Forensic Mental Health Consulting in Family Law: Where Have We Come From? Where Are We Going?

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Forensic Mental Health Professionals (FMHPs) are venturing into a new and expanding form of consultation within the family law arena. They are more frequently being hired by attorneys on one side of a case to join the litigation team and perform a range of consulting functions that veer far afield from traditional FMHP roles as court appointed neutral evaluators and mediators. Though new and exciting opportunities are developing, FMHPs find themselves confronting dilemmas unique to these collaborations. The FMHPs must be answerable to the ethical standards of their profession, while accommodating the rules and needs of the legal world. Forensic psychologists have been involved in legal cases involving mental health issues for more than a hundred years. Trial consultants have also participated in trial preparation and research for more than thirty-five years. These professions have developed ethical and professional standards to guide their work. The FMHPs have much to gain from the efforts of these disciplines, as they endeavor to work responsibly with complex cases, highly charged issues, and multifaceted relationships.

KEYWORDS best interests of child, child custody, consulting services, professional standards, trial consulting

Consider the following vignette: A skilled and experienced forensic psychologist and custody evaluator receives a call from a local attorney who is well respected in the local family law community. The psychologist has not worked with the attorney before, but is eager to establish a
relationship with her and her firm, which often represent well-to-do parents
and do not shy away from litigation.

The attorney needs help managing a difficult client who has recently
begun going through a child custody evaluation. Despite the attorney’s
best efforts, the parent is constantly shooting himself in the foot. The parent
is convinced that he is far smarter than the evaluator, believes that the
evaluator has behaved unprofessionally, and is further convinced that the
evaluator just does not like him. The parent argues directly with the evaluator
and sends incendiary emails to his ex-wife. He is desperate to hang on to
the time he has with his children, with whom he has been very actively
involved.

The attorney believes sincerely that her client has been a good dad, and
that while the dad may have some personal problems, his behavior primarily
stems from his absolute panic about possibly losing time with his children. In
her call to the psychologist, the attorney cries, “Help.” If only a skilled foren-
sic mental health professional could meet with the dad, help him understand
what he is doing, and provide support and guidance for getting through the
evaluation, he might have a shot at a reasonable outcome. The attorney
needs help too, analyzing reams of documentation and developing a strategy
for coping with the case she is facing.

A scenario such as this one is not as far fetched as one might think in
the volatile and emotionally charged world of family law. The vignette
represents some of the opportunities and fears of Forensic Mental Health
Professionals (FMHPs) venturing into new territories in family law and cus-
tody consulting. On the one hand, this fictional consultant has been con-
tacted by an attorney with whom he/she would very much like to
develop an ongoing relationship. It would be awfully hard to turn down
an invitation to work in a collaborative mode with a respected firm that
could provide more work in the future. Plus, there is a lot of work to be
done, at full consulting rate, and it could draw on the range of skills the
FMHP has worked for years to hone—case analysis, knowledge of custody
issues and evaluation procedures and clinical skills useful in dealing with
difficult clients.

But on the other hand, has the attorney asked the consultant to do too
much or to do something that would challenge the bounds of ethical beha-
vior? What would be the impact of saying “no” to at least some of the attor-
ney’s requests? Is it acceptable practice to provide consultation to the
attorney and also work with the parent? If so, what form should the work
take? What kind of “guidance” is responsibly given to a parent who is going
through a custody evaluation and could potentially be a witness in a custody
proceeding? Is the work confidential? And, what if the dad turns out to be far
more disturbed than the attorney believes? What would it mean to help a
deeply troubled parent present well to a custody evaluator? Where does
the best interest of the child standard fit into this picture?
As consultation services rapidly expand in family law cases, these are only some of the complex questions that as a profession, FMHPs need to be asking to ensure that we are delivering services that comport with sound and responsible professional practice. This is not a simple task. The FMHPs are being engaged by family law attorneys of one party to provide a variety of services, including but not limited to: reviewing and critiquing custody evaluations and mediation reports submitted to the court by neutral experts; assisting attorneys “behind the scenes” in various aspects of trial preparation; testifying in an educative manner on specific topics related to a case; offering rebuttal testimony; and even advising or “coaching” parents through custody proceedings. More traditionally used in neutral, court-appointed roles, FMHPs working in family law now find themselves on one side of a case, encountering the goals, wishes, desires, and, even at times, instructions of a particular attorney and a particular parent.

Some consulting roles are more established than others and have garnered more discussion in the professional literature. The FMHPs have been used with increased frequency to review or critique colleagues’ work product and specifically custody evaluations at least since the mid 1990s. Such review work has been the subject of a number of articles addressing issues such as how FMHPs should approach such reviews, and what they add to the resolution of custody disputes (Stahl, 1996; Gould, Kirkpatrick, Austin, & Martindale, 2004). However, consulting roles for FMHPs in family law cases are still evolving, and FMHPs are becoming involved in custody matters in ways that could not have been predicted even in the last decade.

It is not hard to hypothesize why there is such an interest among forensic psychologists in developing these roles. Working within the legal framework can be an exciting and dynamic process, full of intellectual challenge. It also gets mental health professionals out of their individual practice milieus and more involved in a team approach to cases that can be emotionally draining and stressful to manage on one’s own. Consulting work can also infuse diversity into a FMHP’s practice, where there is always risk of burnout. And, with recent downturns in the economy, practitioners are seeking ways to distinguish themselves and diversify services they can offer.

Concurrently, many family law attorneys are utilizing FMHPs in ways that take better advantage of the range of the professional skills that a FMHP may have to offer. For example, skilled FMHPs can provide attorneys with knowledge of the ever-growing research on the many social and psychological factors inherent in the kinds of complex custody cases that often end up in contested hearings and trials. Or, given the increased emphasis on the science of custody evaluations, the FMHP may critique the thoroughness, methodology, and analysis of data collected for a custody evaluation. Newer roles seek to draw on the clinical skills of the FMHP, as family law attorneys seek their assistance in managing distraught, troubled or difficult clients, or to work actively and collaboratively to forge settlements and avoid lengthy and costly trials.
With these more recent functions, come increasingly complex relationships between psychologists and the individuals with whom they interact in family law cases. Traditionally, the legal arena is one predicated on an adversarial process, where argument based on evidence serves as the basis of determining the truth (Beck, Holtzworth-Munroe, D’Onofrio, Fee, & Hill, 2009). Working within the bounds of their own ethics, attorneys are expected to be zealous advocates for the clients. From this view, the FMHP is hired in the interest of furthering the case on behalf of the attorney’s client, ostensibly with the goals of bolstering argument and ultimately winning the case. The attorney must advance, to the extent ethically permissible, the client’s desired outcome. In family law, it may be an increase in custodial time, the ability to make child-rearing decisions unilaterally, or to oppose the other parent’s request for such relief. At the same time that the consulting psychologist is there to be helpful to the retaining attorney whose client is a parent, the FMHP must also be cognizant of his/her own ethical responsibilities, including the obligation to work in the best interests of the child. As Shuman and Greenberg (2003) aptly noted, “the forensic expert is beholden to multiple masters. Integrating the demands of these masters is inherently complex” (p. 220). Thus, even though a family law consultant has entered into a formal contract with the attorney, these cases invariably involve multiple stakeholders, either directly or indirectly. And, not only must the consultant address demands and expectations from the attorney and the parent, he/she should always keep in mind who everyone is fighting about—the children.

