

# An Attorney's Approach to Psychiatrists in Custody Cases

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## 1. The Nature of the Custody Case

We tend to think that a custody case is going to involve a dispute between a husband and wife in a dissolution case, or perhaps between a mother and father after a dissolution has been granted. But it is important to realize that the subject of custody appears in many other types of proceedings, for example, adoption cases, guardianships, and proceedings in the juvenile court. Although frequently the dispute will involve a father against a mother, there will be many cases in which the opposing sides will not be parents but instead may be one or both parents against the county or against competing groups of relatives or even non-relatives where the guardianship of children is involved. Perhaps a parent contends against non-parents in an adoption proceeding. The only characteristics these cases have in common is that all of them involve children and that all of them involve a decision by a judge instead of a jury.

The attorney may be introduced to the custody case early, even before it is a case, or he may be introduced to the case after it is all over and one party wishes to try to change a result that has been made by a court in the past. Perhaps when the attorney first meets the case he finds an emotionally sick client, or perhaps a sick child, and perhaps one or more of the parties to the litigation is already under the care of a psychiatrist.

The only thing the attorney knows for sure is that sooner or later he is going to be in a courtroom before a judge, where he is going to do his best to sell that judge on his client's approach to the custody problem. In this forum the attorney will try to inject psychiatric evidence in support of his cause, and he may have to combat psychiatric evidence introduced by his opposition.

Nowhere in the law is the area of judicial discretion as broad as it is in the custody case. Some people think judges are guided only by their intuition as to where a child should be placed. Perhaps there are some guidelines for a court to follow, such as the generalizations that young children and girls should be placed with a mother, and older boys with the father; that the children should be kept together where possible; that the fault of parents is not a consideration in a custody case except to the extent it has a direct effect upon the child; and finally that the court should consider the views of the child if the child is mature. But really, all of these generalizations are only guidelines, and a judge can choose to ignore one or all of them if he wishes. Sometimes a case ends in a judge's decision that is perhaps only a guess on his part, particularly if the judge says to himself that he thinks that the sides are equally good or perhaps equally bad. It is because of this possibility — and because the judge has no expertise in psychology or psychiatry, generally speaking — that he can and should be influenced by the testimony of the expert. He should be educated by the attorney, with the assistance of psychiatric testimony, as to what really is in the best interests of the children. This is why psychiatric evidence is so vital to a custody case, and why the proper use of psychiatric evidence is so absolutely critical to the attorney who is going to work in this field.

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## 2. Contacting the Doctor

The first decision the attorney must make is whether he needs psychiatric evidence and, if he does, when he should obtain it. Of course, the problem will vary from case to case, but here are some thoughts. In dissolution of marriage cases in San Diego County, we often see father competing with mother right after the case has been filed, each seeking an award of temporary custody while awaiting the case to come to trial. In these cases, each side will have filed sworn statements designed in general to make the other side look as bad as possible. Judges rarely know where the truth lies in these situations, and often a referral is made to the San Diego County Probation Department for an investigation of the home and a written report to the court with a recommendation as to custody. When this happens, the attorney should decide if he should seek the help of a psychiatrist. His client will have already been accused of being a poor or inadequate parent in some fashion, and he can ask a psychiatrist to examine his client and the child. If the psychiatrist's report to him is not favorable, he can avoid its use. If it is favorable, he can present it to the probation officer investigating the case, or else see to it that the doctor talks to the probation officer. If the probation officer is still inclined to favor the other side of the case, the attorney has, in a sense, prepared his own probation report, because he can pit his doctor's report against that of the probation officer. Thus, in this area he cannot possibly hurt himself by seeking the help of a psychiatrist, and he may help his case tremendously.

An attorney will have no problem initially selecting a doctor if there is already a psychiatrist in the case. Perhaps the doctor is treating his client or perhaps the child. In these cases the attorney has to be cautious about what use, if any, he can make of the opinion of a doctor involved in ongoing therapy. He may well find that the psychiatrist treating his client will refuse to become involved in the case in any way. The therapist may tell the attorney that he cannot be involved in a court dispute because if he were to do so it would interfere with the treatment. This problem can take many forms and can involve the related question of cost of treatment as well as treatment itself. I recall one case last year where the client was involved in psychoanalysis, and we were asking the court to rule that the continuing cost of the analysis was a proper expense for the client's budget. We could not get this clinical judgment from the analyst. He refused to involve himself in any way. It would interfere with his treating relationship. We did successfully make the point, however, through the testimony of a forensic psychiatrist who explained the need of the continuing therapy to the court.

