

Divorce Custody Tips & Techniques: Key to the Courthouse Series

I. INTRODUCTION: AN OVERVIEW OF THE CONTEXT OF CUSTODY DISPUTE RESOLUTION PROCESS.6

A. Family: Basic Unit of Society 6

- The preamble to the Nova Scotia *Child and Family Services Act (CFSA)* states, "the family exists as the basic unit of society." . . . "and its well-being is inseparable from the common well-being."..... 6

B. HOW CUSTODY DECISIONS ARE MADE: AN OVERVIEW: Who is the Most Important Person to Persuade in a Court Custody Dispute? 6

- Since the neutral evaluator's opinion is often pivotal, you need to know as much, if not more, about the preferences, tendencies, and biases of any person who might be appointed by the court to evaluate the case as you should know about any judge to whom the case might be assigned. 6

C. Gender Bias 6

- In 1990 the Judicial Council did an exhaustive study and report on gender bias entitled "Achieving Equal Justice for Women and Men in the Court." The Council found that gender bias is alive and well in our court system, and that its most insidious effects may be in the area of family law, pointing out:..... 6

D. Social Bias?..... 6

- "How many judges have preconceived notions about why airplanes crash?..... 6
- How many judges are convinced that certain automobiles are defective? 6
- 1..... 6

E. FIRST CHILDHOOD SOCIAL LESSON RE PERSONAL RELATIONS: 6

- TO SHARE 6

F. HOW CUSTODY DECISIONS ARE MADE: AN OVERVIEW Young Children and Preteens 6

- In determining which parent should have primary custody of a young child or preteen, or whether a form of joint custody is the appropriate award, courts (judges and evaluators) are usually guided by the answers to the following five questions:..... 6

G. Outcome Determinative Questions 7

- 1. *To which parent is the child or children more closely attached or bonded?* 7
- 2. *Which parent has the greater ability to provide structure, consistency, and limits in the child's life?*..... 7
- 3. *Which parent will more strongly support the child's relationship with the other parent?*. 7
- 4. *Who can better assist the child to achieve success in school so as to give the child more choices in life?*..... 7
- 5. *Which parent is more likely to give the child freedom to grow into a capable and self-sufficient adult?*..... 7

H. California Statutory Scheme: 7

- 1. Court jurisdiction to make custody order that is "necessary" or "proper". F.C. §3022..... 7
- 2. Public policy of state - F.C. §3020: 7
- 3. Order of preference in awarding custody, F.C. §3040: 7
- 4. Ultimate outcome determinative issue: Best Interest 8

II. PREPARATION OF A CUSTODY CASE.....	8
A. Theme / factual focus.....	8
B. Develop the Theme.....	9
1. Remember the Role of the Attorney & Counselor at Law.....	9
2. Examine the entire life of each parent and child, and the involvement of each parent with the child.....	9
III. PREPARATION OF/BY CLIENT: STARTS AT INITIAL INTERVIEW. ...	10
A. Prepare written chronological narrative of key factual events, including date, time & percipient witness(es) &/or any documents showing key facts:.....	10
1. willingness to share, or absence	10
2. domestic violence	10
3. facts bearing on "best interest"	10
4. complaints of client parent.....	10
5. complaints of other parent.....	10
B. "T" charts in analyzing best interest of child.....	10
1. Existing Arrangement.....	11
2. Arrangement proposed by Dad ("Dad's Plan")	11
3. Arrangement proposed by Mom ("Mom's Plan")	11
4. Arrangement proposed by Evaluator and/or Expert.	11
C. Journal of key events, timeshare: ongoing from the beginning.....	11
D. Mediation mandated by state Overview.	12
1. Confidential?.....	12
2. Non-reporting and non-recommending counties.....	12
3. Reporting or recommending counties.....	12
4. Mediator's recommendation.....	12
5. See Experts, below, re biases, prejudice, particulars, etc.	12
E. Outside "expert" to prepare client for mediation, custody evaluation/investigation ...	12
1. Pros	12
2. Cons	13
F. Self help should be avoided generally as it has the effect of alienating and/or upsetting professionals and/or decisionmakers, leading to a bad result.....	13
G. Counsel client to avoid domestic violence & enjoy a willingness to share. Everybody wins.....	13
IV. DISCOVERY.....	13
A. Discovery is driven by the evidence we are trying to gather and then introduce in accordance with the restrictive rules of evidence.	13
B. Guiding Principles regarding Evidence.	13
C. Subject Matter: Anything within the 12 Houses (identified above).....	14
1. From the Parent's perspective.....	14

2.	From the Child's perspective.....	14
3.	From a neutral or objective perspective.....	14
D.	Depositions: the best discovery method.....	14
1.	Multiple sessions of deposition very fruitful because it is difficult for the witness:.....	15
2.	Tip: Remember to videotape the deposition.....	15
3.	Tip: Remember to use Realtime© transcription.....	15
4.	Videotape & Realtime advantages:.....	15
E.	Depositions: A Questioning Technique that will bear fruit.....	16
1.	Deposition theory & practice requires hours to explain. This material merely provides an overview, practical techniques and suggestions.....	16
2.	Defects in Deposition taking are probably 1 of the 2 or 3 greatest failures among lawyers – even “good” lawyers.....	16
3.	Framing & Using T-Funnels.....	17
4.	Listen, listen, listen.....	18
F.	Deposition T-Funnel Questioning Patterns to Exhaust Recollection.....	19
1.	Overview: Open the Door, Explore Thoroughly, & Close the Door: basic questions re every conversation/communication/event:.....	19
2.	Explore the Room: T-Funnel Questioning Pattern re ISSUE X (e.g., witness Parent's complaint about the other parent) or a particular meeting or conversation.....	19
3.	Close the Door: Exhaust possible subjects you believe are relevant.....	20
4.	T-Funnel Questioning Pattern re EVENT DETAILS.....	20
5.	Close the Door re Event Details:.....	20
6.	T-Funnel Questioning Pattern re CONDITIONS.....	21
7.	T-Funnel Questioning about a Condition (relating to an Incident).....	21
G.	Sample Deposition Questions to Parents to Begin the Inquiry.....	21
1.	Relationships.....	21
2.	Custody & Parenting.....	22
3.	Difficulties:.....	22
4.	Discipline:.....	22
5.	Education:.....	23
6.	Politeness & Manners:.....	23
7.	Activities:.....	23
8.	Young Children:.....	24
V.	EXPERTS.....	24
A.	Mental Health Professionals.....	24
1.	Qualifications, in general & per statutes F.C. §§3110.5, 1815, 1816, 3111 and C.R.C. Rules 1257.3, 1257.7: See Appendix.....	24
2.	Professional Background.....	24
3.	Bias and/or Prejudice.....	25
4.	What are the Mental Health Professional's bible resources?.....	28
B.	Obtain complete copy of the psychological evaluator's file, including tests, scores, notes, etc.....	29
1.	Retain a consultant to review the file & identify information for potentially fruitful inquiry.....	29
2.	Query: if the other side is requesting the entire file, does an objection lie on the part of the non-party significant other who has a Constitutional right of privacy?.....	29
3.	Does the Mental Health Professional have a duty to advise the non-party before releasing information that would generally be considered personal and private?.....	29

