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## How To Select an Expert in a Custody Case

The legal obligation of an expert witness is to provide independent advice to the court by presenting impartial, unbiased opinions about matters within their field of expertise. This duty is owed singularly to the court and supersedes any duty to the attorney or litigants. Your job, as the attorney, is to find the right expert for each case. One size does not fit all.

By **Toby Kleinman and Daniel Pollack** | November 18, 2019 at 11:45 AM



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A vital part of divorce involves the determination of what proportion of the **children's time will be spent with each** parent. Ideally, divorcing parents can

make this decision themselves or with assistance from their attorneys or a mediator. If the matter winds up going to court, to assist in deciding this issue expert witnesses may be called.

There are two basic issues to deal with when child custody may be an issue that warrants retaining an expert: First, when to retain the expert? Second, whom to retain? Child custody is not an area of law where surprise is necessarily an advantage. On the contrary, the selection of competent experts and a written report submitted to the court and adversary counsel early in a case may actually prevent litigation in the long run.

In order to properly select an expert, there are several considerations. The three critical issues to think about at the outset are: (1) What expertise should the expert have? (2) Should the expert be a person already known to the court before your selection? (3) Is it a good idea to use an expert you personally have previously worked with?

What expertise should an expert have? In determining what expertise the expert should have, you and the prospective expert must know the critical issues of the case. Is your client saying her child is abused, or is your client being accused of abuse? Is your client being attacked for isolating the other parent? Is your client accusing or

**being accused of, or causing, “Parental Alienation Syndrome (PAS)”?** It is noteworthy that you too must know the science, as PAS is not accepted practice within the psychological community.

In selecting an expert, it is important to assume that either the court or your adversary will have sufficient knowledge of the topic being opined on to be able to cross-examine on every issue.

Consequently, it is imperative to ascertain the specific expertise of the expert. Does he or she have sufficient training and experience to give opinions and have those opinions admitted into evidence? Experience alone is not enough. Many experts have general credentials, but they do not have specific training in any narrow field. If the culture of one of the parties may be an issue, it is important that the expert you choose have a specific familiarity with that culture or at least have someone who they can use as a consultant. Do not hire an expert you do not know or have not worked with until you have thoroughly vetted and interviewed them. Ask about their specialized training as well as their experience. Get a copy of their resume. When you speak with

them, ask if they have ever been relied upon by a court. Ask if their testimony has not been admitted by a court, and if so, why. If prior transcripts are available review them yourself. In short, ask **about the prospective expert's** knowledge of every issue anticipated in the case.

**Not every court will permit a litigant's** expert to evaluate the adversary party. Query the expert if they can opine without that evaluation. What would be the limits of their opinion as to custody if they do not do a parent evaluation? If abuse is an issue, do they require an interview of the parents? Ask as many questions as you can to ascertain a comfort level so that you actually have an expert who will give opinions on the issues you require. Hire only upon a comfort level that your expert will be able to help you move your case forward and deal with issues raised effectively.

You must also query regarding what instruments the prospective expert is familiar with and intends to use. Absent any allegations of abuse being raised, the experts are typically looking to **measure each parent's general** psychological status, the emotional

functioning of the children, and the quality of the parent-child relationship. Inquire whether the expert believes the children need to be administered more formal testing. Question if there is any reason why both parents would not be administered the same battery of tests. If abuse is an issue, a parental exam may be unnecessary, as standard practice does not require a parent evaluation to determine abuse. But your expert must know the science so they can make those determinations and explanations and be able to withstand a tough cross-examination.

Should the expert be a person already known to the court before your selection? This is a most difficult issue because judges tend to be sensitive to future attacks on their appointments of experts as court-appointed experts. Using someone the court knows can **backfire if the court rejects your expert's** opinion. On the other hand, it is more likely they will find that person credible if they themselves appoint that person regularly. That said, do not use a person simply because a particular judge appoints him or her. The expert must still withstand the tests noted above and a thorough vetting is critical. Indeed, a

good cross-examination of a known expert who has a limitation on their expertise can cause a judge to stop relying upon that expert.

Is it a good idea to use an expert known and worked with to you before this case? Bias is an important consideration for any court. It is an issue that should be raised at the outset of testimony by the expert or in response to a written report. Whether or not to repeatedly use the same expert is an issue that the expert needs to be able to address. Too often we hear of attorneys **having a “dog and pony show” with one or two experts.** One might find themselves having the expert being asked about multiple cases with an attorney, and even confronted with similar language used by the expert in another case. This can denigrate the effectiveness of an expert witness.

You want to hire a truly independent expert. The perception of a judge that an **expert’s opinions are for sale can be the death knell** for your case. While the expert is being paid, it is not to bolster or pad their opinions. For this reason, **an expert’s credibility may be enhanced** if he or she has done work for plaintiffs,

defendants, petitioners, and respondents.

## Conclusion

Anticipating these expert retention issues will alleviate problems later on if the matter does not resolve amicably. The legal obligation of an expert witness is to provide independent advice to the court by presenting impartial, unbiased opinions about matters within their field of expertise. This duty is owed singularly to the court and supersedes any duty to the attorney or litigants. Your job, as the attorney, is to find the right expert for each case. One size does not fit all.

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