands, experts address psychological constructs and psycholegal issues, and not specifically legal issues (*e.g.,* who should be awarded custody).

Truth, not probabilities or gradations (a child's best interest is or is not served by a particular parenting plan), the language of facts and fact patterns, conclusions reaching specific determinations (the parents have joint legal custody or one parent has sole legal custody) bespeak legal decisions. For when judges decide child custody issues they do not say "maybe a child should be with this or that parent" or that a parent may or may not be guilty of domestic violence. Consequently, in court, when attorneys ask for definitive conclusions and categorical descriptions of litigants, the forensic psychologist responds with probabilities and gradients; "it depends" will often be their answer. When attorneys push for certainty about which parenting plan will best serve a particular family, experts respond with realistic equivocation and skepticism about long-term prediction.

A valid and reliable child custody evaluation stands on five pillars:[6] 1) direct observation of litigants, their children, and their interaction with each other; 2) the litigants' self-report, including what they tell experts about themselves, their history, their children, their spouses; 3) structured interviews in which experts cover the same information with each litigant, and each litigant has the same opportunity (not necessarily the exact same amount of time) to answer all relevant questions and to provide information; 4)

standardized psychological testing that have appropriate basis and relevance to the psycholegal questions (*e.g.*, the MMPI-2 regarding whether or not a litigant exhibits psychopathology); 5) collateral interviews (*e.g.*, grandparents, new spouses) and record review (*e.g.*, mental health and medical records, police reports).

To summarize, experts serve the court and not the litigants. They employ a scientific methodology in which they always consider alternative explanations (a child refuses to see one parent because of the other parent's influence, for justifiable reasons, or a combination of factors), and they apply skilled observations upon which they make inferences about parents and children.

Experts gather information in different ways (*e.g.*, interviews, observation, testing, self-report, collateral contacts, records review) and from several sources (*e.g.,* the litigants, medical/counseling and/or police records, other parties) and treat with skepticism—everything has to be corroborated—what litigants claim. Experts report their findings probabilistically and with considerable nuance as they explain human behavior such as parenting ability in gradients and not in absolutes. In this a tension exists between how the court proceeds and how experts conduct their evaluations, how courts seek definitive conclusions and how experts offer possibilities and probabilities. Nevertheless, experts refer their findings directly or indirectly to the psycholegal issues as defined by statute, *i.e.*, N.J.S.A. 9:2-4.

## WHAT A FORENSIC REPORT CAN SAY

Forensic psychologists can comment on the quality of the parent/child relationships including and especially dimensions of nurturance—degree of effective warmth or coldness—and control, meaning the type and degree of supervision, monitoring, and limit setting.[7] They can offer a psychosocial evaluation of the children, including their view of their parents; their emotional and behavioral adjustment (maturity); their involvement in and adjustment to activities and school; their social functioning; any specific emotional or academic needs; their preferences, if any; the effects of the divorce on them; and their developmental level and concerns.

Forensic psychologists can comment on the parents' history of caretaking; the parents' psychological adjustment; the parents' perception of their children; the parents' ability to provide stability for their children; on parenting skills; on the interaction of one parent with the other; on parenting styles (*e.g.*, authoritarian, permissive, neglectful); on the parents' ability to understand and meet their children's needs; on a history, if any, of substance abuse, legal problems, domestic violence, and as it pertains to parenting and the ability to co-parent, a mental health history. Additionally, experts can comment on a parent's personality functioning and psychopathology (*e.g.*, capacity for empathy).

## WHAT PSYCHOLOGICAL EXPERTS CANNOT OR MAY NOT SAY IN A REPORT

As stated above, a valid and reliable scientific methodology restricts what experts can say in their reports, for they must offer expert opinions and not strictly personal ones. So also does the court and its rules of evidence place limits on experts. In addition, a lack of consensus about evaluative procedures, about what are or are not valid psychological constructs, also limits or at least makes unclear what experts can say in their child custody reports. For example, "presently, there are no psychometrically sound, structured interview protocols for use in custody evaluations…there is no personality test that measures parenting or parental competencies."[8]

On another level, experts disagree not only about the definition and meaning of psychological constructs but also about how they apply to the psycholegal issues in question. In a recent article in *Family Court Review*,[9] for example, a lawyer and psychologist delineate four categories of data gathering and inferences, three of which they assert fall within the legitimate domain of psychological expert reports[10] and the fourth outside of it. For the purposes of clarification and summary, the author will explain their four levels of data collection and inferences. On the first level, experts report what they observe without the addition of opinion or inference (*e.g.*, the child hid behind the chair and refused to answer her parent's questions). On the second level, experts reach conclusions about the psychological functioning of parents, children, and family, and they make inferences about the first level (*e.g.*, the child appears to have an anxious attachment to her mother or father). On the third level, experts reach conclusions about the implications of level 2 for specific custody variables, including custody access (*e.g.*, primary placement with mother/father runs the risk of exposing the child to that parents' overt hostility toward the other parent). On the fourth level, experts draw conclusions about custody and what should happen, that is, what a court should decide. Controversy begins here.

Although courts may permit experts to comment on the ultimate issue[11] (a specific custody plan), experts should not offer such commentary, the *Family Court Review* authors argue, because these recommendations exceed the scope and expertise of psychological experts. In other words, specific recommendations about custody access entails social value judgments (*e.g.,* should a parent's religion or absence of it be a factor in deciding custody, is one parenting style better than another), and moral judgments, or statements about how people should or should not behave, both of which exceed the scope of all the

mental health disciplines. Instead, social policy, the Legislature and the courts decide these issues. In addition, the *Family Court Review* authors conclude that experts lack an adequate foundation in the psychological literature for specific recommendations:

> There are two related reasons why such opinions [on ultimate issues] ought not to be permitted:
>
> - They exceed the boundaries of the empirical knowledge base of the mental health professional
> - They implicitly misrepresent the limits of that knowledge base.…
>
> The best interests standard is a legal and socio-moral construct, not a psychological construct. There is no empirically supportable method or principle by which an evaluator can come to a conclusion with respect to best interests entirely by resort to the knowledge base of the mental health professional.
>
> …Too often, the court must choose the one who is less "bad." There is no empirically verified psychological construct of "good parent" or "bad parent," let alone a construct for the comparative analysis that the court is called upon to perform[11]…. There is no evidence that the social scientist is any better placed to accurately and validly answer that question [custody placement] than is a judge….[12]

These authors argue, in other words, that no sufficient or reliable data exists to make specific inferences about which custody plan will serve a child's best interests, but other experts, this author included, opine that behavioral science and psychology does provide a sufficient knowledge basis to offer "a series of alternative hypotheses, predictions about the future functioning of the child under different custody and access scenarios, also backed by research findings."[13] In this view, experts can offer a range of possible alternative dispositions about custody access plans with attendant risks and advantages, and they can also address special questions such as child abuse, molestation, claims of a parent's psychopathology, and domestic violence.

Other experts conclude that forensic psychologists can offer opinions on the ultimate factual issue (whether a child is being alienated as justifiable grounds for refusing visitation) and not on the ultimate legal issues (whether the child should be forced to see the estranged parent).