As attorney-retained FMHPs become actively involved in more aspects of custody cases, they are also having increasing contact and interactions with the parents, who are the litigants in the case at hand. Given that FMHPs have joined the litigation “team” as consultants, they must consider the implications of their relationship with the parent-litigant, who invariably brings an impassioned investment in the outcome of the case. This in turn, can create strong pulls on the FMHP to join in the advocacy process. By way of example, consider the dilemma for the consultant who is brought in to support a parent’s petition to relocate with a child. What if after immersing him/herself in the case, the consultant comes to believe that such a move would create undue stress or detriment to the child? What does the consultant do with his/her opinions? And, while rarely talked about, it is also the parent who is funding the attorney’s work, which now includes the consultant. Thus, with the introduction of direct contact with the parent, the “multiple masters” have increased in numbers.

As consultants become more prevalent in custody litigation, and as FMHP-attorney collaborations expand in new directions, it seems important and worthwhile to pause and consider thoughtfully just what it is we are doing. What are the parameters of our role as consultants and the various services provided? What are the ethical issues of professional practice when
a consultant works with within the legal arena but is bound by the ethics of professional mental health practice? How can FMHP consultants observe their own professional standards when working collaboratively with attorneys whose professional standards may differ from those of the consultant?

This article suggests that there is much to be learned from an historical view of the interface of mental health professionals and the legal system as we consider the ethical and professional complexities of consulting relationships. To that end, it is suggested that we can look to two vital sources—the evolution of forensic psychology and trial consulting—to guide our thinking. While FMHP consultation is a relatively new phenomenon in family law matters, psychologist mental health professionals have provided testimony in court proceedings for more than a century. For the majority of that time, FMHPs, and in particular forensic psychologists, have been engaged in expert testimony, assisting the trier of fact to understand mental health issues of individuals in cases before the court. In these roles, FMHPs have tried to bring to the legal venue the strengths of a scientific approach to understanding people along with clinical acumen. At the same time, forensic psychologists have learned that they must be mindful of the “rules” of a profession that is not their own. The competent and responsible FMHP must know the legal standards, precedents, and rulings that apply in the specific area in which they practice, as their work must be oriented to the psycho-legal questions at hand. As they have gained a firmer footing in the courtroom, forensic psychologists have worked hard to address issues of professional practice and ethics (Weissman & DeBow, 2003).

For at least the past 35 years, social scientists of various disciplines have also provided consultation in other aspects of trial proceedings. In contrast to forensic mental health consulting, trial consultation has received far more attention and scrutiny in the professional literature in terms of the direct application of social science to the legal process (Kovera, Dickinson, & Cutler, 2003). Initially growing out of a specific set of legal cases, and spurred on by a sense of social activism, trial consultants today assist attorneys in remarkably diverse ways and in an enormously varied range of cases, large and small. For example, they assist attorneys with pre- and post-trial research, case strategy, venue analysis, jury selection, and witness preparation. As such, trial consultants are hired to join litigation teams that are sometimes composed of attorneys from multiple law firms, even representing multiple clients. Many trial consultants are asked to work not only with the attorneys, but also directly with litigants and participants in the trial. Thus, they too are involved in complex relationships where professional standards and responsibility must be woven into the intense team drive to win the case (Lieberman & Sales, 2007). Trial consultants, some of whom are FMHPs, have also sought to define themselves professionally and to develop a set of standards and ethics to guide their work. This article will draw on these sources to understand the complexities of the relationships implied in
the emerging roles for consulting FMHPs in family law, as they endeavor to serve the needs of the retaining attorney, the parent-litigant, the court’s goal to find the truth, and last, but certainly not least, the best interests of the child.

This article does not presume to prescribe definitive answers to these difficult questions; it is intended to highlight what we know from these two areas of practice to inform discourse from which solutions can emerge. Given the relative wealth of discussion in the literature of models for conducting reviews of colleagues’ work products, and specifically child custody evaluations, this article will turn most of its attention to the other emerging consulting roles in family law.

DEFINING THE INTERSECTION OF PSYCHOLOGY AND LAW

While not all FMHPs are psychologists, the intersection of the mental health and legal professions is best described in the literature of forensic psychology. There are several accessible definitions of forensic psychology. “Specialty Guidelines for Forensic Psychology” were originally drafted and approved by the American Psychology-Law Society, Division 41 of the American Psychological Association (APA) and the American Board of Forensic Psychology in 1991 (Committee on Ethical Guidelines for Forensic Psychologists, 1991) and are currently in the process of revision. The most recent revision (August 2010) defines forensic psychology as “all professional practice by any psychologist working within any subdiscipline of psychology (e.g., clinical, developmental, social, cognitive) when applying the scientific, technical, or specialized knowledge of psychology to the law to assist in addressing legal, contractual, and administrative matters.” It seems important to emphasize that the Specialty Guidelines are not intended to apply to an individual’s typical area of practice or expertise, but to “the service provided in the case at hand” (Revision p. 3).

Furthermore, professional practice is considered to be forensic not just because it takes place in the courtroom or judicial procedure per se, but because it addresses specific psycho-legal questions or issues. Goldstein (2003, p. 4) suggests that forensic psychology “involves the application of psychological research, theory, practice and traditional and specialized methodology (e.g., interviewing, psychological testing, forensic assessment, and forensically relevant instruments) to provide information relevant to a legal question.” As such, FMHPs provide “products” (such as reports and testimony) to “consumers” (e.g., judges, attorneys) that contain information to aid in legal decision-making. The Specialty Guidelines thereby suggest that forensic psychologists should be, in a sense, responsive to both the profession that credentials them, as well as the profession that establishes the rules of applicability.
Among the examples of forensic services typically rendered by FMHPs noted in the *Specialty Guidelines* is “serving as a trial consultant or otherwise offering expertise to attorneys, the courts, or others” (Revision, p. 3). Section 1.04 specifically outlines that forensic practice may include not only examination and assessment of an individual’s functioning, but also consultation regarding the “practical implications of relevant research, examination findings, and the opinions of other psycho-legal experts” (Revision, p. 3). Thus, consultants in the Family Law arena should know that their work not only has historical precedence, but can be considered to fall under the umbrella of at least one set of guiding principles for ethical professional practice. Though the *Specialty Guidelines* remain aspirational, they provide important considerations of relevant and sometimes controversial matters of forensic mental health consulting in Family Law, including representation of competencies, knowledge of the legal system, multiple relationships, privacy, confidentiality, and privilege.

