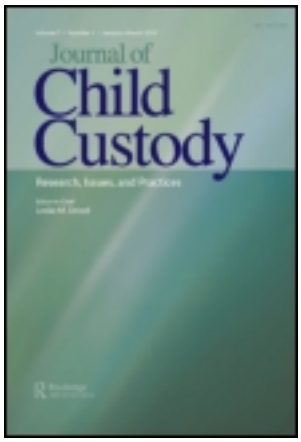

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# Quasi-Judicial Immunity for Forensic Mental Health Professionals in Court-Appointed Roles

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# Quasi-Judicial Immunity for Forensic Mental Health Professionals in Court-Appointed Roles

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**ABSTRACT.** Forensic mental health professionals (FMHPs) are frequently appointed by domestic courts to perform evaluations and related services to families in the midst of pre- or post-divorce developments.

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Clearly, this is one of the most stressful experiences that divorcing couples and their children encounter psychologically, economically, socially, and developmentally. Court-appointed FMHPs have a strong burden of responsibility to these family members to provide highly ethical, professional, and objective services to such participants. However, research demonstrates that regardless of the level of objectivity and accuracy of findings, FMHPs are frequently caught in the crossfire between parties and may be the subject of civil lawsuits and ethics complaints. This paper reviews the need for court-appointed FMHPs to have quasi-judicial immunity to protect them from frivolous lawsuits. Recent case law is reviewed, revealing that FMHPs in court-appointed roles serve as an extension of the court and therefore are protected from civil liability when they function within the community-accepted and ethical boundaries of the role. 

**KEYWORDS.** Quasi-judicial immunity, court-appointed roles for psychologists



Forensic mental health professionals (FMHPs) who specialize in domestic legal issues continue to be in high demand in the arena of assisting family courts with resolution of legal-psychological questions. Unfortunately, it is now well established that professional activity in this area is the most stressful and risk-laden venue in forensic psychology (Bow & Quinnell, 2001; Kirkland & Kirkland, 2001; Kirkland, Kirkland, & Reaves, 2004; Wilbert & Fulero, 1988).

Bow and Quinnell (2001) surveyed 198 psychologists who perform child custody evaluations. They found that 35% of this national sample had encountered at least one licensure board complaint and 10% had been sued for malpractice. Malpractice statistics from the American Psychological Association (APA) Insurance Trust (the Trust) reveal that this compares to a less than 0.005% chance of being sued among the general practice pool of practicing psychologists (Bennett, Bryant, VandenBos, & Greenwood, 1990).

In a large-scale survey, Kirkland and Kirkland (2001) surveyed all member licensure boards of the Association of State and Provincial Licensure Boards (ASPPB) concerning the frequency and disposition of complaints to state and provincial licensure boards in the area of child

custody evaluation. The study surveyed all the 61 ASPPB member boards about the actual number of complaints filed with each licensure board between 1990 and 1999, the nature of each complaint, the number of complaints that resulted in disciplinary actions, and the types of sanctions that were attached to each case. Results reveal that among 34 states and provinces in the sample, a total of 2,413 complaints were filed against licensed psychologists. Of these 2,413 complaints, only 27 or 1% resulted in findings of formal fault against psychologists. While only a small percentage of practitioners are faced with findings of formal fault, resulting in actual discipline, any practitioner will attest to the fact that dealing with any board complaint, no matter how frivolous, is a harrowing experience. Kirkland and Kirkland (2001) describe the experience as having one's license in administrative purgatory during the time of a pending complaint.

FMHPs who practice in this area may take some small measure of comfort in the fact that in most instances, court-appointed FMHPs are granted some degree of protection from civil lawsuits by the doctrine of judicial or quasi-judicial immunity (Lalonde v. Eissner, 405 Mass. 207, 210, 1989). Quasi-judicial immunity extends protection from civil liability to court-appointed experts in their roles as agents of the court. Other jurisdictions have overwhelmingly granted quasi-judicial immunity to persons performing court-appointed duties in this arena:

Williams v. Rappeport, 669 F. Supp. 501(D. Md. 1988), *aff'd* 879 F. 2d 863 (4th Cir.), *cert. denied* 493 U.S. 894 (1989) (court-appointed psychologist and psychiatrist in custody evaluation); Bartlett v. Weimer, 268 F.2d 860 (7th Cir.1959), *cert. denied*, 361 U.S. 938 U.S. 938 (1960) (court-appointed physicians in evaluating a person's mental condition); Moses v. Parwatikar, 813 F.2d 891 (8th Cir.), *cert. denied*, 484 U.S. 832 (1987) (therapists in a sex abuse case); Burkes v. Callion, 433 f.2d 318 (9th Cir. 1970) (same as *Bartlett*); Myers v. Morris, 810 F.2d 1437 *8th Cir.), *cert. denied,* 484 U.S. 828 (1987) (therapists in child sexual abuse case); Doe v. Hennepin County, 623 F. Supp 982 (D. Minn. 1985) (psychologist selected by parents to assist court in custody action); *Howard v. Drapkin,* 271 Cal. Rptr. 983 (psychologist selected and paid by parents to assist court in child custody dispute); LaLonde v. Eissner 405 Mass. 207, 210 (1989); Linder v. Foster, 295 N.W. 299 (Minn. 1940) (same as *Bartlett*); Delcourt v. Silverman, 919 S.W. 2d 777 (Tex. App. 1996), *cert. denied*, 117 S. Ct. 1698 (1997). This paper seeks to examine the nature of immunity for FMHPs in court-appointed roles.