> We can provide expert testimony about ultimate factual issues and we can provide testimony about the best psychological interests of the child, provided the opinion has an adequate basis in data, which supports it.[14]

In responding to the argument that experts cannot and should not offer opinions about specific custody plans, another expert[15] argues that because a scientific basis underlies child custody evaluations, experts can provide an adequate basis for level 3 and level 4 analysis and recommendations.

> The art of doing an evaluation refers to the ability to utilize a scientific style in gathering data while understanding how to integrate that data into sensible and well-articulated recommendations to the family and the court. Child custody evaluation literature has raised the standard for custody evaluators to use a scientific approach, gather relevant data from multiple sources, and integrate that data into the analysis and recommendations. I believe that this allows well-trained and competent evaluators to make Level III and Level IV recommendations to the court.

Obviously, experts cannot offer opinions based upon a lack of sound methodology, an inadequate knowledge base, their own incompetence, personal opinion or bias, purely clinical hunches, those without a sufficient basis in the psychological literature, or which are specifically legal issues (the credibility of a litigant).

## CONCLUSION

Under certain conditions as described in this article, experts can offer valid and reliable information and opinions to courts, provided they recognize their role as advisory, use a scientific methodology of data gathering and analysis, base conclusions on well-founded empirical findings and not just personal opinion or hunches, and they avoid straying into moral judgments or social commentary.

They should, as a matter of course, advise courts of the limitations of their procedures, inferences, and conclusions, and of the advantages and disadvantages of any recommendations. Whether they take a more restrictive view and avoid specific custody recommendations or a more permissive view allowing for such recommendations, humility and caution should guide their work. ■

## ENDNOTES

1. Goldstein, A. M., (2003) Overview of Forensic Psychology in A. M. Goldstein (Ed.), *Handbook of Psychology*. Vol. 11. Hoboken, N.J.: John Wiley and Sons.
2. Although the author refers to psychologists, other mental health disciplines also provide forensic child custody evaluations. The author's comments and analysis may also apply to them.
3. Greenberg, S. A. and Shuman, D. W., (1997) Irreconcilable Conflict Between Therapeutic and Forensic Roles. *Professional Psychology: Research and Practice.* Vol. 28, No. 1, pp. 50-57. Gould, J. W. (1998). Conducting Scientifically Crafted Child Custody Evaluations. Thousand Oaks, CA: Sage Publications.
4. Since a diagnosis does not address specific functional abilities such as parenting, it can be misleading and prejudicial in a child custody case. As the DSM-IV states, a diagnosis (such as pedophilia) "does not imply that the condition meets legal or other nonmedical criteria for what constitutes mental disease, mental

disorder….(and) may not be wholly relevant to legal judgments (p. xi)."

5. In fact, the author asks litigants to sign off on any privilege they may have in a custody evaluation before the evaluation can begin.
6. Gould, J. W. (1999). Scientifically Crafted Child Custody Evaluations: Part Two: A Paradigm for Forensic Evaluations of Child Custody Determination. *Family and Conciliation Courts Review,* 37, 159-178.
7. Otto, R. K., Buffington-Vollum, J. K., & Edens, J. F. (2003). Child Custody Evaluations. In A. M. Goldstein (Ed.) *Handbook of Psychology*, Vol. 11. Hoboken, N.J.: John Wiley & Sons.
8. Gould, J. W. *Ibid.*
9. Tippins, T. M. & Wittman, J. P. (2005). Empirical and Ethical Problems with Custody Recommendations. *Family Court Review,* 43, 193-222.
10. The authors opine that on level 3 only certain limited opinions fall within experts' legitimate domain.
11. FRE 704(a).
12. Tippins, T. M. & Wittman, J. P. *Ibid.*, 214-215.
13. Tippins, T. M. & Wittman, J. P. (2005). A Third Call: Restoring the Noble Empirical Principles of the Professions. *Family Court Review,* 43, 270-282.
14. Kelly, J.R. & Johnston, J.P. (2005). Commentary on Tippins and Wittmann's "Empirical and Ethical Problems with Custody Evaluations: A Call for Clinical Humility and Judicial Vigilance." *Family Court Review,* 43, 233-241.
15. Gould, J. W. & Martindale, D. A. (2005). A Second Call for Clinical Humility and Judicial vigilance. *Family Court Review,* 43, 253-259.
16. Shahl, P. M. (2005). The Benefits and Risks of Child Custody Evaluators Making Recommendations to the Court: A response to Tippins and Wittmann. *Family Court Review,* 43, 260-265.

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## Evidential Standards of Custody and Timesharing Reports

**Continued from Page 9**

829 ("Obviously, the trier of fact can be assisted only in areas that are relevant to its deliberations.").

60. Dana Royce Baerger, Robert Galatzer-Levy; Jonathon W. Gould; Sandra G. Nye, *supra* note 13, at 51 ("Judges and attorneys can greatly increase the utility of evaluations by crafting court orders that pose referral questions specific to each family. This practice increases the likelihood that evaluators will address matters of central importance to the litigation, and diminishes the likelihood that evaluators will address irrelevant issues that confuse the litigation and increase the cost of the evaluation.").
61. *Id.* at 52 ("A particularly problematic situation can arise when an evaluator offers opinions about issues that are both irrelevant to the pending legal issue and highly prejudicial…Placing a child in the primary custodial care of a parent suffering from "Generalized Anxiety Disorder and Personality Disorder Not Otherwise Specified, with avoidant and obsessive-compulsive features" sounds almost negligent – despite the fact that this diagnosis may have nothing whatever to do with caregiving capacity.").
62. Timothy M. Tippins, *supra* note 12.

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# Lifestyle Reports: How Much Info is Too Much?

*by Scott Maier and Noah B. Rosenfarb*

The *Crews v. Crews*[1] decision directed courts, when setting alimony awards, to consider the standard of living during a marriage and whether an alimony award will enable the parties to experience a lifestyle that is "reasonably comparable" to the marital lifestyle. This directive ultimately calls for the courts, litigants and counsel alike to be more fully aware of a divorcing family's intact historical spending during the marriage, as well as the possibilities of spending continuing for one or both of the parties in the future. As a result, New Jersey divorce attorneys have been asking their financial experts to more fully analyze and more formally report on their clients' lifestyle spending. These lifestyle reports are used by the divorcing parties and their counsel to negotiate or otherwise resolve alimony and support issues.

The addition of a lifestyle report as a standard component of a New Jersey divorce has significantly increased the cost of divorcing in this state. The professional fees charged to generate a lifestyle report may run high, based on factors such as:

- how many accounts are utilized by the family,
- the dollar levels of spending,
- the marital assets which are being supported,
- non-recurring or extraordinary expenditures, and
- the size of the family, etc.

Complex family finances may cause these lifestyle reports to be quite extensive, and require a great deal of explanation of the underlying numerical analysis. In addition, significant time may be required of the litigants themselves to explain certain aspects of the family lifestyle to counsel or experts.

So, when all is said and done, how much information in this lifestyle report is enough? How much is *too* much? When does the document go from a simple informative account of the family spending history to an expensive and overly burdensome and confusing document that itself requires an explanatory report? What is the balance?