**EARLY INVOLVEMENT OF PSYCHOLOGISTS IN LEGAL PROCEEDINGS**

How psychologists made their way into the courtroom is not only an interesting story, but shows that the roots of professional forensic practice can be found in the early stages of the profession.

The early direct or “real world” application of psychology and the law can be traced to the writings of Hugo Münsterberg (1906, 1908, 1909, 1914) at the beginning of the 20th century. By that time, many areas of science had been recognized as having application in the courtroom, starting with microscopy and toxicology. However, psychology, the relatively young but rapidly growing and arguably the leading American field of social science, had been excluded. In 1908, Münsterberg, a Harvard psychologist, thrust himself in the middle of debates as to whether psychology had any applicability in legal matters by commenting on the validity of the confession given by an accused murderer who had mental limitations. Though unsuccessful in getting the court to reconsider its actions in the specific case, Münsterberg went on to publish *On the Witness Stand* (1908), an edited collection of eight popular articles written about legal psychology. Among the topics considered by Münsterberg were the memories of witnesses, hypnosis and crime, and the reliability and veracity of confessions. While Münsterberg’s commentaries might seem crude or hyperbolic by today’s standards, his opinions opened up many areas of exploration within the legal arena pertinent to the science of psychology, for example pushing the issue that the accuracy of a witness’ testimony could be influenced by his/her state of mind and/or cognitive capacities.

Unfortunately, Münsterberg’s (1908) articles were more popular than scientific, lacking references and not offering adequate scientific foundation
to gain acknowledgement, much less admissibility in the courtroom. Münsterberg also took the legal profession to task for its own “unscientific” approach. Münsterberg’s writings were the brunt of a scathing and satirical attack by John H. Wigmore, the Dean of Northwestern Law School (1913), which no doubt delayed the acceptance of psychology by the legal profession at least 20 years (Goldstein, 2003, p. 7).

Also, at the beginning of the 20th century, William Marston (Marston, 1917), a student of Münsterberg’s at Harvard, found correspondence between an individual’s blood pressure and the truthfulness of his/her statements. Marston’s studies formed the basis of the polygraph, but perhaps just as important, he was brought in as a defense expert in the trial of James Frye in 1922. Marston was asked to apply his “deception” test to a recanted confession by the defendant. The argument over the admissibility of Marston’s testimony took on meaning beyond the case itself. In 1923, the Court of Appeals of the District of Columbia submitted a written decision that established the standard for admissibility of scientific evidence in federal court. What is known in California and elsewhere as the Kelly-Frye standard was stated in its original form in Frye v. United States (1923) 293 F.1013. The Kelly-Frye standard mandates that new scientific evidence must be relevant to the case and generally accepted within the relevant portions of the scientific community. It excludes from evidence any test results from scientifically unproven methods. This “general-acceptance” standard is still in place in some states (Ogloff & Finkelman, 1999).

As scientific evidence in the courtroom advanced, the Supreme Court recognized that a broader test for admissibility of scientific evidence was required to allow federal judges to perform their gate-keeping function in light of the Federal Rules of Evidence which had been enacted after Frye. In Daubert v. Merrell Dow Pharmaceuticals, Inc. (1993), the Supreme Court directed federal judges to assess the admissibility of expert evidence based not just on general acceptance in the scientific community, but also on whether a determination could be made as to whether the evidence could be tested and shown to be reliable. Expert evidence now had to be grounded specifically in scientific methodology. As the ruling explained, it could no longer be assumed that evidence was accurate and scientific simply because it was introduced by an expert in a field and generally accepted by their peers. Witnesses had to explain the bases of their opinions, and establish that these bases were rooted in scientific inquiry and methodology (Goodman-Delahunty, 1997; Kelly & Ramsey, 2007).

In the several decades following the Frye decision, psychological testimony in the courtroom was limited to testimony or consultation in a number of high profile criminal cases, with more significant growth occurring after World War II. Marston, for example, was called to provide consultation in the Lindbergh baby kidnapping case in 1932. And, also in that matter, New York City psychiatrist Dr. Dudley Shoenfeld, filed a report with the New York City Police Department containing a psychological profile of the kidnapper.
after studying the ransom notes that were sent to the family. Interestingly, this profile turned out to be remarkably accurate.

The application of psychological research to court decisions took a significant leap in the 1954 U.S. Supreme Court decision in Brown v. Board of Education. The decision declared that the discriminatory nature of racial segregation . . . “violates the 14th amendment to the U.S. Constitution, which guarantees all citizens equal protection of the laws.” At trial in Brown’s consolidated case Briggs v. Elliott, the National Association for the Advancement of Colored People (NAACP) presented testimony by psychologist Kenneth B. Clark of the City College of New York. During the 1940s, Clark and his wife designed a test utilizing dolls of different skin color, and drawing tasks to study the psychological effects of segregation on black children. The NAACP legal team argued that Clark’s findings demonstrated the detrimental effect of segregation on the psychological development of African-American children. The Supreme Court specifically cited Clark’s 1950 paper in the Brown decision, using directly mental health and social science research to inform legal decision-making (Beggs, 1995).

As psychological research and practice were growing and developing, its acceptance in court was still slow to emerge. In 1962, the U.S. District Court for the Washington D.C. Circuit held that non-medical mental health professionals, including psychologists, were qualified to offer expert opinions in court regarding mental disorders at the time a crime was committed (Jenkins v. United States 1962). Heretofore, this was the exclusive domain of medical professionals. In Jenkins, the court stated that some psychologists are qualified to render opinions about mental disorders, provided they were sufficiently competent to do so. This was a matter of the psychologist’s experience, expertise and the probative value of his/her opinions.

The foundation for forensic mental health consulting was established in Ake v. Oklahoma (1985). In this criminal case, the U.S. Supreme Court affirmed that a mental health expert or consultant could be a viable member of a defense or prosecution team. In addition to conducting forensic mental health evaluations of defendants for an attorney on one side of the case, the forensic psychology expert could also provide an analysis of relevant case themes, feedback on the strengths and weaknesses of the opposing side’s case themes and review the opposing expert’s assessments (Drogin, 2007). Thus, defense attorneys could obtain consulting assistance that went beyond simply obtaining rebuttal forensic mental health assessments.