The attorney will want a psychiatrist who is sympathetic to his case, yet someone who can be objective, and he wants someone who is interested in the judicial process. Some doctors do not like lawyers. Some doctors do not like to testify in court. Perhaps the psychiatrist will ask himself, "Why should I become involved in a court battle when I have my time booked ahead for weeks with each hour filled? A court proceeding can't do anything for me except take my time and expose me to a lot of hostility!" The doctor should not feel this way, of course, because his day in court should be a stimulating experience for him. Attorneys should assure the doctor that everything possible will be done to avoid wasting his time, and this may take some explaining. Attorneys should tell the doctor at the outset that he cannot always know what day his testimony will be required, or what hour; and that when the time for the hearing comes around the doctor may have to spend time waiting for proceedings to commence because of some delay.

If the client has a family doctor, that doctor can be called and asked to make a referral to a psychiatrist. If there is no family doctor that the client regularly sees, the attorney himself can contact a psychiatrist. He may seek advice from judges or other attorneys as to whom to call.

The attorney must be sure to talk about fees at the time of the first contact with the doctor. When he knows what the charges are going to be, he must get the money in

and have it available for all of the doctor's services, including his examination and his testimony in court. An attorney cannot be too careful about this. If he does not have adequate financing for the case, he should not get into it. Once an attorney takes a custody case he is bound to do the very best job for his client that is possible, and if he knows that psychiatric testimony is required for the proper presentation of his case, he has to get that testimony. If he has not received the money from his client to pay for it, he is going to have to come up with the money out of his own pocket. If he does not do this, he will know and the court will know that he did not do the job he should have done. This problem must be avoided by talking about fees early. If there is a chance that the client may turn into an ongoing patient of the doctor, it must be made clear to the doctor that any responsibility the lawyer has for medical fees terminates after the initial examinations and testimony in court. It also must be explained to the doctor that the other side may try to discredit him on the subject of fees. This is a subject some doctors do not like to discuss. Sometimes, doctors have a sliding scale. They may charge one patient nothing and another patient \$100.00 an hour, and still another patient somewhere in between. Sometimes, the sliding scale of charges is purely subjective with the doctor, and he may have a hard time explaining why he charges a high fee to one patient and a low fee to another. The doctor must be prepared to explain all of this in court.

It is sad when the problem of fees gets in the way of the medical/legal problems which are what the case is all about, but it can happen. I recall one case several years ago in which the client and her child were already working with the psychiatrist, who later testified extensively in court after the dissolution erupted. The case dragged on with hearing after hearing, and the doctor's bill got larger and larger. He made frequent calls to the patient about fees, and finally the relationship between doctor and patient had deteriorated to the point at which the doctor left the case. He stated he could not and would not help further, and the client was left without the help of the psychiatrist and in a frame of mind which prevented her from contracting any others. Attorneys should never let such things happen. If any attorney contacts the doctor, he should himself stand behind the fee, and the doctor should never permit himself to be drawn into a custody fight unless he has that understanding with the lawyer. The doctor should be just as aware as the lawyer that the case may be under-financed. Disagreeable though money matters may be, the doctor should take a hard look at the case from that point of view, just as the lawyer should. The doctor should have the assurance that if he enters the case he does not have to concern himself about the possibility of future fee disputes with his patients.

### 3. Preparation of the Case

Once the lawyer and the doctor have agreed to work together, preparation begins. There is no substitute for personal contact between the lawyer and the doctor. If the attorney does not know the doctor, he should go to see him and should pay the doctor for his time. At the time of the first meeting, the attorney must not forget that the doctor may dislike courts, perhaps even does not like lawyers. In the case of some doctors, this feeling may be really a fear of courts, or perhaps a fear of being made to look foolish. Perhaps that is one reason some doctors duck the chance to testify in court with the excuse that they can't take the time away from their practice. What they really mean is that they might find testifying in court an exciting experience but they don't want to take the chance of humiliation.