This article will address some of the questions posed by those who use and those who prepare lifestyle reports. The article will focus on the following topics:

- What are the minimum components of *any* meaningful lifestyle report?
- Within each component category, what latitude exists in deciding how to present the data gathered?
- How much detail is enough?
- What types of discussions/conclusions are appropriate in the lifestyle report?

## WHAT ARE THE MINIMUM COMPONENTS OF ANY MEANINGFUL LIFESTYLE REPORT?

It is the authors' experience that a lifestyle report must contain certain building blocks in order to be of any use to the parties, counsel and/or the court. The following is the authors' list of the essentials:

**1. A summary of disbursements from all bank and brokerage accounts.** The most obvious starting point for an analysis of what the family spent is the family's checking account activity. In addition, the financial expert must be careful to include other, less obvious disbursing accounts, such as savings, money market or investment accounts with checking privileges or with the ability to make wire transfers.

Also, the financial expert must be alert to *all* of the accounts utilized by *all* of the members of the families. The authors have been involved in cases where the family lifestyle was based on disbursements from more than a dozen accounts. The divorcing couple jointly owned some of these accounts, some were solely owned by each of the parties, some were jointly owned with third parties (*e.g.* one of the spouse's parents, etc.), and some were owned by the children.

A good starting point to ascertain what accounts exist is the case information statements (CISs) filed by the divorcing couple. Notice the recommendation to look at both CISs. It is important to utilize as much information as possible in identifying sources of disbursements. Interviews of both parties are also necessary in most cases. In the occasional extremely adversarial divorce, account information may be obtained from deposition testimony.

**2. A summary of credit card/ credit line transactions.** In this world of easy credit and frequent flyer miles, virtually all clients pay a

considerable amount of their lifestyle expenditures with credit cards. Obviously, no proper analysis of family spending can be complete without placing these transactions into the proper spending categories.

The financial expert must decide how to present credit card expenditures in the lifestyle report. If credit card debt has been accumulated during the report period, the amount of credit card charges should be disclosed when possible. Otherwise, either the amount of credit card charges or the amount of payments to the credit card companies is acceptable.

The amount of detail about credit card charges to present in the lifestyle report varies, based on whether the credit card statements are available, and the cost/benefit of presenting additional detail. Many financial experts assume that all credit card expenditures are personal in nature. Others allocate credit card expenditures among the general categories of shelter, transportation, and personal based on interviews or other information.

Note that lifestyle expenditures via credit card spending may have been accompanied by an accumulation of credit card debt. A separate report—a cash flow analysis—answers the question of whether the divorcing couple spent in excess of their available cash flow.

**3. A summary of funds received from third parties and expended as part of the family's lifestyle.** The *Weisbaus v. Weisbaus*[2] decision directed that courts consider the actual lifestyle enjoyed by the divorcing parties, including amounts funded by third parties. Since this decision was handed down, this part of the analysis has become an important cog in those divorces where the family was, at least in part, supported by someone outside of the family unit (*e.g.* parents, siblings, trusts, estates, etc.).

**4. A summary of family expenses paid for/supported by a spouse's employer/business.** In the authors' experience, more often than not, reimbursements to or direct payments made on behalf of one of the parties are not accounted for on these reports. Such an omission could be extremely obvious (such as when there are no car payments listed as part of the lifestyle expenditures because the cars are paid for directly by the spouse's business) or more subtle (*i.e.* meals, travel, etc.).

Such an omission can improperly skew the overall conclusions reached by the expert. In the authors' view, these expenses should indeed be included in the report and reimbursements/payments should be included in the appropriate section of the CIS as an inflow of funds to the family.

**5. The lifestyle report should accurately report all amounts expended.** Finally, in the authors' opinion, the financial expert should include *every* transaction, during the relevant period, which constitutes spending by any member of the family that is identifiable and quantifiable. Whether or not that item is included as a recurring expense or within some other category may be a matter of professional judgment, as discussed in the next section.

**6. Organize the lifestyle report consistent with the CIS.** The authors believe that the lifestyle report should summarize total or average lifestyle expenditures, and should be presented in the same format as the CIS. Expenditures should correspond to the same line of the CIS, and be categorized as shelter items (Schedule A), transportation items (Schedule B), or personal expenses (Schedule C).

**7. Other questions.** Please note that the authors did not suggest a specific time period for the analysis above, or into which line items certain expenditures might fall. This omission is intentional, as these decisions will be discussed in the following sections of this article.

## WITHIN EACH COMPONENT CATEGORY, WHAT LATITUDE EXISTS IN DECIDING HOW TO PRESENT THE DATA GATHERED?

So, if every transaction should be recorded, and if the summaries should always be presented in a manner corresponding to the CIS, why do we need a report at all? Why not just compile some detailed schedules listing all of the transactions by category, and present these schedules as support for the CIS? These seemingly simple questions are not so simple to answer.

The following illustrations represent the types of decisions that financial experts make regarding the presentation of certain "debatable" items:

**Non-Recurring or Extraordinary Expenditures.** Assume that during the last year of the (intact) marriage, the Smiths renovated their marital home at a cost of $120,000. The Smiths had not done any other renovations during the past 10 years. Further assume that the period under review for this particular lifestyle report is two years. Is it fair to include this $120,000 expenditure in the analysis, thereby increasing the Smith family's average annual spending by $60,000 per year or $5,000 per month?

There are three choices in situations like this. First, one could allow the "actual" spending to stand; however, this would artificially inflate the family spending amount for the period and mislead the reader into believing that the family's lifestyle requires an extra $5,000 for home renovations on an ongoing basis, as a recurring expenditure. This presentation would be improper.

So how does the financial expert fix it? The second choice would be to put the renovation cost in a separate category entitled "non-recurring or extraordinary expenditures." This is the right answer if the expenditure is not expected to recur. That would be the case for certain items (*e.g.* completed orthodontic work for a child, education costs which have ended, etc.). However, most people renovate their

homes periodically, even if the recurrence would not be for another 10 years.

Therefore, in the authors' opinion, the appropriate way to handle this would be to assume that the Smith's home renovations would occur every 10 years and spread the cost over the 10-year period. The result would be an average spending of $1,000 per month ($120,000 divided by 120 months) for home renovations. For the Smiths, this more accurately reflects the ongoing spending pattern of the family.

Obviously, the decision regarding what is non-recurring and extraordinary is very fact-sensitive. It might very well be appropriate to remove something completely; just make sure the expenditure will truly never be expected to return.

**The Time Period Analyzed.** How many years should a lifestyle report cover? Ask 10 matrimonial attorneys and 10 financial experts and you'll receive 30 different answers. While this observation is obviously meant to be a bit comical and very sarcastic, it should drive home the point. There is no hard and fast rule in this realm.

Some financial experts say that (based upon *dicta* in some case law) a presumption of three years is a good starting point. However, the authors have seen no empirical precedent or evidence that three years is better or worse than five years or two years. In fact, the authors believe that the only rule to live by is that *every situation is different*.

The financial experts in each case must look at all of the facts and circumstances and make a determination. Did the parties' employment change during the last few years of the marriage, causing a change in cash flow available to the family? Did other financial circumstances change (*e.g.* inheritances, business buyouts), causing changes in cash inflows? Was there divorce planning during the marriage by one of the parties well before separation? How long were the parties separated before the complaint for divorce was filed? All of these (and other) questions affecting the finances of the couple in the last years of the marriage must be considered to determine the period of time that best represents the marital lifestyle.

