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Testifying about People we Have Never Met in Child Custody Matters

By Jeffrey P. Wittmann, PhD.

The Problem

Forensic Mental health professionals (FMHP's) who offer expert-witness services occasionally run into referrals where they are asked to form opinions about a child or parent without personal contact with the person about whom they will opine. Such requests can arrive to our offices for a long list of reasons involving case-exigencies that prevent contact with a party, an attorney's desperation due to a failing or fragile case, or the genuine need for valid social science information (information that does not require personal contact as its basis) to make its way into court as evidence. This article will explore the professional practice issues involved in such referrals and offer suggestions for navigating these ethically challenging waters.

A somewhat frightening example of such a case crossed my desk as a trial consultant many years ago

The Legal Advocate's Dilemma

When attorneys receive a custody evaluation completed by a court-appointed neutral, they are confronted with expert opinion that has a basis in person-to-person contact with both litigants and all children in the context of a forensic assessment. While this is no insurance that the expert opinion will be sufficiently valid or reliable, such a circumstance at least meets one of the most basic of forensic principles: Making sure we have sufficient data for the opinions we are willing to offer. There may also be a party-retained expert who will only opine about one

Continued on page 2

You Must be Lying Because You Speak a Different Language: Native and Non-Native Language and Perception of Bias

by Jonathan Gould, Ph.D., (ABPP - Charlotte, North Carolina) and Stephanie Leigh Gould, M.A. (Adler University - Chicago, Illinois)

A divorcing couple consulted two experts about a parenting plan for their young child. One expert, prioritizing continuity of care, advised that the child who is accustomed to both parents' daily care, and has a relationship with both parents, should continue seeing both parents frequently, *Continued on page 6*

IN THIS ISSUE

2018 Volume 3, Issue 3
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Continued from page 1...

party (e.g., "In my opinion Mr. Smith's symptoms and test results suggest a bipolar disorder"), based on personal contact with that party. Again, there is no problem from an advocacy perspective because the basis of the opinion, at least from the perspective of direct contact, is adequate. However, lawyers will, occasionally, also seek experts willing to say things in court about litigants or children they have never met or who are at least willing to come very close to doing that. The phone call to a trusted mental health professional (FMHP) may sound like this: "Doc, the father's got an explosive temper but the neutral missed it....Can you read the records in this case and form an opinion about whether he does, in fact, have such a problem?....You won't be able to actually meet him." Or, the referral call may be more blunt: "Doc, I need an expert who will say this guys a hot-head....Would you be willing to read some records and maybe testify about that?" While there are many variations of this scenario, they have in common (a) an advocate's need for certain opinions to get on the record and (b) the inability of the expert to have personal, clinical contact with the parent or child in question.

A somewhat frightening example of such a case crossed my desk as a trial consultant many years ago: The father liked porn. The mother, consequently, saw him as a danger to their daughter child after discovering the offensive material on a home computer. An "expert" psychologist agreed to read a pile of records and reviewed the contents of the father's hard drive derived from a forensic inspection of that drive. Without ever seeing the father, the psychologist generated a report in advance of testimony that, paraphrasing, essentially said: "The records I have read, and the contents of the hard-drive suggest sexual preoccupations warranting the imposition of supervised contact." To say that there is an ethical (and likely evidentiary) issue with such a practice is a gross understatement.

The Evidentiary and Ethical Backdrop

Federal Rule of Evidence 702 states, in part, that a sufficiently qualified expert can offer an opinion about a matter before the court ".....if (b) the testimony is based on sufficient facts or data, (c) the testimony is the product of reliable principles and methods, and (d) the witness has applied the principles and methods reliably to the fact of the case." In Daubert V Merrill Dow Pharmaceuticals (1993) SCOTUS made clear that the latitude given to experts that allows them to offer inferences, conclusions, and opinions "...is premised on the assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." Rule 702 and Daubert make the problems with testimony without a personal assessment clear: Neither the fields of psychology nor psychiatry have developed any validated, reliable techniques for reading records and drawing inferences about someone an expert has never laid eyes on. While such an expert may opine in a manner that sounds logical and compelling, in many such cases the following challenges to the foundations of such testimony suggest extreme caution about whether the proclamations should be made, whether they should be allowed in court, or what weight they should be given: (1) Often such experts cannot be sure they have been given all available written data relevant to the psycholegal question they are trying to answer; (2) Experts willing to opine in this manner can never rule out the possibility that personal contact with the real, living, breathing parent or child they are testifying about would suggest entirely different conclusions than those being shared with the court. Personal contact might strongly suggest that those who produced the written records missed the proverbial diagnostic boat.

Most trusted sources of forensically-relevant ethical codes and guidelines, across disciplines, imply or explicitly state the importance of personal contact before offering opinions about litigants. Unfortunately, many of them need further refinement on this topic, and some are less than definitive or clear. Section 9.01 of the Ethical Principles and Code of Conduct (American Psychological Association, 2002) makes clear that psychologists "...base the opinions contained in their recommendations, reports, and diagnostic or evaluative statements, including forensic testimony, on information and techniques sufficient to substantiate their findings." Later it is stated that, when a personal examination is not warranted "for the opinion" to be offered (when conducting a record review, providing consultation, or supervision) psychologists should explain why personal contact is not necessary. When this principle was applied to the forensic setting in the Specialty Guidelines for Forensic Psychology (American Psychological Association, 2013), section 9.03, the following principles are articulated: (1) Forensic practitioners (FP's) have an obligation to only offer opinions about someone's psychological characteristics when they have sufficient information/data; (2) FP's should make reasonable efforts to obtain such information; (3) If a personal exam cannot happen the limitations this creates on the reliability and validity of the opinion must be made clear.

The Ethics Guidelines from The American Academy of Psychiatry and Law (2005) offer an example of when

testimony without examination may be acceptable (i.e., in the record review involved in malpractice cases). While emphasizing the importance of attempting to have personal contact in other matters, they essentially give psychiatrists permission to offer opinions without an exam after appropriate effort has been made to have such contact. Then, in a somewhat contradictory assertion in Section IV they state the following: "If one parent has not been interviewed, even after deliberate effort, it may be inappropriate to comment on that parent's fitness as a parent. Any comments on the fitness of a parent who has not been interviewed should be qualified and the data for the opinion clearly indicated." The now aged Practice Parameters for Child Custody Evaluation from the American Academy of Psychiatry and the Law (1997) explicitly state the following: "The clinician may work for one party to act as a consultant, to review documents, or to critique the evaluation of the court's expert. Evaluators in this category should not claim to be neutral. If the evaluator has seen only one parent, opinions should not be given on ultimate custody or on the parent not seen."