In reviewing this topic it is important to point out that forensic practitioners and researchers strongly support the principle of accountability

as the hallmark of forensic services, as discussed by Greenberg, Martindale, Gould, and Gould-Saltman (2004). These scientist-practitioners point out that the essence of accountability is the welcome review of one's work by other experts, cross-examining counsel, and the court. This posture also includes the presence of utmost respect for the legal rights and personhood of all parties, as well as the responsible use of the power of the court-appointed role. The central thrust of immunity doctrines is not protection of the individual practitioner, but of the integrity of the judicial process and the court's needs in addressing certain legal questions.

However, it is also clear that court-appointed FMHPs in child custody cases venture into a minefield of potentially highly emotional and conflict-laden issues because of the requirement that the FMHPs give feedback or render opinions that could alienate one or both parties. In order to be effective, this complex professional role requires that the FMHP be able to conduct thorough, objective, assessments and function without fear of being sued by a disgruntled party.

Providing expert testimony was risky before immunity came into existence. What is worthy of opposition, and what quasi-judicial immunity is designed to prevent, is the manipulative and inappropriate use of board complaints and civil lawsuits where the goal is to subvert and prevent the intent of the court in obtaining thorough and objective opinions. There are specific instances in which complaints or lawsuits have been filed for the sole purpose of having a court-appointed FMHP removed from a case or blocked from testifying. Even expert witnesses, who are hired by one adversarial party in a civil lawsuit, have some degree of witness immunity, but that is best addressed as a separate topic.

The importance of being court-appointed is emphasized over and over in the ethical directives of the various specialty FMH professions (APA, 1994; AFCC, 1995). The legal protection/rationale for being court-appointed is emphasized by the following finding: Being court-appointed in pre-and post-divorce cases has consistently led to findings of immunity when the actions of the court-appointed FMHP have been brought to question in a formal complaint, grievance, or lawsuit.

Immunity protects whoever has it from legal liability in a civil or criminal case. However, the issue of whether immunity is attached to a particular role is a matter of law and is only determined after a specific lawsuit has been filed. At that point the issue of whether immunity applies is heavily fact-driven and dependent upon individual case variables. However, there is a broad constitutional law principle, which holds that there

should be a remedy for all wrongs (Peters, 1974: Massachusetts State Constitution, 1780).

While immunity's walls are high for court-appointed experts, thus making a successful civil suit next to impossible, there is no immunity against licensure board complaints and certainly anyone can file a civil lawsuit. Parties to disputes involving court-appointed experts have a considerable stake in the outcome and certain rights to protect that often place them at odds with experts. These adversarial parties often target the expert with their anger, filing a complaint or lawsuit, thus creating the need to consider the expert's professional and legal rights to conduct an evaluation and to present objective and balanced findings without fear of malicious retaliation.

It is proposed that the answer to this dilemma is found by striking the appropriate balance of due protection of all parties concerned. Quasi-judicial immunity should be attached to the role of the court-appointed expert to the degree that FMHPs are free to express themselves thoroughly and objectively without fear of sanction or retaliation. On the other hand, the immunity should not be absolute, i.e., FMHPs should be liable for gross negligence, fraud, unethical conduct, and pervasive violations of established standards and guidelines for professionals who work in the domestic law arena (APA, 1994; AFCC, 1995; Kirkpatrick, 2004). However, it should be noted that the original trial court and the adversarial process itself are the proper venues for review of the work of the court-appointed professional. The California Rules of Court now require formal review of a complaint by the original trial court prior to referring the issue as a formal complaint to the California Board of Psychology as a means of excluding manipulative and groundless complaints (Personal Communication, Anthony Lum, Enforcement Officer, California Board of Psychology, 2/3/05). West Virginia and Florida have passed laws in the last two years that grant quasi-judicial immunity specifically to psychologists who perform child custody evaluations.

## *HISTORY OF IMMUNITY*

The doctrine of judicial immunity originated in early 17th century England in the jurisprudence of Sir Edward Coke. In two decisions, Floyd v. Barker (77 Eng. Rep. 1305 1607) and The Case of the Marshalsea (77 Eng. Rep. 1027 1612), Lord Coke laid the foundation for the doctrine of judicial immunity. Coke's reasoning for judicial immunity was presented on four public policy grounds: (1) The need

for finality of judgment, (2) Maintenance of judicial independence, (3) Freedom from continual calumniations (malicious false charges), and (4) Respect and confidence in the judiciary (Floyd v. Barker, 1607). The Marshalsea case (1612) established that judicial immunity is not absolute. For example, a circumstance in which a judge would not have immunity occurred when a judge proceeded but lacked jurisdiction (Marshalsea, 1612).

