

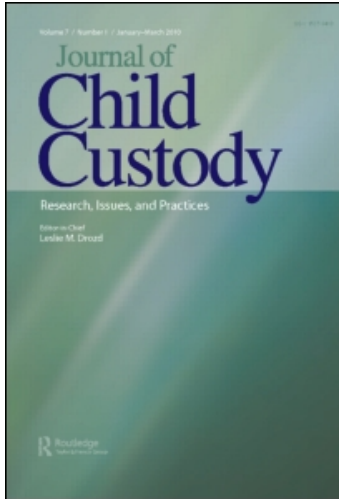
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Countertransference Bias: Self-Examination, Not Cross-Examination

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ABSTRACT. In reply to T. Tippins (2007, this issue), we take issue with his claim that recognition of the biasing impact of custody evaluators' countertransference opens the door to "evidentially legitimate"

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fishing expeditions through evaluators' private lives on cross-examination. We clarify the distinction between self-examination for countertransference bias as a heuristic for improving the sensitivity and objectivity of expert testimony and its use as substantive evidence. We argue that countertransference bias is a highly personal, emotionally charged kind of bias, unlike the cognitive biases more frequently discussed in the child custody literature. We conclude that recognition of the insidious emotional influences that threaten our objectivity in working with families in high conflict divorce is an important ethical responsibility. doi:10.1300/J190v04n03_08 [Article copies available for a fee from The Haworth Document Delivery Service: 1-800-HAWORTH. E-mail address: <docdelivery@haworthpress.com> Website: <<http://www.HaworthPress.com>> © 2007 by The Haworth Press. All rights reserved.]

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Tippins (2007/*this issue*) proposes “with tongue only partially in cheek” that Pickar’s (2007/*this issue*) article on countertransference bias may open the door to all manner of fishing expeditions into custody evaluators’ private lives. Although his sample cross-examination and further discussion along these lines were entertaining, we are concerned that some readers might take him seriously and begin to worry about whether their personal lives are squeaky clean enough to survive cross-examination by attorneys like himself. We devote this brief rejoinder to reassuring readers who act as expert witnesses that they ordinarily have little to fear about public airings of their private dirty laundry, correcting Tippins’ misreading of a few points in our prior articles, and clarifying the difference between using countertransference reactions as a heuristic device and using them as substantive evidence.

OBJECTION, YOUR HONOR!

The judge in Tippins’ opening hypothetical dialogue has sound reason to take a dim view of the cross-examiner’s inquiry into the evaluator’s own sexual and psychotherapy history and “how neurotic this evaluator may be.” Tippins’ astonishing claim that such inquiries into experts’ private lives are “certainly evidentially legitimate” not only violates common sense but is contrary to established law and its underlying principles.

In the majority of states, the rules of evidence governing permissible cross-examination are identical to or similar to the Federal Rules of Evidence (2006). According to Federal Rule of Evidence 611(a)(3), it is the court's duty to "protect witnesses from harassment or embarrassment." Moreover, the use of cross-examination about a witness's personality and past behavior as a basis for making claims about his or her present conduct is generally inadmissible (see FRE 404). FRE 608 (a) specifically limits the use of evidence concerning the personal character of a witness to matters concerning the witness's truthfulness or untruthfulness. FRE 608(b) permits cross-examination of a witness, within the discretion of the court, of specific instances of witness's past conduct, but again, only to the extent it is likely to be "probative of truthfulness or untruthfulness."

Note that there is an important distinction to be drawn between "truthfulness" and "correctness." The inquiry into the witness's character or past acts is limited to showing whether the witness is likely to be honest or lying, not to raising questions about whether the witness is free of any bias or error. Even when the character evidence is offered specifically to impugn the witness's honesty, there are stringent limitations on the use of such character evidence. FRE 609 excludes inquiry even into a witness's past criminal convictions, except under certain strict conditions.

It is the court's responsibility is to keep its eye on the ball. In a child custody hearing, the case is about the positions of the parties and the best interests of the children, not the private life and peccadilloes of the court's expert. FRE 403 holds that any such evidence, even if somehow found to be relevant, must not be more prejudicial than probative, and ought to be inadmissible if found to be confusing or a waste of time.

In short, in at least the vast majority of U.S. state and federal courts, the kind of outrageously intrusive cross-examination illustrated by Tippins is prohibited by the applicable court rules and rules of evidence. Tippins suggests, in effect, that if countertransference were recognized as part of the "basis" for an expert's testimony, then this might be a justification for bringing in otherwise inadmissible testimony and even ignoring statutorily established privileges. However, here he is creatively skirting an important distinction between *possible influences* on a witness's testimony and the evidentiary basis for such testimony, a point that we shall discuss in somewhat greater detail later.

Now, a legal realist might argue that judges, all the same, have broad discretion over what kinds of questions to allow and what sort of evidence to admit and that judges do not always do what they are supposed

to do. Fortunately, there is a significant practical check on judges who might otherwise let cross-examiners run roughshod through evaluators' private lives. It is concern for their own reputation with evaluators and attorneys. A judge who becomes well-known for allowing such harassment and embarrassment of court-appointed experts may find the supply of available experts willing to accept her appointments in the future to be suitably scarce.