The Association of Family and Conciliation Courts' Model Standards of Practice for Child Custody Evaluation (2007) offer the following guidance in section 12.3: "An evaluator shall provide written or oral evidence about the personality characteristics of a particular individual only when the evaluator has conducted a direct examination of that individual and has obtained sufficient information or data to form an adequate foundation for the information provided and/or opinions offered." And finally, the Association of State and Provincial Psychology Boards Code of Conduct (2018) states the following in its Rule of Conduct, A-6: "A psychologist rendering a formal professional opinion about a person shall not do so without direct and substantial professional contact with or a formal assessment of that person."

These professional sources of guidance make clear that, while there is a theme of hesitance about the practice of testifying about people we have never met, the sources range in their tone from one of "be careful if you choose to go there" to "don't ever go there." The mixed messages and confusion in this area are likely the result of market pressures (lawyers seek such opinions, so there's business out there) along with the reality that the question of "should we or shouldn't we" hinges on case-idiosyncrasies and the details of what attorneys actually ask us on the stand. A look at this issue through the prism of varied roles FMHP's might take on in such cases may be instructive.

For the purposes of illustration, we will assume a case with a mother who abuses alcohol when caring for the children and a father who watches porn on his home computer. A neutral child custody evaluation (CCE) is ordered and completed. The oldest daughter, 9 year old Sarah, is in therapy with a child psychologist. For each "expert" a problematic and a cautious response will be offered to amplify some of the issues related to testimony involving no personal assessment.

Cast of Experts

Case-Exposed Diagnostic Expert. The expert was hired to offer an opinion about mother's alcohol abuse after reading many records and the custody evaluation for father's attorney. Problematic: Asked to what degree, if any, the data gathered in the review suggested the mother had an alcohol abuse problem, the expert responds with the following: "Multiple pieces of information in the records I reviewed suggest Ms. Smith has a serious alcohol abuse disorder that is diminishing her functioning in multiple areas of her life-responsibilities. Cautious: "I have insufficient data to form an opinion about this mother's alcohol use, having never personally evaluated her. However, the records I reviewed, if assumed accurate and complete, offer examples of symptoms and behavior consistent with those manifested by people with that diagnosis." Discussion: Martindale (2001) made a distinction between case-blind (no exposure to case facts nor litigants) and case-exposed experts. A "Diagnostic expert" is defined by Faigman, Monahan, & Slobogin (2009) as one who addresses "the individual facts of the case" (p 443) and whose utterances on the stand will therefore meet the legal-fit (relevance) criteria for acceptability. However, their discussion also makes it clear that such testimony can fall short if the basis of the opinion is empirically insufficient, which is the case with the problematic opinion offered above. Referring in testimony to the specific mother in that courtroom without having had any direct contact with her is an opinion that, while it may sound as if it rests on four legs, is actually teetering on only one or two. In the cautious response it is clear that the expert was pulling back from the brink, making clear that s/he was only willing to go so far.

Case-Exposed Framework Experts. This expert was hired to testify about the relapse- risk literature (after reviewing records from mother's outpatient alcohol treatment, records of an ER visit, and her records from an electronic alcohol monitoring company). The expert agrees to review the records related to mother's drinking as background. Faigman, et al (2009) refer to experts who offer testimony about the research literature without specifically attaching its findings to a plaintiff as "framework" experts, the role

that was asked for here. However, on the stand our expert was surprised to be suddenly asked a question specifically focused on the mother. Problematic: "In my opinion Ms. Smith remains at high risk for an alcohol abuse relapse based on a comparison of the records I was provided to review and the research we have on risk of relapse at various time-points post sobriety." Cautious: "The research summarized in the three studies I just mentioned suggests that, for individuals with a moderate-level alcohol use disorder, and who have achieved six months of sobriety, the chances of relapse exceed the chances of remaining abstinent.....I cannot comment on this specific litigant without having had direct clinical contact with her." Discussion: The difference between these two responses should appear obvious. In the first, the expert on sobriety research chooses to not only opine about the literature but to offer a specific inference about a litigant they had never personally evaluated. In the second, more cautious response, the expert educates the court about a possible connection between the literature and certain facts in the case but also evidences an avoidance of inferential overreach.

Case-Blind Framework Experts. The father's legal team brought in a social psychologist who researches pornography-use patterns to rebut mother's claim that the porn-viewing indicated on her husband's hard-drive suggested he may be a risk to their young daughters. No records are reviewed by the expert. Problematic: "Assuming the facts about father's hard-drive you have listed to be true, Mr. Smith's patterns of pornography-viewing are similar to the general patterns found in the North American male population and do not suggest any risk to his children." Cautious: "The rate of at least once-monthly porn viewing for North American males in the age range you have asked about is approximately 64-79 percent so it is a statistically common behavior in this culture……The specific genre of pornography you asked about – The so-called 'standard-fare' option, is the most frequently sought after genre among those who are online-viewers." Discussion: In the problematic utterance above, the expert offers objective data for the court's benefit but has insufficient information to allow the ethically questionable testimony that connects the research literature to the real father in the courtroom (and to his children). While to some it may appear to be a hair-thin distinction-without-a-difference, the "cautious" utterance described above is a form of education for the court that communicates the witness's (and the attorney's) awareness that, in the absence of personal contact with the father-litigant, any proffered opinion about this-father-in-this- courtroom likely represents both an ethical error and an injustice.

Peer-Reviewers. Problematic: Asked to what degree, if any, the data gathered in the review of the custody evaluation suggested the mother had an alcohol use disorder, and what the implications are for the children, the reviewer responds "Multiple pieces of information gathered by the custody evaluator suggest that Ms. Smith's alcohol use disorder is real and should be viewed as a risk for these children." Cautious: "I do not have sufficient data to offer such an opinion, having never personal evaluated her. In addition, my role in the case was not to offer opinions about the litigants nor about the children, but about the data, method, and reasoning in this evaluation and the degree to which they conformed with professional standards." Discussion: The problematic response involved going beyond a critique of conformance to professional standards by the reviewer into the realm of offering what is essentially a second opinion about a matter before the court (despite having never seen the person being opined about). Careful peer reviewers avoid contact with either litigant in order to maintain sufficient objectivity and balance when opining about the quality of an evaluator's work-product and it logically follows that, while they may be able to comment about the quality of the logic applied by an evaluator to the data, they can say little or nothing about the litigants themselves (without violating the ethical dictate to only offer opinions for which there is a sufficient basis).