**ETHICAL GUIDELINES FOR FORENSIC PSYCHOLOGISTS**

A younger field than either law or medicine, the American Psychological Association (APA) first instituted a code of ethical and professional conduct in 1953 (APA, 1953 and 1959).
As noted, it was not until the 1962 U.S. Supreme Court decision in *Jenkins v. United States* that courts recognized that psychologists with specific training and expertise could offer testimony in court regarding mental disease or illness. As psychologists were increasingly involved in legal cases, reference to forensic practice also made its way into the APA ethics code revisions. The APA 1992 revision included a separate section on forensic activities, thus affirming it as a unique domain of practice in psychology (Lipsitt, 2007). While references to forensic activities remained in the APA ethics code, a far more detailed discussion of professional practice and ethical issues was provided in the *Specialty Guidelines for Forensic Psychologists* in 1991. Nonetheless, APA did not recognize forensic psychology as a specialty area of practice until 2002.

The practice of forensic psychology involves professionals who are ethically responsible to the tenets of their discipline, but who also must accommodate the rules of another (Lipsitt, 2007). Both the APA ethics code and the *Specialty Guidelines* recognize the potential for conflicts between ethics and the law. This is acknowledged and discussed, for example in APA Ethics Code section 1.02 (Conflicts Between Ethics and Law, Regulations, or Other Governing Legal Authority) as well as other sections that address issues of confidentiality and privacy (Section 4.01), Multiple Relationships (Section 3.05), and Conflict of Interest (Section 3.06).

The *Specialty Guidelines* address a range of potentially conflict-laden issues for the forensic consultant, from the responsibility to clarify the consulting agreement at the onset, to the conflicts between therapeutic and forensic roles. It seems important to remember that the *Specialty Guidelines* do not offer absolutes, but rather some guidance to navigate responsibly almost inevitable conundrums and complexities when psychologists work in the legal arena. Though it may appear to be obvious on the surface, it bears repeating that fundamental abiding principles spelled out in the *Specialty Guidelines* can often inform ethical practice:

- **Integrity:** “Forensic practitioners seek to promote accuracy, honesty, and truthfulness in the science, teaching, and practice of forensic psychology and they strive to resist partisan pressures to provide services in any ways that might tend to be misleading or inaccurate” (3.01).

- **Impartiality and Fairness:** “Forensic practitioners recognize the adversarial nature of the legal system and strive to treat all participants and weigh all data, opinions, and rival hypotheses objectively” (3.02).

- **Avoiding Conflicts of Interest:** “Forensic practitioners refrain from taking on a professional role when personal, scientific, professional, legal, financial, or other interest or relationships could reasonably be expected to impair their objectivity, competence, or effectiveness, or expose other with whom a professional relationship exists to harm” (3.03).
The history of trial consulting and specifically the application of social science to jury selection can be traced to the work of academic researchers in the 1971–1972 criminal trials of the Harrisburg Seven. In this case, a group of anti-war activists, including Father Philip Berrigan, were accused of several crimes including conspiring to destroy draft board records and kidnap Henry Kissinger, then a presidential advisor. Though the alleged crimes were said to have occurred in various other cities, federal prosecutors selected Harrisburg, Pennsylvania as the site for the trial, given their understanding that it was a politically conservative area. The defense recruited a team of social scientists headed by Jay Schulman of Columbia University to survey Harrisburg residents, both on the phone and face to face. Based on this research, the consultants fashioned profiles of jurors who were likely to be biased against the defense case, an approach that is still fundamental to jury selection. The defense trial team relied on this initial jury consulting method to choose the jury. In this politically conservative venue, and despite the fact that the government had spent more than $2 million on the prosecution of the case, the jury was deadlocked with 10 jurors favoring acquittal and 2 jurors favoring conviction. No retrial took place (Lieberman & Sales, 2007; Strier, 1999; Kairys, 2008).

Schulman then applied the jury selection consulting methodology to other cases, including the Wounded Knee trials. The techniques developed were then applied to numerous other political criminal cases. Since that time, trial consulting has also garnered considerable public attention, and not inconsiderable controversy, in many high-profile cases such as the trials of OJ Simpson, the Menendez brothers, Rodney King, Kobe Bryant, Martha Stewart, Michael Jackson, and Scott Peterson.

While trial consulting has been most visible to the public in highly publicized criminal cases, where the consulting world has really boomed is in civil litigation (Lieberman & Sales, 2007). The field saw rapid growth through the 1980s, as trial consultants became involved in large, highly publicized and diverse civil matters, such as class action lawsuits against tobacco companies and the McDonald’s coffee-spill case. In the world of big money, high-stakes litigation, trial consultants virtually became the norm, rather than the exception.

WHO ARE TRIAL CONSULTANTS?

Trial consultants work in various phases of litigation, engaging contractually with an attorney or law firm to become part of the litigation team. Among the
services that trial consultants provide in litigation that may be of interest to FMHPs in family law include:

- **Case analysis and strategy:** Reviewing case materials to analyze compelling themes; evaluating strengths and weaknesses of the case from both sides; developing narratives and arguments for trial presentation.
- **Witness preparation:** This may include working directly with lay and/or expert witnesses, and can include discussion, review of prior testimony through recordings and/or transcripts, or mock testimony.
- **Presentation strategy:** This may include discussion with attorneys regarding the relative strength of evidence to be presented at trial, as well as the means of presentation. There may be development of presentation tools, such as graphic displays of evidence or argument.
- **Examination strategy:** Reviewing with attorneys how they will conduct both direct and cross examination of lay and expert witnesses. This could include general discussions, or assistance crafting specific examination questions.

Other trial consulting roles, less directly applicable to family law consulting, include offering direct input and assistance with jury selection, including voir dire strategy; conducting focus groups and mock trials to understand attitudes and opinions about a specific case or relevant case themes; providing consultation on opening and closing statements; conducting community attitude surveys and change of venue surveys. Trial consultants may also appear as expert witnesses, such as in change of venue research.

It is important to keep in mind that trial consultants are a heterogeneous group of professionals that includes FMHPs of different disciplines, social scientists, academics, attorneys, and communications experts. There are no specific educational requirements for becoming a trial consultant and there is no certification that must be obtained. While family law mental health consultants may also be of different disciplines (e.g., psychologists, social workers), they are most typically individuals who are licensed to practice in their profession, with their professional activities overseen by licensing or credentialing boards. Thus, professional and ethical standards are in place, though the direct applicability of those standards to consulting work remains less than crystal clear. Still, how trial consultants have addressed professional standards issues may still be instructive.

