

# Disciplines overlap in family law cases

As divorce lawyers, we are intimately aware of the overlapping relationship between psychology and family law.

In certain cases, we feel that we are practicing more psychology than law. At the same time, it is also not uncommon for clients who are in counseling to report discussions with a therapist which dangerously tread on the line of practicing law without a license — or even cross the line. Yet, until recently, it was rare that family law legal professionals worked in tandem, or even communicated, with mental health professionals.

The intersection is most dramatic — and important — when it comes to issues involving children. Courts look to the guardian ad litem for recommendations on how to protect a child who is caught in the middle of a custody dispute, including custody orders and allocation of physical placement. Yet nowhere in legal training are such issues included. It is doubtful that even one law school offers a course on child development or, of critical importance, the effect of domestic violence on children. Yet lawyers are frequently called upon to make recommendations on these issues.

Meanwhile, the legal system tries to cope with the effect of divorce on children by experimenting with various programs. For years in Wisconsin there was a mandatory counseling requirement. Then, mediation became mandatory in most custody or placement disputes. Later, many counties made attendance at a parenting class as a condition of getting a divorce. Communication counseling seems to be the newest attempt to address these issues.

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While these programs are well-intended, there is little consideration given to the psychological literature studying the effects of these programs, or for that matter, of much of family law practice. This literature includes studies of parenting programs, mediation and much more. Yet, it seems to exist in a different universe than the real world of statutory mandates and court proceedings.

Similarly, psychologists are often the key element in custody and placement disputes by serving as evaluators and offering expert testimony. Again, there is a gap between the psychological discipline and the legal process, which is frequently given short shrift in the family law system. It is questionable whether the psychological discipline includes recommending a placement schedule. Yet, judges frequently adopt psychological reports and recommendations without asking this question.

The overlap extends to the everyday practice of lawyers. We make a judgment call on which clients to represent, hoping that our armchair judgment that the dis-

stress exhibited by a potential client is related to the current stress of the circumstances, and not some deep, underlying psychosis.

Over the past several years, collaborative divorce has developed as an alternative to traditional practice. In a collaborative divorce, lawyers and mental health professionals work as a team, dividing responsibility according to their discipline. Equally important, training for collaborative divorce is usually interdisciplinary, allowing each profession to learn about the other.

Of course, most cases are not collaborative, and even some collaborative cases are not interdisciplinary. Little or no legal CLE includes mental health therapists as attendees, and vice versa. For the most part, lawyers and mental health professionals have each existed in their own worlds and intersect, if at all, in a forensic basis.

This article is the introduction to a series of articles looking at the relationship between family law practice and mental health practitioners. These articles will discuss several aspects of this relationship, including studies of the effect of aspects of the legal process and the use of psychologists as experts and as coaches. The series will conclude with a description of efforts to improve the relationship of lawyers and mental health professionals to the benefit of all involved in family law cases.

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# Communication gap creates barrier between research, lawyers

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Most Wisconsin counties require parents to attend a parenting class as a condition of getting a divorce.

On the one hand, these classes are the legal equivalent of chicken soup — it may not make the patient better, but will certainly do no harm. On the other hand, these classes cost parties money through attendance, time to discuss the requirement with their attorney and having to provide verification to the court.

Other than providing a source of clients for course providers, do these classes do any good? On a broader basis, is there any empirical evidence of the effect of the legal system on the participants?

The answer is that there is a substantial body of research on these effects in psychological literature. Unfortunately, there seems to be a disconnect between this research and the family law attorneys and judges who practice in this field.

This article is the second in a series examining the relationship between family law and mental health professionals.

At the outset, it needs to be acknowledged that not all programs designed to affect behavior are successful, no matter how well-intended or seeming intuitive.