Therapists. Problematic: Sarah's therapist accepted Sarah into treatment from the father and has never met mother. Asked on the stand about young Sarah's feelings regarding her mother's drinking, the therapist responds "Sarah is finding the nightly martini-drinking very distressing.....She goes to her room and isolates to get away from her mother after she has had a few drinks.... This woman should not be allowed unsupervised contact with Sarah." Cautious: "All I can say is that, according to Sarah's narrative in our sessions, she finds the alleged alcohol intake by her mother distressing.... However, having never personally evaluated this mother I do not have enough information to opine about her drinking nor about whether she needs to be supervised." Discussion: AFCC's Guidelines for Court-Involved Therapy succinctly state the relevant principle here. It is emphasized in 10.5-c that a court-involved therapist (CIT) "....should anticipate that clients, attorneys, and the Court may ask the CIT to testify beyond the limits of his or her knowledge and role. The CIT should respectfully decline to provide information or opinions that exceed the treatment role or the CIT's knowledge base." (Association of Family and Conciliation Courts, 2010).

These guidelines, a very welcomed and comprehensive addition to our literature, effectively anticipate the pull of various players on the testifying therapist and the way these influences, often well-intentioned, can nudge us toward choices on the stand that do not serve the court's pursuit of truth or the reputation of the profession of which we are a member.

While we are all in the same courtroom, each of the "players" come from professions that occasionally have different goals and rules.

Disentanglement

As should be clear from the discussion above, there will always be unique referral requests that fall in that twilight zone between the "obviously unethical" and "ethical" poles. However, when all of the relevant ethics-related guidelines and codes are considered, one thing is clear: In the absence of personal contact with a person we are asked to opine about on the stand, opining about that specific person's functioning or capacities almost always violates the requirement for sufficient basis and risks, misleading the finder of fact.

Many of us who work with divorcing families are entangled in a rich web of interdisciplinary relationships that can cause us to forget the following reality: While we are all in the same courtroom, each of the "players" come from professions that occasionally have different goals and rules. This remains true despite the fact that we sometimes use the construct of the best interests of the child to smooth over this reality. The best interests of a child, within the imperfect adversarial model, is best assured by each discipline taking its own ethical mandates seriously, even when they conflict with those of the other professionals around us. Mentally "disentangling" from the web of rich relationships and returning to our own profession's ethical and philosophical roots thus remains an important step when a mental health professional is asked to opine about someone they have never met.

Lawyers understandably want an expert whose words on the stand assist them in competently advocating for their client, but they also have an interest in not having their witness's trustworthiness disintegrate in court. That is their role. Judges need information via testimony that is relevant but also sufficiently reliable --- Given their need to assess expert opinions in a particularized manner for the case-at-hand, many might exclude or apply negligible weight to the problematic kinds of opinions listed above. As mental health professionals, our highest values have to remain objectivity, honesty about what we do and do not know, and fairness to the family in question as we choose what to say or not say in our reports and on the stand. Research has now accumulated to support the unsurprising notion that the source of the retention for our services (which side writes the check) has a gravitational influence on our opinions, a human reality that most seasoned lawyers and FMHP's are aware of anyway but that demands repeating (Murrie, & Boccaccini, 2015). FMHP's also need to remain cognizant of the potential damage to the perceived trustworthiness of our disciplines once we are willing to open our practice doors to requests that stretch the limits of what we can and should say on the stand.

We can always refuse a referral (although for those of us buying the groceries through our professional services, this can be painful at times). We can choose to accept a referral with the goal of educating those retaining our services about the necessary boundaries and ethical limits of what we can do. We cannot take-back testimony after it has possibly redirected the trajectory of a child's life. Once we drift toward viewing personal/clinical contact as a less-than-critical foundation for reliable forensic testimony about real people seeking justice, it becomes "the wild west out there," and that can't be good for children.

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Continued from page 1...

You Must be Lying Because You Speak a Different Language: Native and Non-Native Language and Perception of Bias

including overnights. The other expert believed that the more time the baby is away from the mother, the greater the risk to the child's development. Thus, the father should reduce the frequency and amount of his contact for the next few years and then gradually "step up" his overnight childcare and parenting time. The expert recommended that the father should spend two hours on Wednesday and four hours on Saturday, but rarely, if ever, have his child overnight.

Opinions about overnights have shifted over time, shifted from researcher to researcher, and sometimes shifted from one article to another by the same writer.

Overnight decisions are high stakes issues. On the one hand, there is the concern that denying children more overnight care and contact with their fathers weakens the foundation of their relationship and may leave emotional deficits that cannot be overcome when overnights begin after age four. On the other hand, there is the concern that additional overnight care from the father away from the mother exacts a toll by undermining the security of the attachment with the mother. Rather than fostering the child's healthy relationship with both parents, overnight shared physical custody might leave children without a single healthy attachment.

Shifts In Blanket Restrictions

Opinions about overnights have shifted over time, shifted from researcher to researcher, and sometimes shifted from one article to another by the same writer. Articles published between 2000 and 2002 challenged guidelines that restricted young children from sleeping in their father's home (Gould & Stahl, 2001; Kelly & Lamb, 2000; Lamb & Kelly, 2001; Warshak, 2000, 2002). These articles recommended that decision makers consider the option of overnights rather than follow absolute rules favoring or prohibiting overnights. Responses to Kelly, Lamb, and Warshak emphasized the potential risks of overnights, but agreed that the literature did not contraindicate overnights.

In 2011, McIntosh advocated a renewal of overnight restrictions. Based on one government report (McIntosh et al., 2010), along with her mistaken interpretation of a study by Solomon and George (1999), McIntosh advised "caution" about children younger than three years having as little as one overnight a month. She concluded: "In early infancy, overnight stays are contraindicated, undertaken when necessary or helpful to the primary caregiver, and when the second parent is already an established source of comfort and security for the infant" (McIntosh, 2011, p. 4, emphasis added). McIntosh never explained why overnight stays, contraindicated and presumed

harmful, are acceptable when they benefit the primary caregiver—a policy that makes one parent the gatekeeper of overnights.

Scholars who endorse blanket restrictions rely heavily on three studies (McIntosh et al., 2010; Solomon & George, 1999; Tornello et al., 2013) to support their recommendations. In Emery's (2016) words, "Three of four studies raise concerns about babies spending too many overnights away from the primary caregiver in the first year to eighteen months of life" (p. 101). For children younger than 18 months, Emery (n.d.) proposes schedules that range from no overnights and no more than 6 hours of contact with the father each week when parents have a "distant" or "angry" divorce, to a maximum of two overnights per month when parents have a cooperative divorce.

