

Evaluating the Evaluators: Work Product Reviews as Evidence

by Stanley G. Lipkin and Bill J. Fyfe

In child custody litigation, a mental health expert may offer into evidence his or her review of the work product of another evaluator. Such reviews raise questions of evidence, professional standards, and ethics.

An emerging area of evidence in contested family law cases involves the review of expert reports concerning the allocation of parental responsibilities and parenting time. These reports are formally known as work product reviews (WPRs). A WPR is a report offered by one expert critiquing the work of another expert without the collection of independent data.

This article discusses the defining features of a WPR and reviews the recognition of such work in case law and in behavioral science. Applicable ethical rules, statutes, Chief Justice Directives (CJDs), and scientific principles that define the boundaries of what a WPR may or may not include also are addressed. Finally, how WPRs fit within the Colorado Rules of Evidence (C.R.E.) is discussed, with a caveat concerning the risks associated with WPR testimony.

The Arena

The Uniform Dissolution of Marriage Act (UDMA)¹ allows for two types of expert reports regarding parenting time and parental responsibilities: a Child and Family Investigator (CFI)² report and a parenting time or parental responsibilities evaluation (PRE).³ Under each of these statutory reports, a professional collects data and provides recommendations to the court regarding the children in a proceeding involving the allocation of parenting time and/or decision-making responsibility. With increasing frequency, one of the parties is dissatisfied with the recommendations in the report and hires another expert to critique the work of the CFI or evaluator. A WPR may be offered into evidence, and testimony from the reviewer also may be part of a contested hearing.

Recognition of WPR in Mental Health Literature

Experts distinguish between two roles that a mental health professional might perform to assist an attorney in litigating a dispute involving another professional's evaluation of a family. On the one hand, counsel may retain a mental health professional to serve as a consultant who helps the attorney interpret the evaluation, develop case strategy, and prepare for trial. A WPR consultant also may serve as an expert witness and testify as to the quality of the evaluation.⁴ The two roles are not mutually exclusive, but there are significant distinctions. A consultant hired by the attorney and not placed on the witness stand is likely to be covered by the cloak of confidentiality within the work product privilege of the attorney.⁵ This article deals primarily with the expert whose testimony is offered into evidence to critique the evaluation of the CFI or the PRE.

The distinction between a WPR and a "second opinion" depends largely on whether the critiquing expert collects independent data. Without the collection of independent data, there are no independent means to render a second opinion as to the issue before the court—for example, what the parenting plan for the family should be or with whom the children should primarily reside in a relocation scenario.

Given that a WPR does not include the collection of independent data, it is most appropriately limited to an assessment of the perceived strengths or weaknesses of the work of the CFI or the PRE, including critiquing the nature of the data collected, the structural features of the original report, and how inferences are derived from the data available to the evaluator. The emphasis placed on various data points also is open to criticism in a WPR, and there may be confirmatory bias, violation of ethical standards of the pro-

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fessional performing the original evaluation, and flaws in scientific reasoning or the methodology employed by the evaluator that can be called into question. It has not been established whether a WPR can include a re-interpretation of the original expert's data or a reformulation of the inferences to be drawn from the first expert's data.

WPRs in Case Law

There is little explicit case law on WPRs. For as long as there have been experts admitted to give opinion, rebuttal experts also have been employed. The case of *In re Marriage of Newell*⁶ involved a post-decree parenting time dispute. A special advocate⁷ was appointed to make recommendations to the court and to act as a special master. The mother, who was dissatisfied with the ruling of the special master, requested and was granted a parenting time evaluation.⁸ After the parenting time evaluation largely concurred with the special master, the mother retained additional experts, including a pediatrician specializing in the diagnosis and treatment of children with attention deficit hyperactivity disorder (ADHD) who was an expert in assessing children's special needs. The mother also hired an expert in vocational assessment of persons with disabilities. At trial, each expert offered testimony as rebuttal experts in opposition to the special master and the evaluator. The appellate decision does not make clear whether the rebuttal experts collected independent data, but the appellate court granted the trial court broad discretion in deciding to admit the rebuttal experts.⁹