4. Does the subpoenaing attorney/party have a consumer notice duty under C.C.P. §1985.3?.....	29
C. MMPI-2	29
1. NORMATIVE GROUP vs. CUSTODY - DISPUTE GROUP	29
D. Evaluator's Report:.....	30
1. Admissibility: Evid.C. §730 v. FC §3011.	30
2. Qualifications, in general & per statutes F.C. §§3110.5, 1815, 1816, 3111 and Rules 1257.3, 1257.7.....	30
3. Performance of evaluation, Rule 1257.3(e)	30
4. Content of report. F.C. §3111, <i>et seq.</i>	30
5. Admissibility of report. F.C. § 3111(c).....	30
E. Treating psychologist of either parent or child.....	30
1. Evidentiary privilege, Evidence Code 1014. Party or witness can prevent disclosure, in custody proceeding, of confidential communications to psychotherapist.	30
2. Psychotherapist-patient privilege is waived if issue of mental or emotional condition is tendered by patient in proceeding. Evid. Code §1016	30
3. Scope of the privilege: extension to family members:.....	30
F. Minor's Counsel.	30
1. Inherent conflict, statutory requirements, compliance with statutory requirements?	30
2. Statement of Issues, Contentions, Facts, etc. F.C. §3151(b).	30
3. Authorized to give a recommendation but do not have sufficient training, education and experience to make a 'valid' recommendation.....	31
4. How to make counsel's job easier and set up the facts to obtain a positive result.	31
G. Mediator's recommendation	31
1. The reporting county's Family Court Services "recommendations" and "reasons for recommendation": Ten-day rule. Family Code §3111(a).	31
2. Confidentiality of state mandated mediation: Foxgate Homeowners' Association (2001) 26 Cal.4 th 1.....	31
H. Expert testimony: Legal Issues:.....	31
1. Daubert U.S. Supreme Court decision.	31
2. Kelly-Frye California Supreme Court decision.....	31
3. The California Psychological Association and the American Psychological Association rules which are pertinent.	31
I. Coping With Psychiatric And Psychological Testimony, Jay Ziskin, Ph.D., LL.B. (Law and Psychology Press)	31
VI. EVIDENCE.....	31
A. 3 Key Questions.	32
1. What evidence is relevant?	32
2. What evidence is admissible?	32
3. What evidence is persuasive?	32
B. Burden Of Proof	32
C. Presumptions.....	32
1. 3 Key Questions.....	32

2.	Domestic violence: F.C. §3044 Reputtable Presumption:	32
3.	Willingness to share: F.C. §3040(a)(1).	32
4.	F.C. §3080 Presumption, affecting the burden of proof, that joint custody is in the best interest of the child where the parents have agreed to joint custody.....	33
D.	Special Problems with Child’s Statements/Testimony.....	34
1.	Methods of ascertaining child’s wishes.	34
2.	Child’s Statements of preference or opinion are susceptible to:.....	34
E.	DIRECT EXAMINATION OF WITNESSES – AT HEARING.....	35
1.	Present only that which is relevant, admissible, and persuasive.....	35
2.	Plan your direct examination to avoid objections.....	35
3.	Practice questions and answers with your client to give your client guidance to the true, outcome-determinative facts.	35
4.	After your client has successfully completed the requisite practice sessions, you can then ask your client open-ended questions for your client to answer at the hearing.....	35
5.	TESTIMONY IS PERSUASIVE WHEN THE WITNESS IS:.....	35
F.	CROSS EXAMINATION OF WITNESSES – AT HEARING.....	36
1.	Purposes.....	36
2.	Form of Questions.....	36
3.	Guiding Principles: If you can successfully develop and/or attack 1 of these points, then conduct no cross-examination.	37
G.	EVIDENTIARY OBJECTIONS TO DIRECT & CROSS EXAMINATION – AT HEARING....	38
1.	Prepare for the hearing.....	38
2.	Anticipate the other side’s likely objections.....	38
3.	Prepare to defend or present your position concerning objections to key evidence.....	38
VII.	ARGUMENT.....	38
A.	FINAL ARGUMENT OUGHT TO INCORPORATE CASE SPECIFIC FACTUAL VARIABLES	38
B.	[Dan writes something.]	39
VIII.	STATUTES, KICK-OUTS & MOVE AWAYS.	39
A.	Temporary Restraining Orders and Kick-Out Orders.....	39
1.	How often used?.....	39
2.	What type of notice is required?	39
3.	New Status Quo to be preserved.	39
B.	Move Aways.....	40
1.	The move away overlap. Question is detriment to child from change in geography vs. change in custody.	40
2.	Burgess.....	40
3.	Change of circumstances requirement under Montenegro v. Diaz.	40
IX.	BIBLIOGRAPHY.....	40

I. INTRODUCTION: AN OVERVIEW OF THE CONTEXT OF CUSTODY DISPUTE RESOLUTION PROCESS.

A. *Family: Basic Unit of Society*

- The preamble to the Nova Scotia *Child and Family Services Act (CFSA)* states, "the family exists as the basic unit of society." . . . "and its well-being is inseparable from the common well-being."

B. *HOW CUSTODY DECISIONS ARE MADE: AN OVERVIEW:
Who is the Most Important Person to Persuade in a Court
Custody Dispute?*

- Since the neutral evaluator's opinion is often pivotal, you need to know as much, if not more, about the preferences, tendencies, and biases of any person who might be appointed by the court to evaluate the case as you should know about any judge to whom the case might be assigned.

C. *Gender Bias.*

FAMILY LAW NEWS, Spring 1993, Vol. 16, No. 1

- In 1990 the Judicial Council did an exhaustive study and report on gender bias entitled "**Achieving Equal Justice for Women and Men in the Court.**" The Council found that gender bias is alive and well in our court system, and that its most insidious effects may be in the area of family law, pointing out:

D. *Social Bias?*

- "How many judges have preconceived notions about why airplanes crash?
- How many judges are convinced that certain automobiles are defective?
- . . .

Ask instead, however, **how many judges have views about the way to raise children . . . and you may reach a different result.**"

E. *FIRST CHILDHOOD
SOCIAL LESSON RE
PERSONAL RELATIONS:*

■ TO SHARE

F. *HOW CUSTODY DECISIONS ARE MADE: AN OVERVIEW
Young Children and Preteens*

- In determining which parent should have primary custody of a young child or preteen, or whether a form of joint custody is the appropriate award, courts (judges and evaluators) are usually guided by the answers to the following five questions:

G. Outcome Determinative Questions

- 1. *To which parent is the child or children more closely attached or bonded?*
- 2. *Which parent has the greater ability to provide structure, consistency, and limits in the child's life?*
- 3. *Which parent will more strongly support the child's relationship with the other parent?*
- 4. *Who can better assist the child to achieve success in school so as to give the child more choices in life?*
- 5. *Which parent is more likely to give the child freedom to grow into a capable and self-sufficient adult?*

H. California Statutory Scheme:

1. Court jurisdiction to make custody order that is "necessary" or "proper". F.C. §3022
2. Public policy of state - F.C. §3020:
 - a) *Primary concern is the health, safety and welfare of child;*
 - b) *Court to assure frequent and continuing contact with both parents AND encourage parents to share the rights and responsibilities of child rearing.*
3. Order of preference in awarding custody, F.C. §3040:
To both parents jointly OR to either parent

If to either parent [as opposed to "jointly"], **the Court shall consider**, among other factors **which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent.**

F.C. §3040 specifically states it does not create a presumption for or against joint or sole custody orders but allows the court *and the family* the widest discretion to choose a parenting plan that is in the best interest of the child.