A House of Cards: Analytic Gaps Between Scientific Evidence and Blanket Restrictions

Critics have identified multiple and serious flaws in the three studies used to justify concerns about overnighting (Cashmore & Parkinson, 2011; Fabricius, Sokol, Diaz, & Braver, 2016; Lamb, 2016, 2018; Ludolph, 2012; Millar & Kruk, 2014; Nielsen, 2014, 2015; Warshak, 2014, 2018). The flaws include insufficiently valid measures, results derived from faulty data of those measures, and unwarranted inferences drawn from those results. For instance, three questions taken from a measure designed to assess infants' readiness to learn language were interpreted as an index of "emotional regulation" problems (McIntosh et al., 2010): Does your child (a) sometimes or often try to get your attention? (b) look to see if you are watching her or him at play? and (c) try to get you to notice other objects? Overnighting babies had higher scores on this measure. Rather than interpret the results as indicating greater readiness to learn language, or that babies with higher scores enjoyed interacting with their mothers, McIntosh interpreted higher scores as indicating impaired mother–child relationships. Opinions that rely on such faulty studies are unreliable and not trustworthy (Warshak, 2017).

Nevertheless, the report by McIntosh et al. (2010) had a strong impact. Extensive media coverage quoted McIntosh describing dire consequences attributed to overnights (Nielsen, 2014). After AFCC publicly embraced McIntosh's research and views on shared parenting and overnights (see Kelly, 2014; Salem & Shienvold, 2014; Warshak, 2017), mental health experts frequently and confidently cited McIntosh and her coauthors to caution against overnights. A major Australian newspaper wrote, "The influence of this study on Australia's family law system has been so profound that barristers have a special phrase to describe the common experience of losing the battle for some overnight care of toddlers—they joke they've been 'McIntoshed'" (Arndt, 2014). Lawyers in several countries described the same experience.

Shifting the Tide of Misinformation: A Consensus on Overnights

Researchers and practitioners throughout the world expressed concern about the impact of questionable research and skewed views of settled social science research (see, Arndt, 2014; Lamb, 2012; Nielsen, 2015). Misinformation had generated widespread confusion and uncertainty about whether the scientific community had shifted its position on overnights.

To address these troubling concerns and stem the tide of misinformation that had been driving custody decisions, guidelines, and expert opinions, I spent two years reviewing the relevant scientific literature. Then I vetted my analyses with an international group of prominent authorities in the fields of attachment, early child development, parent-child relations, and divorce. The APA journal, Psychology, Public Policy, and Law published a consensus report with the endorsement of 110 social scientists and edited by Michael Lamb (Warshak, 2014).

The endorsers of the consensus report agreed that, in general, a robust body of social science evidence supports shared residential arrangements, including overnights, for children under four years of age whose parents are separated. Circumstances that constitute exceptions to the general recommendations include manifestations of restrictive gatekeeping such as persistent and unwarranted interference with parenting time; a history or credible risk of neglect; physical, sexual, or psychological abuse toward a child; a history of intimate partner violence; a history of child abduction; a child's special needs; and a significant geographical separation between the parents.

In 2017, two additional studies supported the consensus report's conclusions. Fabricius & Suh (2017) studied 116 college students and found better outcomes for those who, in the first three years of life, regularly spent overnights with their fathers after their parents separated. "Even when parents present with high conflict, intractable disagreement about overnights, and a child under 1 year old," Fabricius and Suh (2017) concluded, "both parent-child relationships are likely to benefit in the long term from overnight parenting time up to and including equally-shared overnights at both parents' homes" (pp. 80–81). The second study, Bergström et al. (2018), found that children 3 to 5 years old who spent about equal time in each parent's home after separation had fewer psychological symptoms than those who lived in other custodial arrangements.

And the Dance Continues

The instrument, Charting Overnight Decisions for Infants and Toddlers (CODIT) (McIntosh, 2015; Pruett, 2015), proposes a presumption against more than one overnight per week for children younger than 18 months if their parents are in a dispute over custody, even when parents consistently and sensitively meet the children's needs. Simply by objecting to more frequent overnights, a mother's preference prevails even if her objection is capricious, even if her motives are vindictive, or even if the father demonstrates superior parenting.

Some scholars recommend that overnights be phased in through a "step-up" plan based on the child's age

The CODIT assesses behaviors such as "excessive clinging," "frequent crying," and "aggressive behavior," with no anchors to distinguish between typical and atypical behavior. Even if behaviors such as excessive clinging and frequent crying could be rated reliably, no studies correlate scores on the CODIT—or decisions based on these scores—with outcomes for children. The CODIT assumes, without evidence, that troubling behaviors in an infant or toddler that persist more than two weeks are caused or exacerbated by too much overnighting and can be resolved by restricting or eliminating overnights. Thus, as Austin (2018) argued, the CODIT gives gatekeeping parents a means to rationalize restricting children's overnights with the other parent.

The Ecology of Overnights

Many mothers work evening and night shifts, leaving fathers to deal with children's bedtimes, middle of the night awakenings, and morning routines (Boushey, 2006; Burstein & Layzer, 2007; Fox, Han, Ruhm, & Waldfogel, 2013). Also, many couples alternate nighttime child care responsibilities. Our society regards the father's participation in these childcare activities as normal and desirable. These parents do not report unusual problems between mother and child nor problematic behaviors for the arising from the father's overnight care.

In some families, an infant sleeps in one house on weekdays and in another house on weekends. Young couples often leave their baby on weekends with the baby's grandparents so that the couple can have romantic time together. If infant sleeping arrangements like these raise no alarms when parents live together, those who propose a double standard bear the burden to justify a shift in how these arrangements are judged after parents separate.

Parenting plans need to accommodate the circumstances of the parents. For instance, parents with a typical work schedule will be unable to spend two half-days with their children every workweek. Even if fathers could keep their jobs while regularly being absent from work during the day, they are likely to suffer a loss in income, which forces a father to choose between time with his child and providing adequate financial support.

Parenting time schedules often include 2- to 3-hour contacts during evenings. These contacts are hurried and stressful for both father and child—not situations that foster sensitive and reciprocal interactions. Overnights allow the father and child the time and structure to bond in ways that more closely resemble an intact family, and to become accustomed to being in each other's presence during the evening, at night, and in the morning.

Kelly and Lamb (2000) underscored the special importance of parental care during the evening and overnights to provide opportunities for "crucial social interactions and nurturing activities" (p. 306) that are not possible without overnights. As a result, the child's trust in the parents is promoted, strengthened, and consolidated. Spending time with their baby helps parents provide the regular care that allows them to become attachment figures. Also, spending more time with the baby offers more opportunities for parents to hone their parenting skills through "on the job training" (Magill-Evans, Harrison, Benzies, Gierl, & Kimak, 2007) and to become more confident in their abilities to understand and respond sensitively to their child's needs (Lucassen et al., 2011).