These factors can be minimized during an initial interview in which the problems of the lawyer are explained to the doctor and *vice versa*. The lawyer must clarify the psychiatrist's role as an expert witness for him. He should clarify with him what the lawyer's goals are in the case, and he must expect that the doctor may not agree with those goals after having performed extensive and expensive evaluation. He should attempt to provide the doctor with access to all significant parties involved in the litigation, even to

the extent of obtaining court orders for the examination of the usually-reluctant other spouse. Often, the opposing attorney will attempt to block that examination, but tactically that maneuver can backfire. The judge will wonder what there is to hide. The nature of the particular custody case should be reviewed, and the doctor's qualifications discussed. Once the doctor has completed his examinations and perhaps after he has written his report, the attorney should meet with him again and go over the case with him. No lawyer would place a mailman or a milkman on the stand without carefully discussing his case in advance, and he should do the same with doctors. No doctor should permit himself to be placed on the stand unless he has carefully reviewed the case with the attorney. Doctors should be aware that some lawyers are lazy, and that some lawyers do not know how to properly prepare a case, that they do not know what questions to ask nor how to ask them, and that the doctor's professional reputation can suffer because of sloppy lawyering in getting the case ready for hearing. This does not have to happen. It can be avoided by both the doctor and the lawyer reviewing the case in advance with each other, and being sure that each thoroughly understands what the testimony will be and how it is to be presented.

No lawyer should ever call a psychiatrist as a witness unless he has read every paper or record in the doctor's file. The attorney should assume that, somehow or other, everything in the doctor's file may be subject to discovery by the other side. The attorney should explain to the doctor that he can be discredited by statements in his file which appear to vary from the testimony of the doctor in court. Attorneys should remember that most doctors should have their files before them or at least available to them at the time of their testimony, and, if the file is there, the other side will probably take a look at it.

When an attorney approaches a psychiatrist about a case for the first time, he must be open-minded. He must not take the attitude towards the case that his point of view is the only one which can be helpful to his client. The doctor may have ideas about the case that never even occurred to the attorney! On the other hand, the attorney should explain to the doctor that in the preparation of his testimony the basis for his conclusions can be just as important as the conclusion itself, because it bears upon the credibility of the doctor's evidence.

When an attorney contacts a doctor the first time he must be sure that the doctor gains access to all the attorney's information about the case. Doctors should insist upon this. If other psychiatrists have been in contact with the client, and if a medical history is available from a family doctor, such reports should be obtained. Perhaps the psychiatrist will telephone the family doctor to see if there is information about the patient that nobody thought to tell him. No attorney should take the chance that his doctor-witness can be sandbagged on the witness stand with questions about conditions the doctor did not even know existed in the client's medical background.

Frequently, in preparing the case the doctor will submit a report. Medical reports will vary in length and in content, but in general, they should outline the medical history, description of the examination process, the doctor's impressions, his opinions, and his recommendations. Sometimes, these reports can be used in the custody case without the doctor's testimony even being required. Unless he has been specifically told so in advance, however, the doctor should never assume that he will avoid testimony simply because he has submitted a medical report. He should understand that a medical report is a hearsay document if used at a trial or hearing, and that he should be prepared to testify concerning all of the information in the report. Nevertheless, the medical report is a very useful tool, both for the lawyer and doctor. So long as the report cannot be discredited by statements of other reports or letters the doctor may have written, the report can be submitted to the court without fear.