**Presentation of Taxes, Savings and Investment.** In the authors' experience in this area of litigation support, expenditures for savings, tax reserves and investments are omitted from the CIS as often as they are included. What does this indicate? Does it mean that half of the clients are purposefully committing fraud? Of course not. What this indicates is that most clients are not financial people, and they do not think in terms of savings and investments as lifestyle expenses. Nor do they have any idea what they spend in taxes.

The savings and investment component of a marital lifestyle can be defined in two different ways. One equates savings and investment as equal to the parties' cash inflow less expenses. The other equates savings and investment to the amount the parties knowingly and purposely saved/invested (*i.e.,* 401k contributions, monthly investment programs, etc.). Case law has not yet provided a definition for this lifestyle component.

Once a definition of savings and investment has been assumed, quantifying it is easily accomplished by, for example, looking at brokerage statements, valuation analyses for either party's owned businesses, W-2 forms, income tax returns, etc.

Once the financial expert determines the savings and investment amounts, how should they be presented? Can it be a recurring expenditure? In part, sure. However, more likely than not, some of the savings and investment is dependent upon specific circumstances that may or may not recur. In the authors' opinion, the best way to present such amounts is within a completely separate section of the analysis. This will present all of the data to the reader while allowing the process to determine how much of these spending components should be subject to support calculations.

**Unallocated or Unidentified Expenditures.** It is extremely rare for a financial expert to identify each and every expenditure. So, how should the unidentified transactions be presented? Financial experts present these items in a variety of ways. Some simply identify the items as "miscellaneous," "unidentified," or the like. Some utilize an allocation method (usually based upon the relative ratios of all the identified expenditures) to place unidentified expenditures into categories. Whichever method the financial expert chooses (and the authors do not endorse one over another, believing instead that each case warrants different treatment) the authors believe it needs to be properly supported and explained in the report.

**Intact Family Lifestyle Versus Separate Expenses.** Prior to the mandated use of the new CIS in Sept. 2004, this subject would have been a bit more controversial (due to the fact that the old CIS form did not call for the inclusion of expenditures post-separation). Because of this old construction of the CIS, lifestyle expenditures after separation were not routinely analyzed.

The new CIS form now calls for inclusion of both pre-separation spending as well as post-separation spending for the family. Obviously, there is little guidance in the case law regarding whether or not lifestyle reports must include an analysis of post-separation expenditures. One would expect to see attorneys more frequently request such analyses in the future though. Further, pragmatically, it would be difficult to settle cases without the parties and their respective counsel having some understanding of the parties' current separate spending habits.

## HOW MUCH DETAIL IS ENOUGH?

This is another area of great debate amongst financial experts

who produce lifestyle reports, as well as the attorneys who use them. The essence of this issue is: Does the financial expert reveal all of the detail, every transaction that supports their summaries and, ultimately, their conclusions? Or, alternatively: Does the financial expert set forth only the bare bones summaries and conclusions, and leave the reader to search for the detail through testimony and/or other discovery from the presenter?

It is the authors' belief that all lifestyle reports should be complete and self-contained to the extent possible, leaving very little to the reader's imagination.

Therefore, if the reader were to review the authors' reports, they would find the report itself, supported by summaries that aggregate all of the expenditures by category on separate exhibits for each year in the review period. The exhibit itself would detail the summary by account and aggregate into a total for the year/period. As stated above, the analysis is broken up into various sections reflecting the recurring expenditures, as well as the savings/investment/taxes and the non-recurring/extraordinary items.

Further, this would lead into a master summary that would aggregate the periods analyzed and average the totals by month. The authors use a commonly used spreadsheet package (Excel) to complete the mathematical analysis, but any spreadsheet software can be used.

The reader would then find a separate analysis, by category, year and account, reflecting all of the transactions that ultimately are utilized in the summary calculations. The authors often employ check-writing software to affect this analysis (Quicken, Quickbooks, etc.).

Having said this, the authors note that there is no *mandate* regarding how much detail must be presented within each report. It is the authors' belief, generally, that a more thorough presentation allows, in most cases, for more facile resolutions in these matters.

## WHAT TYPES OF DISCUSSIONS/ CONCLUSIONS ARE APPROPRIATE IN THE REPORT?

It is important to keep the language in the report as concise and reader friendly as possible. Remember that the marital lifestyle report is, to a great extent, merely a mathematical exercise—a compilation of data. It does not require a great deal of professional judgment or subjective opinion (as compared, for example, to a business valuation report). As such, the report is much like an expert's deposition. It is very difficult to win a case in deposition; however, it is quite easy to lose it there. Just as the expert being deposed, the preparer of the lifestyle report must be careful not to embellish the calculations with too much opinion or other extraneous information.

It is not for the expert, in the context of the report, to opine on whether or not the lifestyle can be projected to continue in the future. It is likewise ill advised to attempt to offer an opinion regarding what percentages of the total expenditures are attributable to specific family members.

First, neither statutory nor case law requires such a determination. Under New Jersey law, both spouses could argue that they are entitled to individually maintain the marital lifestyle. There is no formula that sets forth which spouse is entitled to what portion of the documented lifestyle expenses. Second, this allocation would be difficult to ascertain. Just because a certain family member writes the check, that expense does not necessarily pertain to that individual.

Finally, in the authors' opinion, the lifestyle report is not the place to reconcile the available cash flow to the lifestyle expenditures. Don't misunderstand, any competent expert must do this and the results of such reconciliation must be discussed with the attorney representing the client (especially in the case where unreported income, loans, gifts, or other non-income tax related cash inflows exist). The authors are merely suggesting this analysis does not belong in the lifestyle report.

## CONCLUSION

There is no shortage of required information that must be included in any meaningful lifestyle report. However, exactly what information and how the information is presented must be determined on a case-by-case basis. It is crucial that an organized and detailed presentation be made if the report is to be useful in resolving the matter either by the court or through settlement.

It is just as crucial that the language in the report itself be concise, state the basis for the presentation, the documents/data relied upon to prepare the exhibits as well as a detailed description of the *flow* of the presentation.

Finally, the lifestyle report is meant to be a factual presentation. Therefore, it is also important to avoid statements of opinions in such a report, and to allow the report to be utilized solely as a tool to assist in the case's resolution.

This article has not addressed discovery issues related to obtaining the necessary documents to complete lifestyle reports. That topic warrants an entire article to be written about the morass surrounding obtaining information from reluctant parties in some of the more contentious matters. ■

## ENDNOTES

1. *Crews v. Crews,* 164 N.J. 11 (2000).
2. *Weishaus v. Weishaus,* 180 N.J. 131 (2004).

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# Lifestyle Analyses: A Lawyer's Perspective

*by Patrick Judge Jr.*

When commissioning a lifestyle analysis in a matrimonial matter, the author finds it is generally for one or both of the following reasons:

1. To determine the disposable net income of a family with a self-employed income producer; and/or
2. To determine the manner in which the parties spent their disposable net income.