**PROFESSIONAL DEVELOPMENT OF TRIAL CONSULTING**

In 1982, a group of consultants gathered to form a professional organization to address the needs and interests of litigation consultants. Initially known as
the Association of Trial Behavior Consultants, the organization originally had twenty-four members. In 1985, the name of the group changed to its present form, the American Society of Trial Consultants (ASTC), and there are currently roughly five hundred members. In the early years of ASTC, a number of members pushed to develop professional standards, feeling that it would both legitimize the emerging profession, and insulate consultants to some degree from possible lawsuits by disgruntled clients (A. Sheldon, 1985).

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
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<tr>
<td>1908</td>
<td>H. Munsterberg, Harvard psychologist, publishes <em>On the Witness Stand</em>, which includes eight essays on legal psychology</td>
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<td>1909</td>
<td>Munsterberg's essays are challenged by J. Wigmore, Dean of Northwestern Law School</td>
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<td>1922</td>
<td>W. Marston, a developer of the “deception” test, appears as defense witness in <em>Frye v. United States</em></td>
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<td>1923</td>
<td><em>Frye</em> decision on admissibility of scientific evidence: relevant to the case and generally accepted within the relevant portions of the scientific community</td>
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<td>1932</td>
<td>Lindbergh baby case: Marston testifies; first psychological profiling in a criminal case</td>
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<td>1952</td>
<td>APA’s first code of ethics and professional practice. No mention of forensic work</td>
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<td>1954</td>
<td><em>Brown v. Board of Education</em>: Supreme Court use of mental health testing and research to inform legal decision-making</td>
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<td>1962</td>
<td><em>Jenkins v. US</em>: Psychologists are qualified to render opinions about mental disorders, provided they were sufficiently competent to do so</td>
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<td>1971</td>
<td>Social scientist research and consultants used in defense cases against anti-war activists.</td>
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<td>1982</td>
<td>Formation of Association of Trial Behavior Consultants, which became American Society of Trial Consultants</td>
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<tr>
<td>1985</td>
<td><em>Ake v. Oklahoma</em> Mental health expert or consultant could be part of litigation team and not just an evaluator of individuals</td>
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<td>1991</td>
<td><em>Specialty Guidelines for Forensic Psychologists</em> American Psychology-Law Society and Division 41 of APA</td>
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<td>1992</td>
<td>APA Code of ethics and professional practice includes specific section on forensic psychology</td>
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<td>1993</td>
<td><em>Daubert v. Merrell Dow Pharmaceuticals, Inc.</em> Expert evidence now had to be grounded specifically in scientific methodology (can be tested and shown to be reliable)</td>
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<td>2003</td>
<td><em>In re: Cendant Corporation</em>: upheld attorney work product protections for trial consultants, including working with witnesses.</td>
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<tr>
<td>2008</td>
<td>Most recent revision of the Professional Code of ASTC</td>
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**FIGURE 1** Historical timeline of forensic psychology and trial consulting.
personal communication, September 21, 2010). By virtue of education, professional affiliation and experience, ASTC’s membership was diverse. And, with practitioners engaging in such a range of services, it was initially impossible to get consensus on a unified set of practice and ethical guidelines.

The committee working on developing guidelines first started with a survey of membership to determine interests and attitudes. It was decided not to tackle the guidelines in a comprehensive manner, but rather to see in what specific practice areas members could agree to a set of standards. Thus, ASTC first adopted guidelines for venue survey research. In all, there are five separate areas, the other four being: Witness Preparation, Small Group Research, Jury Selection, and Post Trial Juror Interviews.

The most recent revision of the Professional Code of ASTC was in 2008. As with the Specialty Guidelines for Forensic Psychology, the code is primarily aspirational in nature. “The Practice Guidelines are informative only and are not meant to be comprehensive, exclusive or to supplant the professional judgment of a consultant” (p. 1). ASTC has, however, set up a grievance procedure and has fielded a relatively small number of complaints. As there is no specific credential for trial consulting, and as ASTC is a professional organization and not an oversight board, they have few remedies for violations of the professional code.

Even so, some specific aspects of the Professional Code of ASTC may be informative for FMHPs working in family law. As with the Guidelines for Forensic Psychology, the code does not always answer particular ethical or professional dilemmas, but it can raise the right questions and guide thinking through issues at hand. Figure 1 summarizes key dates in the history of forensic psychology and trial consulting.

**ATTORNEY-CONSULTANT RELATIONSHIP**

There can be strong pulls on the FMHP consultant to please the retaining attorney. Pulls, both conscious and unconscious, can go beyond the desire to deliver competent, insightful and timely services. As part of the “litigation team,” the FMHP can easily be drawn into the attorney’s advocacy perspective, including the attorney’s responsibility to work diligently on behalf of his/her client (Greenberg & Shuman, 2007). While attorneys no doubt know that licensed mental health professionals must be responsive to professional codes of ethics, and are answerable to licensing boards, they cannot be expected to appreciate thornier ethical dilemmas. Attorneys do not always understand the limits of what services psychologist consultants can offer and what roles they can responsibly assume. Both the Specialty Guidelines for Forensic Psychology and the Professional Code of ASTC emphasize the importance of establishing a clear contract and setting expectations between
the retaining party and the consultant. With the expansion of litigation consultation in so many forms, it seems imperative that the attorney and consultant enter into a written contract that spells out expectations. The *Specialty Guidelines* make distinctions between the relationship established with the retaining party and the relationships with “those with whom they interact (e.g., examinees, collateral contacts, research participants, students)” (Section 6). Implied in the section called Responsibilities to Retaining Parties is that a contract between the retaining party (usually the attorney) and the consultant is necessary, and that at the time the contract is discussed, the FMHPs “seek to clarify the nature of the relationship and the services to be provided including the role of the forensic practitioner...; which person or entity is the client; the probable uses of the services provided or information obtained; and any limitations to privacy, confidentiality, or privilege” (Section 6.01). Presumably, this would include whether the FMHP is likely to be a consultant “behind the scenes” or possibly a testifying expert. This, of course, has implications for whether the work will be protected by attorney work product.