For example, for many years, parents enthusiastically enrolled their school-aged children in an anti-drug program called "D.A.R.E." While teaching children about the evils of drug usage would seem to be beyond reproach, research studies eventually proved their ineffectiveness. One study conducted by the U.S. Government Accountability Office found that D.A.R.E. and other similar anti-drug programs do not prevent children from becoming drug users in high school. In fact, the GAO study found that D.A.R.E. is actually associated with increased levels of drug use among suburban youth. (See [http://en.wikipedia.org/wiki/Drug\\_Abuse\\_Resistance\\_Education](http://en.wikipedia.org/wiki/Drug_Abuse_Resistance_Education).)

In another example, closer to family law, perpetrators of domestic violence are frequently ordered to attend

anger management classes. As an article in *The Los Angeles Times* found, "[T]here is scant research on anger management to suggest whether these programs work. A few small studies, mostly involving prison inmates and juvenile offenders, have suggested the classes are helpful in discouraging aggressive behavior, but there is no conclusive evidence that they do any good within the general population." (See [www.latimes.com/classified/jobs/news/la\\_he\\_anger19jan19,0,4425631.story?coll=la\\_class\\_employ\\_jobnews](http://www.latimes.com/classified/jobs/news/la_he_anger19jan19,0,4425631.story?coll=la_class_employ_jobnews).)

So, have there been any studies on parenting classes — or for that matter, on other aspects of family court practice?

The answer is yes. For example, as long ago as 1998, the Family Conciliation Courts Review reported a study on the effect of two divorce education programs on domestic violence and parental communication. 36 Fam. Con. Ct. Rev. 1 (Jan., 1998). The study, which included a control group, found that neither program affected rates of domestic violence or actual parental conflict, although one of the programs improved communication between the parents.

Dr. Robert Emery, Director of the Center for Children, Families, and the Law at the University of Virginia, has conducted important research proving that mandatory mediation for parents in a custody dispute substantially reduces the likelihood of post-judgment litigation. This

type of research, which includes a control group for comparison, is invaluable in understanding which programs have merit and those that do not.

Occasionally, this research does find its way into journals read by family law professionals. For example, the *Journal of the American Academy of Matrimonial Lawyers* recently published an analysis of a study on the effect on children of custodial parents moving substantial distances from objecting noncustodial parents. (See Robert Pashow, *A Critical Analysis of the First Empirical Research Study on Child Relocation*, 19 J. Am. Acad. Matrim. Law. 321 (2005)). The study concluded that relocation is generally more harmful to children than good for them.

Yet the question remains: How many lawyers who serve as guardians ad litem for children in removal actions or judges who rule on them are aware of this research? Unfortunately, the answer is not many.

If this research exists and is of critical importance, why does it not reach those who are in the trenches where the information could be put to use in the real world?

The answer can be found in the previously-mentioned disconnect between the professions of family law and mental health. Except in collaborative divorce cases (which still represent only a small minority of cases) and forensic psychologists, the two sets of professionals rarely talk or interact. The result is much valuable research has all the effect in the real world of the tree that falls on a deserted island.

Later in this series, we will examine how to bridge this gap and share these research results among all in this field of practice.

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# Legal systems need deeper understanding of psychologists

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Forensic psychology frequently plays a critical role in family law actions, most often when parents are embroiled in custody and placement disputes. The court appoints a psychologist; tests are administered; and several weeks later, the expert produces a report, often in painstaking detail.

It can be difficult for a client to read, even when it all seems accurate and plausible. (I've often hoped, as I read a report on someone else's psychological state, that I am never put under the microscope in that way.)

This article, part of a series examining the relationship between mental health therapists and family law, will examine the role of the evaluating psychologist.

In a typical custody or placement dispute, the key decisionmaker is not the guardian ad litem for the children, or even the judge hearing the case. Practically speaking, the ultimate decision is made by an evaluating psychologist who subjected the parties and the children to psychological tests and evaluation, and then issued a written report. The GAL almost always adopts the psychologist's recommendation and the court, in turn, almost always adopts the recommendation of the GAL.

The key question is whether the role of the evaluating psychologist falls within the realm of their training and expertise. In states which have adopted the court-as-gatekeeper role as established in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), this question has led to challenges to the admissibility of this testimony, although, to my knowledge, no state has yet barred such testimony. In states like Wisconsin, which have not adopted *Daubert*, courts routinely allow this testimony as a matter of course.