## DETERMINING INCOME

Frequently, a family lawyer encounters a problem in determining the amount of income earned by a self-employed litigant when representing his or her spouse. This creates a two-fold problem: 1) what is the income level for support purposes? and 2) what is the income for business valuation purposes?

When faced with this type of fact pattern, a lifestyle analysis may be beneficial. If a lifestyle analysis is elected, it is important for the individual conducting the lifestyle analysis (generally a forensic accountant) to obtain information from both litigants.

**Information from the spouse of the self-employed litigant.** In the first instance, Part D of the case information statement of the spouse of the self-employed litigant reflects the parties' budgetary line items in the broader categories of shelter, transportation and personal expenses. In addition to obtaining from the spouse of the self-employed litigant his or her estimates regarding the individual budgetary line items (supported with as much documentary proof as possible), it is also important to have that individual set forth all known sources of funds for that lifestyle. For example, did the income of the self-employed spouse fully fund the lifestyle? Did the spouse of the self-employed litigant work? Were gifts from family members received? Was an inheritance received? Did the parties fund their lifestyle through the creation of debt (credit lines, credit cards, etc.)?

**Information from the self-employed litigant.** After obtaining the estimated budgetary line items and the sources used to satisfy those expenses from the spouse of the self-employed litigant, it is important to be able to obtain from the self-employed litigant his or her position on the same two issues (the family's budget and the sources used to satisfy that budget). The self-employed spouse first discloses that position on his or her case information statement. Then, the lawyer or forensic accountant should compare the parties' respective case information statements in anticipation of questioning the self-employed litigant. That litigant should either be deposed or interviewed (by consent) by the forensic accountant who is conducting the lifestyle analysis.

**Deducting disposable funds unrelated to work efforts.** Once the family's budget has been arrived at through the involvement of both parties, any infusion of disposable funds into the family for the time period being reviewed should be deducted from the budget when attempting to determine income earned. As set forth above, examples include any gifts or inheritances received during the time period being reviewed. This applies equally to debt existing at the time of the analysis. The resulting net number (budget *less* disposable funds received by the family unrelated to work efforts *less* debt incurred that remains) is generally a fair assessment of the disposable net income for the family.

## ALLOCATING EXPENSES

The second, and probably more common, reason for commissioning a lifestyle analysis is to determine how the family's resources were spent. Generally, the threshold question is what time period should the analysis cover to accurately portray the marital lifestyle? Should it be the last three years? Should it be the last five years? Should it be an average of the entire marriage? What if aberrational circumstances intervened for a period of time, either causing an unusual spike in income/expenses or, the opposite, a severe decrease in income/expenses? In considering this question and how to present the facts in the most favorable light to the client (especially if the issue appears in the post-judgment context), one should not forget the Appellate Division's response to the defendant-husband in *Guglielmo v. Guglielmo*,[1] when he argued that the plaintiff-wife was "attempting to improve her lifestyle beyond that which she enjoyed with him." Specifically, Judge Philip Gruccio, writing for the part of the Appellate Division addressing the matter, stated:

> …Where a family's expenditures and income had been consistently expanding, the dependent spouse should not be confined to the precise lifestyle enjoyed during the parties' last year together. Defendant's income picture should be viewed with an eye toward the future, since it was to this *potential* that both parties contributed during the marriage. The then existing earning potential of the working spouse may be shared by the spouse who kept the home, and that standard of living should be implemented through an adequate alimony award. (Citations omitted).

Once it is determined what time period the analysis will encompass, the relevant documents for the analysis must be obtained, including all bank and brokerage account statements with copies of the individual canceled checks; credit card statements/receipts; retirement account statements; invoices for both recurring and non-recurring expenses (*i.e.,* mortgage statements, utility bills; car payments; insurance payments, etc.); tax returns and pay stubs. Subpoenas may have to be issued to obtain documents that are not readily available. It is important to remember that the lifestyle analysis will only be accurate if it incorporates all relevant information/ documentation. If a bank account is missed, the analysis may be flawed if that bank account included information pertinent to the time period being reviewed.

After compiling the documentation, the author generally looks to have the forensic accountant assign expenses to the individual budgetary line items on the case information statement. The reader should keep in mind that the case information statement does not segregate expenses for husband, wife and/or the children. The case information statement groups expenses for the family into the individual categories. Depending upon the issues in the particular case, it may be advisable to try to break out certain expenses (to the extent possible) for individual household members. This is particularly important in the alimony context in prosecuting or defending the issue. By way of example, if the supported spouse has a budgetary line item expense of $600 per month for clothing, and that expense historically was allocated $100 to the supported spouse and $500 to the children, this is an important fact to be able to prove when representing the supporting spouse.

When commissioning a lifestyle analysis, the author expects the forensic accountant to not only allocate family expenses into the case information statement budgetary line items, but to also identify unusual, non-recurring expenses.

It is also important to remember that a lifestyle analysis is a numeric analysis. The attorney must assure that the appropriate arguments supplement the analyses that are in his or her client's best interests. For example, if the parties live in a mortgage-free home, the lifestyle analysis may reflect low shelter expenses. The numeric analysis in that instance does not reflect the quality of the lifestyle that the parties lived. In this instance, if representing the supported spouse, an argument may need to be advanced that the litigant's future anticipated shelter expenses will be higher than the lifestyle analysis reflects as that individual may have to borrow funds to purchase a residence post-divorce. The forensic accountant can assist with the expansion of this argument and its incorporation into the lifestyle analysis. For example, the accountant might include anticipated shelter expenses within the lifestyle analysis. For such reasons, it is important that the attorney, forensic accountant and litigant understand the theory of the case and make the best presentation with the facts and circumstances available to advance the client's position.

## PRESERVING THE INFORMATION/ DOCUMENTATION FOR THE FUTURE

In *Crews v. Crews*,[2] the Supreme Court directed that trial courts, when setting an alimony award, make findings regarding the marital standard of living, even in uncontested cases. Specifically, in *dicta*, the Supreme Court stated:

> The setting of the marital standard is equally important in an uncontested divorce. Accordingly, lest there be an insufficient record for the settlement, the court should require the parties to place on the record the basis for the alimony award including, in pertinent part, establishment of the marital standard of living, before the court accepts the divorce agreement.[3]

In the immediate years that followed, a hotly negotiated point in most cases was whether the supported spouse would be able to maintain the marital standard of living based upon the financial provisions of the agreement. In higher income cases, it became routine to commission lifestyle analyses to address this issue.

In June 2004, the Supreme Court issued its opinion in *Weishaus v. Weishaus.*[4] In *Weishaus*, the Supreme Court revisited the issue of whether in an uncontested matter, the Court would require the parties to place on the record the basis for the alimony award, including the marital standard of living.

