

1. **Blurred Lines.** How do you define the relative roles of the custody evaluator (CE) and the lawyer and avoid the pitfalls of crossing into the other's area of expertise?

For both, keep in mind the separate roles. Use Utah Rule of Evidence 702 as your guide. This rule may be helpful to reign in consultants and rebuttal experts who may cross the line and give legal advice rather than sharing an anecdotal experience with a client. If a retained expert has a suggestion for a legal theory or strategy, that should be discussed with counsel, not the client.

From the attorney's perspective, remember that we are retained to apply legal theory and zealously advocate for our clients. Applicable Rules of Profession Conduct (RPCs) include:

- RPC 1.1- Competence: Know your role, and more importantly know the role, theory, and methodology of the CE. At its core, a custody evaluation is an expert report, and the evaluator's testimony is expert testimony. Treat both will all due care.
- RPC 1.3 - Diligence (Comment 1): "A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." In other terms, don't wing it. Know your report and be prepared with a solid outline for testimony or cross-examination.

What about CE's that serve in dual roles, or who have a business relationship with another professional involved in the case (Cassie).

What are the special concerns from the CE perspective? (Chris)

2. **Who's the Boss?** Under what circumstances are instructions from counsel to the CE appropriate and under what circumstances are they not appropriate?

For court-appointed CE, the answer is never. For your rebuttal expert or litigation consultant, the answer will vary, but the attorney should be mindful of several RPC's that are implicated:

- RPC 1.1- Competence: Regardless of academic or other professional training, your role is that of advocate and not an expert.

What about communications with a court-appointed CE, when or is it appropriate to have ex parte communications with the CE.

What duty does the CE have to disclose?

3. **Alternative Facts.** You find out that information relayed to the expert or relied on by the expert is not correct. What is your duty?

Be very cautious that the information assumed or relied upon by your expert is based on fact (and preferably admissible evidence). If the information is knowingly incorrect or flat-out false, you have a duty to be truthful to the court and the others involved in your case

- RPC 3.1- Meritorious Claims and Contentions: advocating for a different legal conclusion or consideration of different evidence is one thing, “alternate facts” are quite another.
- RPC 3.3 - Candor Toward the Tribunal: This extends to correcting the record *during the matter* if you become aware of a material misrepresentation of fact. You have an obligation to "take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Comment 13 to RPC 3.3 states that the conclusion of the proceeding is a reasonable point for the termination of the obligation to report false testimony. The difficult issue is whether the proceedings really concluded in a case, such as a custody matter, in which jurisdiction may continue for many years.

Also, comments to Rule 1.6 (Confidentiality of Information) state that disclosures of crime or fraud known to the lawyer during the representation.

- RPC 4.1 - Truthfulness in Statements to Others.

4. **Let's be friends!** Is a social relationship between an attorney and CE a conflict of interest? Must CE or attorney disclose it?

- AFCC Guidelines on Ex Parte Conduct.
- Attorneys: Not really an RPC issue unless you have represented the CE. This is more an evidentiary issue going to bias.

5. **Road Trip!** Attorneys know (or should know – Rule 5.5) that we cannot engage in the practice of law outside of jurisdictions where we are not admitted without pro hac vice admission. What concerns are there for CE's who do not have licensure in another jurisdiction?

6. **Oops!** Must you return a document sent to you by mistake, when it was intended by the sender, who is opposing counsel, to be sent to his client?

- RPC 4.4(b) addresses the issue of Inadvertent Disclosure. A lawyer must "promptly notify the sender," but it is a matter of professional judgment whether you return the copy or not. ABA Formal Opinion 11-460 affirms that the document does not

absolutely need to be returned, although it is likely good practice to do so (subject to informing the client).

- CE's, any special concerns on privacy and HIPAA issues?
- What if a party is pro se, how should be handle CE reports? Rule 4-903(3)(B) directs that access to a report should be addressed in the appointment order.