WHAT'S IN A NAME?

While George Carlin would hardly be the first name that might occur to us when seeking an authority on the philosophy of science or the history of military psychiatry, we acknowledge the point that professional and scientific terms ought to illuminate rather than obscure their subject matter. That being said, we cannot endorse the Carlin-Tippins Minimum Number of Syllables Rule, nor can we agree that we still ought to be calling Post-traumatic Stress Disorder, "shell shock." In the Carlin-Tippins example from military history, the shift in terminology was far from a vain exercise in syllabification. Concomitant with the change in nomenclature was the recognition of the broad scope, detailed diagnostic criteria, etiology, and course applicable to PTSD, as compared to the narrow and etiologically misguided pseudo-syndrome of "shell shock" among artillery casualties. This was a conceptual shift as well as terminological change that has helped thousands of soldiers, veterans, and civilian victims of threatened death, serious injury, or horrific circumstances to obtain the treatment they need.

The matter is much the same with *countertransference*. None of the terms for bias commonly used at present in characterizing expert testimony (e.g., confirmatory bias, anchoring bias, availability bias, recency bias) begins to capture the highly personal, individualized, and emotionally charged qualities of countertransference bias. By giving this type of bias a name and linking it to a rich and extensive clinical literature, it becomes much easier for forensic psychologists to identify it as a subtle but serious threat to objectivity and to take responsible countermeasures against its influence.

Tippins makes much of the fact that he was unable to locate many subtypes of countertransference mentioned by Pickar (2007/this issue) in the *APA Dictionary of Psychology* (VandenBos, 2007). Here he misconstrues both the provenance of the dictionary (*not* the American Psychiatric Association) and the function of such a reference. The *APA*

Dictionary entry for *countertransference* makes it clear that this term refers, as we have maintained, to a recognized concept in mainstream psychology. However, detailed technical discussions of manifestations and gradations of a concept is beyond the scope of such a dictionary, as this is typically left to the texts, book chapters, and scholarly papers and research articles, which more fully describe the phenomenon and associated concepts.

As we thought we had already clarified in our rejoinder to Martindale and Gould, Pickar never intended to advocate the wholesale importation of every technical term and distinction found in the countertransference literature (or even in his article); rather, he was attempting to illustrate its broad application and complexity for readers unfamiliar with this literature. Pickar had already acknowledged (Pickar & Erard, 2007/this issue, p. 83) that his detailed description of types of countertransference may have been more elaborate than necessary for everyday use in custody matters. It is not clear what Tippins means to add to the prior discussion.

Tippins accuses us of erecting a “straw man,” as he does not read Martindale and Gould to be taking strong issue with psychoanalytic theory or the use of the term, “countertransference.” This prompts us to question whether he read the same article we did. If Martindale and Gould had no major objection to the term, “countertransference,” why, then, did they deem it necessary to invent the awkward psychobabble term, “debaggification?” Why did they compare the likelihood of countertransference bias to that of the appearance of a zebra in Montana? Perusing just the first few pages of Martindale and Gould (2007/this issue), we find:

[W]e assert that Pickar has not contributed to our understanding of various types of bias by tapping the ‘language’ of psychoanalysis in order to create numerous new vocabulary terms. (p. 70)

Though a parent “who presents as angry, hostile, or demeaning towards the evaluator” may generate a negative reaction in the evaluator, we see no benefit in assigning a vocabulary term to this common interpersonal dynamic. (p. 71)

We take a similar position in objecting to the proposed introduction into our professional language of terminology derived from psychoanalytic theory. (p. 71)

We are hard pressed to understand why the use of a term like *countertransference*, as a means of identifying a powerful and often unrecog-

nized threat to evaluator objectivity, receives such a skeptical, if not openly hostile, reception without taking into account the unreflectively antagonistic attitudes of many forensic psychologists toward anything connected with the psychoanalytic tradition. Exploring the origins of this prejudice would carry us beyond the scope of this brief comment.

PHYSICIAN, HEAL THYSELF

Tippins characterizes some of our examples of countertransference as applicable to a “dysfunctional health professional laden with personal baggage.” Although we do not hesitate to acknowledge how malignant countertransference can be as a source of bias among evaluators with serious character disorders, we think it is more important to recognize evaluators who have the courage, honesty, and self-awareness to reflect on and manage or eliminate a potentially distorting countertransference bias.

EVERYTHING IN ITS PLACE

It should be clear that we fully concur with Tippins (and, by extension, with Martindale and Gould) that the proper focus in the courtroom should be (notwithstanding Tippins’ sample cross-examination!) on “biased *behavior* rather than upon the evaluator’s psyche” (p. 97). We further agree that it makes little difference *in the courtroom* how evaluators term their biases, classify them in their own minds, or how they analyze them. By the time we get to court, we are supposed to have already come to terms with and resolved any biases of which we are aware. Thus there is no reason to be fretting, as Tippins does, about the “evidentiary reliability” of the evaluators’ reflections on their countertransference reactions.

