

Extraordinary CLE Program on "Crafting an Examination of the Custody Forensic Expert as Attorney for the Child"

By *Magnolia D. Levy*

For family law practitioners involved in a custody case, the forensic report is often the focal point of the case and, if handled properly, can be a veritable treasure trove of information. Led by *Hon. Deborah A. Kaplan*, one of New York County's Matrimonial Part Justices and *Susan L. Bender*, a partner at Bender Rosenthal Isaacs & Richter, LLP, more than 45 members of the Matrimonial and Family Law Committee met at the law offices of Blank Rome, LLP on February 6 for a CLE program entitled "*Crafting an Examination of the Custody Forensic Expert as Attorney for the Child.*"

The issuance of an Order Appointing a Forensic Evaluator traditionally defines the scope of the forensic evaluation. Any presumption that such orders are all identical was rejected by Justice Kaplan, who advised that the Order is where the Court identifies the issues regarding custody and parenting, often for the first time in the case. Thus, while most orders provide that the evaluator is to address "the parties' respective parenting skills and abilities, their ability to communicate and work together concerning custody and access, and the questions related to parental fitness," Justice Kaplan underscored that the Order often directs the evaluator to consider domestic violence, alcohol and substance abuse, mental health, and many other case-specific issues.

While reviewing and understanding the Order of Appointment is critical for all attorneys involved in a custody dispute, for the Attorney for the Child it is especially important. As Ms. Bender explained, the Order identifies the real and specific issues that impact on the child and his or her well being. It can also enlighten the Attorney for the Child in counseling the child, as well as advocating for him or her.

Both presenters effectively moved the program from the general topic of the forensic report to how the Attorney for the Child can prepare to examine the forensic evaluator. Specifically, Ms. Bender, who has represented both parents and children in custody trials, underscored that her approach to examining the forensic evaluator as the Attorney for the child differs from her approach when advocating for one of the parents. The most significant difference is that the need to challenge the evaluator, on his or her "conclusions" or "opinions" and the empirical basis for same, is often not warranted when she is representing the child and charged with ensuring that all important information is in the record so that the Court can determine the child's best interests. Thus, Ms. Bender's approach as the Attorney for the Child is a more fact-based one, and she considers how those facts can and will aid the court in weighing each parent's parenting capacities, judgment, ability to place the child's needs ahead of his or her own needs and, of utmost importance, each parent's ability to foster a relationship between the child and the other parent. Justice Kaplan supported this approach, noting that she expects the Attorney for the Child to elicit specific information to aide her in determining these very issues, *i.e.*, the child's best interests.

Although the forensic evaluator is not under attack by Ms. Bender when she acts at Attorney for the Child, she insisted that attorneys be intimately familiar with the various guidelines that govern the custody evaluation, as those guidelines furnish useful areas of examination. Specific reference was made to the Model Standards of Practice for Child Custody Evaluation promulgated by the Association of Family and Conciliation Courts and the American Psychological Association Guidelines for Child Custody Evaluations in Family Law Proceedings, copies of which were included in the materials. Members were encouraged to consider the American Academy of Matrimonial Lawyers' Model for Parenting Plan, also provided, as a benchmark for areas of examination on behalf of the child. Members were urged to use the many resources available, since online publications are readily accessible, along with seminal treatises in this area. Justice Kaplan and Ms. Bender both referred to *The Art and Science of Custody Evaluations* by Jonathan W. Gould, ABPP and David A. Martindale, PhD.

Following this overview of the Attorney for the Child's role and the scope of the forensic evaluation, the presenters focused on specific facts that need to be elicited from the forensic evaluator by the Attorney for the Child. For example, information about each parent's interaction with the child is important. By the time of trial, the Attorney for the Child is familiar with the child and aware of the child's wishes, feelings and the like, and should know how the child experiences the time with each parent.

When eliciting information as to a parent's judgment, it may be relevant to ask the forensic evaluator about statements made by a parent in front of the child, *i.e.*, if the parent mentioned his or her feelings towards the other parent in front of the child and ignored their impact on the child. Alternatively, where a child has expressed a "preference" to spend many nights with one parent, it would be helpful for the Attorney for the Child to examine the basis for the so-called "preference" knowing, for instance, that the "preferred parent" allows the child to stay up late and play video games. Awareness of whether your client speaks with one parent when with the other is another area of examination. The forensic evaluator may or may not have fully explored the fact that when the child is with his mother, he rarely speaks with his father.