Sometimes doctors are asked to submit reports about patients, and they forget the patient has not authorized them to release the report before they do so. In one recent

case, the psychiatrist had been counseling both the mother and father concerning their marital problems. After seeing both of them for a number of weeks, the doctor and wife quarreled, and the wife left the doctor, who retained the husband as his patient. Shortly thereafter, a dissolution case was filed and the doctor submitted his report, in which he described the mother as a sick and dangerous person, and as a menace to her children. As it turned out later, the mother did not lose custody of the children and is seeing a different psychiatrist. The point is that, apart from the question of ethics involved, there is a very real potential problem centering about what would have happened if the former patient had lost her case because of the testimony of the psychiatrist. Would she have had a lawsuit or mal-practice claim? In still another case several years ago, the psychiatrist had given a report to the Probation Department. In it, he stated that he thought the father in question, whom he had been treating, was a sound, stable individual. A year later, without his patient's consent, he fired off a second report in which he stated that the patient had an "explosive personality" and that he suffered from various other emotional problems, including alcoholism. Doctors have to protect themselves from such situations.

The attorney should explain to the doctor that his approach should be one of complete candor. If there are unfortunate aspects of the patient's personality, these should not be swept under the rug but instead should be talked about frankly and then minimized, if that is the treatment they deserve. Not only will this thoroughness remove a potential area for dangerous cross-examination, it will also add to instead of detracting from the doctor's credibility, because he will appear to be completely objective.

The doctor should be ready to testify in both medical and lay terms. The doctor should always keep in mind that he is not an advocate. Lawyers are advocates, not doctors. The doctor should not allow the attorney to make him an advocate. It is the doctor's objectivity which gives him his credibility. Many doctors, especially psychiatrists, like to see themselves as *amici curiae*, and the attorney who hires the doctor as a consultant may often have to clarify that thinking. The attorney must assure the doctor and himself that objectivity is what is wanted, even though the doctor is ostensibly aligned on one side of a controversy.

#### 4. Testimony in Court

When the doctor is called as a witness, he is usually asked first about his qualifications as an expert. This is the attorney's first opportunity to convince the judge of the merits of his cause, and it is surprising how frequently lawyers permit this golden opportunity to pass by. There is nothing wrong with an attorney using the doctor's qualifications as part of his basis for selling the judge on the idea that the expert witness is so full of knowledge and wisdom that his opinion concerning child custody has to be given enormous weight.

Many times we see the expert with a splendid list of qualifications take the stand, and the attorneys agreeing between themselves to "stipulate to his qualifications." This means that the doctor testifies but the judge never learns much about his background. If the attorney has an expert witness who has an impressive list of credentials, the thing to do is to bring all of this out, even in spite of a stipulation, unless the judge is an impatient sort who will not permit such an examination.

When the subject of the witness's qualifications comes up, the attorney should never ask the doctor to "state his qualifications." This may produce a long narrative of educational background, professional societies, works published, and the like, all stated in semi-rapid-fire fashion and in so pat a fashion that it almost sounds like a canned speech. This type of testimony can have an adverse effect upon the case. Not only may the judge simply not hear or remember these qualifications, but also he may get the idea that the psychiatrist is overly-impressed with himself and may even take a dislike to him. The proper way to cover the doctor's qualifications is in question-and-answer form. The attorney should ask the doctor about his medical training, then ask him about his training

in his specialty, and then about his professional affiliations, and so on. Sometimes, the expert witness will have a background of testifying as an expert appointed by the courts. The opportunity to bring this up should never be missed. If the doctor answers each question about his qualifications in a candid but low-key fashion, he will demonstrate that he is probably a modest genius, which is exactly the impression the attorney should try to create.

Once the doctor starts to testify about the case itself, the same rule about narrative testimony applies. The lawyer should not allow the doctor to embark upon a rambling discussion of his experience with the case. Here, the problem is not so much that the doctor would be testifying in an unpleasant or overbearing fashion, but rather that if he testifies in a narrative everything he has to say may go by the judge so fast that it is not absorbed. It thus does not achieve the proper effect. The question-and-answer form of testimony avoids this, and, as stated earlier, the questions and answers should be reviewed insofar as possible with the doctor before he ever takes the stand. If the doctor feels that the only way he can properly state the nature of the problem is to use technical terms, it must be made sure that he also explains these terms in laymen's language. It is a sad mistake for the attorney to assume that simply because the trier of fact is a judge instead of a jury, he has some special knowledge of medical terminology. The fact is that he may be turned off by medical terminology and really wants to hear in only the simplest possible terms what the problem is and how the doctor thinks it should be solved. The attorney can best convert the judge from a person with no medical knowledge of the case to one with substantial knowledge by making sure the psychiatrist is a good, but not demeaning teacher.