4. Ultimate outcome determinative issue: Best Interest

“ The "best interest of the child" is a broad concept that involves the following principles: (i) promoting social, cognitive, emotional, and physical well-being; (ii) enabling optimal development as a productive member of our society; (iii) minimizing exposure to danger, abuse, neglect, and family conflict; and (iv) ensuring frequent and continuing contact with both parties so far as it is consistent with the above....” (Cal. Rules of Court, Appendix, §26 (f). **Repealed effective 07.01.2001**).

The Court shall consider health, safety and welfare in determining best interests of child. Fam. Code §3011.

"[I]n determining where custody of children shall lie the courts are not engaged in a disciplinary action to punish parents for their shortcomings as individuals nor to reward the unoffending parent for any wrong suffered by the sins of the other.'... 'In determining what is for the welfare and best interest, factors which must be considered are the desirability of maintaining a stable physical and emotional ambient, and the length of time that a child has been in the continuous actual, physical custody of the parent then having such custody.'" In re Marriage of Stoker (1977) 65 Cal.App.3d 878, 881, 135 Cal.Rptr. 616.

a) Take Different views of Best Interest:

- (1) short term
- (2) long term
- (3) macro perspective
- (4) micro management perspective.

II. PREPARATION OF A CUSTODY CASE.

A. Theme / factual focus.

This guide to custody discusses, develops and exemplifies practical strategies that are not normally pursued, considered, and/or presented satisfactorily in our experience of over 45 years of contested custody disputes. The main focus is on strategies, actual techniques to gather and present persuasive, outcome-determinative evidence.

The first question is what is your objective or goal in disputing custody. You must understand the existing custodial arrangement, the history of how the present custody arrangement developed, the evidence that may exist to support a request for change in custody, and above all, the desired outcome. The desired outcome usually consists of a particular change in the schedule, control over decision-making, and/or some aspect of the parent's participation in the child's life.

The second question is what aspect(s) of the child's life and/or development are you positing as the outcome determinative issue and what

factual criteria will be used to demonstrate it is "best" for child to be awarded to your client, e.g. social and/or cognitive and/or emotional and /or physical well being, etc. There is a great deal of room for case specific creativity buffered only by that which the court will recognize as important in the overall quest for ascertaining the child's "best interest"

Tip: Focus on controlling the question before the decisionmaker in order to control the answer and result.

B. Develop the Theme.

1. Remember the Role of the Attorney & Counselor at Law.

a) Counsel client how to achieve best result.

[Add narrative.]

b) Actively assist client in strategies to achieve the best result.

[Add narrative.]

c) Get Client Control: make client have realistic expectations.

[Add narrative.]

d) Realize client may be with you for many years, until the youngest child reaches the age of majority.

[Add narrative.]

e) Counsel Client re Move Away potential: participate as much as possible in the life of the children.

[Add narrative.]

2. Examine the entire life of each parent and child, and the involvement of each parent with the child.

In order to develop the theme and the story of this family, you must review and analyze each aspect of the life of everyone involved. It helps, in our experience, to have a list of everything involved in most people's lives as the starting point. One of the most comprehensive lists we have seen comes from the 12 Houses found in the Witches' Almanac.

[Dan to research whether the 12 houses is proprietary to Witches' Almanac or in the public domain.]

This list is the starting point for thinking about the evidence to gather and present to persuade the trier of fact.

a) 12 Houses (12 AREAS OF LIFE) + Mom's house & Dad's house.

- 1st: appearance, image, identity
- 2nd: money, possessions, tools
- 3rd: communications, siblings
- 4th: family, domesticity, security
- 5th: romance, creativity, children
- 6th: daily routine, service, health
- 7th: marriage, partnerships, union
- 8th: passion, death, rebirth, soul
- 9th: travel, philosophy, education
- 10th: fame, achievement, mastery
- 11th: goals, friends, high hopes
- 12th: sacrifice, solitude, privacy

III. PREPARATION OF/BY CLIENT: starts at Initial Interview.

A. Prepare written chronological narrative of key factual events, including date, time & percipient witness(es) &/or any documents showing key facts:

- 1. willingness to share, or absence
- 2. domestic violence
- 3. facts bearing on "best interest"
- 4. complaints of client parent
- 5. complaints of other parent

Percipient witness is a witness who had observed a material fact through one of the five senses. The most important senses in this context are sight and hearing. However, keep in mind the distinction between a witness who saw or heard a percipient witness say they saw or heard something, and the witness who actually saw or heard the material fact.

B. "T" charts in analyzing best interest of child.

The T chart is a device allowing you to see at a glance on one page the pluses, advantages or benefits (listed on the left side of the T) and the minuses, disadvantages or negative effects (listed on the right side of the T) of any idea, arrangement, plan, issue, etc. In completing the T charts, look to each area of the 12 houses, and whether that area is a plus or minus as to the various

schedules proposed. The “T” chart ANALYSIS is designed to highlight the benefits and detriments to the child of each aspect of the 12 houses and the child’s life. How is the child’s best interest served by the existing schedule, the schedule proposed by mom and the schedule proposed by dad? In completing the “T” charts include the obvious: for example, drive time to and from school and child activities; parental supervision before and after school; parental/child involvement and activities, etc.

Continually refine the T-charts so the Client can say at any time, when questioned about a point made by the other parent: “That’s a good point from the other parent’s perspective. But are we not trying to meet the child’s best interest and from the child’s perspective...”

1. Existing Arrangement

[insert filled in “T” chart]

2. Arrangement proposed by Dad (“Dad’s Plan”)

[insert filled in “T” chart]

3. Arrangement proposed by Mom (“Mom’s Plan”)

[insert filled in “T” chart]

4. Arrangement proposed by Evaluator and/or Expert.

C. *Journal of key events, timeshare: ongoing from the beginning.*

Client involvement And participation IS KEY TO OVERALL SUCCESS. Instruct the client to construct and write a factual, chronological narrative as to all important events and circumstances. Your instruction to the client and the client’s written response, directed to the attorney, help protect the writing from discovery as a privileged document and part of attorney work product.

D. Mediation mandated by state Overview.

1. Confidential?
2. Non-reporting and non-recommending counties.
 - a) *The mediation typically ends when 1 party signifies clearly that no agreement can be reached.*
3. Reporting or recommending counties.
 - a) *The mediator may turn out to be the decisionmaker who is rubber-stamped by the Court, so you must prepare, prepare, prepare.*
4. Mediator's recommendation.
 - a) *The reporting county's Family Court Services "recommendations" and "reasons for recommendations": Ten-day rule.*
 - b) *Confidentiality of state-mandated mediation: Foxgate Homeowner's Association (2001) 26 Cal.4th 1.*
5. See Experts, below, re biases, prejudice, particulars, etc.

E. Outside "expert" to prepare client for mediation, custody evaluation/investigation

1. Pros
 - a) *The importance of words and actions*
 - (1) What to do and say.
 - (2) The things mental health professionals take from or interpret from words and actions.
 - b) *The evaluation process.*

[TM to insert overview of evaluation process.]

2. Cons

a) **Expense?**

b) **Confidentiality Issues.**

(1) Work product?

(2) Privilege?

F. Self help should be avoided generally as it has the effect of alienating and/or upsetting professionals and/or decisionmakers, leading to a bad result.

G. Counsel client to avoid domestic violence & enjoy a willingness to share. Everybody wins.

IV. DISCOVERY.

A. Discovery is driven by the evidence we are trying to gather and then introduce in accordance with the restrictive rules of evidence.