In *Weishaus*, the Supreme Court noted that the *Crews* case included a contested alimony claim, such that the trial court needed to make a finding regarding the standard of living during the marriage and whether the support awarded will permit the parties to enjoy a lifestyle reasonably comparable to that standard of living.[5] After reconsidering the issue in the uncontested divorce context, the Supreme Court held as follows:

> …We now hold that in uncontested divorce actions, trial courts must have the discretion to approve a consensual agreement that includes a provision for support without rendering marital lifestyle findings at the time of entry of judgment. Our holding in *Crews* should no longer be read to require findings on marital lifestyle in

every uncontested divorce. A trial court may forego the findings when the parties freely decide to avoid the issue as part of their mutually agreed-upon settlement, having been advised of the potential problems that might ensue as a result of their decision. Even if the court does not decide to make a finding of marital standard, however, it nonetheless should take steps to capture and preserve the information that is available.[6]

Accordingly, although it is no longer necessary to spread upon the record at the time of an uncontested divorce the marital standard of living, it may be advisable to have that information preserved in the event that post-judgment litigation takes place concerning the alimony issue. If a modification of alimony application ensues several years after the actual divorce, it may be very difficult to reconstruct the marital lifestyle. Documents are lost or destroyed. Recollections are clouded over time. A lifestyle analysis may be the answer to adequately preserve the marital lifestyle issue in one's file for future use in the event a modification application is brought.

**CONCLUSION**

In summary, whether using the lifestyle analysis to determine income, determine expenses or to preserve what was the marital lifestyle for future use, each case must be evaluated to determine whether the expense associated with having a lifestyle analysis conducted merits the potential benefit that such an analysis may provide. ■

**ENDNOTES**

1. 253 N.J. Super. 531, 543-544 (App. Div. 1992).
2. 164 N.J. 11 (2000).
3. *Crews* at 26.
4. 180 N.J. 131 (2004).
5. *Weishaus* at 141.
6. *Id.* at 144.

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# The Vocational Report: How it is Useful and What it Should Include

*by Brian M. Schwartz*

With issues such as a spouse's absence from the workforce, underemployment and unemployment becoming more prevalent in the practice of family law, the vocational expert has become another tool in the litigator's box. Often, a vocational expert is retained either jointly or by one party in order to assist a court in determining a party's earning capacity. This article will discuss the legal authority for the relevance and use of vocational experts, the preferred contents of the expert's report, and creative, perhaps non-traditional, means of utilizing these experts.

## LEGAL AUTHORITY FOR APPOINTMENT OF VOCATIONAL EXPERTS

The vocational expert can be utilized to assist an attorney on the issues of alimony and child support. With regard to alimony, N.J.S.A. 2A:34-23b lists the factors a court shall consider in making an alimony determination. Those factors include:

1. The actual need and *ability of the parties to pay*;
2. *The earning capacities,* education levels, *vocational skills, and employability of the parties;*
3. *The length of absence from the job market of the party seeking maintenance*;
4. *The time and expense necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, the availability of the training and employment,* and the opportunity for future acquisitions of capital assets and income. (*Emphasis added*)

Regarding child support, the fairness of a child support award is dependent upon the accurate determination of a parent's net income.[1] Paragraph 12 of Appendix IV-A to the Rules Governing the Courts of the State of New Jersey states that:

> If the court finds that either parent is, without just cause, voluntarily underemployed or unemployed,[2] it shall impute income to that parent according to the following priorities:
>
> a. impute income based on potential employment and earning capacity using the parent's work history, occupational qualifications, educational background and prevailing job opportunities in the region.

Further, in those cases for which the child support guidelines do not apply, N.J.S.A. 2A:34-23a provides factors that the court must consider in making an award of child support. Those factors for which a vocational expert could be of use include:

1. Standard of living and *economic circumstances of each parent*;
2. *All sources of income* and assets of each parent;
3. *Earning ability of each parent, including educational background, training, employment skills, work experience*, custodial responsibility for children *including the cost of providing child care and the length of time and cost of each parent to obtain training or experience for appropriate employment;* (*Emphasis added*)

Additionally, factor four concerning contribution toward college, as set forth in *Newburgh v. Arrigo,*[3] is "the ability of the parent to pay the cost."

Clearly, then, there are various statutory and case law factors regarding support of spouses and children that can be influenced by the report and testimony of a vocational expert, and Rule 5:3-3(c) provides that, "Whenever the court concludes that disposition of an economic issue will be assisted by expert opinion, it may…appoint an expert…to report and recommend as to any other [economic] issue…." Therefore, when issues such as the underemployment of a supporting spouse or the return to work of the supported spouse arise, there is authority for the use of a vocational expert in the statutes, case law and Rules of Court.

## CONTENTS OF THE REPORT

Initially, the purpose of the evaluation must be placed in the forefront. Is the evaluation being presented because someone is unemployed, underemployed or seeking a return to the workforce? Allow the audience to understand, from the start, the reason this expert is a necessary piece of the puzzle.

Next, the evaluation must thoroughly explore the particular skills, work history, and education of the

party. The evaluator should delve into each position held by the party—responsibilities that accompanied the position, hours worked at the position, whether promotions were received, and compensation/benefits provided. This should flow, like a narrative, from graduation through the present. The report should also contain that party's resume, and may also contain prior and present employment contracts, offer sheets, benefit statements and any other *indicia* of the position, the duties performed and the compensation package. (In order to assist in this process, the attorney may discuss the contents of a document demand with his or her expert so the necessary documents can be obtained prior to the evaluation.) The evaluator may also investigate whether the party sought other opportunities (while employed), even if those opportunities never came to fruition. Such questions may expose another skill set or field of interest for that party.

The expert also needs to investigate the non-work factors and responsibilities of the party. For example, if a custodial parent is being evaluated for a return to work, the expert must understand any family obligations this person may have. Will there be child care? What type of child care? How will responsibility for the children be allocated between the parents and a child care provider in case of emergency or illness? The answers to these questions will ultimately affect the type of employment that party may obtain. These answers will also affect the weight given to the prior work history of that party. A party who, prior to having children, traveled extensively for work in order to earn a higher level of compensation may not be able to return to such a position. The evaluator, within the report, needs to detail the non-work factors and how those factors affect the conclusion.

The report also needs to discuss in great detail the proposed plan, which will allow the party to earn the income suggested by the evaluator. This is especially important when rehabilitative alimony, or alimony with a step-down provision, is at issue. In *Carter v. Carter,*[4] the Appellate Division noted:

> When granting rehabilitative alimony or in approving a rehabilitative alimony provision where rehabilitative alimony is a negotiated term of a property settlement agreement, the trial judge must inquire of each party as to the parties' understanding of the rehabilitative alimony obligation. This is particularly necessary where one or both of the parties may wrongfully believe that the obligation to pay alimony will end at the conclusion of the rehabilitative period….
>
> The basic premise of an award of rehabilitative rather than permanent alimony is "an expectation that the supported spouse will be able to obtain employment, or more lucrative employment at some future date." Thus, rehabilitative is "payable for a terminable period of time when it is reasonably anticipated that a spouse will no longer need support."

The report should therefore delineate the period of time it will take that party to achieve the income set forth in the conclusion. The report should likewise outline the training necessary and costs related to achieving the goals set forth in the report's conclusion. Again, consideration must be given to any custodial duties of the parent in question, as this may affect the time period. In sum, the vocational expert—both in the report and during testimony—should clearly define the *Carter* plan, so that that can be presented either to a court or within an agreement.

The report should also contain anecdotal information regarding the party. During the interview process, the evaluator should delve into that party's interests, goals, skills, and background. The evaluator should also interview that person's spouse, who may have important anecdotal or labor information. This information can be utilized to determine appropriate employment opportunities of interest to that party. More importantly, it may provide a class of opportunities or an area of employment that may not have been considered by the party.