As stated earlier, it is vitally important to prevent the doctor from becoming an advocate in the case. Advocacy is the job of the attorney, not the doctor. The doctor should state the good with the bad about the attorney's client, although minimizing the bad where it is possible to do so. He must appear to be completely objective and not influenced by his background in the case, by his acquaintanceship with the lawyer, or by the fees that he has been paid. The doctor can always make it clear that he could probably be earning substantially more back in his office than he ever could by spending his time in a courtroom with all of the delays and recesses and uncertainties about time.

Unfortunately, some doctors, however well qualified, insist upon becoming advocates. I had the experience within the past year of observing a local psychiatrist with outstanding qualifications allow himself to become an advocate because of his strong feeling that one parent in the matter represented a hazard to the future welfare of the children. The doctor simply had to inject himself personally into the case and urge a change in custody, even after being warned about the possibilities of unethical conduct, malpractice, and the like.

However well-motivated the doctor may have been in this situation (which manifested itself by the doctor feeding questions to the lawyer, urging a particular line of questioning, and appearing almost eager to take the witness stand), the fact is that when a doctor becomes an advocate he appears to lose his objectivity. Accordingly, he loses his credibility, thus defeating his own purpose.

Cross-examination can be just as important a part of the expert testimony process as the direct examination. The doctor who is very composed and self-confident when answering questions put to him by the friendly attorney who employed him may lose that composure when questioning begins from an attorney he may view as something of an enemy, at least in the sense that he sees the attorney as someone who is attempting to make him look foolish or something other than the expert in the field he knows himself to be. Obviously, it is a mistake for any doctor to become irritated, no matter how antagonistic is the lawyer on the other side. The psychiatrist should remain just as composed under cross-examination as during direct examination. The best way to prepare for cross-examination is to prepare for the direct examination. The doctor should keep in

mind that, before he ever testifies, he has to have knowledge of all the contents of all of his files, of all the information that he can be provided with from independent sources or by the attorney who employs him concerning the background of the patient. He also must be thoroughly prepared to answer questions concerning his compensation for his testimony. If the doctor knows all of the facts, his medical expertise will carry the day for the rest of his evidence.

Unfortunately, as discussed earlier, not all doctors are properly prepared, and not every attorney does his homework in preparing the doctor. It is the *mutual obligation* of the attorney and the doctor to see that preparation is done. Why should a doctor permit himself to be embarrassed on the witness stand? It is at the commencement of cross-examination that the medical reports and files the doctor brings with him achieve such importance. The careful cross-examiner will want to look through the doctor's files before the cross-examination starts. He will, perhaps, ask for a recess to permit this to be done. He will look for discrepancies between statements the doctor made in his direct examination and those appearing in writings in the file.

What can the lawyer do who is cross-examining the expert witness who has been well-prepared, who has testified beautifully, who has done all of his homework, and who has not appeared pompous or overbearing but instead has presented himself as a warm, objective person sincerely interested in the welfare of the child? The first thing the lawyer should keep in mind is that he should not "take on" the doctor in the field of expertise. Attorneys should never try to argue with the doctor about a medical subject. Like a judge who has made a ruling on a matter of law, even if the doctor is wrong, he is not going to admit it out of hand.

## 5. Thoughts on Cross-Examining the Expert

If it is the case, the fact must be emphasized that the doctor has examined the witness only for purposes of the trial. In other words, he has been hired for a limited purpose only, to take the stand and to testify in behalf of one side against the other. However fair the doctor may be, this will accent the fact that his testimony ought at least to be viewed with careful scrutiny.

Next, it must be determined whether there is anything the doctor could have done that he did not do in preparing his testimony. For example, if the doctor examined the child, did he also examine the parent or both parents? Assuming that he examined both parents and the child, did he examine or talk to outsiders who might have had some valuable information about the backgrounds of the parties? Did he talk to the family doctor? If he discussed the married life of the parties, did he explore their early backgrounds and go into their childhood? Does he know what illnesses or traumatic experiences they have had in their lifetimes, what exposure they have had to drugs or alcohol? If the parties involved have a record of hospitalization, has he reviewed medical records?