The idea of immunity also has its origins in the doctrine of witness immunity which originated in English common law hundreds of years ago (Cutler v. Dixon, 76 Eng Rep 886 QB 1585). The intent of granting immunity to witnesses was to promote straightforward and open testimony from witnesses without fear of reprisal in the form of civil lawsuits related to the testimony (Henderson v. Broomhead, 157 Eng Rep 964, 967-968 Ex 1859).

The first United States adaptation of judicial immunity occurred in 1810 (Yates v. Lansing, 5 Jons. 282 N.Y Sup. Ct. 1810). In this case Chancellor John Lansing arrested John Yates for malpractice and contempt. Subsequently, Yates was set free on bond through a Writ of Habeas Corpus when the New York Supreme Court ruled that the arrest was illegal. Chancellor Lansing charged that the release was illegal and had Yates jailed again. Yates then sued Lansing for violation of the Habeas Corpus Act. The New York Supreme Court then dismissed the suit on the grounds of judicial immunity, based on the tests established by Lord Coke.

In the United States the immunity doctrine can be traced additionally to the Fifth Amendment privilege against self-incrimination. In Counselman v. Hitchcock (142 U.S. 547, 1892) the U.S. Supreme Court ruled that the privilege against self-incrimination could be exercised not only by an accused person in a criminal case but also by a witness in any investigation, including grand jury proceedings. There was broad language in Hitchcock that a valid immunity statute must afford a person, compelled to testify, absolute protection from prosecution for any offense to which the testimony relates.

## *TYPES OF IMMUNITY*

There are many types of immunity. Apparently, there is no "absolute" immunity, as there are circumstances, even for judges, in which their actions would not be immune from civil action. *Black's Law Dictionary* (1979) defined governmental tort immunity as "immunity in which the

federal, and derivatively, the state and local governments are free from liability for torts committed, except in cases in which they have consented by statute to be sued" (p. 676). However, in order to provide ample redress for citizens, most states, either by statute or court decision, have greatly restricted this doctrine at both state and local levels (Black, 1979). The legal evolutionary trend seems to be to start with absolute immunity that is then modified by situational due process and equal protection concerns.

Judges have a variation of absolute immunity. In most instances, they cannot be held liable for judicial errors that result in a remand of cases after successful appeal to a higher court. This does not prevent filing of frivolous lawsuits, usually by self-represented litigants, which are typically summarily dismissed. Prosecutors and district attorneys have qualified immunity. They cannot be sued for acts, such as vigorous prosecution, which are within the scope of their employment. Mandatory reporters of abuse, such as psychologists, physicians, social workers, and teachers have statutory immunity, a type of absolute immunity that recognizes that if the law requires them to report a case of suspected child abuse, the accused person cannot sue the reporter even if the report turns out to be incorrect.



## *QUASI-JUDICIAL IMMUNITY IN FMHP CASES*

Court-appointed professionals, such as FMHPs, in family court cases, have quasi-judicial immunity because they perform functions integral to the judicial process and must be able to generate expert opinions objectively without fear of being sued (Lalonde v. Eissner, 405 Mass. 207, 210, 1989).

### *Parker v. Dodgion (Utah)*

In Parker v. Dodgion (971 p.2d 496, 497 Utah 1988), a court-appointed psychologist was ordered to perform a child custody evaluation. In this case a father brought a civil lawsuit against Dr. Dodgion, alleging that the defendant psychologist was negligent. Specifically, the plaintiff alleged that the defendant was grossly negligent in the performance of his court-appointed duties in that he utilized psychological tests to identify and profile the father as a sexual abuser. As a result of this classification, the psychologist recommended that the plaintiff not be given custody or even allowed visitation with his daughter. The

court-appointed defendant psychologist moved to dismiss the lawsuit with a motion for summary judgment arguing, among other things, that he was entitled to judicial immunity. The trial court granted the motion for summary judgment and dismissed the lawsuit with prejudice. The Utah Supreme Court affirmed the decision on the basis that the defendant was entitled to quasi-judicial immunity. In summarizing the matter, the court cogently stated,

> Courts that have addressed this issue have uniformly held that psychologists appointed by the court to conduct psychological evaluations of parties involved in custody disputes perform a function integral to the judicial process and are therefore immune from suit. Several reasons support this conclusion. First, if these individuals are subject to suit, they will be much less willing to serve the court in such a capacity. Second, a psychologist who agrees to fill the role of a court-appointed evaluator will be less likely to offer the disinterested, objective opinion the court seeks in making such an appointment if he or she is subject to suit." (971 p.2d at 498-499)

***Dr. Sandra Rahrer v. Montana Board of Psychologists***

In a celebrated case in 1993, a Montana psychologist, Dr. Sandra Rahrer, was treating a child whose parents became involved in an acrimonious child custody battle. Dr. Rahrer was asked to prepare a report that was to be used by the mother. The case settled, but the father filed a complaint with the Montana Board of Psychologists. The case was investigated, probable cause was established, and a hearing ensued. The hearing resulted in a finding of no wrongdoing by Dr. Rahrer, who counter-petitioned the Board asking for attorney fees based on the argument that there was not probable cause for a hearing.

