

Is it legal and ethical for child custody evaluators to use AI?

Elisa Reiter and Daniel Pollack | June 11, 2024



During divorce proceedings, when parents of minor children cannot agree on the terms of custody, a judge may appoint a child custody evaluator. The evaluator is tasked with interviewing the parties and their children, and, if the evaluator has the appropriate credentials, there may also be psychological testing of the parties and minor children.

We live in a technologically advanced era. By drawing from a deep well of information, artificial intelligence (AI) can be an aid to people in all

areas of life. What if the “expert” child custody evaluator relies on AI in compiling their report?

Federal Rules of Evidence

Rules 703 and 705 of the Federal Rules of Evidence may be summarized as follows:

- An expert may base their opinion on facts or data they have observed themselves or been advised of.
- There must be a reliable, valid basis for those facts or data.
- A judge acts as a gatekeeper, to determine if the facts or data lack probative value or, by contrast, are so prejudicial that their probative value is outweighed.
- Unless a court rules otherwise, an expert—such as an evaluator—may state their opinions and give their reasons for them without first establishing the facts and data upon which they rely.
- The evaluator is subject to voir dire, and/or cross examination.
- To take the evaluator “on voir dire” is to examine them outside of the jury’s presence to determine if the facts and opinions on which they rely are unreliable and/or invalid.
- The evaluator/expert’s opinion is not admissible if the facts and data underlying their opinion lack a sufficient basis.

The use of AI algorithms to write up a custody evaluation by a court-appointed mental health professional raises significant ethical and

practical concerns. Each child custody case is unique and requires a nuanced, personalized assessment that considers behaviors—not mere labels—regarding the specific circumstances and dynamics of each family.

Ethical Concerns

Relying solely on an AI algorithm to generate custody evaluations risks oversimplifying complex family situations and failing to capture important contextual signals. Child custody evaluations have far-reaching consequences for the well-being of children and families, and the decision-making process should not be dependent on mere algorithms.

Child custody evaluators should be qualified to undertake the duties imposed upon them by a court. If the mental health professional appointed as an evaluator simply defers that onerous responsibility to AI, they do so at their own peril, arguably raising questions about informed consent. The parties involved may not truly understand nor consent to having their lives—and where and with whom their children will reside—decided by a less than opaque algorithmic process.

Practical Concerns

From a practical standpoint, the reliability and validity of AI algorithms in this context are questionable. Child custody evaluations involve assessing subjective factors such as parenting skills, emotional bonds, and the best interests of the child. These may not be easily quantifiable or amenable to algorithmic analysis. While AI may, in theory, mitigate the bias inherent in labeling, it does not necessarily prepare the

evaluator for the nuances of personal observation, nor in regard to cultural aspects that should be factored into the evaluation.

Regarding those cultural factors, AI may perpetuate and exacerbate bias in the data. For instance, we frequently hear in child protective services cases that “money talks.” We need to be mindful of what serves the best interests of the children involved in each case.

Legal Considerations

Pursuant to the Federal Rules of Evidence 703 and 705, expert witnesses must ground their opinions on reliable, valid principle and methods, and disclose the underlying facts and data supporting their position, as well as on the research they may have relied on in each case.

An AI algorithm in the context of a custody evaluation is unlikely to meet these standards. Why? The basis of the AI algorithm is often not transparent, and may be quite difficult to analyze.

Lawyers like labels. Mental health professionals must use their training and acumen, wading through the myriad of potential criterion in the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) to determine if behaviors they observe in a given family dynamic cause concern about a party’s ability to parent, and/or whether behaviors observed in a child create concerns that a child has special needs that one parent may be better able to deal with than the other. Child custody evaluations are about more than labels.

Additionally, the adversarial nature of legal proceedings necessitates that the parties involved have the opportunity to cross-examine and challenge the evidence presented, including the methods and

assumptions used by expert witnesses. Relying on an AI system could undermine this fundamental principle of due process.

In April, 2024, an advisory committee, comprised of eight experts, met to consider, in part, the impact of AI and machine learning on evidence. The panel's stated goals included:

- to educate the Committee about how machines generate information that could be used at trial, and the risks that outputs from machines may not be accurate;
- to provide insight as to how machine output might be offered in court, and thus present a challenge to the Evidence Rules; and
- to get more insight into deepfakes and how to combat them.

Based on the recommendations of the experts involved, there is a proposal to revise the Federal Rules of Evidence to add a new subsection to FRE 901 to address deepfakes:

901(c): Potentially Fabricated or Altered Electronic Evidence. If a party challenging the authenticity of computer-generated or other electronic evidence demonstrates to the court that it is more likely than not either fabricated, or altered in whole or in part, the evidence is admissible only if the proponent demonstrates that its probative value outweighs its prejudicial effect on the party challenging the evidence.

In addition, another recommendation was made to revise FRE 901(b)(9) to give courts some basis for evaluating the basis for AI generated reports:

[901](b) Examples. The following are examples only—not a complete list—of evidence that satisfies the requirement [of Rule 901(a)]: (9) Evidence about a Process or System. For an item generated by a process or system: (A) evidence describing it and showing that it produces an accurate *a valid and reliable result*; and (B) *if the proponent concedes that the item was generated by artificial intelligence, additional evidence that: (i) describes the software or program that was used; and (ii) shows that it produced valid and reliable results in this instance.*

The use of AI in custody evaluations raises many ethical, practical, and legal issues. Mental health professionals are charged with answering certain questions based on their personal observance of behaviors in each unique family dynamic. Mental health professionals must exercise caution, prioritizing their own judgment, based on their experience, professional training, judgment and research, holding fast to the ethical obligations that bind them. All classifications of mental health professionals typically have ethical canons which they are obliged to follow.

The unique function or dysfunction of each family means that mental health professionals need to do the work they have been appointed to do, rather than relying on AI algorithms that may lack the requisite reliability and validity to stand up to the mandates of the rules of evidence.

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