In *In re Marriage of Hatton*,¹⁰ also a post-decree modification of parenting time and parental responsibility, multiple custody evaluations were performed. The Colorado Court of Appeals implicitly approved the trial court having allowed testimony from a professional who submitted a review of an evaluation. The rebuttal expert, who was revealed only days before trial, apparently had not collected independent data, but had interviewed the children.¹¹

Contents of a WPR

As mentioned above, a WPR does not contain independent data. The following discussion focuses on what opinions might be properly stated in a WPR and on what basis those opinions may be reached.

Examination of Qualifications of Appointed Expert

A WPR may ask whether the expert was qualified by statute to perform the study undertaken. According to CRS § 14-10-127, the following qualifications are required of PREs:

- (4) A person shall not be allowed to testify regarding a parental responsibilities or parenting time evaluation that the person has performed pursuant to this section unless the court finds that the person is qualified as competent, by training and experience, in the areas of:
 - (a) The effects of divorce and remarriage on children, adults, and families;
 - (b) Appropriate parenting techniques;
 - (c) Child development, including cognitive, personality, emotional, and psychological development;
 - (d) Child and adult psychopathology;
 - (e) Applicable clinical assessment techniques; and
 - (f) Applicable legal and ethical requirements of parental responsibility evaluation.
- (5) If evaluation is indicated in an area which is beyond the training or experience of the evaluator, the evaluator shall consult with a mental health professional qualified by training or experience in that area. Such areas may include, but are not limited to, domestic violence, child abuse, alcohol or substance abuse, or psychological testing.¹²

In addition, the person performing a § 127 evaluation must be a licensed mental health professional.¹³

With respect to a CFI, there are separate qualifications in CJD 04-08, including specific training requirements:

Standard 6: The CFI shall maintain competence through training.

The CFI shall accept appointments only after attaining a level of competence that includes an understanding of both the legal and psychological/social issues that are typically present in dissolution or parenting cases, and shall maintain and regularly update his or her training in relevant areas.

New child and family investigators shall complete 40 hours of training in relevant areas prior to accepting appointments.

Attorneys and mental health professionals and other members of the community who are working as child and family investigators shall complete no less than 15 hours of continuing education in relevant areas every three years.

In addition, CJD 04-08 lists specific areas of prior training:

- the effects of divorce, single parenting, and remarriage in children, adults, and families

- dynamics of high conflict divorce
- child development, including cognitive, personality, emotional, and psychological development
- child and adult psychopathology
- family dynamics and dysfunction
- domestic violence
- substance abuse
- child abuse
- parenting capacity
- diversity issues
- available services for the child/ren and parties including medical, mental health, educational, and special needs
- the legal standards applicable in each case in which the CFI is appointed
- interview techniques for interviewing children and others.¹⁴

The CJD also requires the CFI to recognize and inform the parties when he or she finds that an issue is outside his or her area of expertise.¹⁵

Contents of Expert Report

The WPR may critique the structure of a written report. Regarding PREs under § 127 evaluations, the statute provides that:

(7)(a) A written report of the evaluation shall be provided to the court and to the parties pursuant to subsection (3) of this section.

(b) The report of the evaluation shall include, but need not be limited to, the following information:

(I) A description of the procedures employed during the evaluation;

(II) A report of the data collected;

(III) A conclusion that explains how the resulting recommendations were reached from the data collected, with specific reference to criteria listed in section 14-10-124 (1.5), and, if applicable, to the criteria listed in section 14-10-131, and their relationship to the results of the evaluation;

(IV) Recommendations concerning the allocation of parental responsibilities for the child, including decision-making responsibility, parenting time, and other considerations; and

(V) An explanation of any limitations in the evaluations or any reservations regarding the resulting recommendations.¹⁶

CFI reports should follow the requisites of the order of appointment.¹⁷ The report submitted must be presented in a timely manner and must be “clear and non-technical.”¹⁸