Some scholars recommend that overnights be phased in through a "step-up" plan based on the child's age (Pruett, Deutsch, & Drozd, 2016). If the goal is to help the child and father acclimate to overnights, though, wouldn't it be easier if the overnights existed since infancy? Furthermore, as Austin (2018) observed, a plan that requires periodic adjustments is likely to engender additional litigation.

Conclusion and Challenge Redux

Considerations favoring overnights for most young children are more compelling than concerns that overnights jeopardize children's psychological development. This conclusion carries the imprimatur of a consensus of 110 researchers and practitioners who define the accepted and settled view of science (Warshak, 2014).

Nearly two decades ago (Warshak, 2000), I posed the logical challenge: If sleeping away from both parents during nap time at daycare centers does not harm young children, and napping during the day in their father's home does not harm young children, how can spending the night in their father's home harm them, when the majority of the time they are asleep and unaware of their surroundings? What reasons or evidence can explain a greater risk attached to nighttime care? By what logic do we deprive children after their parents' separation of enriching bedtime and morning experiences enjoyed by children in two-parent homes? These questions remain unanswered.

Fathers take the night shift in two-parent homes. They can, and should, do so when living apart from their children's mothers.

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The Challenges of International Relocation and the Risk of Abduction

by Alberto Yohananoff, PhD. and Martin Friedlander, Esq.

Relocation cases are difficult to adjudicate because of their all-or-none nature. In relocation cases there are "no shades of gray" or middle ground scenarios. Relocations are allowed to proceed forward or not; it is a winner takes all type of decision.

International relocations are more complex to adjudicate given the need to deal with different and competing jurisdictions...

International relocations are more complex to adjudicate given the need to deal with different and *competing jurisdictions* (leading to the ratification of treaties such as the Hague convention designed to address the issues of jurisdiction). International relocations are also more complex because of the greater *geographical distance* that these relocations entail and because of *cultural issues* (different countries have different cultures; how a particular child is likely to acclimate to the change in cultures that need to be considered). Some of the questions to be considered in this context are: the impact of a child living in a different culture; how this may impact the child's sense of rootedness; his/her psychological sense of well-being and his/her developing sense of self?

This short article will take a look at some of the challenges of international relocation and, in particular, will take a look at a unique phenomenon in international relocation, namely *the risk of abduction*.

The Hague Convention is a treaty by which signatories nations agree to the return of an abducted child to the country of habitual residence. Custody is adjudicated by the country of the child's habitual residence – that is a place where the child is physically present for a sufficient time to have adjusted (acclimated) to its culture. The purpose of the Hague convention is to prevent "forum shopping" by which a parent seeks adjudication of the custody dispute in what he/she considers a favorable jurisdiction. It is also important to note that the Hague convention does not address issues of best interest/custody, but *only the issue of jurisdiction*.

The criteria for the enforcement of Hague convention are: (1) the abducted child is under the age of 16 (2) the removal is defined as wrongful, that is, the child is being removed from their habitual residence in breach of "right of custody" of the custodial parent (provided that these rights have been exercised).

There are 3 important exception to the enforcement of the Hague conventions and may lead the fact finder to rule that *the right of return to the country of habitual residence should not be enforced*. The three exceptions are:

1. if the child is not returned within a year, the parent may lose the right to return, if it can be demonstrated that the child is *considered well settled* (i.e., has adjusted well) to the new environment.

2. The child may not be returned if there is a *grave risk* that the return of the child will result in grave risk of physical or psychological harm.

3. The right of return may be precluded when a child objects to being returned and has attained *age & degree of maturity* by which he demonstrates that his/her wishes should be factored in.

Let's take a closer look as how a mental health professional who is hired to perform an evaluation pertaining to a Hague case may go about assessing each of these dimensions. Specifically, how one determines if a child is well settled in the new environment? How one determine the presence of grave risk, and finally how one goes about assessing whether a particular child has reached an age and degree of maturity and therefore his objection to his return to the country of habitual residence should be seriously considered by the judge who hears the case.

In assessing the overall adjustment to new environment one may look at relevant dimensions such as:

- The connections that the child has established in the new community.
- Hi adjustment his new school environment.

- The extent to which the child is engaged in extra-curricular activities
- The child's overall adjustment to the new culture.

How does one determine if grave risk exist and whether that should preclude the child's return to the country of established residence? In assessing such dimension a mental health professional may want to assess the following:

- Assess for any evidence that the child has been psychologically or physically abused.
- Assess for any evidence that the child has been exposed to deleterious conditions such as exposure domestic violence in the home.
- Assess for any internal signs of trauma in the child (the presence of excessive anxiety, PTSD, symptoms of depression).
- Assess the child's exposure to intolerable external situations (outside of the family) in a new environment, e.g., disease, famine, frequent earthquakes, war zone.

Finally, how does a mental health professional may go about to establish whether a particular child has reached the age and degree mature by which his objection to the return to the land of habitual residence should be seriously considered? To assess this dimension the mental health professional should consider assessing the following dimensions:

- Assess for the presence of sufficient cognitive abilities of the child through quick cognitive assessment measure (such as the Wechsler Abbreviated Scale of Intelligence) and/or careful mental status.
- Assess to what degree to which the child evinces an ability to express himself/herself in sufficiently articulate and clear manner.
- Assess whether the child's expressed objection to a return to his prior environment is a true reflection of his/her true wishes rather than coaching by a parent.

One the unique factors in international relocations is that it occurs in the context of a cross-cultural marriage, that is the spouses are from different countries. This plays an important factor with respect to the risk of abduction. In the next few paragraphs I will outline the particular challenges that cross- cultural marriages present and how these challenges may contribute to a greater risk for abduction.

Cross cultural marriage and the Risk of Abduction

Cross-cultural marriages are inherently difficult because of the need to negotiate different cultural norms (Skoler 1998). In cross-cultural marriage stressors such as, culture shock, the need to acculturate, and a limited support system in the new culture may be prevalent. In unsuccessful cross-cultural unions, seeking to return to a country of origin can be seen a source of comfort and it may resonate with one's sense of identity and affiliation. When cross-cultural marriages do not work out, the fear of loss the child may be accompanied by the sense of losing the child to another nation or culture.

