How-to-guide to cross examine a custody evaluator. A discussion of the rules of evidence in California relating to psychological opinion testimony.

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I. Introduction

This outline reviews the rules of evidence relating to expert witness testimony, including examples of inadmissible testimony and the legal objections which may be raised to that testimony. Techniques for cross-examining child custody evaluators are also discussed, with a particular emphasis on ways to detect and establish bias.

II. Rules of Evidence Re Expert Opinions

A. General Rules re Admissibility of Expert Opinion

Expert witnesses may give testimony in the form of an opinion if:

— The witness is qualified to testify as an expert.

— The expert witness' testimony is related to a subject matter that is sufficiently beyond common experience;

— The expert's opinion would assist the trier of fact;

— The expert witness' testimony is based on matters perceived by or made known to the expert (either before or at the hearing);

— The expert witness' testimony is based on matters reasonably relied upon by experts in forming such opinions, whether or not those matters are admissible in evidence.

(Evid. Code, § 801.)

An expert witness may state on direct examination both the reasons for his or her opinion and the matters on which it is based. (Evid. Code, § 802.)

B. Summary of Common Objections to Expert Testimony

— Irrelevant. (Evid. Code, § 350.)

— Party calling witness unreasonably failed to comply with expert witness disclosure requirements or make the witness available for a deposition. (Code Civ. Proc., § 2034.300.)

— Witness not qualified as an expert. (Evid. Code, § 801, subd. (a).)

— Opinion not likely to assist the court because the matter is not “sufficiently beyond common experience”. (Evid. Code, § 801, subd. (a).)

— Opinion not based on matters which may be reasonably relied upon by an expert in forming an opinion. (Evid. Code, § 801, subd. (b).)

— Opinion based on speculation, conjecture or other improper matter. (Evid. Code, § 803.)
— Prejudicial effect substantially outweighs the probative value of the testimony, or the testimony would result in an undue consumption of time. (Evid. Code, § 352.)

C. Opinion Based on Unreliable Matters

“[W]hen an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value because an expert opinion is worth no more than the reasons upon which it rests.” (Jennings v. Palomar Pomerado Health Systems, Inc. (2003) 114 Cal.App.4th 1108, 1117 (internal quotes omitted).)

Specifically, experts may not rely on speculation or conjecture in forming an opinion. (Korsak v. Atlas Hotels, Inc. (1992) 2 Cal.App.4th 1516, 1526 (a “casual sampling of unknown sources” within the industry is not a reasonable basis for an opinion.))

Example: “I conducted a survey of five parents and found that children love their mother more than their father.”

Objection/Motion to Strike: Not a reasonable basis for opinion. (Evid. Code, § 801, subd. (b).) Survey evidence may not be reasonably relied upon in forming an opinion unless the survey results are statistically significant and relevant to the opinion. (Korsak v. Atlas Hotels, Inc., supra, 2 Cal.App.4th at p.1526.)

D. Opinion Based on Improper Matter

An expert's opinion may be based on evidence “whether or not admissible” if it is the kind of information experts reasonably rely upon in forming an opinion on the subject matter involved. (Evid. Code, § 801, subd. (b).) Indeed, experts commonly rely on articles, books and reports as a basis for forming an opinion. The expert may generally describe the matters on which he or she relied in forming an opinion, even those matters which would constitute inadmissible evidence.

However, inadmissible matters properly relied upon by an expert do not become admissible just because the expert relied upon those matters or references them in his or her direct testimony. The expert may only general describe the inadmissible matters he or she relied upon. It is error to allow

the expert to testify as to the contents of inadmissible hearsay statements or other matters which are not admissible.

1. Contents of Reports and Publications – Direct Examination
An expert “may not under the guise of reasons [for his or her opinion] bring before the jury incompetent hearsay evidence.” (People v. Coleman (1985) 38 Cal.3d 69.) The expert may state that he or she relied on a particular report, study or publication in forming an opinion, but cannot describe the contents of those documents or state that the findings in those documents agree with his or her opinion, unless a hearsay exception exists.
Example: “I relied on a article in Eccentric Psychologist which found that golfers are less likely to be child-centered parents than non-golfers.

Objection/Motion to Strike: Hearsay. (Evid. Code, § 1200.) An expert may not testify as to details in individual case histories in medical journals to support his or her opinion. (Furtado v. Montebello Unified School Dist. (1962) 206 Cal.App.2d 72, 79.)Example: “In forming my opinion, I relied on the witness statements in the police report which all state that they observed your client hitting the children.”