The hearing officer found that the Board's failure to dismiss the complaint prior to a hearing was not unreasonable and denied the award of attorney fees. Dr. Rahrer appealed the case to the local district court for review, as a tort action against the Board, alleging bad faith and frivolous prosecution. The Montana Supreme Court ultimately found that the Montana Board was immune from tort action under the doctrine of quasi-judicial immunity.

The Supreme Court found that the determination and processes of the Psychology Board all involved the exercise of discretion and judgment, and therefore found that the Board was entitled to summary judgment and dismissal of the lawsuit on the issue of quasi-judicial immunity.

The court stated, "The process, however imperfect, is designed to catch and punish the guilty and vindicate the innocent. As lengthy and inconvenient as it was (to Dr. Rahrer), this process ultimately accomplished this function" (p. 598) (Sandra Rahrer v. Bd. of Psychologists, Mont. CC: ADV, 97-598). Dr. Rahrer, in our view, may have sought redress with the wrong party. Her cause of action may have been sustained against the complainant.

This case outcome also demonstrates that FMHPs must remain steadfastly patient with due process variables of even frivolous board complaints or lawsuits. They must let the process run its due course, possibly without retaliation. Such a perspective is inherently difficult and requires that practitioners accept some of the distress that accompanies a defendant in such an action as unfortunate features of the landscape or part of the "cost" of practice in this challenging area of professional practice.

### *Hughes v. Long (Pennsylvania)*

In 1983, a Chester County, Pennsylvania Court of Common Pleas appointed a social worker and a psychologist to perform a child custody evaluation. The parents were evaluated and at some point the evaluators informed the parties of their recommendations concerning custody. The father hired his own adversarial expert. There was a subsequent dispute over release of the raw data and the father then contended that the court-appointed practitioners created false new data reports and destroyed the original data. The court adopted the recommendations of their own court-appointed experts despite the father's allegations. The father filed a lawsuit against the practitioners.

After the state court dismissed the lawsuit on the basis of immunity, the father appealed the case to the United States District Court for the Eastern District of Pennsylvania alleging interference with his familial rights in violation of the 14th Amendment and alleging fraud, defamation, breach of contract, and conspiracy. The District Court granted the court-appointed practitioners' motion to dismiss the lawsuit on the basis of quasi-judicial immunity {Hughes v. Long, 242 F.3d 121, 242 F.3d 121 (3d Cir. 2001)}.

The Court noted that, although the practitioners were not entitled to prosecutorial immunity, they were entitled to quasi-judicial immunity because they acted as arms of the court and performed functions integral to the judicial process. The court specifically compared the role of these experts to that of guardians ad litem, who are entitled to judicial immunity, precisely because of their intimate relationship to the court as

"actual functionaries" or arms of the court. This outcome underscores the necessity of court-appointment and the protection that accompanies the role, even in the face of dealing with an adversarial "expert" pushing for a certain disposition/outcome.

### *Tyrone G. Duff v. Richard W. Lewis, PhD (Nevada)*

In Duff v. Lewis (Supreme Court, Nevada, No. 29581, May 19, 1998), the Nevada state licensure board entered a judgment against a court-appointed psychologist and the courts later threw out the ensuing civil lawsuit on the basis of quasi-judicial immunity. In this case, Tyrone Duff and his wife Yolanda Duff had divorced in 1988. The wife received primary custody of their two sons and the husband was awarded traditional visitation rights. The wife later remarried a five-time ex-felon with offenses including attempted homicide, aggravated assault, battery causing substantial harm, two drug offenses, a history of violent behavior, and alleged sexual assault. In a subsequent visitation weekend the ex-husband (Duff) allegedly observed inappropriate sexual behavior between the two boys.

Duff arranged for his sons to be evaluated by a marriage and family therapist who agreed with his assessment and reported the case to social services. On November 15, 1990, the district court issued a protective order that awarded temporary custody of the children to Duff, supervised visitation to the mother, prohibited contact with the new husband, and sought a court-appointed evaluation of the children by psychologist Dr. Richard W. Lewis, whose fees were ordered to be split between the parties. Dr. Lewis evaluated the father, the mother, and the children and subsequently recommended that the children be returned to the mother on the basis of findings that the father suffered from a mixed personality disorder with paranoid and narcissistic features. The father then filed a complaint against Dr. Lewis with the Nevada State Board of Psychological Examiners. The case proceeded to a formal hearing in May, 1995. On July 20, 1995 the Board entered its findings of fact and conclusions of law that Dr. Lewis' evaluation was deficient.

The Board concluded that the evaluation was deficient because the court-appointed psychologist failed to inform the court as to how Duff's prescribed medications might have affected his performance on the psychological tests, selectively reported findings giving the court the impression that Duff was of substandard intelligence, and failed to avoid misleading the court that Duff's IQ scores fell in the average range of intellectual functioning. The Board issued a private letter of reprimand

against Dr. Lewis and ordered that he pay $4,000 in costs for the disciplinary hearing.