Review of Data and Data Collection Techniques

In a WPR, the critiquing expert first reviews the professional report and considers the appropriateness of the data collected by the primary investigator. The most important inquiry is whether the data collected by the CFI or PRE are sufficient to support the recommendations of the report. Section 127 evaluations have the following requirements:

In preparing the report concerning a child, the evaluator may consult any person who may have information about the child and the child’s potential parenting arrangements. Upon order of the court, the evaluator may refer the child to other professional personnel for diagnosis. The evaluator may consult with and obtain information from medical, mental health, educational, or other expert persons who have served the child in the past with-

out obtaining the consent of the parent or the person allocated parental responsibilities for the child; but the child's consent must be obtained if the child has reached the age of fifteen years unless the court finds that the child lacks mental capacity to consent. If the requirements of subsections (3) to (7) of this section are fulfilled, the evaluator's report may be received in evidence at the hearing.¹⁹

CFI reports are required to meet standards set out in CJD 04-08: Standard 8: The CFI shall collect data and conduct an investigation sufficient to allow the CFI to provide competent opinions.

A CFI shall complete whatever investigation is necessary in light of the scope of the court order, the legal standard being addressed, and the complexity of the family and the family issues being evaluated.²⁰

Application of Correct Statutory Standards

It is appropriate for a WPR to note whether all appropriate statutory factors have been considered and whether the correct statutory standard has been applied in a modification matter. An evaluator or CFI must consider whether the issue to be decided falls under a best interests standard or a standard that requires evidence of physical or emotional harm. Depending on the circumstances of the modification, the controlling statute and governing case law for a modification of parenting time or decision making may require best interests considerations²¹ or a conclusion of endangerment.²²

Ethical Issues

It also is appropriate for a WPR to contain a consideration of ethical issues, including whether the evaluator or CFI has shown evidence of bias or a lack of neutrality. Bias can occur in subtle ways. For example, there can be bias on the basis of cultural, religion, gender, or racial differences. A properly conducted WPR also may consider whether the data were obtained from significant sources. The WPR may consider whether an undue amount of time was spent with one of the parents and his or her collaterals, which resulted in a distortion of the evaluator's perceptions, or whether the evaluator over-emphasized one parent's view and subsequently proceeded to confirm such an opinion from the data.

Link Between Data and Conclusions

The WPR may consider whether the data collected support the conclusions reached by the evaluator. The statute on evaluations specifically requires that the report contain:

A conclusion that explains how the resulting recommendations were reached from the data collected, with specific reference to criteria listed in section 14-10-124 (1.5), and, if applicable, to the criteria listed in section 14-10-131, and their relationship to the results of the evaluation.²³

In addition, a WPR may question whether alternative hypotheses for interpreting the data were properly considered and whether recognized research supports a link between the data collected and the conclusions reached. If the conclusions are not based on a consideration of relevant research, the evaluator might be speculating as to causal relationships. In this context, a WPR might offer a summary of social science research on a substantive issue, such as studies on effects of overnight visitation for young children, or the psychological impact on children of witnessing domestic violence. Apparently, this was the type of expert testimony offered in *Newell*. A WPR can delineate alternative and plausible interpretations of the evaluation data set inferences; it then is up to the court to make the ultimate inference as to the meaning of the data.

Limitations of WPRs

A WPR is, in essence, an assessment of an investigation—a critical review of procedure, data analysis, and inference. As such, a WPR is not a substitute for a newly formed opinion.

Second Opinions

A WPR should respect the distinction between a review and a second opinion. A second opinion from a supplemental evaluation²⁴ necessarily requires the collection of independent data. For a psychologist, venturing a second opinion not supported by sufficient study would be a violation of the Ethical Principles of Psychologists and Code of Conduct, Standard 9.01, which states:

Except as noted in 9.01c, psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements or conclusions.²⁵

A WPR serves as a review of the original report. It provides an analysis of the report's suitability for the court to decide on ultimate issues; it is not a reevaluation of the subject matter of the report. The goal of a WPR is to evaluate the process of reaching the original recommendations on parenting time or decision-making responsibility. If the reviewing expert ventures an opinion on the ultimate issues, a line is crossed where opinions are being offered without appropriate data collection. It is one thing to express the opinion that the data collected are inadequate or that the data do not support the conclusions. It is quite another for the reviewer to venture his or her opinion about a specific family without the separate collection of data involving contact with both parties and the children.