Objection/Motion to Strike: Hearsay. (Evid. Code, § 1200.) An expert may not testify as to the contents of a report which has not been admitted into evidence. (Continental Airlines v. McDonnell Douglas Corp. (1989) 216 Cal.App.3d 388, 416.) 2. Exception – Cross-Examination re Contents of Certain Writings

Although an expert may not testify as to the contents of inadmissible writings on direct examination, the expert may be cross-examined as to the contents of writings under certain circumstances. On cross-examination, an expert may be questioned regarding the content of any scientific, technical, or professional text, treatise, journal, or similar publication only under the following circumstances:
— The witness referred to, considered, or relied upon such publication in arriving at or forming his or her opinion.
— The publication has been admitted in evidence.
— The publication has been established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.

If so allowed, relevant portions of the publication may be read into evidence but may not be received as exhibits. (Evid. Code, § 721(b).)

This rule provides counsel the opportunity to challenge the expert's opinion if it contradicts what others have written on the subject, provided that the expert states that he or she considered or relied upon those publications, or the publication has been established as a reliable authority by the testimony of any witness. Counsel can often have the witness admit that the publication was "considered" or is a "reliable authority" as part of the set up for this line of questioning. Or, counsel can use his or her own expert to establish that the publication is a reliable authority.

3. Opinions of Non-Testifying Experts

An expert may testify that he or she consulted with or relied upon the opinion of another expert in forming his or her own opinion, but may not reveal the content of the other expert's opinions. (People v. Catlin (2001) 26 Cal.4th 81, 137–138.) It is error to allow the admission of an opinion of a non-testifying expert because there is no opportunity to cross-examine the other experts as to the basis for that opinion. (People v. Campos (1995) 32 Cal.App.4th 304.) For example, in Campos, it was proper for the court to allow a psychiatrist to testify that she relied on the hearsay opinions of non-testifying experts in forming her opinion, but it was improper to allow her to testify that the opinions of the non-testifying experts agreed with her own. (People v. Campos, supra, 32 Cal.App.4th at 308.)

Example: "I consulted with another expert in the field and she agreed with my findings."

Objection/Motion to Strike: Hearsay. (Evid. Code, § 1200.) Expert may not testify as to the content of a non-testifying expert's opinion. (People v. Campos, supra, 32 Cal.App.4th at 308.)Example: "I had the parties tested by Dr. Stephens and he found that father had an elevated L-Scale on the MMPI."

Objection/Motion to Strike: Same as above.

E. Exclusion of Opinion Based on Improper Matter

“The court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion. In such case, the witness may, if there remains a proper basis for his opinion, then state his opinion after excluding from consideration the matter determined to be improper.” (Evid. Code § 803.)
When “an expert has relied on privileged material to formulate an opinion, the court may exclude his testimony or report as necessary to enforce the privilege.” (Fox v. Kramer (2000) 22 Cal.4th 531, 541.)
Example: “I relied upon the tape-recordings mother made of father’s telephone conversations with her.”

Objection/Motion to Strike: Same as above (assuming the recordings were made illegally).Example: “My opinion is based primarily upon the discussions I had with the children’s psychologist with mother’s permission.”

Objection/Motion to Strike: Improper basis for expert opinion (assuming that there was no waiver of the patient-psychotherapist privilege by both parents having joint legal custody, per Evidence Code section 912, subdivision (b)). (Evid. Code § 803.) If the expert opinion is based primarily on improper matter, the entire opinion may be excluded. (See Fox v. Kramer , supra, 22 Cal.4th at p.541.)

F. Expert Reports are Hearsay
The expert witnesses’ report is hearsay and should be excluded from evidence on objection of any party, even if the witness testifies in court. (See Evid. Code, § 1200.) Counsel often agree to admit the report into evidence as a matter of routine. However, unless the report benefits the client, it is a better practice to object to the report being admitted into evidence and require the expert to explain his or her opinion and the bases therefor. The report may be marked for purposes of identification so the witness and the court may refer to it during the examination of the expert, but there is no reason to agree to the admission a report into evidence which is harmful to the client.

Many stipulations for the appointment of a joint expert or a court’s expert provide that the report will be admitted into evidence without foundation, subject to cross-examination. Agreeing to the admission of the report in

advance relieves the party who wants to use the expert's opinion from having to pay the expert to appear in court to testify. The other party will have the burden to bring the expert to court for cross-examination. Counsel will have to make a tactical decision whether to agree to the admission of a report into evidence which he or she has not seen.

III. Cross-examination Techniques

A. Preparing for the Examination

Counsel must conduct discovery to obtain the expert's file. A deposition of the expert should also be considered. The following documents should be obtained:

— Report
— Full file, including all handwritten and computer-written notes and all communications with the parties or their counsel
— All psychological test data including computer generated scoring and narratives
— Phone logs and notes from calls
— Billing files
— Curriculum vitae

B. Using the Evaluator as Your Expert

Even if the evaluator's recommendation is adverse to the client, the report usually contains some positive findings or complimentary statements about the client. For example, "Father loves Susanna (the child) and Susanna loves him." In cross-examining the evaluator, counsel should develop a series of questions which require the evaluator to admit all of these positive findings. Using the above example: "You believe that my client truly loves Susanna don't you? You also believe that Susanna loves him, correct?"