The following day (July 19, 1996) Duff filed a lawsuit against Dr. Lewis seeking damages for Lewis' alleged negligence. On October 30, 1996 the district court granted Dr. Lewis' motion for summary judgment and dismissed the lawsuit on the basis of quasi-judicial immunity.

Duff appealed the district court's dismissal of the lawsuit. The Nevada Supreme Court affirmed the dismissal and ruled that Dr. Lewis was entitled to quasi-judicial immunity from Duff's suit because he was court-appointed, served as an arm of the court, and performed a function integral to the judicial process. In addition, the Court noted that the essence of the court-appointed role is the freedom to act and opine in an independent manner. The Court also noted the existence of adequate procedural remedies and safeguards that hold court-appointed professionals accountable for their actions, including the adversarial process of cross-examination, the ability of opposing counsel to point out alleged deficiencies to the trial court judge, motions for modification of the trial court's order, as well as the appellate review process. Once again, the necessity of being court-appointed is demonstrated.

### *Alan Elam v. Jonathan W. Gould, PhD (North Carolina)*

Alan Elam and Nancy Carrol divorced in North Carolina in 1991. A court awarded custody of one son to the father and one son to the mother. In 1999, the husband sought to obtain custody of the other son. The trial court appointed psychologist Jonathan W. Gould to conduct an independent evaluation of the child in question. Dr. Gould subsequently generated a forensic psychological report in which he opined that the father had alienated the child in question and that a change in the custodial arrangement would negatively affect both the child and his relationship with his mother. The trial court relied upon these recommendations in its determination that the child should remain in the custody of the mother.

Mr. Elam subsequently filed a lawsuit against Dr. Gould alleging claims of negligence/malpractice, intentional infliction of emotional distress, unfair and deceptive trade practices, fraud, and breach of contract. Dr. Gould answered the complaint with a motion to dismiss the lawsuit, which was then granted by the trial court. Mr. Elam appealed. The North Carolina Court of Appeals ruled that the trial court had properly dismissed the lawsuit against Dr. Gould because he was court-appointed and his report and opinions were used in the due course of a

judicial proceeding and therefore the defendant was immune from any civil liability (Elam v. Gould, Mecklenburg County, North Carolina, No. 02 CVS 9894 3/16/2004) (North Carolina Ct of Appeals 03-511).

An important finding in this case involved the evaluator's use of and reliance on third party sources of information. The plaintiff alleged that Dr. Gould had violated ethical and legal guidelines by relying on collateral contacts and including information from them in his report. The Court ruled that there was no ethical or legal violation and affirmed that use of third party sources were necessary to the functioning of the court-appointed role. This outcome also supports use of collateral interviews as objective sources of forensic opinions for court-appointed FMHPs.

### *Francis Politi v. Janet L. Tyler, PhD (Vermont)*

In Vermont, a case boldly underscored the importance of the FMHP being court-appointed and specifically named in pre- and post-divorce cases. In 1993, Dr. Janet Tyler accepted involvement in a child custody evaluation and used a contract that she authored as the basis for her involvement. The appointing court issued an order specifying that "a forensic evaluation" be performed without naming the specific professional. This posed a particular problem for this practitioner because the court ruled that the defendant (Dr. Tyler) was not a court-appointed expert and that "the duties imposed on the defendant arose from her contract with the parties, not from a quasi-judicial function performed pursuant to a court order." As a result, the court denied Dr. Tyler's claims of judicial immunity and observed that the duties required of her were imposed by a contract with the parties and as such, were comparable with what is expected of any expert jointly selected by litigants. Fortunately for Dr. Tyler, the court did rule that the statute of limitations had run which barred the plaintiff's claim for intentional infliction of emotional distress. However, what is clearly noteworthy for practitioners is to make certain that they are clearly court-appointed and specifically named in the court order. One dissenting justice noted that it was "painfully apparent' that the entire lawsuit could have been avoided by the simple expedient of including Dr. Tyler's name in the court order.

### *Sandra Steinburg v. Karl Kirkland, PhD (Alabama)*

In Alabama, a case recently was dismissed by summary judgment in the favor of and to the great relief of one of us (KK). In this case, Dr. Kirkland was appointed as a "mediator and family counselor" to

help a post-divorce couple implement a parenting plan. The initial appointment occurred in 2001, and in the interim, the court gave Dr. Kirkland verbal instructions to interpret and implement his role as a parenting coordinator (PC) rather than a mediator, as the original order described the role. As the fields of mediation and parenting coordination have evolved, it has become clear that there are distinct differences in these post-divorce roles (Kirkland, 2004). For example, the content of mediation is confidential and not to be reported back to a court, whereas the developments that occur in the process of parenting coordination are definitely to be reported back to a court as a means of accountability for the respective parents. In this particular instance, the judge changed the nature and even the name of the role midstream, but never changed the original order. Luckily, numerous letters to the court by the PC documented this change.