The rules of inquiry at discovery are much broader than the evidence that can be introduced, so almost anything involving any parent or child is discoverable in a custody dispute.

Regardless of the restrictive rules of evidence in court at a hearing or trial, one must present to the evaluator all evidence that should be considered by the decisionmaker.

As a result of these two principles, the gathering of the evidence is critical.

B. Guiding Principles regarding Evidence.

In re Marriage of Russo (1971) 21 Cal.App.3d 72, 98 Cal.Rptr.501

""**[Substantial evidence]** clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with 'any' evidence. It **must be reasonable in nature, credible, and of solid value**; it must be actually "**substantial' proof** of the essentials which the law requires in a particular case." [Citation.]." (Id. at p.87.)

Russo (1971) 21 Cal.App.3d 72, 98 Cal.Rptr.501

COMMENTS: This is a long and rambling decision which restates much of the trial testimony, and looks to many evidentiary difficulties and errors commonly found in custody disputes (particularly those in which the moving party's complaints about the custodial parent are numerous but less than earth-shaking).

In re Marriage of Kern (1978) 87 Cal.App.3d 402, 150 Cal.Rptr. 860

. . . the refusal of the trial court to consider all the evidence is tantamount to a failure to exercise discretion, and calls for reversal of the ensuing court order or decree [citations]." (Id. at p.411.)

C. Subject Matter: Anything within the 12 Houses (identified above).

1. From the Parent's perspective.
2. From the Child's perspective.
3. From a neutral or objective perspective.

D. Depositions: the best discovery method.

It never ceases to amaze us what people will admit to on cross-examination at a deposition – especially if you prepare for the deposition thoroughly.

1. **Multiple sessions of deposition very fruitful because it is difficult for the witness:**

- a) *To remember exactly what was said before.*
- b) *To decide instantaneously how one should answer a slightly different, but related question.*
- c) *To determine how a series of well planned questions may lead to different answers than before.*
- d) *To take into account all facts in answering the initial absolute questions (containing the words: never, ever, always, etc.).*
- e) *In between sessions of deposition, & after the last session, analyze the deposition testimony, and discover the facts that impair the deponent's credibility.*

2. Tip: Remember to videotape the deposition

3. Tip: Remember to use Realtime© transcription.

4. Videotape & Realtime advantages:

- a) *Makes witness behave better*
- b) *Record's witnesses' misbehavior*
- c) *Makes witness answer quicker*
- d) *Eliminates arguments re what occurred*
- e) *Reduces coaching between questions & answers*
- f) *Realtime advantages*

(1) Helps interrogator stay focused, find her/his place.

(2) Eliminates arguments re what witness said.

E. Depositions: A Questioning Technique that will bear fruit.

1. **Deposition theory & practice requires hours to explain. This material merely provides an overview, practical techniques and suggestions.**
2. **Defects in Deposition taking are probably 1 of the 2 or 3 greatest failures among lawyers – even “good” lawyers.**
 - a) ***Flailing around. Having no questions & no subject outline – free style.***
 - b) ***Having a too detailed list of questions from which examiner cannot escape – you have to listen & explore areas the witness raises.***
 - c) ***Stab in the Dark method – raise an issue, but when the witness says things you don’t like, leave the issue, failing to exhaust it.***
 - d) ***Failing to develop question patterns/sequences. Anticipation.***
 - e) ***Following the witnesses’ declaration or pleading.***
 - (1) Why start with their script?
 - (2) Don’t you think they memorized their story?
 - f) ***Excessive Objections – don’t get me started. Not productive.***
 - g) ***Waiting too long to take the deposition.***
 - (1) The longer the case goes on before the deposition occurs, the more clues the witness has re what to say, what not to say.
 - (2) The earlier the better.
 - (3) One Deposition Rule: does not apply. Survey: Has anyone had the one-deposition rule imposed to deny them the chance to ask questions re new or previously undiscovered information?

3. Framing & Using T-Funnels.

- a) ***Basic Idea: Open the Door, Go In, Explore, Leave the Room after you have completed exploring thoroughly, but Close the Door on your way out, leaving the Witness locked up in the Room.***
- b) ***Why T-Funnels? Although preparation is critical, using the T-funnel deposition questioning pattern is better than prepared narrow questions @ deposition, for 2 reasons:***

- (1) Getting the other side's whole story is critical
 - (a) *You want to encourage the other side to tell you everything they might have the urge to (tell an evaluator or to) testify to at Trial – to give yourself and your client the time & opportunity to uncover the Truth, & prepare to impeach.*
 - (b) *You also want to require the other side to do 3 things necessary for you to have a good deposition:*
 - (i) Take positions or show unwillingness to do so: either Certainty or Uncertainty is helpful
 - (ii) Explain fully & justify his/her behavior/thinking.
 - (iii) Exhaust his/her recollection re all that matters.
- (2) Tendency when you have specific knowledge is to ask narrow questions, which:
 - (a) *Exclude potentially relevant details;*
 - (b) *Exclude the stupid/false things people will say if you give them the opportunity.*

(c) *Fail to exhaust recollection, leaving the witness free to pick & choose what s/he will say (in Evaluation or) at Trial.*

c) *Develop detail questions to pose to Witness (Did X occur, etc.)*

- (1) What might normally have occurred during such an event or concerning a particular issue
- (2) What others have said occurred during the event or concerning a particular issue
- (3) What documents suggest or state occurred during the event or concerning a particular issue
- (4) Specific facts with legal relevance

d) *Admit your own ignorance: it will be very disarming.*

e) *Use other evidence during the questioning:*

- (1) Use what other witnesses have said
- (2) Use documents from any source, but exhaust the witnesses' recollection first

f) *Use Funnels within funnels*

- (1) Tell me all that was said re X at Y.
- (2) Tell me all that was said re X being available at Y.

g) *Determine which events or issues to exhaust by T-Funnels*

h) *Practice, practice, practice.*

4. Listen, listen, listen.

Use the topic list to be sure that all issues have been covered, but not as an inflexible plan. An invaluable attribute of a deposition is its **spontaneity**; the deponent's answers are unfiltered and uncensored by adverse counsel. When

the deponent's answer suggests a new topic, the questioner should follow the suggestion and explore the new topic, assuming it is relevant or may lead to something relevant. It is of fundamental importance to listen to the answer and follow up on it with related questions where the answer invites more inquiry.

Counsel should return to the topic outline only to see what topic might best be next explored. While the topic outline works best when it is arranged in some rational order, the questioning, if of an adverse deponent, probably should not be similarly organized. Hopping from topic to topic may be the best way to extract useful admissions and confessions from an adverse witness.

F. Deposition T-Funnel Questioning Patterns to Exhaust Recollection

1. Overview: Open the Door, Explore Thoroughly, & Close the Door: basic questions re every conversation/communication/event:

- ◆ Who (was present)? Where? When? Why? How?
- ◆ What did you say/do?
- ◆ What did the Other Parent say/do?
- ◆ Did either of you say/do anything else?
- ◆ Was anyone else present?
- ◆ Was any record made?
- ◆ Is there anything in existence that may help you recall anything else that either of you may have said/done?
- ◆ If the answer is I don't know – Is there anything you can identify now that may help you recall anything else that either of you may have said/done?
- ◆ Are you sure you've testified to everything important that occurred in the conversation/communication/event?

2. Explore the Room: T-Funnel Questioning Pattern re ISSUE X (e.g., witness Parent's complaint about the other parent) or a particular meeting or conversation.