The *Professional Code of ASTC* suggests that close scrutiny needs to be paid to precisely who the retaining party is. The trial consultant is most commonly retained directly by an attorney or law firm and becomes part of the litigation team. However, there may be times when retention comes from the client whom the attorney is representing, or even from an insurance company who is contractually financing the litigation. The question of who is the client is an important one. As the *Professional Code* spells out, “the trial consultant who is retained by the attorney: (1) works under the direction and supervision of the attorney; (2) cooperates with the attorney to assure all consultant-attorney communication is subject, to the extent provided under the law, to attorney/client privilege and work-product doctrine” (Page 4). When the contract is made with the litigant, the work “probably is not subject to legal protection from discloser under any attorney/client privilege, work-product, or other doctrine” (Page 4).

It is this author’s experience that most family law consultants understand that they need to work with a written contract, and that the contract should be with the attorney who represents the party or parent. However, there are no standards for contracts and the matter of who provides payment for services and at what time is less clear. Even some experienced attorneys prefer that their clients (the parent-litigant) pay consultants directly. The attorney may not want to incur the liability for the consultant directly, especially if they are having trouble collecting fees from the parent/litigant. This can be a dangerous practice on several fronts, as it surely jeopardizes the objectivity of the consultant, who may well feel that payment for services is somehow dependent on how their opinions are received by the parent. Sound forensic practice includes contracting directly with the attorney for a retainer.
at the onset of the consultation agreement and obtaining additional monies when those retainers are depleted.

In light of these considerations, FMHP consultants would be well advised to:

- Always work from a written contract that spells out the terms of the consulting agreement. The agreement should include:
  - The scope and nature of anticipated work;
  - The intention that information gathered and opinions rendered will remain confidential and held under privilege to the extent provided by law;
  - Any potential limits to confidentiality that can be anticipated at the onset of the agreement, including but not limited to the possibility that the consultant will be a testifying expert;
  - Responsibilities of the retaining party and the consultant under the contract;
  - Explicit fee agreement; and
  - How the consultation agreement can be terminated by either party.
- Establish the contract should be between the consultant and the retaining attorney;
- Work with a retainer system and avoid accepting contingent fees; and
- Accept payments directly by the attorney and not by the litigating or other third party.

The consulting agreement sets the framework and the tone for attorney-consultant relationship. Fortunately, the principles of science can anchor the FMHP consultant as he or she navigates the waters between advocacy and neutrality. The objectivity of the scientific process underlies admissibility under Daubert, including the mandate to weigh the relative merits of rival hypotheses, and discusses the basis for the opinions rendered. These criteria are echoed in several sections of the Specialty Guidelines in phrases such as “truthfulness in science,” “goals of accuracy, objectivity, fairness and independence.” Thus, the competent and respected FMHP consultant will best serve the retaining attorney via the consultant’s independent ability to view the strengths and weaknesses of the case. This represents the consultant’s sound understanding of the adversarial process and their responsibilities within it. (Shuman & Greenberg, 2003) So, rather than shying away from exploring fully the relative merits of the opposing case, consultants should see this as a responsible part of the consulting practice. It is hoped that FMHP consultants who are known for their objectivity and independence will earn a sound reputation in the legal community. In fact, a consultant’s ability to point out the weaknesses in a case can be an invaluable asset in an attorney’s responsibility to help the parent-litigant come to agreements or settlements that are more realistic than their expectations.
CONSULTANT-PARENT RELATIONSHIP

Increasingly, FMHP consultants are having direct contact and interactions with the retaining attorney’s client—the parent. Again, roles may be diverse. As outlined by Hobbs-Minor and Sullivan (2008), there is much to be gained by affording parents sound and responsible consultation in the context of the attorney-client relationship. Therapeutic support, education about divorce-related issues including children’s developmental needs, and realistic views of custody proceedings can all contribute to better outcomes for families. Conceived in part as an expanded conflict resolution role, there can be direct benefits to the parents, the parent’s attorney, and indirectly to children and even other family members. However, consultants and parents also enter into relationships that are complex and demand that the FMHP exercise particular care, caution, and expertise. As those authors also point out, role boundaries and ethical practice issues have not been well explored in the literature.

The distinctions between therapeutic and forensic roles have been well discussed in the forensic psychology literature (e.g., Heilbrun, 2001; Greenberg & Shuman, 1997, 2007). Those discussions, which need not be repeated here, have focused primarily on forensic assessment of individuals versus therapeutic assessment and treatment. Many of the principles of forensic assessment surely apply to FMHP consulting. For example, the consultation work is performed in the context of a legal action and must address relevant psycho-legal questions; the consultant should remain neutral, at least quasi-objective and explore all facets of the case; the work involves a multi-client system.

In expanded consulting roles involving parents, distinctions between forensic and therapeutic roles become less clear. Hobbs-Minor and Sullivan (2008) note that in some roles, direct and substantive contact with the parent is an essential part of the process that is deemed helpful:

The mental health consultant: (1) provides support to the parent and to the attorney in obtaining the most recent information and expertise that can assist with the specifics needed on the case; (2) teaches the parent new skills to move towards resolution of custody issues; (3) collaborates with the attorney and the parent as a team throughout the mediation and/or family court process; (4) remains under the confidentiality of the attorney-client privileged relationship; and (5) serves as a parenting plan advisor (Hobbs-Minor, 1998).

As these authors note, the skilled FMHP consultant can bring a beneficial perspective to the parent as they try to resolve post-divorce custody disputes. They can provide educational information; help manage parents’ anxieties and fears; offer direct feedback to parents about their views and perspectives; assist parents to remain child-focused; and offer psychological structuring to emotionally vulnerable parents (Hobbs-Minor & Sullivan 2008).
In addition, some consultants are hired to offer parents advice on how to manage their participation in a custody evaluation.

These more recent family law consulting roles raise several questions. Among them is to the extent to which consultant-parent contact is confidential and protected by attorney work-product privilege. The Supreme Court first recognized this privilege in 1947 in *Hickman v. Taylor*, 329 U.S. 495, 510–11 (1947). In that decision, the Court held that an attorney must “work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel” and be free to “assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.” The context of attorney work-product protection in current or anticipated litigation extends to experts and consultants hired by attorneys, so long as the FMHP has not been designated as a testifying expert.