In this case, the father was the custodial parent of his daughter. The mother essentially had backed away from regular contact. Dr. Kirkland, as the PC, facilitated reconciliation of the mother-daughter relationship, regularly reinforced and confronted both parents where necessary, and consistently made written reports back to the court. The judge who signed the court order was defeated in a general election around the same time (2004) that the mother filed bankruptcy and began to experience a number of other problems. Dr. Kirkland had to confront the mother about severely degrading the father to the child and the mother responded by directing much of her anger toward the PC. She went on to file a lawsuit accusing the PC of fraud, breach of contract, wanton disregard for the rules governing mediation (i.e., confidentiality), and intentional infliction of emotional damage. A complicating factor was the fact that her lawyer was not a domestic relations attorney and had no concept of the differentiation of different pre- and post-divorce roles for court-appointed psychologists. The trial court dismissed the lawsuit by summary judgment, but it took almost a year to reach that outcome. There was no appeal. Even though the PC was reassured repeatedly that this was a frivolous lawsuit with a predictable outcome, it was an emotionally draining experience. The malpractice policy covered approximately $10,000 in legal fees for two attorneys. The case agent for the malpractice company (through APA Insurance Trust) was helpful and supportive. However, the experience was difficult.

This case highlights the need to be specifically named in the court order with a clear description of the scope and parameters of the court-appointed role. If you do parenting coordination, use a pattern order that defines the role specifically and spells out the inclusion of quasi-judicial

immunity. Judges retire or get defeated and they may not be there to explain the subtleties of verbal instructions that occur during the course of implementing a given role. Any role clarification therefore needs to be done in writing. A well-documented file with copies of letters to the parties and the court proved very helpful in this case. Some of the anguish of the experience was funneled into the research that led to this paper.

## *CURRENT TRENDS AND FUTURE DIRECTIONS*



It is indeed unfortunate, but certainly understandable, that many FMHPs come to avoid and shun involvement in this area of practice altogether. There are currently many extremely talented FMHP researchers and practitioners in forensic-domestic practice. How many more of our talented colleagues steer clear of the entire area, simply due to the unreasonably high risks associated with domestic practice, or how many good practitioners leave in dismay after a board complaint or a lawsuit? We propose four interventions for reducing these risks along several different fronts including statutory solutions, court rules and regulations changes, licensure board adaptations, and input from the ethical and professional regulatory standards.

Several conclusions follow: (1) FMHPs *must* be court-appointed; (2) The FMHP must be named specifically in the court order by given legal name; (3) The duties and parameters of the role, including the specific legal question to be addressed must be clearly delineated in the court order; and (4) The retainer, fee, or payment arrangements should be addressed in the court order. In addition, some courts split the fee arrangement based on relative abilities of the parties to pay, e.g., husband: two-thirds and wife: one-third.

Some potential practitioners of forensic psychology might avoid entering this area of practice because of fears about the impact of claims on malpractice premiums. Researchers have consistently demonstrated that practitioners who perform CCEs, and post-divorce services such as parenting coordination, encounter a much higher risk of board complaints and civil lawsuits (Bow & Quinnell, 2001; Kirkland & Kirkland, 2001). Is this fear of a premium increase justified by actual data from the malpractice carrier?

Dr. Bruce Bennett, Chief Executive Officer of the American Psychological Association Insurance Trust (the Trust) (personal communication, November 30, 2005), reports that there is no direct causal relationship between encountering a lawsuit or a board complaint and an

individual practitioner subsequently experiencing an increase in annual premium costs. In fact, the cost structure for the Trust-sponsored professional liability insurance policy is more affected by geography and other factors than lawsuit history or, excluding prescription privileges, type of practice. Policies are not individually underwritten; thus premiums are not adjusted by the number of complaints or lawsuits or, except for prescription privileges, the type of practice. For example, among mature policyholders (those insured for at least seven years on claims-made policies), the annual premiums were as follows for an individual practitioner: (1) low range, Alabama; $438.00/year, (2) medium range, New York; $719.00/year, and (3) high range, California; $1,253.00/year. The unfortunate experience of encountering a lawsuit was not a cause for a premium increase, in and of itself. However, underwriters do have the option of non-renewal or raising a given individual policyholder's premiums if there are obvious problematic patterns. Dr. Bennett observes that rather than raise rates, the underwriters typically just choose not to renew the policy.

The unfortunate incident of encountering a lawsuit or licensing board complaint is not a cause for a premium increase, in and of itself, for the individual practitioner.[1] However, underwriters do have the option to non-renew a policy if there are obvious problematic patterns such as multiple lawsuits or board complaints demonstrating illegal or unethical behavior, or serious incompetence. In such situations, the carrier might choose not to renew a psychologist's policy, but such action rarely happens based solely on the filing of a licensing board complaint or a lawsuit. Allegations involving sexual misconduct or other serious boundary violations are a different matter and are likely to result in a decision to non-renew a policy.