Ultimately, the evaluator must reach a conclusion, which is based upon statistical and trade information such as that which is detailed extensively in Dr. Wolkstein's article, also published in this issue of *New Jersey Family Lawyer*. Within that conclusion, attorneys and courts are seeking the same goal—reasonableness.

No attorney wishes to present a report to the court that, in his or her own mind, is unreasonable. Like the budget pages from a case information statement, the conclusion must pass the *smell test*; that is, the facts must reasonably support the conclusion. Just as a gross annual salary of $40,000 per year (without debt accumulation) very likely cannot support an annual budget of $80,000, the high school graduate who has been out of the work force for 10 years cannot reasonably be expected to return to the workforce immediately and earn a significant salary. An unreasonable conclusion will render the report, and the expert, moot.

As attorneys, there is often a focus on the bottom line; what can this person earn? Yet, the conclusion should focus less on the final income figure, and more on the plan for achieving that income. The conclusion should contain a summary of skills, education, training and employment history; relevant anecdotal information; a summary of statistical data; and a listing of available opportunities that meet the criteria of this particular party. The report should detail the particular training that might be necessary, the reasonable amount of time necessary to achieve that training, the reasonable cost of the training, and the availability of the training. Perhaps the expert can recommend a course of training with a specific

institution, which might, for example, offer job placement services, or which has an established hiring history of its students/trainees. The expert may also find training programs offered by corporations, such as management training programs, which are available. The report may include the names and contact information for job placement agencies. In other words, in addition to the anticipated income, the report and its conclusion can be a how-to for that party to obtain that income. By demonstrating that the opportunities exist, and developing a plan for achieving goals, that party has a better chance of actually obtaining that employment, rather than an empty imputation of income.

**CREATIVE USES FOR VOCATIONAL EXPERTS**

Presently, most vocational experts are utilized by matrimonial attorneys and the family court for the purpose of imputing income to an unemployed/underemployed spouse, or to determine the earning ability of a spouse who will be returning to the work force shortly. However, there may be other roles for these experts. For example, an attorney represents the supporting spouse. The client would like to limit or reduce his or her alimony exposure. The attorney's first instinct is to retain a vocational expert to determine a reasonable level of income to impute to the supported spouse.

Perhaps, instead, the attorney represents the supported spouse, who has not worked in several years. The client is aware that, in a divorce, there just is not enough money to support two households. Additionally, upon divorce, he or she will lose medical insurance. A return to work is imminent. However, having been out of the work force for so long, the client is unsure of his or her potential income and benefit package.

In either case, rather than seeking a litigation strategy of imputation of income, or entering into an agreement with so many unknowns, the attorney can retain the vocational expert to *find employment* for the supported spouse. The vocational expert could meet with the supported spouse, perform the same evaluation, and then actively seek positions for that spouse. In other words, the attorney is essentially retaining the expert to act as a job placement firm to assist the spouse in obtaining employment. Ultimately, if the supported spouse finds employment, the issues of imputation and expectation of income are settled, rather than nebulous. Further, issues such as benefits, child care needs and the like are addressed in the present rather than being discussed in the abstract.

Vocational experts can also be utilized in college contribution cases. For example, perhaps there is an issue regarding whether the child should attend prestigious (and expensive) Ivy U. or the less prestigious, and less expensive, State U. Assume further that the child in question has a particular course of study he or she will be pursuing. Perhaps State U. has a particularly impressive record of employment and placement of students who graduate from that particular department, which is comparable to that of Ivy U. The vocational expert can evaluate the employability—both in terms of opportunity and anticipated income—of the student upon graduation depending upon the institution attended. With the assistance of this expert, the argument could be made that this particular child should attend the less expensive state institution, based upon a cost-benefit analysis and the opportunities that may be available upon graduation. ■

**ENDNOTES**

1. Pressler, Rules Governing the Courts of the State of New Jersey, Appendix IV-A, section 12.
2. For an excellent discussion on the topic of "voluntary underemployment or unemployment, without just cause," *see Storey v. Storey,* 373 N.J. Super. 464 (App. Div. 2004) and the various cases cited therein.
3. 88 N.J. 529 (1982)
4. 318 N.J. Super. 34 (App. Div. 1999).

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# Vocational Expert Opinion: Challenges and Responses

*by Eileen Wolkstein*

In many divorce proceedings, the vocational expert is retained to evaluate the employability and earning potential of both spouses. Substantive data is valuable to support requests for permanent, term and rehabilitative alimony and child support.The vocational expert, also known as an employability expert, is most effective when providing an objective analysis of the individual's greatest potential in the labor market based on a comprehensive assessment of the individual considering data related to personal, social, medical, psychological, educational and vocational factors.

The findings of the assessment are then applied to the labor market. The final determination of employability and earning potential is based on the intersection of the assessment and the labor market. The expert conducts extensive labor market research.

The expert, in rendering a decision, examines the information provided by the individual, the results of the research, the range of occupations that meet the person's qualifications, the marketability with given skills, the potential to increase earnings through continued education, and the need for education to enhance employability (especially true for individuals who have been out of the labor market for a significant number of years as well as for those whose area of expertise is no longer marketable given changing conditions in the marketplace).

The final report presents the full array of information gathered during the interview, the assessment of this information based on the expert's skill, knowledge and experience (overall professional ability) to evaluate the facts using objective standards and methodologies for determining vocational potential, and assessment of the labor market information with regard to the individual. The conclusion integrates this information into a final determination of employability in a range of occupations, the earning potential, factors that contribute to or detract from the ability to work (child care, need for additional education, commutation), likelihood of securing employment, and steps necessary to improve prospects for working (career counseling, skill building in interviewing, negotiating).

## THE INTERVIEW PROCESS

The vocational interview is typically conducted in the office of the professional in order to create the most favorable climate for the interchange that is necessary to establish rapport and engage in the inquiry process. It is incumbent on the expert to establish with the individual the nature of the interview; the goals, objectives and process; and to clearly articulate the objectivity of the report that will follow.

The interview process includes the deliberate taking of information in an organized and systematic manner. The expert gathers from the person all relevant and available information, such as resume, summary of job search, sample cover letters, medical records and report, results of testing, academic transcripts and grades, and employment evaluations.

If the interview reveals that the person has a medical condition or is under the care of a physician, therapist or other health or mental health practitioner, information from that professional is requested from the individual, or the request is submitted to the individual's attorney, as a means to assist the interviewer in rendering an opinion.

## NATURE OF QUESTIONS INCLUDED IN EACH CATEGORY

*Background:* This gives a broad picture of the person's history and present circumstances.

*Personal/Social/Medical:* This portrays the person's present status in the family and the community, as well as medical factors and personal factors that can impact employability.

*Economics/Financial*: This includes all sources of income.

*Education:* This provides a picture of the person's educational background, record of achievement, and approach to learning, and establishes a level of qualification for employment.

*Employment:* This presents the person's skills, knowledge, abilities, and areas of specialization; industry affiliation; work skills and values on the job performance, work challenges and successes.

*Vocational Testing:* This allows for objective measurement of factors that contribute to employment potential, as well as academic and psychological barriers to employment.