While there is good reason for consultants to have confidence in the protection of attorney work-product, the trial consulting literature suggests that some caveats and cautions should be exercised (Perrott & Wolfe, 2010). This issue has been explored in some depth in the trial consulting literature, where attorneys and consultants are highly invested in keeping pre-trial research, preparation and jury selection strategy private and confidential. The case most often referred to is *In re: Cendant Corp.* (2003) which generally upheld protections established in *Hickman v. Taylor* as applied to trial consultant’s work. (Interestingly, the consultant who provided witness preparation in the Cendant matter was Dr. Phillip McGraw, better known as “Dr. Phil.”) *In re: Cendant* was argued and appealed, with the final ruling made by the U.S. Court of Appeals for the Third District. In most jurisdictions, the ability of an attorney to discover a consultant’s work has not been fully resolved (ASTC Professional Code p. 34). That is to say, it appears that the *Cendant* decision protects the content of the consultant’s work with witnesses under attorney work-product, but not necessarily the fact that the consultant was used. And, even this cannot be guaranteed. Thus, it is possible that a parent who has worked with a mental health consulting expert might have to acknowledge that they worked with a consultant, and who the consultant was, though it is unclear as to whether they would have to testify as to the exact content of meetings and discussions with the FMHP consultant. On the surface, this might not seem problematic. However, even the mere acknowledgment that a parent has worked with a consultant can be viewed negatively by a custody evaluator or can be cannon fodder for an aggressive attorney on the other side. Custody evaluators may feel uncomfortable knowing that there is someone with whom the parent is discussing the evaluation process, and may not trust that the parent is really being themselves in interviews and observations. And, opposing counsel may cast doubt on the credibility of a parent who has worked with a consultant, even if the consultant has acted in very responsible ways. This certainly should signal family law
mental health consultants that they must be very careful in terms of how they support and advise the parents with whom they meet.

Parent-Consultant Meetings–Witness Preparation?

While not all parents whose attorneys have engaged a consulting FMHP are on track for a full custody trial, it should be acknowledged that most parents testify in court or provide sworn declarations at custody proceedings. Even if the consultant is not asked to meet with the parent specifically to discuss his/her testimony in court, a consultant’s input may also affect parents’ participation in custody evaluations, statements in hearings or settlement conferences and family court mediation. Apart from issues of confidentiality noted previously, what are some of the ethical considerations of working with parents who are going through custody proceedings?

The trial consulting literature can again afford some perspective here. Of the many diverse services that trial consultants have provided, working with witnesses in preparation for trial is the most controversial. It is performed by consultants of various disciplines, and can range in scope from offering coaching about dress, demeanor, and presentation style, to engaging in very detailed mock direct and cross-examinations. While much of this may not appear to pertain directly to the custody consultant working with a parent in litigation, some principles are surprisingly relevant.

Trial consultants are often brought in on cases where there are high personal and financial stakes, and where pressures for witnesses to “perform” well in court are enormous. It is very easy for the trial consultant to join in the pressure-cooker atmosphere that is the norm in trial preparation. In terms of working with witnesses, attorneys are primarily guided by the American Bar Association’s Model Rules of Professional Conduct (1983) which prohibits attorneys from falsifying evidence or assisting witnesses to testify untruthfully. Interestingly, until ASTC developed professional standards, there were no parallel guidelines for consultants who were part of the attorney team. Trial consulting professional standards attempt to address the complex dynamics and responsibilities inherent in working with potential witnesses. Some of the questions the standards try to address include: who should be doing witness preparation; the need for informed consent; are there any guidelines for determining ethical versus unethical consultation. Several components of the ASTC standards seem directly relevant to the hybrid roles FMHPs are assuming that include supporting or collaborating with parents who are involved in custody proceedings:

- Trial consultants shall advocate that a witness tell the truth;
- Trial consultants shall provide witness preparation services within the boundaries of their competence based on education, training, or other appropriate professional experience;
Trial consultants shall discuss with the client limitations on confidentiality in the provision of witness preparation services including but not limited to discovery requests; and

Trial consultants do not script specific answers or censor appropriate and relevant answers based solely on the expected harmful effect on case outcome.

The FMHP consultant who finds him/herself working directly with parents has many goals that seem reasonable and even admirable. Is it not reasonable to help a parent express themselves more effectively to a custody evaluator or even on the witness stand? Is it not helpful to assist the parent to see multiple sides of a complex situation and wade through the pros and cons of various custody schedules they might propose to an evaluator? Should a parent not be well versed in the issues relevant to petitions to relocate with a child and be able to address these issues in an evaluation or court hearing?

In developing guidelines for professional practice, ASTC struggled with the ethics of advising and preparing witnesses, especially making distinctions between providing information, feedback and guidance, versus unethical approaches such as scripting, shaping, and instructing witnesses. Instructive in the ASTC guidelines is the notion that a consultant crosses a line when he/she becomes too directive and provide instruction regarding the content of the client’s testimony. This can take the shape of suggesting answers to specific questions that are anticipated on the witness stand or urging a witness to not reveal something truthful, because it might not be beneficial to the case. Similarly, the FMHP consultant must be aware of taking too active and directive an approach in the process of “supporting” a parent through post-divorce processes.

For example, Hobbs-Minor and Sullivan (2008) accurately note the clear breach of ethics if a consultant directly assists a parent to fill out a questionnaire for a custody evaluator. And, it is not unheard of for consultants to explain the MMPI-2 or the Rorschach to an anxious parent, and perhaps even preview parts of the tests, again to allay the parent’s fears but which could violate the ethical rules regarding test security.