The Trust recognizes that certain forensic activities such as custody evaluations are high-risk areas of practice and the mere filing of a frivolous complaint should not be the basis for policy non-renewal. An important benefit offered for those insured by the Trust is the availability of a Case Review procedure where a psychologist can request that the Trust review a decision made by the carrier regarding such matters as failure to issue a policy, non-renewal of a policy, or problems with the legal counsel assigned by the carrier. While the Trust cannot mandate that the carrier change a negative decision, the Case Review may result in the Trust recommending that the carrier reconsider the decision, which is frequently successful. (More information about coverage issues, premium rates by geographical region, and requesting a Case Review may be obtained by visiting the Trust Home Page at www.apait.org.)

Dr. Bennett points out that four factors determine psychology malpractice insurance premium cost: (1) geographic location-state of licensure, (2) limit of liability chosen, (3) specific discounts such as discounts for CE credits and full-time vs. part time practice, and (4) occurrence policy vs. claims-made policy. While forensic practice is not a variable in determining an individual's premium, the plan does have a premium differential for psychologists that have been granted the authority to prescribe medication. The reason for this premium differential is clear: it is not reasonable that the premiums of those psychologists who do not prescribe psychotropic medications should subsidize the losses associated with prescription privileges.

### *Statutory Solutions*

Colorado's omnibus mental health licensure board, which collectively regulates six mental health professions in that state, sought to solve this problem by statutory change. The Colorado legislature passed a law prohibiting child custody evaluations from being the subject of discipline by the state licensure board (Colorado Mental Health Statute, 1998). In response to burgeoning numbers of complaints, the board reasoned that the court-appointed status of the FMHP-evaluator should exempt the practitioner from defending the typical acrimonious and groundless complaints of an angered party. It can be argued that such an exemption goes too far in reacting to what appears to be a maelstrom of complaints. The legislative "cure" would prevent state licensure boards from having jurisdiction and regulatory control over a most important area of consumer protection. However, given the numbers of complaints that licensure boards receive (Kirkland & Kirkland, 2001), this type of change may be a welcome relief to a given board, as it was in Colorado.

Amos Martinez, program administrator for the six mental health licensure boards in Colorado (personal communication, December 17, 1999), provided the background to this scenario in an interview. Martinez reported that in 1992 all six mental health boards jointly approached the Colorado legislature with the request for the statutory change. The boards took the position that the proper venue for grievances was the original trial court, not the regulatory board. The legislature agreed that the best forums for assessing complaints associated with expert testimony in child custody cases were the trial court judge and the adversarial process itself.

A different kind of statutory solution is also emerging. In July of 2004, statutory protection for psychologists was provided in West Virginia, which allows psychologists to provide "good faith" custody evaluations during or after divorce proceedings without fear of being sued by parents who are disgruntled over their custody evaluations (Greer, 2004). Florida passed a similar law in 2003. Both laws were passed in response to growing numbers of groundless complaints to courts and licensure boards.

Under the new West Virginia law, if a civil action is filed against a psychiatrist or psychologist, the complainant must pay all legal fees if the judge rules that the suit is frivolous because the evaluation was performed in good faith in the due course of a court-appointed role. The West Virginia law also required a change in the nature of the pathway for complaints in this area to licensure boards. The law specified that administrative complaints to state licensure boards could no longer be anonymous.

Both Florida and West Virginia used the 1994 APA Guidelines for Child Custody Evaluations in Divorce Proceedings (APA, 1994) as the guide for the standard of care in the law. The legislation recognizes the importance of the standard by requiring plaintiffs to specifically cite the alleged breach of APA guidelines. Without a specific cite of an alleged breach of APA guidelines, the law provides that the suit be dismissed. Greer (2004) points out that the bill was seen as being so logical and helpful by the West Virginia legislature that it passed immediately and without opposition. The law was described as helping children, courts, parents, and practitioners.

### *Court Rules and Regulations Changes*

In 2002, the California Family Court system began requiring all court-appointed child custody evaluators to meet certain educational, experiential, and training requirements as a prerequisite for court appointment (California Rules of Court, Section 1816, Rule 1257, 2002). In order to be eligible for court appointment, evaluators must declare, under penalty of perjury, that they have the following: (1) Knowledge of the psychological and developmental needs of children and parent-child relationships, (2) knowledge and use of assessment and testing procedures that meet generally accepted clinical, forensic, scientific, diagnostic, or medical standards, (3) knowledge and use of a policy that informs all adult parties of the purpose, nature, and the method of evaluation, (4) knowledge of all aspects of the nature and effects of sexual abuse and

the related rights of alleged victims, and (5) be licensed in their respective specialty and certified by the Judicial Council as a court-connected evaluator. The rules also specified the manner in which cases of alleged child sexual abuse should be handled.

The California Family Court System also promulgated rules that require all county family courts to implement plans to deal with complaints that arise in child custody evaluations ordered by their courts. While implementation may differ to some degree by county, the parties are required to first take up their complaints with the original trial court prior to filing a formal complaint with the psychology board or filing a civil lawsuit. This step assures that the original trial court hears the issues first. This line of reasoning agrees with the general trend that the original trial court judge and the associated adversarial processes are the best venues to evaluate the validity of the complaints. It is said, "As California goes, so goes the nation." California has led the nation in terms of relative numbers of child custody evaluation complaints between 1990-1999 (Kirkland & Kirkland, 2001). California also appears to be leading the nation in terms of solutions for this major area of professional conflict.