Showing these positive findings "humanizes" the client and builds up his or her parenting ability. The questions should be asked in a neutral tone, as if the evaluator were the expert for the client. The point of this strategy is not to argue with the witness, but to use the evaluator's positive findings about the client to bolster the client's side of the case.

This evidence may also cast doubt about the evaluator's opinion. An opinion only carries weight when it is a logical conclusion based on the facts. The

court makes the ultimate determination. Just because the evaluator drew a particular conclusion based on a set of facts does not mean that the court will agree. As discussed below, the evaluator may have been blinded by bias or prejudice. The client has a greater change of success if counsel emphasizes the facts which the court can rely upon in ruling in the client's favor.

C. Establishing Evaluator Bias

Since everyone has biases to some degree, cross-examination in this area is fertile ground. It is unlikely that an expert will ever admit that his or her opinion was influenced by bias or prejudice, but circumstantial evidence may show otherwise.

1. Definitions of Bias and Prejudice

Though bias and prejudice are similar, within the context of custody work, it is important that a distinction be made. A prejudice is an opinion (even if only tentatively held) that is in place prior to obtaining the information reasonably needed to make an informed judgment. Bias, as the term is used here, includes prejudgments but also refers to attitudes, beliefs, or judgments that may be spontaneously triggered by events that occur during the evaluative process or that may be attributable to the methodology employed by the evaluator.
(Martindale, D. A., "Bias and Prejudice in Custody Evaluations." The Matrimonial Strategist, 23:9, 3-8 (Oct. 2005) (emphasis in original).)

"Only fools assert that they are free of biases." (Id.) The evaluator can be asked to identify what his or her biases are and how steps were taken to control them from impacting on the opinion reached.

2. Confirmatory Bias

"The inclination to seek information that will confirm an initially-generated hypothesis and the disinclination to seek information that will disconfirm that hypothesis has been repeatedly documented [Citations]." (Id.)

The opinion expressed by the expert is based on a hypothesis (i.e., the expert's suggested explanation of the conduct of the parties and the testing

results and the proposed correlation between that information and the recommendation being made to the court). Failing to consider alternative explanations or hypotheses may show “confirmatory bias.”

3. The Primacy Effect

First impressions are lasting impressions. This is known as mental set, anchoring, or the primacy effect. (Id.) Therefore, the evaluator should meet with both parents together for the first time if at all possible. “No human evaluator can take information from Parent A and avoid processing that information until Parent B has been heard from.” (Id.)

4. Detecting Bias

If the expert was improperly biased, his or her report will usually reveal that bias. The report and the expert’s opinion should be examined for the following indicators of bias:

— Selective reporting of test data
— Skewed or inaccurate interpretation of test data
— Ignoring unfavorable test results of one parent or inflating the importance of the other parent's test results
— Failure to consider alternate hypotheses
— Improper ex parte communications with a party or counsel (may show identification or familiarity with one side)
— Spending considerably more time with one parent and his or her collaterals than with the other side (billing statements are an objective measure of how much time the evaluator spent)
— Opinion is not a logical conclusion based on the evidence
— Failure to follow laws, rules, or established methods
— Failure to recognize any weaknesses or shortcomings of the parent the opinion favors
— Readiness to assume facts which support one parent
— Failure to compare interview data with alternate sources of information to assess credibility of statements made in interview

D. Failure to Comply with Guidelines

The guidelines of the APA, AFCC and any other organizations to which the evaluator belongs should be examined carefully to determine if the evaluator followed them. State law and court rules in this regard should also be reviewed.

The American Psychological Association Child Custody Guidelines (1994) state: “The focus of the evaluation is on parenting capacity, the psychological and developmental needs of the child; and the resulting fit.” If the evaluator failed to focus on these issues, the opinion should be attacked on those grounds.

1. Sample Questions: Parenting Capacity
The APA Child Custody Guidelines require you to assess the parenting capacity of each parent, correct?
What are the primary factors that define parenting capacity?
Where in your report do you define the parenting capacity of each parent?
Where in your notes dif you record information relating to the parenting capacity of my client?

2. Sample Questions: Developmental Needs of the Child
The APA Child Custody Guidelines also require you to assess the psychological and developmental needs of the child, correct?
What are the psychological and developmental needs of the child?
Where in your report do you define the psychological and developmental needs of the child?
Where in your notes dif you record information relating to the psychological and developmental needs of the child?

3. Sample Questions: Resulting Fit
The APA Child Custody Guidelines require you to assess the resulting fit between the parenting capacities of each parent and the child’s psychological and developmental needs, correct?
Where in your report do you define the resulting fit?
Where in your notes dif you record information relating to the resulting fit?

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