Now, perhaps the doctor will answer that, in his opinion, he did not really think that it was necessary for him to go through all of this. Even if he says he did not need to do it, he may admit that perhaps, had he done so, he could have found some helpful information. Further, even if he says that he does not think that anything the exploration of these collateral areas could have produced would have changed his opinion, nevertheless his answer adds somewhat to the doubt which can be cast upon his opinion — particularly if the cross-examiner is himself about to place a doctor on the stand who *has* explored all of these outside areas.

If possible, the attorney should try to get the doctor to admit that in the vital medical areas of the case there is room for a difference of opinion. Most doctors will admit that there can be a *bona fide* difference of opinion on many medical subjects. Of course, the subject of testimony will depend upon the case, but if the doctor says that there cannot

be a *bona fide* difference of opinion as to the subject about which he has just testified, he makes himself look not only pompous but also somewhat foolish if an equally qualified psychiatrist then testifies to just such a difference of opinion. The best thing the doctor can do is admit that there can be differences of opinion, including perhaps differences on the very subject at issue.

Sometimes, the cross-examiner will find that the doctor has not done any more than simply talk to his patient, and that he has accepted as fact, for purposes of his examination, the story the patient has given him. This situation is made to order for the cross-examiner, who can then possibly bring out a series of other facts which might change the impact of the testimony altogether.

The psychiatrist who is going to be testifying in custody cases in California should at least be familiar with some of the recent publications in the area, at least those which some courts might look to in trying to resolve the custody case. Two appellate decisions in California within the past year have cited the book *Beyond the Best Interests of the Child* by Goldstein, Freud, and Solnit. In each case it was cited for the proposition that emphasis on child placement should be on continuity of parental relationships to lessen the trauma caused the child by the interruption of this relationship.

## 6. About Patients and Clients

Often, when an attorney meets his client for the first time, he sees a capable person, perhaps with a responsible position in business. The client is articulate and convincing as to the merits of his cause. Unfortunately, he may soon turn out to be rigid in his point of view. Then, after a hearing, he may become angry if things did not go exactly as he wishes. About this time, the attorney may hear that everybody on the other side "lied" or "committed perjury," and that somehow or other "justice had to be done." Soon, the attorney may hear that there has been a "conspiracy" against the client. Further, if the case is one in which the attorney and opposing counsel were called together into the judge's chambers to discuss the case, the client may feel that *both* lawyers and the judge were conspiring.

Attorneys must watch out for these clients. If a lawyer hears early in the case that the opposition is the client's "enemy" and a "perjurer," the lawyer must be on guard and must keep a written record of what he does. Interviews with the client must be followed with confirming letters, outlining the advice in detail. Doctors must remember that, just as the attorney can be accused of conspiring, so can the doctor. Paranoid clients see everyone as against them who is not *completely* for them. They will accuse and perhaps try to sue their own doctors or lawyers. Such things happen not just occasionally but frequently. It illustrates the statement that sometimes a lawyer's best friend can be the opposing attorney, and his worst enemy his own client.

## 7. Summary

The contested custody case has in common with any other case that it is a search for the truth through the medium of the courts. Many modern thinkers believe that the courts are not the proper arena for discovering the truth in all cases. Increasingly, there is agitation to remove areas of testimony from the courts, placing them perhaps in the hands of some commission appointed by government. So far, this has not happened in the area of child custody, and we still have the courtroom technique of examination and cross-examination, with a final decision by a judge on the basic subject of truth, that is, what is the best interest of the child.

The attorney can learn from the doctor in this process, and I think the doctor can learn from the courts. I hope the day will come when no psychiatrist will ever say that he is too busy to take the patient's case if it is likely to involve him in legal controversy. I

hope the time will come when no psychiatrist will say that he will not become involved with a case unless he can do so as an appointee of the court as opposed to a doctor employed by one of the parties. I hope the doctor will look forward to providing testimony and that some of the thoughts expressed in this discussion will make his day in court a better experience for him.