Unsuccessful cross-cultural marriages significantly increase the risk of abduction as parents are likely to idealize their family, homeland, culture, deprecate the transplanted culture, and reject the child's mixed heritage. Parents with strong financial/emotional ties outside of the US are more likely to abduct – as they feel that their own cultural identity should be given priority in the child's upbringing (Skoler 1998). The dissolution of a marriage with the psychological injuries that it entails may make a parent more prone to feel that there is nothing left in the "new country" and help rationalize the flight to the country-of-origins. Extended families can play a significant role in these disputes. Specifically, when cross cultural marriages do not work out there may be a higher likelihood that the family-of- origin will participate in the devaluation of the former spouse (Skoler 1998).

For all of these reasons, extreme solutions, such as abductions, are more likely to be seen as a potential remedy in cross-cultural marriages. The risk to the child in these circumstances is grave. Abducted children are at risk to become indoctrinated by the abducting parent and alienated from the left-behind parent. A child who is indoctrinated develops an emotional dependency on the abducting parent, which changes the nature of their relationship and the nature of their relationship to the left-behind parent. The literature suggests that young children (ages 2-3) are more vulnerable to abductions (Rohrbaugh, 2008).

Motivation for Abduction

What are the motivational factors that account for the decision to abduct? Many times, abductors believe that they are more likely to obtain a more favorable disposition in "their jurisdiction." The literature (Johnston & Girdner 1998, 2001; Chiancone 2001; Johnston, Roseby & Kuehnle 2009) suggests a number of risk factors that should be

considered in predicting potential abductions. These include:

- Prior threats of abduction. Abductions are more likely to occur if the abductor has no ties to areas in which the child resides.
- Presence of serious psychiatric conditions.

The above referenced literature also suggests that certain individuals are more prone to engage in acts of abduction. These include:

- Perpetrators of domestic violence. These individuals often operate under the mistaken assumption that the child is their possession and that they can control the other parent through the child.
- Victims of domestic violence. Parents who believe that their child has been abused/molested and have not been assisted by the Courts.

It is important to note that when marriages are yet to be officially dissolved, abduction happens through a *dynamic of deception*. The abducting parent often concocts elaborate and plausible scenarios to justify their traveling abroad with the child (e.g., attending the wedding of a family relative, the funeral of a family member), *obtaining spousal consent in the process*, only to betray their spouse's trust once they reached their preferred destination by informing their spouse that they do not intend to return.

It is important to note that when marriages are yet to be officially dissolved, abduction happens through a dynamic of deception...

Psychological Impact of Abductions

The literature suggests that children who have suffered from long term abductions fare worse compared to children abducted for short periods of time (Chiancone 2001; Rohrbaugh, 2008; Johnston, Roseby & Kuehnle 2009). This is so because these children are more likely to experience an unstable, nomadic lifestyle, as well as hiding, which disrupts development of a cohesive sense of self-identity. In contrast, children that are only held briefly have yet to develop loyalty to the abducting parent and, if young, may regard their experience as an adventure. Older children may feel angry and confused with both parents: at the abductor for keeping them away from other parent and at the left-behind parent for failing to rescue them. When children are abducted for a lengthy period of time, they are more likely to be indoctrinated, even after the child is rescued, and consequently, psychological difficulties are likely to ensue (e.g., the child may feel that he/she lost the abductor he/she depended upon and no longer trusts the left-behind parent).

Abducted children may experience an array of symptoms as suggested by Johnston and colleagues 2009 including:

- anxiety & fearfulness, or PTSD like symptoms
- eating and sleeping disturbances
- crying and mood swings
- aggressive behavior & irritability
- difficulties trusting others
- clinging/regressive behavior (e.g., thumb sucking, bedwetting)

Attachment disorder this is often a by-product of these experiences, as children may encounter difficulty re-establishing a healthy relationship with the left-behind parent, even after reunification. The degree of emotional trauma is related to the amount of disruption in the child's routine, the child's awareness of what is happening, and the age of the child. It is important to note in this context that the left behind parent is likely to be traumatized and thus he/she may experience sleeping difficulties, and feelings of loss, rage, helplessness, anxiety and depression (Chiancone 2001; Johnston et al. 2009.)

Remedies to Prevent Abductions

What are some ways to reduce the risk of abductions? When risk factors can be identified regarding a potential abductor, preventive measure may be taken and these may include:

- Limit contact (supervised visits) between the at-risk parents and the child

- Removal of passport
- Notice to schools, day care providers, medical personnel, with instructions not to release the child to the parent seen at risk for abduction.

In sum, relocation cases are vexing matters because of their all-or-none nature. International relocations pose particular challenges because they involve complex issues of jurisdiction (addressed through mechanisms such as the Hague convention), the geographical distance involved, and cultural issues. A particular challenge specific to international cases involves the risk for abduction. Risk factors for abduction, however, can be identified used to mitigate the risk of such drastic solutions, along with the implementation of preventive measures designed to decrease the risk of abduction.

A particular challenge specific to international cases involves the risk for abduction. Risk factors for abduction, however, can be identified used to mitigate the risk of such drastic solutions, along with the implementation of preventive measures designed to decrease the risk of abduction.

Martin E. Friedlander, Esq. is an experienced family attorney with over twenty-five years of experience. He is the principal of Martin Friedlander, PC., a boutique law firm in New York City, which specializes in all aspects of family and matrimonial law and handling complex custody hearings.

Alberto (Avi) Yohananoff specializes in forensic assessments in a variety of litigation categories including civil/family law (child custody, child protective proceedings, termination of parental rights, juvenile delinquency), Hague convention matters, and criminal matters (sentence mitigation, competency matters). Dr. Yohananoff's primary emphasis is in child custody matters. Dr. Yohananoff also teaches and lectures on topical issues in forensic psychology.

Speaking engagements have included repeated presentations at the New York County Lawyers' Association, and at the AFCC, most recently in Toronto, Canada, Dr. Yohananoff has been an invited guest speaker at the Summer Judicial Institute in 2018. Dr. Yohananoff teaches forensic psychology to graduate students at the City College of New York. He was published in the Journal of Forensic Practice (2015) and most recently he co-authored an article entitled "Best Interest, Parents Contractual Rights and Raising of Children under a Defined Religion" in the New York Law Journal (January 11, 2018).

In addition to performing child custody evaluations Dr. Yohananoff has reviewed forensic reports of professional peers and has assisted attorneys in the preparation of cross-examination of expert witnesses. Dr. Yohananoff has provided expert testimony in Federal, Family and Supreme Court in the New York metropolitan area as well as in Nassau and Westchester counties. He has been affiliated with the Faculty of NewYork Presbyterian Hospital/Weill Medical College of Cornell University, and serves on the voluntary faculty of North Shore University Hospital.

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Early Childhood Assessment

By Leah Younger, PsyD.