- ◆ Tell me everything that occurred [or was communicated] re X [or at meeting on Y date with the Other Parent].
- ◆ What else occurred [or was communicated] re X [or at meeting on Y date with the Other Parent]?
- ◆ Did anything else occur [or was anything else communicated] re X [or at meeting on Y date with the Other Parent]?
- ◆ Did Z happen [e.g., anyone communicate anything about the W problem] at the meeting on Y date with the Other Parent?
- ◆ Did W happen?
- ◆ Did you say anything re A?
- ◆ Did the Other Parent say anything re B?
- ◆ Did you think you should tell the Other Parent about C?

- ◆ If not, why not?

3. Close the Door: Exhaust possible subjects you believe are relevant

- ◆ Other than what you have testified to, is there anything else that you can recall occurring re X [or at meeting on Y date with the Other Parent]?
- ◆ May have to identify exactly what testified to, e.g.: Other than A, B, C, anything else occur/communicated?
- ◆ Is there anything you are aware of that might refresh your recollection?
- ◆ If unknown – Is there anything in existence that you can identify now that might refresh your recollection?
- ◆ Are there any documents that refer or relate to this meeting?
- ◆ Are you aware of any record being made by anyone regarding this meeting?
- ◆ Have you discussed with anyone else what happened re X [or at meeting on Y date with the Other Parent]?
- ◆ Have you become aware of any communication anyone else had re what happened re X [or at meeting on Y date with the Other Parent]?

4. T-Funnel Questioning Pattern re EVENT DETAILS

- ◆ Please tell me everything that happened at the Event on Y date.
- ◆ What else occurred at the Event?
- ◆ Aside from A, B and C, what else happened at the Event?
- ◆ What else occurred at the Event?
- ◆ Was anything said at the Event re Z's reaction to W?
- ◆ Was anything said at the Event about D?
- ◆ What else was said at the Event about D?
- ◆ Was anything else said about D at the Event?
- ◆ Was anything said about what D would do in light of E?
- ◆ Focusing on E, tell me everything that was said by you or the Other Parent re E.
 - ★ *What else?*
 - ★ *Anything else?*
 - ★ *Is there anything that may help you recall anything else?*

5. Close the Door re Event Details:

- ◆ Have you testified to everything that happened at the Event?
- ◆ Have you testified to everything that was said about D at the Event?
- ◆ Is there anyone else who knows (anything) about the Event other than you and the Other Parent?
- ◆ Is there anyone (other than the Other Parent) who you communicated with about the Event?
- ◆ Did you tell a friend anything about the Event?
- ◆ Did you tell a therapist anything about the Event?
- ◆ Are there any writings of any kind, such as notes, memos, reports, etc., that

- refer to this Event?
- ◆ If a writing exists – Aside from your memo, are you aware of any other writings that refer to or evidence this Event?
 - ◆ Where is the writing?
 - ◆ If it was not brought – Why didn't you bring the writing to this deposition?

6. T-Funnel Questioning Pattern re CONDITIONS

- ◆ Precisely identify the Condition you are asking about:
 - ★ *The Subject (e.g., parent's/child's performance/health, etc.)*
 - ★ *The Time (e.g., from X date to Y date)*
 - ★ *The Various Factors that make up the condition (e.g., child acting out at school/home, parent abusing child, etc.)*

7. T-Funnel Questioning about a Condition (relating to an Incident)

- ★ *Please describe your [or your child's] mental and emotional health in the days/weeks/months before [after] the incident.*
- ★ *Please give me a general description of your [or your child's] mental and emotional health [happiness] in the days/weeks/months before [after] the incident.*
- ★ *How were you [your child] feeling just before [after] the incident?*
- ★ *Describe your child's relationship with you just before [after] the incident.*
- ★ *Describe your relationship with your child just before [after] the incident.*
- ★ *Describe your [or your child's] relationship with your spouse [the Other Parent] at that time.*
- ★ *Describe what was happening at your job during that time.*
- ★ *Describe your financial situation at that time.*
- ★ *Did you have any problems sleeping?*
- ★ *Were you happy at that time?*

G. Sample Deposition Questions to Parents to Begin the Inquiry.

Use the T-Funnel technique with each sample question below and the particular issues in your case as a starting point.

1. Relationships

- ***Describe [each child]'s relationship to you.***
- ***Describe [each child]'s relationship to [the other parent.]***
- ***How are the children reacting to the divorce/separation?***
- ***What have you ever said to the children about the divorce?***
- ***What was their reaction?***
- ***Do you ever talk to the children about [the other parent]? What do you say?***
- ***How do you feel about your children's relationship with [the other parent]'s relatives?***
- ***Do you expect to be involved with your children continuing that relationship? How?***

- *Who do the children go to when they're hurt? Sad?*
- *Are you involved with anybody who will have a lot of contact with the children when they are with you?*
- *What is the children's relationship with him/her?*
- *What do you think the role of a stepparent should be?*

2. Custody & Parenting

- *Why do you want custody?*
- *In what ways do you think you would be the better parent? Why?*
- *Do you think [the other parent] is a good parent?*
- *Do you have any objections to the way s/he parents?*
- *Are there any areas of major disagreement between you concerning child rearing? religion? education? lifestyles? moral values?*
- *Do you think the children have any preferences about whom they want to live with?*
- *If so, what? How do you know? If so, why?*
- *If you do not get sole custody, what visitation do you want?*
- *If you do get sole custody, what visitation do you think would be appropriate for [the other parent]?*
- *What do you think about joint custody?*
- *Do you think it might work in your situation? Why/why not?*

3. Difficulties:

- *Do you see any difficulties in being a single parent?*
- *What are your current work hours?*
- *What are your career goals?*
- *What child care arrangements do you have for the time you are not able to take care of the children yourself?*
- *What have you done concerning your children's health care needs?*
- *What do you do when a child is sick on a workday?*
- *What do you think about parents admitting to a child s/he is wrong?*
- *How do you feel about telephone contact between the children and [the other parent] when they are with you?*

4. Discipline:

- *How do you usually discipline your children?*
- *What do you think are the best ways of disciplining a child?*
- *What do you think about physical punishment?*
- *What types of behavior do you feel warrant punishment?*
- *What do you think about the use of rewards as a way to discipline your children?*
- *What do you think are the most important influences on children's behavior?*
- *How do you deal with your children lying?*
- *Why do you think children lie?*

- *At what age should a child be willing and able to tell the truth most of the time?*

5. Education:

- *What do you think a parent's responsibility is regarding the children's education?*
- *What are your educational goals for the children?*
- *What do you think a parent should teach a child before s/he enters school?*
- *What have you taught your children already?*
- *What values do you think are important to teach a child?*
- *How do you teach your children those values?*
- *Have you had any parenting education?*
- *Have you read any books on child development or parenting? What? Do you own any of those books? If not, why not?*
- *What age do you start talking to your children about sex? Have you done that yet?*
- *What contacts have you had with your children's school?*
- *What responsibilities do you think a [fill in age] year old child should have in the home? [Repeat for each child.]*

6. Politeness & Manners:

- *How important do you think it is for children to be polite?*
- *At what age do you think children should be able to be polite to visitors, friends, and relatives?*
- *Are your children polite? What happens when they aren't polite?*
- *What do you consider to be good table manners?*
- *At what age should a child have good table manners?*
- *Do you think your children have good table manners?*
- *[If they don't] How do you handle their poor table manners?*
- *At what age should children show respect to their parents?*
- *When should children be able to sympathize with their parent's feelings?*