*Job Search:* This provides details on the person's overall attitude and disposition toward work in general, the current job, job seeking, scope of work sought, and degree of moti-

vation to work.

*Other:* Depending on the information that is gathered, the expert might engage in further inquiry into details beyond the above factors.

## LABOR MARKET RESEARCH

Labor market research is conducted by the use of a wide variety of resources. The breadth of the resources used determines the value of the findings. It is sometimes the case that one could obtain the same information from three or four sources, and establish that this information is the most current and accurate. If there are conflicting outcomes, it is necessary to expand the search to gather as much relevant information as possible in order to establish a finding. The totalities of these findings are stated in the report. In addition, the expert includes all print information that has been obtained from professional organizations; government publications; Internet sites; job surveys; and surveys of qualifications, licenses, degrees and all related information.

## THE REPORT AND WHAT CAN BE SAID AND NOT SAID: POINTS FOR CONSIDERATION

The vocational expert needs to understand the parameters of his or her expertise in rendering an opinion. Not being a physician, there cannot be assessments of illness. Not being a psychologist, there cannot be diagnostic assessments of mental health. Not being a child expert, there cannot be assessments of child mental health. Not being a learning specialist, there cannot be an assessment of the special learning needs of children or adolescents the client describes as "being classified" or suffering from a learning disability or ADHD.

Breaking this down into specific categories and examining the principles by which the vocational expert works in presenting information, interpretations and conclusions, this discussion will focus on some of the most potentially controversial areas, which are also the ones that are most significant in the opinion process. While this discussion is not inclusive, it lays out examples that can help the reader better understand the parameters of the vocational expert's scope of work and opinion formation.

### *Medical History*

If the client has a medical history, whether physical, mental, emotional, or neurological, factors related to this condition may have an impact on employability and overall functioning. The expert has the choice of reporting as the individual reported, or gathering information from treating physicians to obtain a more accurate basis of information. Experts who are not trained in vocational rehabilitation are not prepared to assess this information in regard to assessing maximum functional capacity. For these individuals, the most that can be done is to present the facts of the illness: the treatment, the client's statement of functional loss and relevance of the condition to functioning in the home, in school and in the workplace.

For example, a diagnosis of multiple sclerosis itself does not imply that the person cannot work. However, the person might be limited to work that does not require extensive mobility if there are muscular limitations, or work that does not require extensive verbal communication if there is speech involvement. In this case, the report should reflect the history and effect of the illness and its impact on employment based on the client's presentation only if there is not more medical information available. The expert who is also a vocational rehabilitation professional is able to apply the information more specifically to the reasonable accommodations that might be necessary, as well as the impact of the condition on employment.

In another example, the client might report suffering from extreme depression that is being treated by a psychiatrist or other mental health professional. Medication may or may not have been prescribed. In this case, the expert inquires about the impact of the symptoms on the person, with specific reference to functioning in and out of the home. The expert reports the information that is provided, and the client's judgment of what he or she can and cannot tolerate. Again, if the expert is a rehabilitation profession, he or she is able to review medical documentation and make an assessment of functional capacity based on the presenting information.

### *Child Care*

Another area in which there is room for consideration of what to present and how best to present it is the care of a child or children. This extends from the basic needs of pre-school children to the care of school-aged children and children with special needs.

The client reports that he or she is the primary caregiver, and that this cannot change for the well being of the children. The client adds that given the changing family dynamics there cannot be more stress on the children. How this impacts the person's ability to work from a motivational and time perspective needs to be presented. However, how best to present it remains a dilemma. The expert can present the assessment that the client presents. For example, "I cannot have someone else care for my children so I need a job that is from 9:30-2:30, and the employer has to be flexible in case the school is closed or the child is ill."

In another example, the client might state that the child or children have tutoring and special educational enrichment after school, or need parental guidance in doing homework because of ADD or ADHD. For this reason the parent cannot be absent from the home.

The expert can reflect this in his or her report. In reality, very few

jobs meet these criteria. What does this mean for the expert? It means that the expert presents what the client's position is, the degrees to which there are any positions that would allow for this flexibility, and what options exist that come closest to meeting these criteria. The expert should also present the range of jobs that the person could obtain if childcare were not an issue. The ultimate decision is up to the judge.

### *Employment History*

The labor market is in a constant state of flux. With increased emphasis on technology, skills become antiquated very quickly. In addition, many positions are now managed by technology requiring a new set of skills. Still other areas have been contracted abroad and have ceased to exist in the current economy.

The client might report a work history that has been extensive but stopped more than 10 years ago. In some of these cases, the last job might have existed five years ago, but the technology has changed radically and the person is no longer competitive in the current labor market at the prior level. It is essential that the expert convey the full range of responsibilities the person held, but also express that the field has changed, how it has changed and the impact of these changes on the ability to be competitive. The findings have impact on the final opinion regarding what the person is able to do with existing skills, what skills are needed to be competitive and the economic implications of the various stages of employability.

An example of this is presented by the individual who had a constant progression in his or her field of work, rising in the organization and realizing increased responsibility and earnings. At a point in time, the company required a person with a different skill set to perform the emerging work, and the person was terminated because there was not another fit in the company. The nature of the person's skills and labor market realities showed that he or she would not be able to equal his or her earnings in a new company. This is based on having *grown up* in a company and obtaining corporate knowledge that is only possible after a prolonged period of employment. The individual would not be able to duplicate this knowledge in a new company, and therefore would have to start at a lower level and work his or her way back up. It is these nuances of the labor market that the expert needs to know and consider in rendering an opinion.

### *Educational History*

The person might have earned a bachelor of arts degree 15 years ago and not worked for seven to eight years. Is the degree still of value to meet the requirements of a specific field, and if so, of what value? In addition to the degree, what are the experience requirements? While this information is included in the report, it needs to be annotated for current relevance. The occupation might now require an MBA or other qualifications. The expert needs to make these factors very clear, and consider them in rendering an opinion.

Conversely, the person might have an MBA and have worked at a senior level until seven or eight years ago. Since the person has not used the degree in a number of years, it may well be of less value with regard to earnings because of a lack of recent experience.

## RENDERING AN OPINION

After completing the interview and conducting the labor market research, the expert formulates an opinion based on all the information that has been gathered. The expert determines a reasonable and expected salary projection, and likelihood of employment at the maximum level. The expert renders an opinion regarding how the person can be most marketable in the current labor market. This opinion reflects occupations for which the individual is currently qualified, as well as those for which he or she may require further education. The expert provides a current salary range, as well as a salary range at differing levels of preparedness. In arriving at an opinion, the expert details all the information gathered, and analyzes it according to occupational categories and levels of responsibility. Included in this process is the consideration of the qualifications of the individual to compete in the labor market with existing skills and experience.

## IN SUMMARY

The employability expert is a non-biased, neutral, objective analyst of an individual's background, personal, social, medical, emotional, and educational experiences as they impact the individual's ability to be competitive in the current labor market. The opinion that is rendered is based on a careful analysis of information, extensive labor market research and the synthesis of this information arriving at an opinion of employability as well as earning potential in the current labor market; the ability to increase earning potential and employability through training or retraining; and the possibility of personal development, improved job search and interview skills through vocational counseling. ■

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