Most readers of this publication are familiar with the recommended procedures for conducting child custody evaluations with elementary and older aged children. Many readers may even be familiar with the recommended process to follow when making specific recommendations regarding overnight access for infants. However, it seems minimal attention has been paid to the need for specialized infant assessments when conducting a custody evaluation or designing a robust access schedule with an infant, which for the purpose of this article is a child under the age of five years old. This is highly relevant to attorneys and mental health professionals who facilitate settlement conferences, provide consultation, or engage in collaborative divorce, as well as to parents who engage in conversation about the best access schedule for their infant or toddler.

Specialized infant assessments serve to inform on the significant objective factors that should be evaluated and used to direct recommendations and schedules, rather than relying on subjective determinations, such as parental preference, prejudice, or impulsive responding. Ideally, risk factors and areas of child vulnerability should be identified prior to generating recommendations or implementing schedules. Thereafter, in line with primary prevention, efforts can be directed at promotion of the child's health and well-being, before the onset of problematic behaviors or emotional distress. What follows is a review of these factors.

The relevant factors can be grouped according to child, caregiver, and family context variables. Child variables indicate the status of the infant's development, including any progress or delay in motor, speech, cognitive, or emotional development and functioning. The child's physical well-being and overall adaptation need to be considered as well. Finally, the infant's daily schedule, activities, and routines are also of significance. Caregiver variables indicate the quality of each adult's caregiving capacity and competency, as well as each adult's independent functioning. More specifically, identified child variables are, each caregiver's knowledge, support, and facilitation of the infant's status and routines. Family contextual variables indicate the sufficiency of the environment provided by each caregiver, including the supportive nature of the environment and the degree of environmental stability. More specifically, the family's historic interactions and access patterns, as well as sources of support, need to be considered as well. Special attention needs to be paid to the transition frequency, access consistency, predictability, duration and geographic location between pre- and post-transfer settings.

For any factor identified as an area of concern or issue, the ensuing recommendation or access schedule needs to be sensitive to the matter

For any factor identified as an area of concern or issue, the ensuing recommendation or access schedule needs to be sensitive to the matter and directly address the variable. To offer one example, if the assessment revealed areas of delay or impairment in the infant's developmental progress, the infant needs to participate in an access schedule that accommodates the impairments and allows for sufficient parental intervention. The need for active parental guidance of the infant along the ideal developmental trajectory should take precedence. Because development is integrated across domains, a developmental disability or delay identified in any one area will affect other developmental domains as well. To that end, as parental intervention occurs, there should be minimal schedule changes that will likely induce distress and further disrupt the infant's evolving development. Thus, the variables of continuity and consistency are paramount to providing the infant with stability.

Without allowing the aforementioned objective variables to act as a guide, there is significant risk posed to the child's mental health and development. There is a greater likelihood of parental subjective bias leading to multiple modifications of the access schedule, which in turn increases the adaption demands placed on the child. Increased quantity and increased frequency of scheduling

modifications, along with lack of predictability, abridged durations, and inconsistencies in the schedule are detrimental to a young child's development. Schedules of that nature require multiple adjustments to changing situations. When faced with this task, the infant's focus is shifted away from, and interferes with, developmental tasks. Repeated, unmanaged, emotional distress is not only taxing, but serves to impede thriving, or life energy. In turn, this adversely affects the infant's progression through normative development and hampers the infant's overall stability and growth, including attaining the developmental skills needed given the infant's stage of development. Finally, there is significant likelihood that the parent-child relationships will suffer as the infant will not readily depart from one caregiver or successfully acclimate and adjust to the other caregiver.

The factors described earlier can be assessed via a specialized assessment model that is similar to that followed by custody evaluators, but with some notable specifications (italicized below) not followed by all. Interviews with the caregivers are used to evaluate caregiver capacity, including knowledge and skills necessary to address and meet the child's needs. Repeated observations with each caregiver and the infant are used to evaluate each caregiver's attunement with the child, the child's degree of comfort and bond with each caregiver, the quality of interaction between caregiver and child, and the implementation of the child's daily routines, including caregiver sensitivity and ability during feeding, bathing, playing, and sleeping routines and activities. Repeated observations of the infant's transitions between the caregivers are used to evaluate caregiver preparations of the child prior to the transfer, the child's affective and emotional state from pre-transfer to post-transfer, parental responsiveness to the child's reactions, and communication and collaboration between the caregivers. Together, these repeated observations allow for authentic assessment, which emphasizes observing young children in everyday settings and routines, engaging in real-life tasks and activities, and displaying crucial learning competencies. Finally, standardized testing is used to assess the infant's development and well-being by screening for the infant's delays or fully assessing known issues (that have not been recently evaluated by a competent professional) in the areas of psychological, social, physical, emotional, and independent functioning.

This proposed model of assessment facilitates data collection about the child, parent, and contextual factors. These factors inform on the variables that serve to promote, or detract from, infant adaptation and development. Consideration of these factors is necessary in order to take proactive protective action on behalf of the infant that addresses the relevant findings of the assessment. Together, the findings of the assessment are used to identify and understand problems, strengths, and vulnerabilities within the family. In turn, the specific needs of the infant, as it relates to advancing the child's developmental achievements, psychological health, and bond with each parent, while minimizing risks to the child, serve as a compass when making recommendations and designing access schedules.

Leah R. Younger, Psy.D. is a licensed psychologist in New York state. She is a graduate of Pace University's combined Psy.D. program in school-clinical psychology, with a specialization in child psychology. Dr. Younger has been a member of the undergraduate psychology department at Mercy College, where she was an instructor on childhood and adolescent psychopathology. After obtaining specialized training in forensic psychology, Dr. Younger established her current practice, Younger Psychology. The practice provides a wide range of assessments and therapeutic interventions for diverse populations of infants, children, adults, and families. Dr. Younger conducts infant/child assessments and collaborates with parents and attorneys in the development of access schedules and parenting plans. She also conducts child custody and psychological evaluations. Dr. Younger has extensive experience working with high-conflict parents and serves as a parenting coordinator, parent consultant, family therapist, and reunification therapist. She has performed these functions for families involved in Family and Supreme Courts of Nassau County, Richmond County, Kings County, Queens County, and New York County. Finally, Dr. Younger provides trial consultation services and conducts peer reviews.

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Thoughts and Impressions on the AFCC Toronto Conference

By Elizabeth Demeusy, M.A.