7. Activities:

- *How old do you think children should be before they are expected to do routine chores without being reminded?*
- *Do your children have any routine chores when they are with you? Do they do them?*
- *How long can your children be left unattended during the day? At night?*
- *Are your children pretty responsible about staying alone?*
- *Do you know what they do when they're alone?*
- *How much TV do your children watch? What shows?*
- *Do you watch TV with them? How often?*
- *Do you think your children have any need for counseling? [If yes] Why?*
- *Have you been involved with any counseling with them?*

- *Do you think [the other parent] should go to counseling with them?*
- *When your children are with you, what do you generally do?*

8. Young Children:

- *What have you done to make your home safe for your children?*
- *At what age should a child be able to sit quietly for 1/2 hour?*
- *When do you think a child should be able to totally dress him/herself?*
- *When do you think a child should be able to bathe him/herself?*
- *When do you think a child should be able to get him/herself ready for bed?*
- *At what age should a child be completely toilet trained?*
- *When do you think a child should be able to play cooperatively with other children?*
- *What do you think constitutes a good daily diet for your children?*
- *What do you do when your children won't eat what you think they need?*

V. EXPERTS.

A. *Mental Health Professionals.*

1. **Qualifications, in general & per statutes F.C. §§3110.5, 1815, 1816, 3111 and C.R.C. Rules 1257.3, 1257.7: See Appendix.**

[Append relevant Code sections in some good order, e.g. Family Code, California Rules of Court, Code of Civil Procedure, Evidence Code, separated into those enumerated sections with its own Table of Statutes, Rules (Cases).]

2. **Professional Background.**

a) ***Education***

- (1) Institution
- (2) Courses
- (3) Major or primary emphasis

- b) Training**
- c) Experience**
- d) Publications: books or articles**
- e) Unpublished manuscripts**
- f) Curriculum Vitae: review for useful information, questions**

3. Bias and/or Prejudice.

- a) Is there an actual bias and/or prejudice? Yes, there is.**

The lawyer's job is to discover the prejudices/biases of the particular Mental Health Professional, and find a way to use those to your advantage. Every Mental Health Professional has a bias that is peculiar to Mental Health Professional's. To a person, when challenged, every Mental Health Professional believes in her/his heart that s/he has a unique, God-given talent to distinguish between really sick people & healthy people with some flaws, between liars & people who sometimes make mistakes innocently, between bad people & good people.

Every Mental Health Professional also has a bias that most people have. Once a person has taken a position, they will say things, often things that are questionable or false, to support their positions – especially when subjected to a patient, prolonged series of questions indicating skepticism & disbelief.

- b) How exactly do you go about uncovering and exposing the bias and/or prejudice? Examples:**

(1) When Mental Health Professional takes a position in a declaration/report favorable to 1 parent, prepare a plan to dissemble the position.

- (a) *When deposing the Mental Health Professional, set up a series of questions, getting the Mental Health Professional to support her/his initial position with stronger & stronger statements that would seem to follow logically as a corollary of the original position.*

(b) *Then use the more extreme position to discredit the Mental Health Professional by developing a series of questions in advance.*

(2) Examine the Mental Health Professional's record in other cases.

(a) *Talk to experienced colleagues.*

(b) *Obtain the Mental Health Professional's reports and/or testimony in other cases.*

There are many transcripts floating around, & under California law, discovery and hearings are "public records".

(c) *Examine the record to see propensities, prior issues raised concerning neutrality, impartiality, past mistakes, fruitful areas of questioning.*

(3) Examine the Mental Health Professional's personal life & situation:

(a) *Age.*

(b) *Marital Status: Divorced, single.*

(c) *Children: Age & sex.*

(d) *Parenting Plan for Mental Health Professional's children.*

(e) *Issues, problems, litigation, evaluation.*

(4) Be open to every opportunity to influence the evaluator to do the right thing.

c) *Is the mental health professional unaware of facts which are or could be outcome determinative? Yes, undoubtedly.*

(1) Set Up in Deposition:

(a) *You included in your Report/declaration every relevant fact?*

- (b) *You are certain you did not miss any relevant fact?*
 - (c) *If it was relevant, you uncovered it?*
 - (d) *If it was relevant, you considered it?*
 - (e) *If it was relevant, you discussed it in your Report/declaration?*
- (2) Identify certain isolated facts you as the advocate believe should be outcome determinative or material:
- (a) *Why does your Report/declaration not mention [the critical fact(s)]?*
 - (b) *Did you know the critical fact(s)?*
 - (c) *If so, when?*
 - (d) *If the Mental Health Professional knew the critical fact(s):*
 - (i) Did you consider the critical fact(s)?
 - (ii) Did the critical facts impact the conclusion/opinion?
 - (iii) If so, how?
 - (e) *If the Mental Health Professional did not know the critical fact(s):*
 - (i) Do the critical facts change the conclusion/opinion?
 - (ii) If not, why not?

In between the doublespeak and jargon, if you think about it, there will be opportunities to discredit the Mental Health Professional.

- (3) If the Mental Health Professional makes a diagnosis or renders an opinion:

- (a) *What are the factual predicates for the diagnosis/opinion?*
- (b) *Do the factual predicates exist?*
- (c) *Is there any controversy about the factual predicates?*
- (d) *What did you rely upon in formulating the diagnosis/opinion?*
- (e) *If the expert relied upon the report of 1 party:*
 - (i) Did you rely on the party to give a truthful report?
 - (ii) If so, does it matter that the party relied upon has made false statements?

4. What are the Mental Health Professional's bible resources?

The bible resources provide very rich data. For instance, if you can get an evaluator to make a diagnosis, you can then examine the evaluator on how the parent diagnosed differs from the textbook example. That will almost always be the case in at least some details.

a) Standards of Practice

- (1) American Psychological Association, Ethical Principles of Psychologists and Code of Conduct at: <http://www.apa.org/ethics/code>
- (2) California Rules of Court, Rule 1257.3, details the standards of practice for court ordered child custody evaluations.

Query? Did the psychological evaluator adhere to (1) and (2) above?

b) DSM IV

c) The MMPI:

- (1) Caldwell, Forensic Questions and Answers on the MMPI/MMPI-2.

- (2) Caldwell, Advanced MMPI/MMPI-2 Interpretation Seminar Audio Tapes.

B. Obtain complete copy of the psychological evaluator's file, including tests, scores, notes, etc.

1. Retain a consultant to review the file & identify information for potentially fruitful inquiry.
2. Query: if the other side is requesting the entire file, does an objection lie on the part of the non-party significant other who has a Constitutional right of privacy?
3. Does the Mental Health Professional have a duty to advise the non-party before releasing information that would generally be considered personal and private?
4. Does the subpoenaing attorney/party have a consumer notice duty under C.C.P. §1985.3?

C. MMPI-2

1. NORMATIVE GROUP vs. CUSTODY - DISPUTE GROUP

Nearly 100% of clients seen for custody evaluations have lower Scale F scores than the mean psychotherapy client and more than 75% of them score lower on Scale F than did the average person.

[Consider inserting another key point re MMPI.]