### *Licensure Board Solutions*

The California Board of Psychology fielded 1,660 child custody evaluation complaints in the decade between 1990 and 1999 (Kirkland & Kirkland, 2001). Interestingly, there was only one case investigated that resulted in findings of probable cause or formal findings of fault. Despite this low occurrence rate for findings of fault, the fact that there are so many complaints causes enormous administrative problems for psychology boards across the country (Kirkland & Kirkland, 2001). The California Board of Psychology also uses a specific expert referral system for evaluating formal, pending complaints.

The California Board of Psychology (Personal Communication, Tony Lum, Enforcement Officer, California Board of Psychology, February 4, 2005) contracts a variety of experts in child custody matters to screen pending complaints. The Board uses the APA guidelines (1994) as the standard of care for evaluating pending complaints. If the board-appointed expert finds no violation of any of the specific APA Guidelines for Child Custody Evaluations in Divorce Proceedings (1994), the Board cannot take any administrative action against the FMHP appointed to perform the evaluation.

### *Professional and Ethical Regulatory Standards*

H. D. Kirkpatrick (2004) strongly made the point that "the field of child custody is beyond (minimum) guidelines" (p. 62). Kirkpatrick argues that the CCE field is beyond "guidelines" and has established a "floor" of standards. He goes on to identify 26 standards that constitute this floor. Kirkpatrick (2004) went on to present 26 minimum practice standards. There are at least two sources for each standard. The standards are based on one or more of the following five professional sources for guidelines: (1) The American Academy of Child and Adolescent Psychiatry (1997), (2) the American Academy of Psychiatry and the Law (1995), (3) the American Law Institute (2002), (4) the American Psychological Association (1994), and (5) the Association of Family and Conciliation Courts (1995).

Kirkland, Kirkland, and Reaves (2004) noted that an additional source for information from the realm of professional regulatory data is the trends in disciplinary data from bodies such as the Association of State and Provincial Psychology Boards (ASPPB) and its Disciplinary Data System (DDS), which can be used to teach practitioners about trends in the types of errors practitioners are making and the related disciplinary sanctions. Ogloff and Olley (1998) observed that "at the most basic level both the law and ethics share two fundamental goals: the regulation of behavior and the protection of society" (p. 221). These authors also noted that five areas influence the ethical behavior of professionals: (1) causes of action found in general criminal and civil law, (2) peer review processes, (3) actions/rulings from state and provincial licensure boards, (4) civil litigation and malpractice complaints, and (5) statutes and government regulations. They also noted that "the law shapes ethical standards and ethical standards shape the law" (Ogloff & Olley, 1998, p. 222).

Another possible avenue for future changes could come in the form of inter-professional association support. By way of example, when one of us (KK) was the subject of a frivolous civil lawsuit involving court-appointed parental monitoring, the state family law association offered to file an amicus curiae brief in support. The association was concerned about the possibility that such lawsuits would intimidate experts, who would then decline to serve in court-appointed roles in domestic law. Fortunately, the trial court held that quasi-judicial immunity applied and dismissed the lawsuit. The brief was not needed. However, it was reassuring to know that the state's family law division was willing to be so supportive and protective of the experts' role.

## *CONCLUSIONS*

Matthew Sullivan (2004) described the role of the court-appointed, post-divorce parent coordinator as a "legal/psychological hybrid, demanding knowledge and skill in legal domains (legal procedure, relevant case law, etc.), psychological domains (child development, family systems, etc.), and dispute resolution (mediation and settlement processes)" (p. 576). This description is accurate in reference to all court-appointed professional roles, both pre-and post-divorce. Sullivan (2004) observed that there are so many review processes (e.g., judicial review, local court rules governing the review process, as in California, multiple licensure and regulatory boards, as well as appellate court review) for the work of the court-appointed professional that disgruntled litigants can go "forum shopping" as a means of avoiding legitimate feedback and findings concerning their parental deficits.

Search of case law failed to reveal a single case in which named court-appointed FMHPs were not ultimately found to be immune from civil lawsuits due to quasi-judicial immunity. Case law review clearly supports the finding of the U.S. Supreme Court in *Butz v. Economou* (438 U.S. 478 1977), that for individuals who are court-appointed to perform judicial functions, those professionals must have the freedom and confidence to conduct those actions without worrying about an unhappy party bringing a cause of action against them for those same actions. Without quasi-judicial immunity, the basis for this role ceases to exist. The very same reasons cited by Lord Coke in 1607 (Floyd v. Barker 77 Eng. Rep. 1305, 1607) still hold true today. For purposes of judicial and quasi-judicial immunity, professionals must be free to function for the public welfare and for the integrity of the judicial process because of the absolute needs for finality of judgment, freedom from continual calumniations (malicious false charges), maintenance of judicial independence, and respect and confidence in the judiciary.

## NOTE

1. An increase in the number of lawsuits with significant losses, whether from forensic or non-forensic activities could result in an overall rate hike. (Personal Communication, Dr. Bruce Bennett, CEO, APAIT, November 30, 2005).

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