Earlier this month, I attended the AFCC 56th Annual Conference in Toronto, Ontario, Canada. The theme of the conference was "The Future of Family Justice: International Innovations." I was excited about this conference due to its interdisciplinary perspective on court-involved families. Luckily, I was afforded the opportunity to attend the conference due to the generous scholarship provided by the New York Chapter of the AFCC. I am currently a Ph.D. Candidate in the Clinical Psychology program at the University of Rochester. My research interests broadly focus on evidence-based preventative interventions for high-risk youth, particularly those at risk for entering or currently involved in the child welfare system. I have extensive clinical experience working with families imbedded in multiple systems, including child welfare and family court. I also have a passion for translating research to practice and policy.

Given my background and interests, the AFCC conference was the perfect opportunity to expand my knowledge of family justice, while learning from and networking with professionals from multiple disciplines. I attended a number of interesting talks that covered a wide range of topics, and were presented by professionals in a variety of fields. The presentations included topics such as psychiatric illness, the opioid epidemic, domestic violence, and child abuse, all as they relate to parenting and child custody. I was pleasantly surprised by the multitude of opportunities for networking, such as a luncheon, banquet, and other planned social events. I met a number of professionals from different training backgrounds, many with common goals and passions. I was also excited to learn about the early to mid-career professional network (E2M) which specifically supports professionals at this developmental stage.

Overall, I found the conference very informative and engaging. I was able to expand my knowledge in a number of areas relevant to my interests and work. As a new member of AFCC, I look forward to learning more about the organization and taking advantage of the numerous interdisciplinary training and networking opportunities that this organization has to offer.

Elizabeth M. Demeusy, M.A. is a doctoral student in clinical psychology at the University of Rochester. She conducts her research at Mt. Hope Family Center. Her research interests broadly pertain to how risk factors, such as child maltreatment, underlie the development of psychopathology. Much of her research focuses on prevention and intervention efforts to help children who are at risk for, or have experienced, maltreatment. Elizabeth also has a passion for translating research to clinical practice and policy. She has extensive clinical training and experience working with youth and families who have experienced trauma. Currently, Elizabeth's dissertation examines the effectiveness of a multicomponent community intervention to prevent child abuse and neglect and to promote healthy functioning in early childhood. Following graduation, Elizabeth plans to pursue a career that focuses on increasing accessibility to evidence-based mental health services for vulnerable children and families.

Of Note and Interest

- The 56th Annual Conference in Toronto was well attended by the NY Chapter.
- Larry Braunstein, Esq. joined forces with Arnie Sheinwold, Psy.D. and presented on using child custody evaluations for settlement purposes debating the benefits of using a forensic evaluation to settle custody disputes without a hearing and the potential ethical problems that such an approach would entail.
- The Honorable Douglas Hoffman presented with Valentina Shacknes, Esq., Martin Friedlander, Esq. and Avi Yohananoff, PhD. on the challenges of international relocation cases and the risk for abduction.

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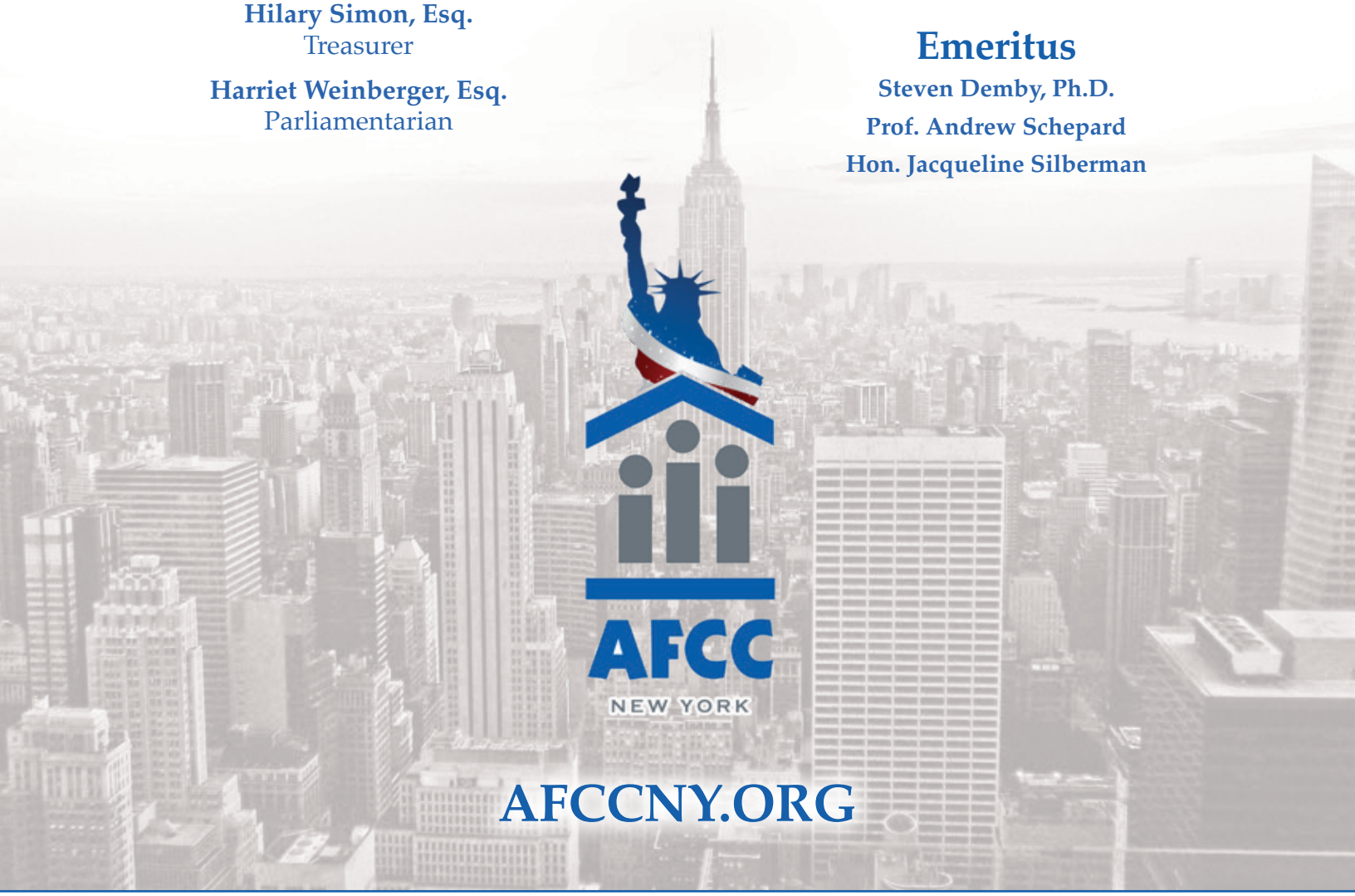

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