D. Evaluator's Report:

1. **Admissibility: Evid.C. §730 v. FC §3011.**
2. **Qualifications, in general & per statutes F.C. §§3110.5, 1815, 1816, 3111 and Rules 1257.3, 1257.7.**
3. **Performance of evaluation, Rule 1257.3(e)**
4. **Content of report. F.C. §3111, et seq.**
5. **Admissibility of report. F.C. § 3111(c)**

E. Treating psychologist of either parent or child

1. **Evidentiary privilege, Evidence Code 1014. Party or witness can prevent disclosure, in custody proceeding, of confidential communications to psychotherapist.**
2. **Psychotherapist-patient privilege is waived if issue of mental or emotional condition is tendered by patient in proceeding. Evid. Code §1016**
3. **Scope of the privilege: extension to family members:**

“all relevant communications to psychotherapists and to psychiatric personnel, by intimate family members of the patient. Such inclusion of communications by intimate family members within the privilege of section 1014 will encourage the fullest disclosure by the patient's intimate family.” *Grosslight v. Super. Ct. (Hoover) (1977) 72 Cal.App.3d 502, 140 Cal.Rptr. 278*

F. Minor's Counsel.

1. **Inherent conflict, statutory requirements, compliance with statutory requirements?**
 - a) **Duties. F.C. §3151(a).**
 - b) **Rights. F.C. §3151(c).**
2. **Statement of Issues, Contentions, Facts, etc. F.C. §3151(b).**

Review Statute re elements of report required – if ordered by the Court – and get Court order requiring elements.

3. Authorized to give a recommendation but do not have sufficient training, education and experience to make a 'valid' recommendation.
4. How to make counsel's job easier and set up the facts to obtain a positive result.

G. Mediator's recommendation

1. The reporting county's Family Court Services "recommendations" and "reasons for recommendation": Ten-day rule. Family Code §3111(a).
2. Confidentiality of state mandated mediation: Foxgate Homeowners' Association (2001) 26 Cal.4th 1.

H. Expert testimony: Legal Issues:

1. Daubert U.S. Supreme Court decision.
2. Kelly-Frye California Supreme Court decision.
3. The California Psychological Association and the American Psychological Association rules which are pertinent.

I. Coping With Psychiatric And Psychological Testimony, Jay Ziskin, Ph.D., LL.B. (Law and Psychology Press)

VI. EVIDENCE.

Note: the court needs evidence. As attorneys we are to get the facts, just the facts, present the admissible facts; avoid admission of facts that do not assist in your client's cause.

Most times you win or lose a case before you walk into a courtroom. In other words, you have prepared the key evidence for admission and/or successful objection, or you failed to do so.

A. 3 Key Questions.

1. What evidence is relevant?
2. What evidence is admissible?
3. What evidence is persuasive?

B. *Burden Of Proof*

Evidence Code Section 500 - Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.

C. Presumptions

The issues with presumptions associated: Domestic violence; willingness to share.

1. **3 Key Questions.**

- a) *Is there a presumption in your favor?*
- b) *Have you established the underlying facts to give rise to the presumption?*
- c) *What facts or evidence are necessary to overcome the presumption?*

2. Domestic violence: **F.C. §3044** Reputable Presumption:

Domestic violence perpetrated against the other parent or the children w/i last five years creates a rebuttable presumption that an award of custody to that parent is not in the child's best interest. F.C. 3044 delineates the facts necessary to rebut the presumption, including whether the perpetrator has demonstrated that giving custody to the perpetrator is in the best interest of the child. [In other words, it is presumed that an award of custody to a perpetrator of domestic violence is not in the best interest of the child unless the perpetrator demonstrates that such an award is in the best interest of the child.]

3. Willingness to share: F.C. §3040(a)(1).

"most likely to assure frequent and continuing contact with the other parent. "It is common knowledge among family law practitioners that the quickest way for a parent to lose primary physical custody is for that parent to obstruct the visitation rights of the other parent." (In re Marriage of Moschetta (1994) 25 Cal.App.4th 1218, 1232, 30 Cal.Rptr.2d 893.

Comment: the quickest way to lose custody rights is actually committing domestic violence or abuse.

Frustration of visitation is a proper ground for change of custody order. In re Marriage of Wood (1983) 141 Cal.App.3d 671, 190 Cal.Rptr. 469

4. F.C. §3080 Presumption, affecting the burden of proof, that joint custody is in the best interest of the child where the parents have agreed to joint custody.

If the parents have "agreed to" or "reached an understanding on the custody of their children", then a copy of the agreement OR an affidavit as to their understanding SHALL be attached to the petition or action. F.C. 3061

Absent an agreement or understanding or stipulation regarding custody, the Court MAY enter an *ex parte* temporary custody order. F.C. §3062. However, F.C. §3063 indicates Court SHALL refrain from making *ex parte* custody orders unless there is a showing of **immediate harm** to child or **immediate risk** child will be removed from California.

D. Special Problems with Child's Statements/Testimony.

1. Methods of ascertaining child's wishes.

- a) **Child testimony if allowed by the Court. F.C. §3042.**
- b) **Child speaking through intermediary, i.e. "alternative means" per F.C. §3042(b).**
- c) **Child speaking to evaluator, who takes wishes into account.**
- d) **Child speaking to minor's counsel, who takes wishes into account.**

2. Child's Statements of preference or opinion are susceptible to:

a) Suggestibility.

Children frequently model and mimic the behavior of their parents and their parents' responses and reactions to behavior of the parents and their parent's responses and reactions to behavior of the children.

b) External influence.

The child receives messages from the environment: what is normal in one household, if considered abnormal or terrible in the other household, will be part of the context of the child's later statements and/or alarm and/or concern.

c) Child's development.

All children's comments must be put into the developmental context. There are always multiple reasons for any statement and if the interrogator does not explain the various reasons for any statement then the interrogator is showing a predisposed bias.

A child's perception is altered from that child's own developmental stage. Note that research exists that kids tell the truth as well as research existing that suggests that kids lie. Must be inquisitive as to why the expert in your case is relying on one or the other basic premise and be prepared to attack the research and conclusions of this premise based upon the population which was tested. If the population tested from which the research emanates is not "custody battle children" then it is suspect.

d) Conflicting Perspectives

The impact of the child's voice is subject to at least two competing intellectual perspectives:

- (1) Young children ought be believed because children are unlikely to produce inaccurate reports of personally experienced events AND there is no evidence that suggestive techniques are commonly used in child custody cases. [For more exhaustive information see, Lyon, T. D. (1999) The New Wave in children's Suggestibility Research: A Critique. Cornell Law Review, 84, 1004-1087.]
- (2) In some circumstances, children are highly susceptible to producing inaccurate reports AND leading or suggestive interview techniques are used frequently enough to cause concern. [For greater insight into this perspective, see Ceci, S.J. and Freidman, R.D. (2000) The Suggestibility of Children: Scientific Research and Legal Implications. Cornell Law Review, 86, 33-106.]

E. DIRECT EXAMINATION OF WITNESSES – AT HEARING.

1. Present only that which is relevant, admissible, and persuasive.
2. Plan your direct examination to avoid objections.
3. Practice questions and answers with your client to give your client guidance to the true, outcome-determinative facts.
4. After your client has successfully completed the requisite practice sessions, you can then ask your client open-ended questions for your client to answer at the hearing.
5. **TESTIMONY IS PERSUASIVE WHEN THE WITNESS IS:**

a)

- **SUCCINCT**
- **CERTAIN**
- **SIMPLE**
- **CONCISE**

HUMBLY SPEAKING WITH CONVICTION

F. CROSS EXAMINATION OF WITNESSES – AT HEARING.

1. Purposes.

Unless you have a specific purpose and reasonable goal in mind – exposing defects in the four testimonial capacities or an expert’s mistakes – do not ask any questions of hostile witnesses at the hearing.

a) Lay witness

- (1) Show bias, prejudice
- (2) Show inability to perceive, recollect or relate
- (3) Show propensity to lie or lack of credibility

b) Focus on the four testimonial capacities are:

- (1) Perception.
- (2) Recollection.
- (3) Sincerity.
- (4) Narration.

c) Expert Witness

- (1) Voir Dire – attack procedure per Daubert_... not generally acceptable testing, procedure, etc. – to see if Mental Health Professional is allowed to testify about testing, procedure, opinions, conclusion.
- (2) Show facts witness unaware of when witness formulated opinion
- (3) Show bias or prejudice

2. Form of Questions.

a) At Deposition:

- (1) Use T-Funnel question sequence to exhaust any subject or issue.