Certainly, where the issue is a psychological diagnosis of a parent, the use of a forensic psychologist is critical. While not perfect, the tests and clinical evaluation can uncover psychological issues that are critical to parenting.

Other than the bottom line, the extent to which lawyers pay attention to these evaluations is questionable. Especially when the lawyer is serving in the role of guardian ad litem for children, the evaluation can reveal important information to the eventual recommendation. Yet, fully understanding the nature of testing and the application to the psychologist's recommendations requires an understanding of the nature of the role of the evaluating psychologist.

Moreover, some cases do not require such an evaluation at all. Frequently, neither party suffers from a mental illness. Psychological testing frequently reveals both parents to be within normal parameters and capable of having periods of physical placement.

As one highly respected family law attorney, Charles Phillips of Phillips & Gemignani S.C. in Waukesha, puts

it: "Psychologists have opinions, but generally they are unrelated to scientific analysis. The placement schedule which meets the 'best interest' of a child is clearly determined by, and the obligation of, the trial court. While experts may be qualified to have valid opinions with respect to amounts of time and frequency of access by parents to children in a particular case, there is extremely limited scientific data on the effects of any particular placement schedule generally as compared to how children deal with the schedule."

Wisconsin allows a trial court the discretion to deny psychological testing, even where requested by a party. See *Kettner v. Kettner*, 2002 WI App 173, 256 Wis. 2d 329, 649 N.W. 2d 317. While it is easier for a GAL or the court to have an evaluation to "hang their hat on," before recommending or ordering them, the GAL and the court need to consider whether the needed recommendation is consistent with the analysis such evaluations provide.

These issues, the necessity of evaluations and their applicability are too important to be relegated to a "pass-the-buck" mentality, or just reading the last page that gives the recommendation, while ignoring the evaluation that led to it.

The legal system needs to have a deeper understanding of psychologists, their training and the limitations of their expertise.

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# *Clients can be coached to manage divorce anxiety*

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Many, if not most, of the clients seen by a family law attorney, exhibit a high degree of anxiety. Sometimes, it manifests itself in anger; sometimes in depression; and sometimes in a different manner altogether. This anxiety interferes with the attorney's ability to concentrate on the legal aspects of the case.

Frequently, the attorney will refer the client to a mental health therapist. Certainly, when the mental health aspects are severe, therapy is necessary. Often, however, all the client needs — and sometimes all the client can handle — is a guide through the emotional aspects of the marital crisis. Recent experiences have raised the possibility that referring the client for therapy might not be the best means of helping the client through the mental health aspects of the divorce.

This is the next in a series of articles examining the relationship between family law attorneys and mental health professionals.

One of the innovations of the increasingly popular collaborative divorce model is its use of mental health coaches. Prior to collaborative divorce, mental health professionals were used for one of two purposes: providing therapy or evaluations.

The role of a "coach" is neither. As explained by Dr. Sanford Portnoy in a recent article, therapy typically "seeks symptom amelioration or cure." Sanford M. Portnoy, "Divorce Coaches: A New Resource for Matrimonial Lawyers," 19 Am. J. Fam. L. 4 (Winter, 2006). However, the role of a coach is far more limited. As explained by Dr. Portnoy, it is intended to "help individuals manage situations... [T]he emphasis is on helping the client manage in specific, delineated ways. It is skills training rather than healing." The search for underlying causes and, hopefully, resolution, waits for later.

Why does this approach have merit? As an analogy, while news stories try to explain events as they occur, novels examine more global issues. Interestingly, the great war novels are never written during the war, but years later. For example, the great Civil War novel, "*The Red Badge of Courage*" was written in 1895, some 30 years after the end of the war. Similarly, the great World War I novel, "*All Quiet on the Western Front*", was written in 1929, 11 years after the end of that war. And, "*From Here to Eternity*" was written in 1951, six years after the end of World War II. We may still have not seen a great novel arising from the Vietnam War.