We are unsure how this point escaped Tippins’ notice. In our previous article (Pickar & Erard, 2007), we wrote:

Martindale and Gould also draw the *mistaken inference that Pickar somehow intended for evaluators to testify in court about their countertransference reactions*. Rather, recognition of one’s own countertransference is recommended as a means of developing further hypotheses and correcting distortions in the evaluator’s inferences and judgments. We would obviously prefer that cus-

tody evaluators themselves notice the operation of countertransference on their opinions rather than be confronted with this possibility for the first time in the courtroom. (p. 85); italics added)

Self-examination for countertransference biases is something that is supposed to have taken place long before the evaluator sets foot in court. Prior to offering their expert opinions, psychologists are expected to have carefully analyzed and weighed the evidence supporting their opinions and to have excluded, to the extent possible, biasing factors that have no real evidentiary value. Thus, self-examination for countertransference biases should begin at the outset of the evaluation as an indispensable aspect of the process of *de-biasing* (i.e., checking for blind spots, misleading clinical impressions, invidious comparisons, and other distorting influences). Such distortions may undermine the evaluation at every stage—in the conduct of the evaluation, the formulation of professional opinions, and communication of these opinions to the parties and the court. However, the rational outcome of such a self-examination is not the affirmative public confession of all one’s “toxic thoughts and dirty demons,” to use Tippins’ colorful language, but rather a deliberate course correction and effortful balancing that should take place prior to testimony about one’s professional opinions. Countertransference bias is most powerful when it is unreflective and unacknowledged. As one names and recognizes such biases, it becomes relatively easy to curtail their influence and adopt a more objective standpoint. Thus, our position is that psychologists’ reflections on their possible countertransference reactions are not some new type of “evidence,” to be unearthed in courtroom confessions or cross-examinations, but rather a tool to be used by evaluators in their own efforts to be as fair and objective as possible in developing and communicating their expert opinions.

Contrary to Tippins’ assertions, evaluators need not set forth such internal analysis as “bases for their opinions,” because that is simply not what they are. Evaluator’s opinions are based on evidence, and it is only evidence (not one’s private inner workings at the drafting stage or the entire sequence of ideas that were tried out and discarded at one point or another) and its final analysis that is a proper subject for expert testimony.

For this same reason, we question Tippins’ warning that an expert must affirmatively acknowledge any consultations he or she had with colleagues concerning matters in the case at bar. Unless the expert actually relies on something a colleague said as substantive evidence, it is at

most simply an influence on the expert's opinion. Almost anything might have some kind of direct or indirect influence on an evaluator's opinions—scientific or popular literature, experiences in one's own family, parallels with previous cases, even last night's dreams—but none of these constitute the *basis* for the evaluator's testimony. If experts were actually required to spontaneously volunteer an accounting of all possible non-evidentiary influences on their opinions, they would have to take the stand for weeks at a time.

At the same time, except in certain specified circumstances (e.g., when it takes place as part of a hospital's internal quality controls or when covered by a peer-review statute), peer consultations are usually not privileged, nor is inquiry into them necessarily irrelevant or prejudicial. Thus, such consultations often may be fair game for cross-examination. Our advice in such circumstances would be to honestly acknowledge such consultation when asked and to point out its advantages in contributing to the objectivity and accuracy of one's opinions, while also emphasizing that the opinions offered are ultimately one's own. APA Ethical Standard 2.03 mandates that "psychologists undertake ongoing efforts to develop and maintain their competence" (APA, 2002) and peer consultation is one of the principal ways that experienced psychologists accomplish this. Such consultation is generally given broad deference by the courts as being in the public interest:

Clinicians can take comfort in the fact that reviewing courts have consistently expressed a reluctance to disrupt the exchange of information between professionals. Judges recognize that the case method of instruction is highly effective, widely used and of great social benefit. Because of this, courts have expressed an unwillingness to interfere in an educational transaction that has proven to be effective and widely used. (Alban & Frankel, 2007, pp. 25-26)

Tippins considers it "incredibly arrogant" for an evaluator to use his or her internal subjective experiences in interacting with people who are being evaluated as a possible means of enhancing their sensitivity and understanding. Here Tippins ignores some 40 years of peer-reviewed clinical psychology literature on this topic. Carefully observing, analyzing, and interpreting in context not only the behavior, feelings, and motives of others, but also the psychologist's own in response to them is a major part of the training and discipline of applied psychologists. This is not arrogance—it is simply what we do.

It is important to note that Pickar does not advocate the use of the evaluator's own reactions as evidence in themselves, but merely as a heuristic in developing additional hypotheses to confirm in a more objective and evidence-based manner.

BACK TO BASIC HONESTY

Tippins points out that what really matters in the courtroom is basic honesty. We agree, but we would hasten to point out that the most challenging kind of honesty is honesty with ourselves. The history of clinical psychology, on which most forensic psychology is founded, can be understood to a great extent as a deep exploration of the power of self-deception in clients and clinicians alike. Respecting the power of self-deception and working with modesty and determination to grapple with the insidious emotional influences that threaten our objectivity in working with families in high conflict divorce is our own ethical responsibility—not an afterthought to be delegated to cross-examiners.

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