Multiple Relationships

The expert performing a WPR must avoid multiple relationships. Multiple relationships may be prohibited by ethical codes or by applicable statute or practice standards. For a psychologist, dual

roles are prohibited under the Ethical Principles of Psychologists and Code of Conduct:

3.05 Multiple Relationships

(a) A multiple relationship occurs when a psychologist is in a professional role with a person and (1) at the same time is in another role with the same person, (2) at the same time is in a relationship with a person closely associated with or related to the person with whom the psychologist has the professional relationship, or (3) promises to enter into another relationship in the future with the person or a person closely associated with or related to the person.²⁶

A psychologist refrains from entering into a multiple relationship if the multiple relationship could reasonably be expected to impair the psychologist’s objectivity, competence, or effectiveness in performing his or her functions as a psychologist, or otherwise risks exploitation or harm to the person with whom the professional relationship exists.

Consider a case where the mother has received an unfavorable CFI report. To oppose the report, she employs a psychologist who, years before, performed a PRE on the same family that was much more favorable to her. The psychologist reenters the case as a confidential consultant, and meets with the mother and her attorney to advise them on the weaknesses of the CFI report. Later, the psychologist shifts to the role of presenting a written WPR after having had a one-sided relationship with one of the parties. In this context, the expert’s work in connection with the WPR could be construed as a violation of the dual-role clause of Rule 3.05 of the Ethical Principles of Psychologists and Code of Conduct.

With respect to CFIs, the CJD sets out specific requirements: Standard 4. The CFI shall not serve inconsistent dual roles.

The CFI shall not

- A) serve as a formal mediator in the case
- B) provide psychotherapy to any of the parties or children in the case
- C) provide legal advice to any party or otherwise act as an attorney in the case
- D) later accept an appointment as a child’s legal representative (CLR) in the same case or in the same family if s/he is an attorney
- E) accept the appointment if s/he has had a prior personal relationship, or a prior professional role with the family. This shall not include a prior appointment as child and family investigator.
- F) serve as an arbitrator or special master in the case prior to termination as his or her role as a CFI.²⁷

Confirmatory Bias

Reaching a conclusion too early in the WPR process is an inherent problem when the reviewer starts as a consultant for one party and submits a WPR to the court. In such situations, the reviewer generally is not disclosed to the opposing party. This is entirely proper when the consultant is in an advisory role. However, when the consultant shifts to an expert witness role, it is inevitable that the extent of reviewer contact with the party who sought the WPR will be open to question. The WPR expert making the tran-

sition from consultant for one party to representing his or her work as unbiased is inherently compromised by the fact that all contacts with the parties before the role transition have been one-sided. This will present fertile grounds for cross-examination and likely will compromise the effectiveness of the WPR and the weight given to it by the court.

Admission as Evidence

A WPR faces the same hurdles as any expert evidence when determining its admissibility. The expert must be qualified under C.R.E. 702.²⁸ The WPR must have probative value under C.R.E. 403.²⁹ Case law calls for examination of the qualifications of the expert, the reliability of the scientific principles being applied, and the usefulness of the information to the trier of fact.³⁰ The reliability of a WPR may be called into question.

Because WPR is an area under development even within the behavioral sciences, there are questions as to the standards for conducting a WPR. These questions include:

1. Does the WPR conform to professional standards of reliability?
2. Were the WPR techniques standardized within the reviewers?
3. Are there any standards of WPR techniques as required by the Rules of Evidence?³¹

The admissibility and weight to be given to a WPR, as with any expert report, depends on factors discussed in case law. These include whether the technique itself has been subjected to peer review, whether there are any professional standards for the technique, and whether there is any general acceptance of the approach within the behavioral disciplines.³² A WPR may apply such standards to the PRE it critiques; the WPR itself comes under the same scrutiny when offered into evidence.