- (2) Use open-ended questions to get the witness to talk at length.
 - (a) *Usually, you will find something in the jabbering that will be useful to discredit witness.*
 - (b) *Caveat: re-assess the skill of the witness in talking at length after a few questions.*

If the witness is very skillful, and using up a great deal of valuable time, switch to leading questions or use questions designed to avoid long answers.

- (3) Use a questioning sequence that is not a recognizable pattern to jolt the witness out of a rehearsed answering pattern. Jump around in:
 - (a) *Subject areas*
 - (b) *Details*
 - (c) *Chronology*
- (4) Pin down the witness: make the witness take positions, identify all facts supporting each position, and make the witness explain facts tending to disprove the position taken.

b) At Hearing:

- (1) Simple
- (2) Leading: leave no room for any answer other than your desired answer. No open ended questions.

3. Guiding Principles: If you can successfully develop and/or attack 1 of these points, then conduct no cross-examination.

**a) CROSS-EXAMINATION PURPOSE:
IMPEACHMENT**

- BIAS
- INTEREST
- PREJUDICE

- INCONSISTENCY WITH ANOTHER WITNESS
- INCONSISTENCY WITH PHYSICAL EVIDENCE
- INCONSISTENCY WITH THINGS NOT DONE
- INCONSISTENCY WITH COMMON SENSE
- OMISSIONS
- INCONSISTENT STATEMENTS
- Source: Cross-examination: Science And Techniques by POZNER and DODD (1993)

b) EFFECTIVE CROSS EXAMINATION ALWAYS

- Maintains eye contact with witness
- Uses short questions
- Uses plain words
- Asks leading questions
- Asserts only one fact per question

(1)

c) EFFECTIVE CROSS EXAMINATION AVOIDS

- Sledgehammer techniques
- Repeating questions asked on direct
- Technical language
- Asking "Why"
- Allowing witness to explain
- Argument with witness
- One question too many

G. EVIDENTIARY OBJECTIONS TO DIRECT & CROSS EXAMINATION – AT HEARING.

1. Prepare for the hearing.
2. Anticipate the other side's likely objections.
3. Prepare to defend or present your position concerning objections to key evidence.

VII. ARGUMENT.

A. FINAL ARGUMENT OUGHT TO INCORPORATE CASE SPECIFIC FACTUAL VARIABLES

De facto parenting before separation

De facto parenting (schedule) since separation
Social progress &/or problems of child
Academic progress &/or problems of child
Child's age, sex, & temperament
Mom's social & psychological functioning
Dad's social & psychological functioning
Parenting skills
Mother/child relationship
Father/child relationship
Stressful life factors/events: Mom, Dad, Child
Social support networks for child
Social support networks for each parent
Each parent's capacity for understanding & responding to the child's needs

B. *[Dan writes something.]*

VIII. Statutes, Kick-Outs & Move Aways.

A. Temporary Restraining Orders and Kick-Out Orders.

1. **How often used?**
2. **What type of notice is required?**
3. **New Status Quo to be preserved.**
 - a) ***What is the impact on custody and visitation?***
 - b) ***If the restraining orders are restrictive, will it prompt a violation?***
 - c) ***Will a violation impact the custody and visitation determination?***
 - d) ***Status quo:***
 - (1) When is the status quo determined?
 - (2) Is the status quo determined at date of separation or at the time of the court hearing?
 - (3) Presumption that the parent's agreement regarding custody and visitation is in the children's best interest.

- (4) The delays associated with the court process through court adjunct mediation, etc. provide a planning opportunity during this process.

B. Move Aways

1. **The move away overlap. Question is detriment to child from change in geography vs. change in custody.**
2. **Burgess.**
 - a) ***Do not stipulate to anything short of joint custody, unless client is advised of the Burgess repercussions.***
 - b) ***Query: Does seeking a move away show unwillingness to share? This is certainly a potentially fruitful subject on inquiry and/or discovery.***
3. **Change of circumstances requirement under Montenegro v. Diaz.**

IX. Bibliography

Custody:

Stewart, James W. Judge. The Child Custody Book: How to Protect Your Children and Win Your Case. Atascadero: Impact Publishers, Inc., 2000.
Stahl, Philip M. Ph.D. Parenting After Divorce: A Guide to Resolving Conflicts and Meeting Your Children's Needs. Atascadero: Impact Publishers, Inc., 2000.
Ehrlich, Joshua Ph.D. "Losing Perspective: A Danger in Working with High-Conflict Divorces", *American Journal of Family Law*, Aspen Law & Business, Winter 2001, Vol. 15, No. 4.

Evaluations:

Statewide Office of Family Court Services. "Child Custody Evaluation". In *Litigating the Child Custody Evaluation Process*, 1999 , pp. 13-15.
Little, Margaret Ph.D. "Guidelines for Therapists: What You Should Know When Your Client is Involved in a Child Custody Evaluation". In *Litigating the Child Custody Evaluation Process*, 1999 , pp. 16-19
The MMPI, MMPI-2, & MMPI-A in Court: A Practical Guide for Expert Witnesses and Attorneys, Pope, Butcher and Seelen

Expert Testimony:

Coping With Psychiatric And Psychological Testimony, Jay Ziskin, Ph.D., LL.B.
(Law and Psychology Press)

Mediations:

Pruett, C. Eileen. "Model Standards of Practice for Family and Divorce Mediation: Guidelines for a Mature Profession". In *American Journal of Family Law*, Aspen Law & Business, Winter 2001, Volume 15 Number 4.

Carruthers, Susan E. "Mediation in Child Protection and the Nova Scotia Experience". In *Family and Conciliation Courts Review - Winning Essay: 1996 Meyer Elkin Essay Contest*, January 1997, Vol. 35, No. 1

Depositions:

Israel, Stuart M. "130 Rules for Every Deponent". In *Litigation*, The Journal of the Section of Litigation - American Bar Association, Summer 2001, Vol. 27, No. 4.

Scheff, Richard L. "Getting Witnesses to Talk". In *Litigation*, The Journal of the Section of Litigation - American Bar Association, Summer 2001, Vol. 27, No. 4.

Mills, Laurin H. "Taking Chances at Depositions". In *Litigation*, The Journal of the Section of Litigation - American Bar Association, Fall 2001, Vol. 28, No. 1.

Deposition Skills, The Rutter Group.

Dunne on Depositions, Kevin J. Dunne (Bancroft-Whitney)

Depositions: Procedure, Strategy and Technique, Paul M. Lisnek

Los Angeles County Bar Association Ethics Opinion No. 497, Consulting with a Client during a Deposition, March 8, 1999

Koch, Nancy J. and Tiela M. Chalmers. "The Deposition: Part I: How to Prepare". In *Family Law News*, State Bar of California, Spring 1994, Vol. 17, No. 1.