But, questions of ethics and sound professional practice arise in the grey areas. Parents often view the consultant as an authority that fills an emotional need at a time of great vulnerability. In instances where a consultant shepherds a parent-litigants through a four to six month custody evaluation, the parent is especially prone to subtle and unconscious influence. This can manifest in how parents present themselves or how they form responses during the custody evaluation. For example, take the case of an attorney and consultant working with a narcissistic parent. Many narcissistic individuals are exceptionally good performers and are skilled at taking direction for impression management if doing so meets their needs and goals. However, by definition, narcissistic people also lack empathy, a quality that
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<tr>
<th>Situation</th>
<th>Dilemma</th>
<th>Guidance toward solution</th>
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<td>FMHP is hired by attorney to help &quot;manage&quot; an anxious parent/litigant during a CCE. The parent asks the FMHP for advice re: what to say to the evaluator that would be convincing re: her belief that she’s been the victim of domestic violence.</td>
<td>What is needed to help the parent bind their anxiety? There may well be a pull to support the parent’s perception of self as a victim that could influence the degree of &quot;guidance&quot; the FMHP provides. At what point would a FMHP unduly influence the CCE process?</td>
<td>Support can be generic without affirming whether DV has occurred; the FMHP can emphasize the limits of the information the consultant has and inability to come to a conclusion about possible DV; the consultant must be careful not to actively shape the parent’s interviews with the evaluator.</td>
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<td>FMHP is hired by attorney and signs a contract. Initial retainer is paid by the attorney, but additional checks for services start to come from the parent/litigant.</td>
<td>Lack of clarity as to who is the responsible party. Possible concern about attorney work product. FMHP’s ability and willingness to provide honest feedback could be negatively impacted.</td>
<td>It’s best to establish quickly that all payments should come from the attorney.</td>
</tr>
<tr>
<td>FMHP is hired to work with an anxious or reactive parent/litigant throughout a child custody evaluation or other litigation proceedings. Parent asks for specific advice and/or information about psychological tests.</td>
<td>How much information is useful to contain the parent’s feelings and behavior (and satisfy the retaining attorney) versus how much violates test security.</td>
<td>Test security trumps the parent’s anxiety, some of which might be expected given the circumstances. Discussing generic information about specific psychological tests may be acceptable; however, reviewing test items and procedures would be ethically compromising.</td>
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<td>FMHP is hired to work confidentially with parent/litigant through CCE. Either therapy or parenting coaching is recommended by the evaluator and ordered by the court. Parent asks FMHP to be the therapist/coach.</td>
<td>This represents a significant shift in roles. The shift for the FMHP is from being part of the litigation team to being a service provider to the individual.</td>
<td>The FMHP should decline the new role. Especially if the parenting coach must now report to the court, the previously confidential work would have to be disclosed.</td>
</tr>
<tr>
<td>FMHP is asked by attorney to write a declaration on a specific topic relevant to the litigation. Then, the attorney also asks FMHP for assistance preparing cross-examination questions of witnesses.</td>
<td>If the FMHP agrees to help with examination preparation, there is a shift away from being a more dispassionate expert on research and literature to an advocacy role on the litigation team. This could hurt the expert’s credibility as he/she would be a declared expert subject to cross examination. Confidentiality of the examination preparation is compromised.</td>
<td>These multiple roles are not necessarily tenable from an ethical point of view; however the consultant’s credibility as a representative of the research may be questioned. The FMHP should give strong consideration to choosing one role or another.</td>
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<td>FMHP is hired as part of the litigation team as a confidential consultant. After immersing him/herself in the case, the consultant believes that the retaining attorney’s position does not support the best interests of the child.</td>
<td>The FMHP may be reluctant to disagree with the retaining attorney. These cases are never black and white. There may be little time for the attorney to hire another expert.</td>
<td>FMHP must be true to the examination of the evidence and data they review, and to the best interests of the child. It’s most helpful for the FMHP to present the strengths and weaknesses of both sides of the case to the attorney, and let the attorney decide how to use the information.</td>
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**FIGURE 2** Ethical dilemmas.
is central to sound, child-centered parenting. It is not hard to imagine a consultant helping such an individual present themselves more favorably than they otherwise would in the custody evaluation. There could be via seemingly benign “tips” about the parent containing behavior that might be off-putting, or a discussion of what evaluators look for on home visits or parent-child observations. A bright narcissist is often a quick study. The risk is that the parent’s “improved performance” could also obscure parenting deficiencies that would be valuable for the custody evaluator to fully appreciate. Given the evaluator’s task of addressing the best interest of the child, is the consultant’s work ethically flawed? Have noble intentions morphed into too much advocacy? Again, these are complex issues that do not lend themselves to “bright line” interpretations.

So again, what can we “take away” that is relevant to including parents in the consulting process? The FMHP might be wise to consider the following:

- At the onset of consulting work, the FMHP should clarify with the attorney the nature and extent of anticipated contact with the parent/client. There should be an open and ongoing discussion of any possible role conflicts, especially if the consultant-parent involvement changes during the course of the attorney-consultant collaboration;
- The FMHP and attorney should clarify at the onset specifically whether the parent is expected or is likely to be a witness in a custody proceeding;
- When consultation includes direct work with a parent, the FMHP should provide informed consent to the parent, including possible limits to confidentiality. This is best done as a discussion that includes the attorney;
- If the parent will or may be a witness, the FMHP might be well advised to avoid substantive contact with the parent outside the presence of the attorney;
- If meeting with a parent prior to trial, even in the presence of the attorney, the consulting expert should uphold ethical standards including:
  - advocating that the parent/litigant tell the truth;
  - avoiding shaping or exerting undue influence on the parent’s participation in a custody evaluation or legal proceedings;
  - operating within the bounds of the consultant’s competence and experience;
  - reviewing the actual or potential limits on confidentiality; and
  - respecting psychological test security.

Applications in Professional Practice

What follows in Figure 2 are some examples of murkier situations the FMHP family law consultant might find him/herself in with suggestions of how to think through dilemmas these circumstances pose.
AND SO WHERE ARE WE GOING?

Working in family law and child custody can be both enormously gratifying, but equally challenging. Arguably, no other area of psychology requires the breadth and depth of skills and knowledge. At the same time, the demands are great, the stakes are very high and the venue is permeated with intense and conflicting emotions. Expanding consulting services are emanating from the increased collaborations between FMHPs and attorneys as well as the wealth of scientifically based research of the impact of divorce on children, parents, and family systems. But, concurrently, we are venturing into territory where ethical and responsible professional behavior is less well defined. This does not mean we should not be venturing, but it does mean we should be doing it thoughtfully, with open discussion of the predicaments we face, and with an eye towards constantly defining and redefining what ethical behavior is. This is what has been happening historically in the worlds of forensic psychology and trial consulting. Considerable progress has been made. The work must continue.

It would seem like a glaring omission not to re-emphasize that as FMHP working in family law, we always bear responsibility to the best interests of children. The best interests standing itself is hardly an absolute, as it involves balancing the interests of the child, the parent, and sometimes even the state as parens patriae (Smoron, 1998). Even the most responsible consultants, who are answerable to multiple clients and must be responsive to their own professional ethics while accommodating the rules of the legal profession, must also strive to understand the best interests of the child. It is one thing for a consultant to beg off a case where he/she has been asked to review a custody evaluation when the consultant cannot support the position of the attorney who wants to hire him/her. In a sense, that is an easy call. What is more difficult is for the FMHP consultant to not get so swept up in meeting the needs of the attorney and the parent that some understanding of what is best for children is lost in the mix. Responsible consultants owe it to all of the participants to take the time to understand this to the extent possible.

And what advice can we offer the theoretical consultant in the vignette that opened this article? While there might not be one “right way” to address the situation, there are enough warning signs to suggest that the consultant should proceed thoughtfully and with caution. He/she might be well advised to take the time needed to understand the case in the depth that it warrants, tease out the separate needs of the attorney and the parent, and delineate how the consultant can and cannot be helpful. The consultant should have the courage to ask tough questions, offer the full range of his/her thoughts and impressions, and rely on the independence and integrity of his/her professional opinions and responsibilities.
REFERENCES


In re: Cendant Corp Sec. Litig., 343 F.3d 658 (3rd Cir. 2003).