Interestingly, both Justice Kaplan and Ms. Bender stressed that merely repeating the contents of the report is useless, as in most cases, the report is in evidence (albeit with some limitations as to hearsay from the collaterals, a subject also briefly touched upon during the meeting.) Thus, in considering the forensic evaluator's summary of the meetings between each parent and the child, both speakers encouraged the Attorney for the Child to go beyond the written report and ask probing questions about the nature and quality of the interaction, such as the child's appearance, body language, facial expressions, comments etc. These facts often get condensed into the report, wherein the child is described as having "enjoyed" the time with the parent.

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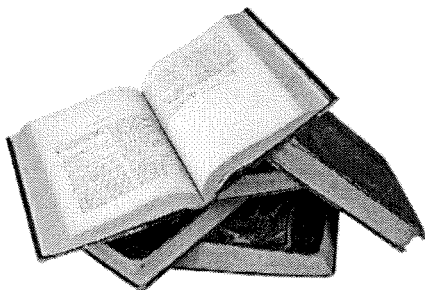
The presentation raised a number of interesting side-topics that sparked lively discussions, the first of which was who gets to see the forensic report once it is completed. Mention was made of the three different proposals regarding this topic now being considered by the Office of Court Administration as a result of the decision in Sonbuchner v. Sonbuchner, 96 A.D.3d 566, 947 N.Y.S.2d 80 (1st Dept. 2012). There, the First Department held that "counsel and *pro se* litigants should be given access to the forensic report under the same conditions." *Id.* at 568. Sonbuchner involved a *pro se* litigant who was prevented from having access to the forensic expert's report by the lower court prior to the expert testifying.

A second topic raised concerned the value of the forensic report, especially considering the amount of hearsay it necessarily contains. Practitioners must be sure to establish which collateral sources (mental health providers, doctors, teachers, care givers, etc.) were seen and why, in order to ensure that the court has a clear understanding of source of the information contained in the report. This necessarily involves a consideration of the hearsay contained in the report, although notably there is no uniform position within New York State on the admissibility of hearsay in these reports, see, e.g., Lubit v Lubit, 65 A.D.3d 954, 885 N.Y.S.2d 492 (1st Dept. 2009); Matter of Khan v Dolly, 6 A.D.3d 437, 774 N.Y.S.2d 365 (2nd Dept. 2004); Matter of Matthews v. Matthews, 72 A.D.3d 1631, 899 N.Y.S.2d 496 (4th Dept. 2010).

In closing, the matter of a *Lincoln* hearing (an *in camera* interview by a judge of the child or children involved in a custody dispute) was addressed, given its unique function during the course of a custody trial and considering the Attorney for the Child's express involvement in that hearing. The Attorney for the Child's duty and obligation to make sure the child fully understands what the hearing is about cannot be minimized. Regardless of who they represent, attorneys were urged by the speakers and many members to consider the impact that a *Lincoln* hearing is likely to have on the child - it will be an experience the child may never forget and should be resorted to only if all other avenues are exhausted.

The Matrimonial & Family Law Committee thanks the speakers for their time and expertise, and it thanks Blank Rome LLP for hosting the event.

Maguolia D. Levy is a member of the NYWBA Matrimonial & Family Law Committee. She is a partner at McLaughlin & Stern, LLP and represents clients in all aspects of matrimonial and family law, including pre- and post nuptial agreements, divorce negotiation and litigation, equitable distribution, spousal support, custody and visitation issues.



Program Speakers Hon. Deborah Kaplan and Susan L. Bender



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"Persuasive Writing for Lawyers"

featuring

Honorable Gerald Lebovits

Judge of the New York Civil Court, New York County

Planning for this CLE program is underway,
but save the date so you do not miss this event.

- Date:** Monday, May 13, 2013
- Time:** 6:00 p.m.
- Place:** TBA
- CLE:** TBA (accreditation pending)
- Cost:** Complimentary for members*
\$35 for Non-Members and Guests
Light refreshments will be served.
- RSVP:** Email CrimLawRSVP@nywba.org
to register.

Due to space limitations, advance registration is required.