Therapy is, to a large extent, trying to get the client to write a novel of their life, by searching for the greater issues that affect their lives. When the legal bullets are flying overhead might not be the best time to engage in this search. The best that the client can do is to keep his head down and wait for the shooting to stop.

Coaching is assistance for keeping the head down and avoiding increasing problems. As many collaborative lawyers can attest, using coaches can be a godsend for

lawyers seeking to deal with legal issues and avoid the emotional ones from subsuming them at great cost to everyone.

Can coaching be applied in a non-collaborative approach?

Perhaps not as well as in a collaborative case, where a teamwork approach can assure that each professional is working in tandem with each other professional in an organized fashion.

Still, there is no reason why it cannot work in a traditional divorce. As Dr. Portnoy explains, even without the frequent direct contact in a collaborative setting, the benefits of coaching can still be attained. These benefits include separating the client's psychological and emotional needs from the legal needs, teaching the client how to communicate more effectively with the lawyer, and preparing the client emotionally for court hearings and other stressful events associated with the legal system.

As Dr. Portnoy explained, the role must be clearly explained to the client. Further, clients, especially those involved in custody and placement disputes, should be made aware that it is unclear whether confidentiality and the traditional patient-therapist privilege apply in the coaching context.

However, it should be an easy sell. For the client, it maximizes the efficiency of their financial resources. For attorneys, it allows us to act in the field for which we were trained.

The value is obvious for both.

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# *Time to move forward together*

Over the past few weeks, this column has examined the relationship between family law attorneys and mental health professionals. We have examined the issues from the perspective of studies of family law processes and of the use of mental health professionals in the legal process.

Now, how can lawyers and mental health professionals work together in the future to improve the family law process for all involved? Finally, what is being done to facilitate this cooperation?

In December 2005, a “summit” meeting was held in Washington at the office of the American Psychological Association. Present were representatives of the APA and representatives of the American Bar Association Family Law Section. The sole agenda item for the day-long meeting was cooperation between the two entities.

As discussed in the previous articles, there are numerous areas in which cooperation is important: Divorce lawyers need to be educated on the effect of divorce issues on parents and their children. Courts need to be educated on how their conduct affects the future of the litigants in front of them. Legislators, both state and county, need to be made cognizant of studies and research to help guide where best to spend the limited resources available.

The myriad goals identified included:

- To conduct a needs survey of judges, attorneys and mental health professionals;

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- To conduct a review of the law and public policy with recommendation for changes;
- To develop educational opportunities for attorneys and mental health professionals; and
- To develop public educational materials for families involved in the legal process.

How should these goals be addressed? Among the ideas discussed were:

- The creation of Web sites, or expansion of existing sites, with educational materials and other resources for families, as well as educational material for professionals;
- The publication of special issues of relevant professional journals revolving around these specific themes and topics; and
- The organization of continuing education meetings.

The list of substantive areas deserving attention is long. Some of these areas were discussed in the earlier articles

in this series, but others include:

- Psychology issues encountered by attorneys representing children and adults with disabilities;
- Legal and clinical issues with nontraditional families;
- Children’s access to mental health services;
- Alternatives to the “best interests” standard; and
- Effects of domestic violence, relocation and parental conflict and alienation on children

Clearly, there is a tremendous, almost intimidating, amount of work to be done. Where to start? To quote the king in *“Alice in Wonderland,”* “Begin at the beginning and go on till you come to the end: then stop.” Except, there will be no end and no stop. Once we begin, we must keep going.

One of the working task force groups which will start working on these goals will be planning a joint meeting between the ABA FLS and the APA for April 30-May 4, 2008 in Chicago. This time, however, the meeting is designed to be only one aspect of an ongoing relationship. Both before the joint meeting and afterward, the two groups intend to work together to improve this area of law and of life for all involved.

To quote another famous character, Rick, in *“Casablanca,”* “This is the beginning of a beautiful friendship.”

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