Because the use of WPRs is an emerging discipline, there are many areas of inquiry for practitioners to consider in preparing to cross-examine such experts and in raising objections to the admissibility of such reports. Although there remain hurdles to overcome, a well-considered WPR that conforms to standards of systematic assessment, reasonableness, and helpfulness to the court can be a valuable addition to a trial of complex family disputes.

Conclusion

WPRs constitute an emerging area of evidence in family law cases involving issues of parental responsibility and parenting time. The mental health and social science literature is not well developed as to professional standards for WPRs, and Colorado case law has not extensively or explicitly dealt with this type of evidence. Accordingly, existing statutes, rules of evidence, and mental health standards of practice and ethics principles should be applied to such reports when they are tendered into evidence. Although WPRs are vulnerable to attack, a well-reasoned WPR that satisfies evidentiary reliability considerations may be of benefit to the court in contested parental responsibilities matters.

Notes

1. CRS §§ 14-10-101 *et seq.*
2. CRS § 14-10-116.5.
3. CRS § 14-10-127.
4. Gould *et al.*, "Critiquing a Colleague's Forensic Advisory Report: A Suggested Protocol for Application to Child Custody Evaluations," 1(3) *J. Child Psychol.* (2004); Martindale and Gould, "Evaluating the evaluators in custodial placement disputes," ch. 17 in Hall (ed.) *Forensic psychology and neuropsychology for criminal and civil cases* (Taylor & Francis, 2008).
5. *Hickman v. Taylor*, 329 U.S. 495 (1947); *A v. District Court*, 550 P.2d 315 (Colo. 1976), *cert. denied*, 429 U.S. 1040 (1977).
6. *In re Marriage of Newell*, 192 P.3d 529 (Colo.App. 2008).
7. "Special advocate" was the designation under an earlier version of CRS § 14-10-116.5 for the expert appointed to study the family and make recommendations to the court on parental responsibility and parenting time. This designation was supplanted by the child and family investigator (CFI) of the current statute.
8. CRS § 14-10-127.
9. *Newell*, *supra* note 6, *citing People v. Martinez*, 74 P.3d 316, 322 (Colo. 2003).
10. *In re Marriage of Hatton*, 160 P.3d 326 (Colo.App. 2007).
11. *Id.* at 329.
12. CRS § 14-10-127(4).
13. CRS § 14-10-127(1)(b).
14. CJD 04-08, Comments to Standard 6 (amended Jan. 2, 2008).
15. *Id.* at Standard 7.
16. CRS § 14-10-127(7).
17. CRS § 14-10-116.5(1) provides "The court shall set forth the specific duties of the child and family investigator in a written order of appointment."
18. CJD 04-08, *supra* note 14 at Standard 11.
19. CRS § 14-10-127(2).
20. CJD 04-08, *supra* note 14 at Standard 8.
21. CRS §§ 14-10-129(1)(a)(I) and (2) and 131(2). *See also Newell*, *supra* note 6; *In re Marriage of Ciesluk*, 113 P.3d 135 (Colo. 2005).
22. CRS §§ 14-10-129(1)(b)(I) and (1.5) and -131(2)(c) and (2)(d). *See also Hatton*, *supra* note 10.
23. CRS § 14-10-127(7)(b)(III).
24. CRS § 14-10-127(1.5).
25. American Psychological Association, "Ethical Principles of Psychologists and Code of Conduct with 2010 Amendments" 9.01(b), available at www.apa.org/ethics/code/index.aspx.
26. *Id.* at 3.05.
27. CJD 04-08, *supra* note 14 at Standard 4.
28. C.R.E. 702. Testimony by Experts. 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.
29. C.R.E. 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. "Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."
30. *People v. Shreck*, 22 P.3d 68 (Colo. 2001).
31. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
32. *Id.* ■